



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *RK v Canada Employment Insurance Commission*, 2020 SST 1025

Tribunal File Number: GE-20-1256

BETWEEN:

R. K.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Lilian Klein

HEARD ON: May 21, 2020

DATE OF DECISION: July 9, 2020

DECISION

[1] I am dismissing the appeal with modifications. The Claimant received earnings, but the Commission miscalculated the amount of these earnings and did not allocate them to the correct weeks.

[2] The Claimant received \$3,448 in earnings when he lost his job. These earnings should be allocated at a rate of \$1,577.00 per week, starting with the week of September 15, 2019, until all earnings have been allocated.

OVERVIEW

[3] The Claimant lost his job on September 16, 2019, and applied for employment insurance (EI) benefits. His Record of Employment (ROE) showed vacation pay of \$325. The Commission allocated this money to the week of September 29, 2019.

[4] An amended ROE showed that the Claimant received three types of payments on separation from his employment: vacation pay (\$1,911.23), pay in lieu of notice (\$1,576.92) and an amount initially identified as severance (\$1,576.92). The Commission allocated this money over three weeks, starting the week of September 22, 2019. The Commission says the change in how it allocated the Claimant's increased earnings led to an overpayment of \$1,361.00.

[5] On reconsideration, the Commission decided that the \$1,576.92 it had called severance was paid to the Claimant for giving up his right to reinstatement. Such payments are not considered earnings and are therefore not allocated. This change reduced his earnings.

[6] The Commission says it allocated the Claimant's reduced earnings over two weeks rather than three, and decided that benefits were payable one week earlier: the week of October 13, 2019. His benefits would therefore end one week earlier, the week of February 16, 2020.

[7] The Claimant says he is not appealing the reconsideration decision, which reduced his earnings. He is appealing the way the Commission allocated his reduced earnings, resulting in the overpayments documented in two Notices of Debt.¹ He argues that the Commission did not

¹ *Braga v Attorney General of Canada*, 2009 FCA 167.

implement the reconsideration decision to remove his settlement money from the allocation since it never told him what his reduced overpayment was. He says the CRA told him his debt remains unchanged at \$1,361, as documented on his first Notice of Debt dated November 23, 2019.

[8] The Claimant says the Commission should have reduced the debt of \$1,361 to \$680. He later argued that the Commission should reduce the debt to \$562.² The Claimant also believes that the Commission acted illegally when it calculated an additional debt of \$562, as documented in the Notice of Debt issued on March 21, 2020.

[9] The Claimant argues he should not have to repay any benefits because the overpayments are the result of the Commission's mistakes.³ However, my jurisdiction arises solely from the reconsideration decision. This means that the only issue before me is how much the Claimant received in earnings and how those earnings should be allocated.⁴

POST-HEARING DOCUMENTS

[10] It became clear at the hearing that I did not have all the relevant information before me. The Claimant said he could give me more documentation about the benefits he received and when he received them. I accepted his post-hearing submissions as relevant to this appeal since they included evidence that confirmed the weeks the Commission paid him benefits.⁵

[11] I asked the Commission to explain its adjustments and recalculations of the Claimant's overpayment because its submissions were unclear.⁶ The Commission had put the second Notice of Debt dated March 21, 2020, right after the reconsideration decision letter dated March 10, 2020. The letter informed the Claimant that his "severance pay" (should read: "settlement pay") would be removed from the allocation of his earnings. It did not explain how that action reduced his debt.⁷ The placement of the second Notice of Debt suggested that \$562 was the reduced debt.

² GD20-4.

³ S 52 of the *Employment Insurance Act* (EI Act).

⁴ *Attorney General of Canada v Mosher*, 2002 FCA 355.

⁵ GD17-6 to GD17-8.

⁶ My authority to make this request comes from s 32 of the *Social Security Tribunal Regulations*.

⁷ GD3-224.

[12] The Claimant was understandably confused. So was I. There was a reference to a new overpayment of \$562 in the Commission's initial submissions to the Tribunal, but the wording and the charts it provided were confusing.⁸ The Commission responded to my request for more information with a submission that explained its many recalculations and reallocations.⁹

[13] I made the following earnings and allocation decision based on all the evidence before me, including the new information I received from the parties after the hearing.

ISSUES

[14] I have to decide:

1. **Did the Claimant receive earnings?**
2. **If these payments are earnings, how should they be allocated?**

ANALYSIS

[15] The law says that earnings are the entire income of a claimant arising out of any employment.¹⁰ The law defines both "income" and "employment." "Income" includes any income that a claimant got or will get from an employer or any other person, whether it is in the form of money or something else.¹¹ Severance pay is also earnings.¹² "Employment" includes any employment under any kind of contract of service or employment.¹³

[16] The Claimant is the party who has to prove it is more likely than not that the money he received from his former employer is something other than earnings.¹⁴

Did the Claimant receive earnings?

[17] Yes, the Claimant received earnings. His former employer paid him \$1,911.23 as vacation pay. This type of payment counts as earnings when paid because of a separation from

⁸ GD4-2.

⁹ GD14.

¹⁰ S 35(2) of the *Employment Insurance Regulations* (EI Regulations).

¹¹ S 35(1) of the EI Regulations

¹² *Blais v Attorney General of Canada*, 2011 FCA 320.

¹³ S 35(1) of the EI Regulations.

¹⁴ *Attorney General of Canada v Radigan*, A-567-99.

employment. As well, the employer paid him \$1,576.92 as pay in lieu of notice. This type of payment counts as earnings since it compensates an employee for loss of earnings.

[18] The employer also paid the Claimant \$1,572.92 as part of a settlement for giving up his right to reinstatement. This money is not considered earnings as long as three conditions are met:

1. the right to reinstatement exists,
2. the employee has asked for reinstatement, and
3. the payment is made to relinquish that right.¹⁵

[19] I find that the Claimant met his onus of proof to show that he met all three conditions. I therefore find that the settlement money is not earnings. The Commission initially treated this money as earnings but decided on reconsideration to remove it from allocation of his earnings.

[20] Based on the above considerations, I find that the Claimant received \$3,488.00 in earnings when he lost his job. The Commission says his earnings totalled \$3,153.84, but I find that the correct amount is \$3,488.00 since this is the total of his \$1,911.23 in vacation pay and \$1,576.92 as pay in lieu of notice.¹⁶

How should the Claimant's earnings be allocated?

[21] The law says earnings have to be allocated.¹⁷ Earnings are allocated depending on the nature of the earnings: why were they paid?

[22] The Claimant's earnings were his vacation pay and the pay in lieu of notice. There are sections in the law on allocation that apply to earnings paid or payable for these reasons.¹⁸ The employer made these payments because the Claimant's job ended when he was dismissed. This is called: being separated from your employment.

[23] The law says that earnings paid or payable because of a separation from employment are allocated starting with the week of the separation. The allocation starts that week even if the

¹⁵ *Canada v Plasse* [2000] F.C.J. 1671; *Attorney General of Canada v Warren*, 2012 FCA 74.

¹⁶ GD3-216, GD3-223.

¹⁷ S 36 of the *Employment Insurance Regulations* (EI Regulations). A payment is not considered earnings if it falls under the exceptions set out in s 35(7) of the EI Regulations, or if it is not from employment.

¹⁸ S 36 of the EI Regulations.

earnings were paid or payable on another date.¹⁹ The Commission says the week of the Claimant's separation from employment was the week of September 22, 2019. However, I find that the week of separation was the week beginning September 15, 2019, because his dismissal date—September 16, 2019—fell during that week.²⁰

[24] The amount of earnings to be allocated starting on September 15, 2019, is based on the Claimant's normal weekly earnings. The Commission says this amount is \$1,664.00 until all his earnings are allocated.²¹ However, the evidence shows that the Claimant's normal weekly earnings were \$1,576.92.²² He has not disputed this amount.

[25] That means that \$1,577 (\$1,576.92 rounded up) should be allocated to the week of September 15, 2019, and \$1,577 to the week of September 22, 2019. No benefits are payable during his waiting period, the week of September 29, 2019.²³ The balance of the allocation (\$334) reduces the amount of benefits payable for the week of October 6, 2019.

[26] This revised allocation means that the Claimant's 19 weeks of benefits were *payable* from the week of October 6, 2019, to the week beginning February 9, 2020, regardless of when they were actually paid.

[27] I encourage the Claimant to contact the Commission to clarify how this revised allocation affects his total overpayment. Only the Commission has the authority to adjust the amount of an overpayment.²⁴

CONCLUSION

[28] The appeal is dismissed with modifications. The Claimant received \$3,488.00 in earnings. These earnings should be allocated at a rate of \$1,577.00 per week, starting with the week of September 15, 2019, until all his earnings have been allocated.

¹⁹ S 36(9) of the EI Regulations.

²⁰ S 36(9) of the EI Regulations.

²¹ GD4-1.

²² See the ROE at GD3-53, the Deposit Advice Form at GD3-99 and the ROEs at GD3-102 and GD3-216.

²³ S 13 of the EI Act.

²⁴ *Prevant v. CEIC* (1980) 36 CBR (N.S.) 103 (Fed TD); *Attorney General of Canada v Mosher*, 2002 FCA 355.

Lilian Klein

Member, General Division - Employment Insurance Section

HEARD ON:	May 21, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	R. K., Appellant