



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *S. N. v Canada Employment Insurance Commission*, 2020 SST 340

Tribunal File Number: AD-19-845

BETWEEN:

S. N.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: April 21, 2020

DECISION AND REASONS

DECISION

[1] The appeal is allowed in part. The General Division should have addressed the allocation issue in more detail, but the Claimant's vacation pay and statutory holiday pay were still subject to allocation under section 36 of the *Employment Insurance Regulations*.

OVERVIEW

[2] The Appellant, S. N. (Claimant), is appealing the General Division's decision.

[3] The General Division found that the Claimant should have reported money that he got from his employer for vacation and statutory holiday pay. The General Division also found that these were earnings that should have been allocated, or applied, to a given week. Once these earnings were applied, it meant that the Respondent, the Canada Employment Commission (Commission), had paid more benefits to the Claimant than he should have received. The Claimant would have to repay this overpayment. The Claimant asked the General Division to write off the overpayment, but the General Division found that it did not have any power to write off any of the overpayment.

[4] The Claimant argues that the General Division made several mistakes. He says that the General Division ignored the fact that his employer was late when it paid him. More importantly, he argues that the General Division failed to see that he reported all of his vacation and statutory holiday pay. He also argues that the General Division failed to consider his argument that the vacation and statutory holiday pay should have been allocated when he earned them, rather than when he received them.

[5] The Commission (Commission) agrees that the General Division did not address some of the issues before it. Even so, it argues that the General Division allocated the earnings correctly.

[6] I am allowing the appeal in part. The evidence shows that the Claimant received both vacation and statutory holiday pay. Even if his employer was late when it paid him, and even if the Claimant had already filed his Employment Insurance reports before he even received the vacation or statutory holiday pay, the Claimant still had to report any vacation pay or statutory

holiday pay. The General Division could have explained the allocation issues more, but, in the end, the vacation pay and statutory holiday pay still had to be allocated under sections 36(9) and (13), respectively.

ISSUES

[7] The issues are as follows:

- i. Did the General Division ignore the fact that the Claimant's employer was late when it paid him vacation and statutory holiday pay?
- ii. Did the General Division make a factual error when it found that the Claimant had not reported his vacation and statutory holiday pay?
- iii. Did the General Division ignore the Claimant's arguments about when his vacation and statutory holiday pay should have been allocated?

ANALYSIS

Background Facts

[8] The Claimant worked for a food services company at a university. The company laid him off in mid-December 2017 because of a shortage of work.

[9] The Claimant then applied for Employment Insurance benefits. From January to May 2018, the Claimant filed reports with the Commission. He reported whether he worked or received any earnings. His employer called him for work from time to time. The Claimant declared any earnings he received. The Claimant received Employment Insurance benefits. The amount of benefits he got were based on what he declared were his earnings.

[10] The Claimant's employer provided the Commission with a Record of Employment. It set out the Claimant's earnings.¹ This caused the Commission to ask the Claimant's employer for

¹ See Record of Employment, at GD3-47.

payroll information. The employer told the Commission what it had paid the Claimant.² The Commission saw that there was differences between what the Claimant said he earned from what the employer said it paid to the Claimant. The Commission asked the Claimant to explain these differences.

[11] The Claimant denies that his employer paid him when he did not work.³ He explained that he had been laid off in December 2017. He did not work for the rest of that month and into January 2018. He also explained that he did not work during reading break when the school was closed.

[12] The Claimant claimed that he had correctly filled out the reports and that he had declared everything his employer paid him, including statutory holiday and vacation pay.⁴

[13] The Claimant provided copies of his Earnings Statements.⁵ He says that the Earnings Statements prove that his employer was late when it paid him vacation pay. During the hearing before me, the Claimant argued that “if [his employer] paid [him] late for that vacation pay, that’s not [his] fault.”⁶

[14] The Commission decided that the Claimant had declared only some of his earnings. It adjusted the allocation of these earnings, so this led to an overpayment. It meant he got more Employment Insurance benefits than he should have gotten.⁷

[15] The Claimant asked the Commission to reconsider its decision. Again, he denied that he had any income when he was not working. He confirmed that his employer had been late paying him. He claims that he correctly filled out the reporting forms. He also claimed that his employer provided the Commission with the wrong information.⁸ The Commission did not change its decision.⁹

² See Request for Payroll Information, at GD3-49.

³ See Claimant’s responses to Request for Clarification of Employment Record, at GD3-51 to 53.

⁴ *Ibid.*

⁵ Earnings Statements, at GD3-54 to 57 and GD3-65 to GD3-68.

⁶ At approximately 44:00 of the audio recording of the Appeal Division hearing.

⁷ See Commission’s letter dated July 16, 2019, at GD3-58 to GD3-59.

⁸ See Claimant’s Request for Reconsideration, at GD3-62 to GD3-63.

⁹ See Commission’s letter dated September 10, 2019, at GD3-71 to GD3-72.

[16] The Claimant appealed the Commission's reconsideration decision to the General Division.¹⁰ The General Division dismissed his appeal.

ANALYSIS

Issue 1: Did the General Division ignore the fact that the Claimant's employer was late when it paid him vacation and statutory holiday pay?

[17] No. I find that the General Division did not ignore the fact that the Claimant's employer was late when it paid him vacation and statutory holiday pay.

[18] The General Division knew that the Claimant was saying his employer paid him late. At paragraphs 2 and 7 of its decision, the General Division member noted the Claimant's argument that his employer did not pay him on time and that he received his pay one week after his pay period.

[19] Either way, the General Division recognized that it did not matter whether the Claimant's employer was late when it paid the Claimant. The General Division still had to decide whether the vacation pay and statutory holiday pay were earnings under the Regulations.

[20] The Claimant does not disagree that the vacation pay and statutory holiday pay are earnings. The dispute is over whether he reported vacation pay and statutory holiday pay and whether they were properly allocated.

Issue 2: Did the General Division make a factual error when it found that the Claimant had not reported his vacation and statutory holiday pay?

[21] No. I find that the General Division did not make a factual error when it found that the Claimant had not reported his vacation and statutory holiday pay. However, I find that the General Division overlooked a small discrepancy in the Claimant's weekly earnings.

[22] There was a discrepancy between what the employer reported and what the Commission accepted as the Claimant's earnings. There was no evidence to support the Commission's

¹⁰ See Notice of Appeal.

decision to use a figure for that week's earnings other than the employer's payroll information. The Commission should correct this discrepancy.

[23] The Claimant maintains that he accurately reported all of his earnings, including any vacation and statutory holiday pay. If the Claimant already reported all of his vacation pay and statutory holiday pay, then he should not have to report them again or have those same earnings allocated a second time.

[24] In the hearing before me, the Claimant claimed that he reported all of his vacation pay "even before December 14, 2017."¹¹ If the Claimant reported all of his earnings, including vacation and statutory holiday pay, these amounts would appear in the weekly reports.

[25] Yet, according to payroll information from the employer, the amount that the Claimant reported to the Commission is different from the amount that his employer stated that it paid to the Claimant.¹² This suggested that the Claimant did not always report his earnings accurately.

[26] The Claimant has said that he was confused about filling out his forms because his employer was late when it paid him vacation pay. He filed copies of his Earnings Statements from his work. The General Division described these Earnings Statements as pay stubs.

[27] However, late payment does not excuse the Claimant from having to report vacation pay, even if he was paid later than he expected. While the Earnings Statements show the amounts that his employer paid him for vacation pay and statutory holiday pay, they do not prove that he reported these amounts to the Commission.

[28] The following shows what the Claimant reported to the Commission and what the employer said it paid to the Claimant.

¹¹ At approximately 43:50 of the audio recording of the Appeal Division hearing.

¹² See Request for Payroll Information, at GD3-49.

Week beginning on	Amount that the Claimant reported to the Commission	Amount of gross earnings that the employer paid to the Claimant¹³
December 17, 2017	\$0 ¹⁴	\$564.68)
December 24, 2017	\$0 ¹⁵	\$117.25) \$681.93
February 11, 2018	\$510 ¹⁶	\$654.36)
February 18, 2018	\$375 ¹⁷	\$358.24) \$1,012.60
February 25, 2018	\$0 ¹⁸	\$237.76
April 22, 2018	\$360 ¹⁹	\$671.90

[29] I have combined the weeks of December 17, 2017 and December 24, 2017, because the Earnings Statement dated January 5, 2018, covers both of these weeks. Similarly, I have combined the weeks of February 11, 2018 and February 18, 2018, because the Earnings Statement dated March 2, 2018, covers both of these weeks.

Weeks beginning December 17 and December 24, 2017

[30] The Earnings Statement for the period ending December 29, 2017 confirms the employer’s payroll information that it paid the Claimant the below amounts:²⁰

¹³ *Ibid.*

¹⁴ See the Claimant’s report to the Commission at GD3-18. At box number 1650, when asked whether he worked or received any earnings during the second week of the report, the Claimant answered “no.”

¹⁵ *Ibid.*

¹⁶ See the Claimant’s report to the Commission at GD3-27. At box 1135, the Claimant answered that he had \$510 in total gross earnings for the period from February 11, 2018 to February 17, 2018.

¹⁷ See the Claimant’s report to the Commission at GD3-34.

¹⁸ See the Claimant’s report to the Commission at GD3-35.

¹⁹ See the Claimant’s report to the Commission at GD3-43.

²⁰ See Earnings Statement dated January 5, 2018, at GD3-57.

- Statutory holiday pay	\$117.25
- <u>Vacation pay</u>	<u>\$564.68</u>
Total (gross):	\$681.93

[31] The Claimant noted that he did not work during this pay period. His employer laid him off from work from December 15, 2017 to January 8, 2018. He wrote on the Earnings Statement that the employer should have paid him these amounts on December 16, 2017. The employer did not pay him on December 16, 2017. Even the Claimant admits that his employer was late.

[32] It did not matter though if the employer paid him late. The Claimant still had to report any earnings. However, in his report to the Commission, the Claimant reported that he did not work or have any earnings for the timeframe December 17 to 30, 2017.²¹

[33] Although the Claimant claims that he reported all of his earnings, I do not see any evidence that he reported the statutory holiday or vacation pay that he received for the pay period ending December 29, 2017. These amounts do not appear in any of the reports. The Claimant should have reported them.

Weeks beginning February 11 and February 18, 2018

[34] The General Division wrote,

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).

[35] In fact, the vacation pay of \$118 and shift pay of \$3.01 totals \$121—not \$127.60.

[36] The General Division should have gone a step further and broken down the weekly earnings.

²¹ See report at GD3-18.

[37] The Earnings Statement for the period ending February 23, 2018 covers the weeks beginning February 11 and 18, 2018.²² The Earnings Statement shows the employer paid the Claimant statutory holiday pay of \$117.99 and shift pay of \$3.01. The statutory holiday pay was for Family Day. In British Columbia, where the Claimant lives, Family Day fell on February 12, 2018.

[38] The employer stated that Claimant's gross earnings for the week from February 11 to 17, 2018 were \$654.36.²³ The Claimant reported that his earnings for this week were \$510.²⁴ The difference is \$144.36. This means the Claimant should have reported an additional \$144.36 in earnings, part of which was for statutory holiday pay of \$117.99. (At this point, this has no effect on the calculation of the overpayment for this week because the Commission already considered this in its overpayment calculation.)

[39] For the week beginning on February 18, 2018, I note that there is a small discrepancy between the Request for Payroll Information from the employer and the Request for Clarification of Employment Information from the Commission to the Claimant. The employer reported that the Claimant's gross earnings for the week from February 8 to 24, 2018, were \$358.24.²⁵

[40] When the Commission asked the Claimant to clarify his earnings, it used the amount of \$378.24 as the Claimant's gross earnings for this week. When it calculated the Claimant's overpayment, it used the amount of \$378.24. When it made its representations to the General Division, it referred to the amount of \$358.24.²⁶

[41] I do not see any evidence to explain why the Commission used \$378.24 as the Claimant's gross earnings. It may be that the difference is because of a typing error. In the absence of any evidence showing how the Commission came to the figure of \$378.24, I will accept the employer's information regarding the Claimant's gross earnings for this week. Indeed, the Earnings Statement shows the gross earnings for the pay period was \$1,012.60. If the gross

²² See Earnings Statement dated March 2, 2018, for period ending February 23, 2018, at GD3-56.

²³ *Ibid.*

²⁴ See the Claimant's report to the Commission at GD3-27. At box 1135, the Claimant answered that he had \$510 in total gross earnings for the period from February 11, 2018 to February 17, 2018.

²⁵ *Ibid.*

²⁶ See Representations of the Commission to the Social Security Tribunal – Employment Insurance section, at GD4-2.

earnings for the week beginning February 18, 2018, were truly \$378.24, then the gross earnings for the pay period for both weeks would have been \$1,032.60.

[42] I find the Claimant's gross earnings for this week were \$358.24.

[43] The Claimant reported that his earnings for the week were \$375.²⁷ This means that he reported an extra \$16.76 in earnings.

[44] The Commission should adjust the Claimant's earnings for the week of February 18, 2018, to reflect the corrected earnings of \$358.24, as the employer had initially reported. This should result in a nominal reduction of the overpayment.

Week beginning February 25, 2018

[45] The Earnings Statement for the period ending March 9, 2018 covers the weeks beginning February 25, 2018 and March 4, 2018. The Earnings Statement confirms the employer's payroll information that it paid the Claimant \$237.76 in vacation pay.²⁸

[46] The Claimant wrote on the Earnings Statement. He noted that he did not work between February 25 and March 3, 2018. In his report to the Commission, the Claimant reported that he did not work or have any earnings for the week from February 25, 2018 to March 3, 2018.²⁹

[47] The Claimant claims that his employer should have paid him vacation pay on February 24, 2018. Even so, the Claimant still had to report vacation pay as earnings.

[48] I do not see any evidence that the Claimant ever reported the vacation pay of \$237.76 in any of his reports.

Week beginning April 22, 2018

[49] The Earnings Statement for the period ending May 4, 2018 covers the weeks beginning April 22 and April 29, 2018. It shows that the Claimant received \$313.66 in vacation pay.³⁰ This

²⁷ See the Claimant's report to the Commission at GD3-32 to GD3-34.

²⁸ See Earnings Statement dated March 16, 2018, for period ending March 9, 2018, at GD3-55.

²⁹ See the Claimant's report to the Commission at GD3-34 to GD3-35.

³⁰ See Earnings Statement dated May 11, 2018, for period ending May 4, 2018, at GD3-54.

was on top of gross regular earnings of \$475.52 and shift pay of \$1.60. The total gross pay was \$790.78.

[50] The employer stated that the Claimant's gross earnings for the week from April 22 to April 28, 2018 were \$671.90. (The difference between the Earnings Statement and the employer's payroll information is likely because the Earnings Statement covers a two-week period. In any event, the Commission is not suggesting the Claimant should have reported \$790.78.)

[51] In his report to the Commission, the Claimant reported that his gross earnings for the week were \$360.³¹

[52] The difference between what the Claimant reported and what his employer reported as his earnings for the week from April 22 to April 28, 2018, is \$311.90 (\$671.90 less \$360). As the General Division noted, there is a small difference of \$312.

[53] Ultimately, what matters is whether the Claimant reported all of his earnings. He underreported his earnings for this week by \$312.

Summary

[54] The General Division looked at the Claimant's Earnings Statements and payroll information from the employer. It also looked at the earnings that the Claimant reported to the Commission in his reports. The General Division saw that there was a difference in what the Claimant reported from what his employer reported as the Claimant's earnings. The payroll information, including the Earnings Statements, showed a higher amount of earnings from what the Claimant reported that he got.

[55] The General Division noticed that the difference was from vacation and statutory holiday pay, and a little bit of shift pay. The General Division listed these differences at paragraph 9 of its decision.

³¹ See the Claimant's report to the Commission at GD3-42 to GD3-43.

[56] The Claimant has consistently maintained that he reported all of his earnings, including vacation and statutory holiday pay. However, he has been unable to produce any evidence to show that he reported these amounts. He relied on the Earnings Statements, but the amounts for vacation pay and statutory holiday pay on them do not match what the Claimant reported to the Commission.

[57] I find that the General Division generally accurately listed the Claimant's earnings. For the week of April 22, 2018, it noted that there was a small difference between what was reported and what was on the Earnings Statement and payroll information. The General Division correctly noted that amounts for vacation pay and statutory holiday pay were missing from the Claimant's reports to the Commission. Therefore, I find that the General Division did not make a factual error when it found that the Claimant had not reported his vacation and statutory holiday pay.

[58] The General Division did not set out the breakdown of the Claimant's earnings for the weeks beginning February 11 and 18, 2018. It did not point out the Commission's error regarding the Claimant's gross earnings for the week of February 18, 2018. The gross earnings for the week should have been \$358.24, instead of \$378.24. Once the Commission adjusts the earnings, this should slightly change the amount of the overpayment.

Issue 3: Did the General Division ignore the Claimant's arguments about when his vacation and statutory holiday pay should have been allocated?

[59] Yes. I find that the General Division did not look at the Claimant's arguments about allocation. These arguments included when to apply his vacation and statutory holiday pay.

[60] When earnings are allocated to a week, that sum of money is considered earnings during that week. Any earnings that are applied to a week can affect how much a claimant receives in Employment Insurance benefits.

[61] The General Division found that the Claimant was not disputing how the Commission allocated the earnings. It accepted how the Commission allocated the earnings.

[62] Yet, the Claimant has always said that his employer was late when it paid him vacation pay. From this, I had understood that the Claimant was essentially arguing that vacation and statutory holiday pay should have been applied to the weeks that he earned them, rather than a

week later, when his employer paid him. The General Division did not consider whether late payment could affect how earnings are to be allocated.

[63] To be fair, the Claimant did not fully make out his arguments. Still, it would have helped if the General Division had addressed the allocation issues and determined how the earnings were to be allocated.

[64] I will now turn to looking at the allocation issue to see if the General Division properly allocated the Claimant's earnings. If not, or if it is unclear from its decision how the earnings were to be allocated, I will describe how they should be allocated.

Findings

[65] The General Division had to decide how to apply vacation pay and statutory holiday pay. It said that it accepted the Commission's representations on allocation. But, the representations³² did not describe how the Commission had applied the vacation pay or statutory holiday pay.

[66] It may be that the General Division relied on the Commission's overpayment calculation.³³ But, much like the representations, there was no clear explanation. The overpayment calculation did not explain how the Commission applied the earnings in the first place.

[67] The Claimant did not make any arguments about the shortcomings in the General Division's analysis on the allocation. He preferred to focus on his employer's late payments. He also focused on whether he reported his earnings. Nevertheless, I still have to decide how the earnings should be allocated.

[68] Section 36 of the *Regulations* deals with how earnings should be allocated. Allocation of any earnings depends on why the payment was made in the first place. In my leave to appeal decision, I wrote that the Claimant should explain how sections 36(4), (8) and (13) of the *Regulations* apply in his case.

³² Representations of the Commission to the Social Security Tribunal – Employment Insurance Section, at GD4.

³³ See Overpayment Calculation for Claim Effective December 17, 2017, at GD3-60.

[69] I referred the Claimant to the Commission`s Representations to the General Division at page GD4-8 of the hearing file. There, the Commission argued that section 36 of the Regulations sets out the rules that apply to the allocation of earnings. The section describes how the earnings are to be allocated. The section designates what weeks any earnings will have been considered to have been earned by a Claimant.

Vacation pay

[70] The Commission acknowledges that the General Division should have examined whether vacation pay was subject to section 36(8) or to section 36(9) of the Regulations. The Commission further argues that section 36(9) of the Regulations applies in this case.

[71] Sections 36(8) and (9) of the Regulations state:

(8) Where vacation pay is paid or payable to a claimant for a reason other than a lay-off or separation from an employment, it shall be allocated as follows:

- (a) Where the vacation pay is paid or payable for a specific vacation or periods, it shall be allocated ...
- (b) In any other case, the vacation pay shall, when paid, be allocated ...

(9) Subject to subsections (10) to (11), all earnings paid or payable to a claimant by reason of a lay-off or separation from an employment shall, regardless of the period in respect of which the earnings are purported to be paid or payable, be allocated to a number of weeks that begins with the week of the lay-off or separation in such a manner that the total earnings of the claimant from that employment are, in each consecutive week except the last, equal to the claimant`s normal weekly earnings from that employment.

[72] Section 36(8) of the Regulations does not apply when vacation pay is paid because of a lay-off. In this case, the Claimant was laid off from his job. Because of this, section 36(8) of the Regulations does not apply. Instead, section 36(9) of the Regulations must apply. Under section 36(9) of the Regulations, the vacation pay has to be applied from the date of lay-off.³⁴

³⁴ The Federal Court of Appeal said that section 36(9) has to apply. So, vacation pay is allocated from the date of lay-off.

[73] The Claimant's employer laid him off on Friday, December 15, 2017. So, even though his employer paid him vacation pay in January 2018,³⁵ the vacation pay has to be allocated from December 15, 2017. This is consistent with how the Federal Court of Appeal says the allocation should take place.³⁶ In *Brulotte*, the Federal Court of Appeal held that, "with regard to the allocation of the earnings, subsection 36(9) of the Regulations emphasizes the reason for which the earnings are paid and not the timing of that payment."

Statutory holiday pay

[74] The Commission acknowledges that the General Division did not clearly explain how to allocate statutory holiday pay. The Commission argues that section 36(13) of the Regulations applies.

[75] Section 36(13) of the Regulations states:

(13) A payment paid or payable to a claimant in respect of a holiday or non-working day that is observed as such by law, custom or agreement, or a holiday or non-working day immediately preceding or following a holiday or non-working day that occurs at the establishment of the employer or former employer from whom the claimant receives that payment, shall be allocated to the week in which that day occurs.

[76] Here, the Claimant received statutory holiday pay for December 25, 2017. Under section 36(13) of the Regulations, the statutory holiday pay has to be allocated to the week of the holiday. Even if he did not report his statutory holiday pay, this is how the Claimant suggests these earnings should have been applied.

CONCLUSION

[77] I am allowing the appeal in part and varying the General Division's decision.

[78] As the Commission acknowledges, the General Division failed to clearly explain how it allocated the Claimant's vacation pay and statutory holiday pay. I have substituted my own

³⁵ See Earnings Statement for period ending December 29, 2017, at GD3-57. Pay date was January 5, 2018.

³⁶ See *Sarrazin v. Canada (Attorney General)*, 2006 FCA 313 at para. 7 and *Brulotte v. Canada (Attorney General)*, 2009 FCA 149 at para. 13.

decision to replace the General Division's decision on the allocation issue. I did this to explain how to allocate vacation pay and statutory holiday pay.

[79] There was a minor discrepancy regarding the Claimant's gross earnings for the week of February 18, 2018. The Claimant had in fact earned \$358.24, rather than \$378.24. For this particular week, the Claimant reported slightly more earnings than he actually received. The Commission shall adjust the earnings and any overpayment accordingly.

Janet Lew
Member, Appeal Division

HEARD ON:	March 31, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	S. N., Appellant S. Prud'homme, Representative for the Respondent