



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *DT v Canada Employment Insurance Commission*, 2021 SST 171

Tribunal File Number: GE-21-5

BETWEEN:

D. T.

Claimant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Gary Conrad

HEARD ON: January 14, 2021

DATE OF DECISION: January 16, 2021

DECISION

[1] The appeal is dismissed. The Claimant received earnings and the Canada Employment Insurance Commission (Commission) allocated (in other words, assigned) those earnings correctly.

Overview

[2] According to the Record of Employment (ROE) issued by his employer the Claimant got \$4,689.70 as vacation pay and \$12,582.27 as pay in lieu of notice for a total of \$17,271.97 from the employer due to being laid-off. The Commission decided the money is “earnings” under the law because the monies resulted from the severance of employment.

[3] The law says that all earnings have to be allocated to certain weeks. What weeks earnings are allocated to depends on why you received the earnings.¹

[4] The Commission allocated the earnings starting the week of September 29, 2019. This is the week that the Commission said the Claimant separated from his employment. The Commission said that separating from his job is why the Claimant received the earnings.

[5] The Claimant disagrees with the Commission. The Claimant states that the amount of money used by the Commission in their allocation is incorrect. He agrees he was paid the total amount as shown on his ROE but says that some of the money was received before he separated so it should not be counted towards the allocation and most of that money was actually a bonus that he was entitled to regardless of whether he separated or not.

Issues

[6] I have to decide the following two issues:

- a) Is the money that the Claimant received earnings?
- b) If the money is earnings, did the Commission allocate the earnings correctly?

¹ See section 36 of the *Employment Insurance Regulations* (EI Regulations).

Analysis

Is the money that the Claimant received earnings?

[7] Yes, the \$17,271.97 the Claimant received is earnings. Here are my reasons for deciding that the money is earnings.

[8] The law says that earnings are the entire income that you get from any employment.² The law defines both “income” and “employment.”

[9] **Income** can be anything that you got or will get from an employer or any other person. It doesn't have to be money, but it often is.³ Case law says that severance pay is earnings.⁴

[10] **Employment** is any work that you did or will do under any kind of service or work agreement.⁵

[11] The Claimant has to prove that the money is **not** earnings. The Claimant has to prove this on a balance of probabilities. This means he has to show that it is more likely than not the money isn't earnings.

[12] The Claimant's former employer gave the Claimant \$17,271.97⁶. The Commission decided that this money was severance pay and vacation pay. So, it said that the money is earnings under the law as the money was paid to the Claimant due to his separation from his employment.

[13] The Claimant agrees the total amount listed on the ROE of \$17,271.97 that his employer said he received is correct; however, in his testimony he argued that the majority of that money is a bonus paid to him that he would have received whether he separated or not so it should not be a part of the allocation.

² See section 35(2) of the EI Regulations.

³ See section 35(1) of the EI Regulations.

⁴ See *Blais v Canada (Attorney General)*, 2011 FCA 320.

⁵ See section 35(1) of the EI Regulations.

⁶ GD03-16

[14] The Claimant had previously stated when speaking to the Commission that some of that money was paid to him for a peaceful separation⁷ and that some of the money was part of his September salary and the sale of his annual leave credits⁸.

[15] The Commission says that while the Claimant argued that some of the money was received before he separated from his employment he still agreed that it was paid due to the separation, as it was paid for a peaceful separation, so if he had not separated he would not have received the money, therefore it was paid for separation⁹.

[16] The Commission says the Claimant's ROE shows he was paid \$17,573.56 in his last pay period which is his wage for the 8 hours of work in that pay period and the \$17,271.97 he received in separation monies¹⁰.

[17] I find the Claimant received \$17,271.97, from his employer, as the Claimant agrees as such. I further find this money was received upon his being laid-off from his employer.

[18] I find the amount of \$17,271.97 does not include salary as the Claimant is arguing as the ROE shows the amount including the hours of work paid to the Claimant for the October 2019 pay period was \$17,573.56, while the amount listed on his ROE as being received upon separation as \$17,271.97, consisting of vacation pay and pay in lieu of notice, not including the salary shown on his ROE for that period.

[19] I further find the Claimant has failed to provide sufficient evidence to support the amount of \$17,271.97 included the sale of annual leave amounts received independent of his separation as opposed to his employer paying him out his accrued vacation pay of \$4,689.70 as they state on the ROE.

[20] The Claimant says his employer paid out an annual bonus as follows:

[21] Each month an employee can collect 8.34% from the total of 100% based on employee productivity for that month. The maximum bonus for an employee who was 100% productive in

⁷ GD03-27

⁸ GD02-5

⁹ GD04-4

¹⁰ GD04-4

12 months is 2.5 months of their salary. As an example if an employee was employed from January to October and was 100% productive they would receive 9 months x 8.34% x 2.5 months of their salary¹¹.

[22] The Claimant says that the money he received at the end of September 2019 was based on his activity and productivity he had from January 2019 to October 2019 and if he had not been laid-off and had not worked for the last three months of the year 2019 he would have been paid the same amount of \$12,582.27¹².

[23] The Claimant submitted a sheet showing a payment from his employer to support he got a bonus from 2018 that was paid to him in January 2019.

[24] The Commission says the payment document proves nothing; there is no indication of why that money was paid or that it was even paid to the Claimant and it is irrelevant if the Claimant was paid a bonus at some previous date as it has no bearing on the allocation of separation monies¹³.

[25] The Commission further says there is no indication on the ROE the Claimant was paid a bonus on separation and he had previously said those payments were for a peaceful separation¹⁴.

[26] In looking at the Claimant's ROE there is a significant increase in his usual pay for the pay period of January 2019, (the Claimant was paid monthly). I find this supports the Claimant did get some sort of extra payment in that pay period, it could even have been a bonus as he argues, but the ROE itself is not determinative the Claimant got a bonus in January 2019.

[27] I further find I agree with the submission of the Commission that the included payment sheet from the Claimant¹⁵ does not provide enough information to determine the Claimant got a bonus in January 2019. I find it is not clear what the amount in the payment sheet is showing, whether it is the Claimant's total pay for that period after deductions, or whether it is showing a

¹¹ GD08-1

¹² GD08-1

¹³ GD07A-1

¹⁴ GD07-1

¹⁵ GD06-2

total bonus amount. When factoring in the Claimant's annual monthly salary as shown on his ROE it is doubtful the amount shown on the payment sheet is all a bonus.

[28] I also find I agree with the submission of the Commission that even if the Claimant did get a bonus in January 2019, which I have found there is insufficient evidence to support, that does not prove the amounts he received from his employer upon being laid-off included a bonus; there is nothing on the ROE or from his employer to indicate as such.

[29] I further note the Claimant once again alludes to monies received for a peaceful lay-off agreement when speaking about his "bonus"¹⁶, which further supports the monies he received from his employer in the total amount of \$17,271.97 are all due to being laid-off by his employer.

[30] I therefore find the money the Claimant received from his employer, in the amount of \$4,689.70 as vacation pay and \$12,582.27 as pay in lieu of notice for a total of \$17,271.97 is earnings; it was paid to him as a result of his being laid-off from his employment thus it was income arising from his employment, making it earnings.

Did the Commission allocate the earnings correctly?

[31] The law says that earnings have to be allocated to certain weeks. What weeks earnings are allocated to depends on why you received the earnings.¹⁷

[32] The Claimant's earnings are pay in lieu of notice and vacation pay. The Claimant's employer gave the Claimant those earnings because the Claimant was laid-off due to a shortage of work.

[33] The law says that the earnings you get for being laid-off have to be allocated starting the week you were laid-off. It doesn't matter when you actually receive those earnings. The earnings have to be allocated starting the week your lay-off starts, even if you didn't get those earnings at that time.¹⁸

¹⁶ GD08-1

¹⁷ See section 36 of the EI Regulations.

¹⁸ See section 36(9) of the EI Regulations.

[34] I find that the Claimant was laid-off starting October 1, 2019; no party has disputed this was the Claimant's last day of work. I find this would make his week of lay-off starting September 29, 2019.

[35] The Commission says they allocated the amount of \$17,272, rounded up from \$17,271.97, starting the week of September 29, 2019, to December 14, 2019, at an average weekly earnings of \$1,630.00 and the balance of \$74.00 allocated to the week of December 15, 2019¹⁹.

[36] The Claimant argues the allocation amount is incorrect as it takes into account money that was not paid due to his lay-off.

[37] As I have found above the Claimant received a total of \$17,271.97, due to being laid-off from his employment and all of that money is earnings, I therefore find the Commission correctly allocated the amount of \$17,272.

[38] I note the Claimant has not disputed the Commission's determination of his average weekly earnings of \$1,630.00. As such I find I accept the Commission's determination of the Claimant's average weekly earnings.

[39] I find that even if the Claimant may have received some of the pay in lieu of notice in advance of his actual layoff date, for a peaceful separation, that does not change the allocation. The law states that it is not when the earnings are paid that matters, but the reason they are paid²⁰, and since I have found the amount of \$4,689.70 as vacation pay and \$12,582.27 as pay in lieu of notice for a total of \$17,271.97, received by the Claimant was paid due to his being laid-off, according to the law²¹, they are to be allocated starting the week of the layoff, September 29, 2019, at his average weekly earnings, which the Commission correctly did.

[40] I note the Claimant has raised arguments about the time it took the Commission to deal with making their allocation decision based on the amended ROE issued by his employer and the

¹⁹ GD04-2

²⁰ Subsection 36(9) of the EI Regulations.

²¹ Subsection 36(9) of the EI Regulations

negative tax implications this will have on the Claimant and that he should possibly be compensated for the costs associated with this, but such issues are outside my jurisdiction.

Conclusion

[41] The appeal is dismissed.

[42] The Claimant received \$17,271.97 in earnings and these earnings were correctly allocated by the Commission.

Gary Conrad

Member, General Division - Employment Insurance Section

HEARD ON:	January 14, 2021
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	D. T., Claimant