



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *RS v Canada Employment Insurance Commission*, 2020 SST 1170

Tribunal File Number: GE-20-2020

BETWEEN:

R. S.

Appellant / Claimant

and

Canada Employment Insurance Commission

Respondent / Commission

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Raelene R. Thomas

HEARD ON: October 28, 2020

DATE OF DECISION: October 30, 2020

Decision

[1] The appeal is allowed in part. The vacation pay is earnings and must be allocated to (deducted from) the Claimant's EI benefits. The Commission incorrectly allocated the vacation pay. It is to be allocated at the rate of the Claimant's weekly earnings to the weeks of unpaid vacation taken by the Claimant in 2019 and to the weeks including and following July 1, 2020.

Overview

[2] The Claimant stopped working on June 30, 2020, to take a period of parental leave. He established a claim for EI parental benefits effective July 12, 2020. His employer paid out his accumulated vacation pay on July 1, 2020. The Commission decided that the vacation pay was earnings and allocated the money to the Claimant's parental benefits. This meant the Claimant's EI benefits were reduced from July 12, 2020 to August 8, 2020. The Claimant disagreed with the Commission's decision. He says that the employer pays out vacation pay every July 1st, he does not have paid vacation when he takes time off and that the vacation pay is counted as part of his annual income. The Commission maintained its decision on reconsideration. The Claimant appealed to the Social Security Tribunal (Tribunal). The Commission revised the allocation in its submission to the Tribunal. I agree with the Commission's submission.

The Claimant did not attend the hearing

[3] A hearing can go ahead without the Claimant if the Claimant was given the notice of the hearing. The Claimant authorized the Tribunal to communicate with him by e-mail. The Notice of Hearing was emailed to the Claimant on October 22, 2020. The Claimant emailed the Tribunal on October 27, 2020, stating that he would not be able to attend the hearing and that he was okay with it proceeding in his absence. On the day of the hearing, I established a teleconference at the scheduled time. At 30 minutes past the time set for the hearing, the Claimant had not appeared and I disconnected from the teleconference. I am satisfied the Claimant received the notice of hearing and will decide the appeal in his absence.

Issues

[4] I have to decide whether the money the Claimant received is earnings, as defined by the *Employment Insurance Act*, and, if I decide the money is earnings, did the Commission allocate the amount correctly from the Claimant's EI benefits?

Reasons for my decision

[5] 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 form of money or something else.² "Employment" includes any employment under any kind of contract of service or employment.³

The vacation pay is earnings

[6] The Claimant told the Commission that his employer pays out vacation pay on July 1st each year. The employer told the Commission that vacation pay is paid on an anniversary date of July 1 each year. The Record of Employment (ROE) shows that the Claimant received \$4,519.93 in vacation pay. The employer told the Commission the vacation period that applied to that payment was from July 2, 2019 to July 1, 2020.

[7] To be considered earnings, the income must arise out of any employment or there is a "sufficient connection" between the claimant's employment and the money received.⁴ The evidence tells me the Claimant received vacation pay on July 1, 2020, from his employer having worked for his employer for the 12 months prior to that date. This means the income arose out of the Claimant's employment. As a result, I find that the vacation pay is earnings within the meaning of the *Employment Insurance Regulations*.

¹ *Employment Insurance Regulations*, section 35(2)

² *Employment Insurance Regulations*, section 35(1)

³ *Employment Insurance Regulations*, section 35(1)

⁴ The presence of a "sufficient connection" between earnings and employment was considered by the Federal Court of Appeal in *Canada (Attorney General) v. Roch*, 2003 FCA 356

The Commission incorrectly allocated the vacation pay

[8] The Commission says that sums received from an employer are presumed to be earnings and must be allocated to a period on claim unless the amount falls within an exception specified in the law.

[9] The Commission initially allocated \$3,333.00 of the vacation pay to the first three weeks of the Claimant's EI benefits and \$75 to the fourth week. The vacation pay was allocated at an amount equal to the Claimant's weekly earnings.⁵ After the Claimant requested reconsideration, the Commission found out from the employer that vacation pay was paid every July 1st for the vacation period spanning the previous 12 months. The vacation pay the Claimant received on July 1, 2020, was for the vacation period July 2, 2019 to June 30, 2020. The Claimant took two unpaid weeks of scheduled vacation in those 12 months: August 12 - 16, 2019 and December 9 - 13, 2019. The Commission maintained its decision after reconsideration.

[10] How vacation pay is allocated to EI benefits depends on the circumstances leading to its payment. Where vacation pay is paid to an employee when they separate from their employment through layoff, termination or quitting, the vacation pay is allocated at the rate of the Claimant's weekly earnings to the first weeks of the Claimant's EI benefits.⁶ The Commission chose to allocate the vacation pay as if the Claimant had separated from his employment. He did not, he was taking a period of parental leave. As a result, I find the Commission incorrectly allocated the Claimant's vacation pay.

[11] Where vacation pay is paid or payable to a Claimant for a reason other than layoff or separation from employment the law provides for a different method of allocation. The law says that the vacation pay is to be allocated to the vacation periods taken by the Claimant and in any other case to a number of weeks that begins with the first week for which it is payable at the rate of the Claimant's normal weekly earnings.⁷ As noted above the Claimant was on parental leave when the vacation pay was paid out on July 1, 2020. For the Claimant this means that the vacation pay he received on July 1, 2020, should have been allocated at the rate of his normal

⁵ The Claimant's weekly earnings were calculated as \$1,111.32

⁶ *Employment Insurance Regulations*, section 36(9)

⁷ *Employment Insurance Regulations*, section 36(8)

weekly earnings to the two weeks of unpaid vacation that he took in 2019 and to the weeks including and after July 1, 2020, which is when the vacation pay became payable.

[12] I agree with the Commission's recalculation of the Claimant's normal weekly earnings as \$1,126.00.⁸ The amount to be allocated is \$4,519.93. The Claimant had an unpaid vacation of one week from August 12, 2019 to August 16, 2019; \$1,126.00 should be allocated to that week. The Claimant had a second unpaid vacation of one week from December 9, 2019, to December 13, 2019; \$1,126.00 should be allocated to that week. That leaves \$2,267.93 that should be allocated at the rate of the Claimant's weekly earnings to the weeks including and following July 1, 2020, the date the vacation pay became payable.⁹ Thus, \$1,126.00 should be allocated in each of the weeks of June 28, 2020, to July 4, 2020, and July 5, 2020, to July 11, 2020. That leaves \$15.93 that should be allocated to the week of July 12, 2020, to July 18, 2020. I note that the \$15.93 will be rounded up to \$16.00.

CONCLUSION

[13] The appeal is allowed in part. The vacation pay is earnings and must be allocated. It is to be allocated at the rate of the Claimant's weekly earnings to the weeks of unpaid vacation taken by the Claimant in 2019 and to the weeks including and following July 1, 2020.

Raelene R. Thomas

Member, General Division - Employment Insurance Section

HEARD ON:	October 28, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	None

⁸ The Claimant worked 40 hour weeks and was paid \$28.15 an hour which results in \$1,126.00 weekly earnings

⁹ Section 2 of the *Employment Insurance Act* defines a week to be a period of seven consecutive days beginning on and including Sunday