



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *RB v Canada Employment Insurance Commission*, 2020 SST 1122

Tribunal File Number: GE-20-2102

BETWEEN:

R. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Lilian Klein

HEARD ON: December 4, 2020

DATE OF DECISION: December 14, 2020

DECISION

[1] I am dismissing the appeal. The \$22,500 that the Claimant's former employer paid her on January 23, 2020, is earnings because the payment arose from the job she lost on April 13, 2018.

OVERVIEW

[2] When the employer dismissed the Claimant on April 13, 2018, it paid her vacation pay and pay in lieu of notice. The Commission allocated these amounts as earnings against her benefit claim. The employer offered her \$22,500 in return for agreeing to a settlement package and signing a release form.¹ The Claimant refused this offer.

[3] On January 2, 2020, the Claimant brought a civil suit against her former employer for \$200,000 in damages. The suit is ongoing.

[4] On January 23, 2020, the employer deposited \$15,750 into the Claimant's bank account. The Commission accepted the employer's explanation that this was severance of \$22,500 (which amounted to \$15,750 after the usual deductions).

[5] The law says severance pay is earnings and must be allocated. When the Commission allocated the \$22,500 to weeks in the Claimant's benefit period, it led to an overpayment.

[6] The Commission says the Claimant has to repay the overpayment, but her benefit period will be extended because she now has more earnings to be allocated. The Commission says this means she may be able to recoup some or all of the overpayment in her extended benefit period.

[7] The Claimant says she does not want to extend her benefit period; she disputes in principle that the \$22,500 is severance. She argues that she was not entitled to severance. She says the money is an advance payment towards the damages she is seeking in her civil suit.

ISSUE

¹ All figures are rounded up to the next decimal place.

[8] I have to decide if the money the Claimant received was earnings. If so, did the Commission allocate these earnings correctly?

ANALYSIS

[9] The law says your entire income from any employment counts as earnings.² The law defines both “income” and “employment.” “Income” includes any income you got, or will later get, from an employer.³ “Employment” includes any employment under any kind of contract of service or employment, whether or not you perform work.⁴

The Claimant has the burden of proof

[10] You have the burden of proof if you wish to argue that money you received was not earnings.⁵ If you get a settlement, you have to prove that part or all of it was due to “special circumstances” other than loss of employment income.⁶

Severance payments are earnings

[11] The law says that severance pay counts as earnings.⁷ Your employer pays you to compensate you for your lost earnings.

The Facts

[12] The parties agree that the Claimant’s former employer paid her a total of \$7,443 when it terminated her employment on April 13, 2018. This amount consists of \$3,981 as pay in lieu of notice and \$3,462 in accumulated vacation pay. The Commission allocated these amounts against her benefit claim starting with the week of April 15, 2018, the week she lost her job.

[13] In a termination letter dated April 18, 2018, the Claimant’s employer offered her \$22,500 in exchange for agreeing to the terms of settlement and signing a Release and Indemnity.⁸ The

² S 35(2) of the EI Regulations.

³ S 35(1) of the EI Regulations.

⁴ S 35(1) of the EI Regulations.

⁵ *Bourgeois v Attorney General of Canada*, 2004 FCA 117.

⁶ *Attorney General of Canada v Radigan*, A-567-99.

⁷ *Blais v Attorney General of Canada*, 2011 FCA 320.

⁸ Termination letter - GD3-56 to GDR-58; Release and Indemnity - GD3-59 to GD3-60.

letter says the employer was offering her a “separation package” that included a “lump sum payment” of \$22,500. She refused this offer.⁹

[14] After unsuccessful settlement discussions, on January 2, 2020, the Claimant began legal proceedings against her employer. She is seeking \$200,000 in damages. On January 22, 2020, the employer indicated that it would defend the suit. On January 23, 2020, the employer deposited \$15,750 into the Claimant’s account (\$22,500 less the usual deductions).¹⁰

[15] The employer issued an amended Record of Employment (ROE) on July 20, 2020, which stated that the \$22,500 was a severance payment.¹¹

What does the Commission say?

[16] The Commission says the \$22,500 is severance because it arose from the Claimant’s employment and she has not submitted proof that the money is anything else. In the absence of other evidence, the Commission accepted the employer’s statement that it paid this money as severance, as documented on her amended ROE.

What does the Claimant say?

[17] The Claimant maintains that the \$22,500 is not severance. She argues that it cannot be severance since she was not entitled to severance under the terms of her employment letter¹² or the *Employment Standards Act*.¹³ For the record, I can only decide matters under the *Employment Insurance Act* and *Employment Insurance Regulations*.¹⁴

[18] This means I will only be deciding (i) whether the \$22,500 met the criteria to count as earnings under this legislation and (ii) whether the Claimant met her burden of proof to show that the money was something other than earnings.

⁹ GD12-2.

¹⁰ GD3-35.

¹¹ GD3-36.

¹² GD2-29 to GD2-37.

¹³ *Employment Standards Act, S.O. 2000 c.41*.

¹⁴ The relevant sections of the EI Regulations can be found at GD4-14 to GD4-15.

[19] The Claimant says the \$22,500 was advance payment for the damages she is claiming in her lawsuit. She says the proof is that her employer only made the payment after she filed her lawsuit.

[20] The Claimant says that the \$22,500 was not “paid” to her because she is disputing that it is earnings. She cites the Commission’s *Digest of Benefit Entitlement Principles* (Digest), which says it does not allocate earnings unless there is agreement on what type of money is paid.¹⁵

[21] The Claimant says the Commission acted unfairly. She argues that it prejudged her claim because it told her the payment was likely to be earnings before it contacted the employer to verify what the money was.”¹⁶

[22] The Claimant argues that the Commission did not properly investigate the \$22,500 payment. She says the Commission should have penalized the employer because it provided false information when it said the payment was severance.

[23] The Claimant says the Tribunal has ruled in the past that the Commission cannot allocate money as severance where the employer did not provide sufficient information to support that finding. She cites two Tribunal decisions, arguing that they show the Commission cannot allocate money as earnings if the parties have not agreed to the terms of the settlement.¹⁷

Has the Claimant proved that the money is something other than earnings?

[24] I find that the Claimant has not provided evidence that the \$22,500 is anything other than earnings, paid because she lost her job. She has not yet settled her civil suit so she cannot prove that the payment is for damages. As a result, the only available evidence shows it is more likely than not that this money was severance, paid because her employment ended. Such payments are earnings because they arise out of a former employment.

¹⁵ The Commission’s *Digest of Benefit Entitlement Principles*, Chapter 5 (<https://www.canada.ca/en/employment-social-development/programs/ei/ei-list/reports/digest/introduction.html>).

¹⁶ GD14-4.

¹⁷ *R.L. v Canada Employment Insurance Commission*, 2014 SSTGDEI 18; *R.C. v Canada Employment Insurance Commission*, 2019 SST 564.

[25] The Claimant has relied heavily on the Commission's Digest to support her arguments, but the publication is only an interpretive guide. It is not binding on this Tribunal.¹⁸ It is an internal policy document providing guidance to Commission agents. It does not have the power of the law, nor does it replace the employment insurance legislation.¹⁹

[26] I do not accept the Claimant's argument that the \$22,500 was not "paid" to her because she is disputing what it is. The facts show that the employer paid her this money by depositing it directly into her bank account on January 23, 2020. She did not return the payment and the money remains under her control. This means that her employer paid her the money.

[27] Although I am not bound by past decisions of the Tribunal, I considered the facts and findings in the cases that the Claimant submitted. I find that these decisions do not support her arguments since the appeal in each case was of a settlement that the parties had already reached. The Claimant has not reached any agreement with her employer to settle her lawsuit.

[28] The facts and evidence do not support the Claimant's argument that the Commission failed to get enough information from the employer to decide that the money was severance. The Commission submitted records of its conversations with the employer, the amended ROE, and the termination letter with its offer of a "separation package." The letter referred to a lump sum payment of \$22,500 (equal to "three months' pay"). This wording suggests that the \$25,500 was a severance payment rather than damages since no damages have yet been awarded.

[29] The Claimant has the burden of proof to show that the money was something other than earnings, but she did not submit any proof. She has no settlement agreement documenting that her employer agreed to pay her damages. She says she cannot share details of her settlement discussions with the employer in December 2019, to show it was considering paying her damages. She bases her appeal primarily on her hopes of winning her lawsuit. This is not evidence.

[30] Based on the available evidence, I do not find that the Commission acted unfairly. It was reasonable for it to see a link between the lump sum payment of \$22,500 in the "separation

¹⁸ *Attorney General of Canada v Greey*, 2009 FCA 296; *A. A. v. Canada Employment Insurance Commission*, 2017 SSTADEI 2.

¹⁹ *R. F. v. Canada Employment Insurance Commission*, 2016 SSTGDEI 99.

package” offered in 2018, and the \$22,500 that the employer paid the Claimant in January 2020. Since she reported that there was no settlement awarding her damages, a fair inference was that the payment was severance.

Did the Commission allocate the earnings correctly?

[31] The law says earnings must be allocated to the weeks of your benefit claim. The allocation method depends on why the earnings were paid. There is a section in the law that applies to earnings paid or payable because of a lay-off.²⁰ If you are laid off, the Commission allocates those earnings at your usual rate of weekly pay, starting with the week you lose your job. The earnings are subject to allocation whether they are paid when you were laid off or at a later date.²¹

[32] When the Commission allocates severance to weeks in your benefit period, the allocation can change or even eliminate the benefits payable for those weeks.²² If you already received benefits, the payment weeks may change. You must repay any overpayment that comes from that change. However, the Commission says when it extends your benefit period and adjusts your payment weeks, you may later be able to recoup some or all of the overpayment.

[33] I have already found that the Claimant had earnings of \$22,500 in the form of severance pay. The Commission allocated these earnings to the weeks of her benefit claim together with her vacation pay and pay in lieu of notice, for a total of \$29,942. It used a weekly earnings rate of \$1,731. The allocation ran from the week of April 8, 2018—the week she lost her job—to August 4, 2018, with the balance applied to the week of August 5, 2018.²³

[34] The Claimant does not dispute the rate of weekly earnings. I therefore accept the Commission’s calculation of the allocation weeks using that earnings rate.

CONCLUSION

²⁰ S 36(9) of the *EI Regulations*.

²¹ Under s 36(9) of the *EI Regulations*, severance is allocated in equal payments at your normal weekly rate of earnings starting with the week you lose your job. The balance is applied to the final allocation week.

²² S 35(2) of the *EI Regulations*.

²³ GD3-18 to GD3-19.

[35] The appeal is dismissed. The Claimant's former employer paid her severance of \$22,500. These earnings must be allocated against her benefit claim.

Lilian Klein

Member, General Division - Employment Insurance Section

HEARD ON:	December 4, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	R. B., Appellant