



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *FB v Canada Employment Insurance Commission*, 2020 SST 1020

Tribunal File Number: GE-20-1927, GE-20-1928

BETWEEN:

F. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Amanda Pezzutto

HEARD ON: October 9, 2020

DATE OF DECISION: October 15, 2020

DECISION

[1] F. B. is the Claimant in this case. The Commission made decisions about his earnings and about his entitlement to benefits while he was outside of Canada. The Claimant is appealing these decisions to the Tribunal.

[2] I am dismissing the Claimant's appeal. The vacation pay is earnings and the Commission allocated the earnings correctly. He has not proven that he is entitled to benefits for the entire time he was outside of Canada.

OVERVIEW

[3] The Claimant's employer laid him off and paid out his vacation pay. The Commission decided that the vacation pay was earnings and allocated it from the week of his lay-off. During his benefit period, the Claimant travelled abroad to care for his father. The Commission allowed benefits for seven days, but did not allow benefits for the entire time the Claimant was out of Canada. The Claimant appealed the Commission's decisions about his vacation pay and his time out of Canada to the Tribunal.

[4] I am dismissing the Claimant's appeal on both issues. The vacation pay was earnings and the employer paid it because of the lay-off. The Commission must allocate the vacation pay from the week of the lay-off. The Claimant was receiving regular benefits and so he is only entitled to benefits for the first seven days of his absence from Canada.

[5] I do not have the jurisdiction to hear an appeal on the issues the Claimant brought up during the hearing. This is because there are no reconsideration decisions on these issues and I cannot skip the reconsideration step. However, I ask that the Commission contact the Claimant to discuss the following:

- Can he post-date his benefit period by one week so that the vacation pay allocation does not happen during his benefit period?
- Is he entitled to benefits for the care of a critically ill adult while he was out of Canada caring for his father?

[6] If the Commission makes reconsideration decisions about these two issues, then the Claimant may bring an appeal to the Tribunal if he disagrees with the Commission's reconsideration decisions.

PRELIMINARY MATTERS

[7] The Commission originally decided that the Claimant was not available for work while he was outside of Canada. During the reconsideration process, the Commission changed this decision. The Commission agreed that the Claimant had proven that he was available for work while he was outside of Canada. Because the Commission made a decision in the Claimant's favour, I will not make a decision about his availability for work while he was outside of Canada.

ISSUE

[8] I have to decide:

1. Is the money that the Claimant received earnings?
2. If it is earnings, did the Commission allocate it correctly?

[9] I also have to decide whether the Claimant is entitled to benefits during his time outside of Canada.

ANALYSIS

Did the Claimant receive earnings?

[10] The \$486 in vacation pay that the Claimant received is earnings.

[11] The law says that earnings are the entire income of a claimant arising out of any employment.¹ The law defines both "income" and "employment." "Income" includes any income that a claimant did or will get from an employer or any other person, whether it is in the

¹ Subsection 35(2) of the *Employment Insurance Regulations*.

form of money or something else.² “Employment” includes any employment under any kind of contract of service or employment.³

[12] The Claimant’s employer paid him \$485.81. The Commission rounded this to \$486. According to the Record of Employment (ROE), this money was vacation pay. The Commission accepted the employer’s description of the money as vacation pay and decided that the money was earnings.

[13] The Claimant agrees that the employer paid him the money. He agrees that it was vacation pay. At the hearing, he said that he agrees that the money is earnings.

[14] Both the Commission and the Claimant agree that the Claimant’s employer paid him vacation pay. I accept that this money is income from employment because the employer paid it to the Claimant. I find that the \$486 of vacation pay is earnings.

Did the Commission allocate the earnings correctly?

[15] The law says that earnings have to be allocated.⁴ Earnings are allocated depending on the nature of the earnings: why were the earnings paid?

[16] The Commission argues that the employer paid the vacation pay because they laid the Claimant off.

[17] According to the ROE, the employer paid the vacation pay because the Claimant stopped working. At the hearing, the Claimant said that the employer paid out the vacation pay because employees had to cover their portion of their insurance coverage during the lay-off. He said that the employer would not have paid out the vacation pay if they had not laid him off.

[18] I find that the lay-off was the trigger for the vacation payout. In other words, the employer paid the vacation pay because they laid off the Claimant. There is a section in the law on allocation that applies to earnings that are paid or payable because of a lay-off.⁵

² Subsection 35(1) of the *Employment Insurance Regulations*.

³ Subsection 35(1) of the *Employment Insurance Regulations*.

⁴ Section 36 of the *Employment Insurance Regulations*.

⁵ Subsection 36(9) of the *Employment Insurance Regulations*.

[19] The law says that earnings paid or payable because of lay-off are allocated starting the week of the Claimant's separation from employment. The allocation starts on that week despite when the earnings were paid or payable. The Commission must allocate the earnings so that they are equal to the Claimant's normal weekly earnings.⁶

[20] I find that the week of the Claimant's lay-off is the week beginning May 20, 2018. This is because the ROE says that his last day of work was May 24, 2018. According to the ROE, the Claimant had earnings in the week beginning May 20, 2018. He earned more than \$1700. The ROE shows the Claimant's weekly earnings, and it is clear that \$1700 is more than his normal weekly earnings.

[21] The law says that the Commission must allocate the Claimant's earnings to each week so that his earnings are equal to his normal weekly earnings. This means that the Commission cannot allocate the vacation pay to the week beginning May 20, 2018. This is because he already earned more than his normal weekly earnings in that week. The Commission allocated the vacation pay to the following week: the week beginning May 27, 2018. The vacation pay was less than the Claimant's normal weekly earnings, so the Commission allocated the entire \$486 to the week beginning May 27, 2018. The Claimant has not given me any evidence to show that the Commission made a mistake about his earnings. I am satisfied that the Commission has allocated the vacation pay correctly.

[22] At the hearing, the Claimant said that he disagreed with the Commission's decisions about his vacation pay because he wanted the Commission to start his benefit period one week later. He said that he did not think the Commission should have deducted the vacation pay from his benefits; instead, he says that the Commission should have started his benefit period after it finished allocating his vacation pay.

[23] The Claimant has already had one appeal about the start date of his benefit period. The Tribunal agreed with the Claimant and found that his benefit period should start on May 27, 2018. I do not have the authority to change a decision made by another Tribunal Member. This means that I cannot change the start date of the Claimant's benefit period.

⁶ Subsection 36(9) of the *Employment Insurance Regulations*.

[24] Furthermore, there is no evidence that the Claimant ever asked the Commission to post-date his benefit period by one week. There is no evidence that the Commission has made an initial decision or a reconsideration decision about post-dating the Claimant's benefit period. I do not have the authority to make a decision on an issue if there is no reconsideration decision.

[25] The Claimant has the option of asking the Commission to start his benefit period later. If he disagrees with the Commission's decision, he can ask for a reconsideration, and then appeal to the Tribunal. However, I cannot skip over these steps. I do not have the authority to make decisions about the Claimant's benefits if the Commission has not first made a reconsideration decision.

[26] Because there is already one Tribunal decision about the start date of the benefit period and because there is no reconsideration decision about post-dating the start of the Claimant's benefit period, I find that I do not have the authority to make any decisions about the start date of the Claimant's benefit period.

Is the Claimant entitled to benefits while he was out of Canada?

[27] The Claimant is entitled to benefits for seven days while he was out of Canada. This is because he was out of the country attending to his sick father while he was claiming regular employment insurance benefits.

[28] Usually, you cannot receive employment insurance benefits if you are outside of Canada.⁷ There are some exceptions. The *Employment Insurance Regulations* has a list of the exceptions. If you are outside of Canada for one of the following reasons, you might be able to receive benefits:

- To undergo medical treatment that is not readily or immediately available in Canada;
- To attend a funeral of a family member;

⁷ Paragraph 37(b) of the *Employment Insurance Act*.

- To travel with a family member while they are getting medical treatment outside of Canada;
- To visit a seriously ill or injured family member;
- To attend a job interview; or
- To conduct a job search.⁸

[29] It is always your responsibility to prove that you meet all of the requirements to receive EI benefits.⁹ This means that you have to prove that one of these exceptions apply to you if you want to collect benefits while you are outside of Canada.¹⁰

[30] The Claimant left Canada on June 12, 2018 and returned on October 18, 2018. He left Canada to care for his father. The Commission accepted that he remained available for work while he was outside of Canada. However, the Commission decided that he could only receive benefits for seven days. This is because the law only allows benefits for seven days if a claimant is outside of Canada to care for a sick family member.

[31] The Claimant argues that he should receive benefits for the entire time he was outside of Canada. He says that subsection 55(4) of the *Employment Insurance Regulations* says that he can receive benefits for the entire time he was outside of Canada because he was caring for a sick family member.

[32] This is subsection 55(4) of the *Employment Insurance Regulations*:

A claimant who is not a self-employed person is not disentitled from receiving benefits in respect of pregnancy, the care of a child or children referred to in subsection 23(1) of the Act, the care or support of a family member referred to in subsection 23.1(2) of the Act, of a critically ill child or of a critically ill adult or while attending a course or program of instruction or training referred to in paragraph 25(1)(a) of the Act for the sole reason that the claimant is outside Canada, unless their Social Insurance Number Card or the period of validity of their Social Insurance Number has expired.

⁸ Subsection 55(1) of the *Employment Insurance Regulations*.

⁹ Subsection 49(1) of the *Employment Insurance Act*.

¹⁰ *Canada (Attorney General) v Peterson*, A-370-95.

[33] This part of the law provides an exception to the general rule that claimants cannot collect benefits while they are outside of Canada. If a claimant is collecting one of the following kinds of benefits, they can receive those benefits while they are outside of Canada:

- Maternity benefits (“benefits in respect of a pregnancy”);
- Parental benefits (“benefits in respect of...the care of a child or children referred to in subsection 23(1) of the [Employment Insurance] Act”)
- Compassionate care benefits (“the care or support of a family member referred to in subsection 23.1(2) of the Act”)
- Benefits to care for a critically ill child (“the care or support ... of a critically ill child” – benefits described in section 23.2 of the Act)
- Benefits to care for a critically ill adult (“the care or support ... of a critically ill adult” – benefits described in section 23.3 of the Act)
- Benefits for someone attending a training program that the Commission or another authority referred them to (“while attending a course or program of instruction or training referred to in paragraph 25(1)(a) of the Act”).

[34] The Claimant applied for Employment Insurance regular benefits. There is no evidence showing that he ever asked for any other kind of benefits. At the hearing, he said that he did not ask the Commission to pay him benefits for the care of a critically ill adult because he did not know about these kinds of benefits.

[35] The Claimant has not proven his entitlement to benefits under subsection 55(4) of the *Employment Insurance Regulations* because he has not proven that he was receiving any of the kinds of benefits this part of the law refers to. The Claimant was receiving regular benefits and so subsection 55(1) of the *Employment Insurance Regulations* applies to him. He was outside of Canada to care for his father. This means that he is entitled to benefits for the first seven days of his absence. I am satisfied that the Commission correctly calculated his entitlement to benefits.

[36] The Claimant argues that he is not an expert about Employment Insurance benefits. He says that the Commission should have recognized that he was caring for his critically ill father. He says that the Commission should have told him about benefits for the care of a critically ill adult.

[37] I agree with the Claimant. He has always been clear about his reason for travelling outside of Canada. It would have been good client service if the Commission had told him about benefits for the care of critically ill adults.

[38] However, the evidence is clear that the Commission did not tell the Claimant about these benefits. The Claimant did not ask for benefits for the care of a critically ill adult. There is no initial decision about his entitlement to these benefits. There is no reconsideration decision about his entitlement. I do not have the authority to skip the reconsideration step and make a decision about whether the Claimant has proven his entitlement to benefits for the care of a critically ill adult. Furthermore, I do not have all of the necessary information to make a decision about whether the Claimant has proven his entitlement to these kinds of benefits.

[39] I ask that the Commission contact the Claimant to discuss his possible entitlement to benefits for the care of a critically ill adult. The Claimant should know that there are special conditions he has to meet to prove his entitlement to these kinds of benefits.

CONCLUSION

[40] I must dismiss the Claimant's appeal on both issues.

Amanda Pezzutto

Member, General Division - Employment Insurance Section

HEARD ON:	October 9, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	F. B., Appellant