



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *S. N. v Canada Employment Insurance Commission*, 2019 SST 1633

Tribunal File Number: GE-19-3464

BETWEEN:

S. N.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Kimber Johnston

HEARD ON: October 25, 2019

DATE OF DECISION: November 7, 2019

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Claimant failed to declare to the Commission vacation pay and statutory holiday pay he received. He argued that, at the time he filed his reports with the Commission, he was unaware of these payments as he received his pay one week after his pay period. He further argued that his employer made a mistake in reporting his earnings and he provided his pay stubs as proof. The pay stubs confirm that the Claimant received vacation and holiday pay during the reporting periods in question. The law is clear that vacation pay and holiday pay arising from employment are earnings and must be allocated. The Claimant did not dispute the allocation of the earnings; rather, he requested that he be relieved from repaying the resulting overpayment. The Tribunal does not have the jurisdiction to write-off an overpayment.

- ISSUES:**
1. Is the money that the Claimant received earnings?
 2. Did the Commission allocate the earnings correctly?
 3. Can the Tribunal write-off the overpayment?

ANALYSIS

Issue 1: Is the money that the Claimant received earnings?

[3] Earnings are the entire income of a claimant arising out of employment. “Income” includes any income that a claimant did or will receive from an employer or any other person, whether in the form of money or something else. “Employment” includes any employment under any kind of contract of service or employment.¹

[4] The onus is on the Claimant to prove that the monies in question constitute something other than earnings. The Courts have ruled that vacation pay and statutory holiday pay are

¹ Subsections 35(1) and (2) of the *Employment Insurance (EI) Regulations*.

considered to be earnings.²

[5] The Claimant made a claim for benefits and a benefit period was established on December 17, 2017. The Claimant's Record of Employment dated May 10, 2018 shows he worked during his benefit period from December 18, 2017 to April 24, 2018.

[6] The following table shows, for each Employment Insurance (EI) weekly reporting period in question, the Claimant's declared earnings, as well as the Claimant's gross earnings for the same weekly periods, provided by the employer to the Commission on August 10, 2018.

Week of	Claimant's declared earnings	Gross earnings
December 17, 2017	\$0	\$564.68
December 24, 2017	\$0	\$117.25
February 11, 2018	\$510	654.36
February 18, 2018	\$375	\$358.24
February 25, 2018	\$0	\$237.76
April 22, 2018	\$360	\$671.90

[7] In his appeal to the Tribunal, the Claimant submitted that the amounts he reported are correct and that his employer and Service Canada have made a mistake. At the hearing he argued that he always reported his earnings truthfully, it was his employer and the employer's accountant who made the mistakes because sometimes they paid him when he did not work. He questioned how he could have income when he did not work. He further argued that he received his pay a week following the end of his pay period, so knowing how much to report became very confusing and messy for him. He submitted that he reported everything accurately when he filled out his EI reports and the mistakes have caused him a lot of time and paperwork and has

² *Blais v. Canada* (Attorney General), 2011 FCA 320.

taken a toll on his health.

[8] The Claimant also submitted his pay stubs for the EI reporting periods in question. The Commission submits, and I agree, that the pay stubs accurately reflect the gross earnings reported to the Commission by the employer as outlined in the table above. The pay stubs also reveal that the discrepancy between the amount of the Claimant's gross earnings and the earnings he declared to the Commission is attributable to the amount of vacation pay and statutory holiday pay he received.

[9] Specifically, the Claimant's paystub dated January 5, 2018 reveals the Claimant was paid \$564.68 in vacation pay for the week of December 17, 2017 and was paid \$117.25 in statutory holiday pay for the week of December 24, 2018. His paystub dated March 2, 2018 indicates that for the pay period February 9 – 23, 2018, the Claimant was paid vacation pay in the amount of \$118.00, together with a small amount of shift pay, which accounts for the difference (\$127.60) between his combined gross earnings for the weeks of February 11 and 18, 2018 (\$1012.60) and the amount of earnings declared by the Claimant for these two weeks (\$885.00). His pay stub dated March 16, 2018 for the pay period February 24- March 8, 2018 indicates he was paid \$237.76 in vacation pay. And, his pay stub dated May 11, 2018 for the pay period April 21 – May 4, 2018 indicates the Claimant was paid \$313.66 in vacation pay, which is almost equivalent to the difference (\$312.00) between the earnings he declared for the week of April 22, 2018 (\$360.00) and the gross earnings reported by the employer (\$671.90).

[10] In summary, based upon the information provided in the Claimant's paystubs, I find that the differences in the amount of earnings the Claimant declared to the Commission and the gross earnings that he actually received from his employer for the EI reporting weeks in question are attributable the amounts of vacation pay and statutory holiday pay he received, as well as a very small amount of shift pay. While it is true that these earnings are not wages in compensation for hours he worked, the Claimant was nonetheless paid these amounts by his employer who is obliged to pay vacation and statutory holiday pay under provincial law. As noted above, these payments also constitute earnings arising from the Claimant's employment.

[11] I accept the Claimant's argument that, because he was not paid until a week following his pay period, he did not know about the vacation and holiday pay he was receiving when he filed

his EI weekly reports. And, I further note here that the Commission has not penalized the Claimant for false reporting. However, the pay stubs support that he received these amounts and accordingly, the Claimant was obliged to declare the earnings once he became aware of them.

[12] At the hearing, when asked why he did not report to the Commission the amounts of vacation and holiday pay he received, he testified that it was only \$200-300 that he received after he was laid off and he did not think it mattered. He further testified that there was a lot of confusion and the accountant had made mistakes.

[13] Accordingly, based upon the evidence provided by the employer and the Claimant, I find that the Claimant received vacation pay and holiday pay in the amounts and in the timeframes outlined in paragraphs 6 and 9 above. I further find that vacation and holiday pay are earnings arising from the Claimant's employment and they must be allocated.³

ISSUE 2: Did the Commission allocate the earnings correctly?

[14] In his appeal, the Claimant does not dispute the manner in which the Commission allocated the earnings and I accept this as a fact.

ISSUE 3: Can the Tribunal write-off the overpayment?

[15] The allocation of the Claimant's earnings created an overpayment of \$831. The claimant did not dispute the amount of the overpayment. However, at the hearing, the Claimant requested that I rectify the situation so that he does not have to repay this amount.

[16] The Tribunal does not have the authority to decide on matters relating to write-off, only the Commission has that authority.⁴ Pursuant to section 112.1 of the *Employment Insurance Act* a decision of the Commission respecting a write-off is not subject to review under section 112 and, pursuant to section 113 only a decision that has been reconsidered under section 112 can be appealed to the Tribunal. Therefore, the Tribunal does not have the jurisdiction to deal with the matter. Further, the Courts have ruled that I am not at liberty to interpret the legislation in a

³ Subsections 35(1) and (2) of the *Employment Insurance (EI) Regulations*.

⁴ Section 56 of the *Employment Insurance Regulations*.

manner that is contrary to its plain meaning.⁵ Accordingly, I do not have the jurisdiction to write-off the overpayment.

CONCLUSION

[17] The appeal is dismissed.

Kimber Johnston
Member, General Division - Employment Insurance Section

HEARD ON:	October 25, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	S. N., Appellant Ms. Chan, Interpreter

⁵ *Canada (Attorney General) v. Knee*, 2011 FCA 301.