



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *SJ v Canada Employment Insurance Commission*, 2021 SST 90

Tribunal File Number: GE-21-102

BETWEEN:

S. J.

Appellant / Claimant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: John Noonan

HEARD ON: February 10, 2021

DATE OF DECISION: February 15, 2021

Decision

[1] The appeal is dismissed.

Overview

[2] The Claimant, S. J., initially was in receipt of vacation pay and severance totalling \$67,750 which was allocated against his June 17, 2018 claim for benefits. A revised ROE submitted by the employer showed a significant increase in the amount of severance pay which changed the allocation dates. The Claimant was upon reconsideration by the Commission, notified that his severance and vacation pay payment of \$264,408 from his employer was considered earnings for Employment Insurance purposes and would be allocated against his claim from June 17, 2018 through to November 16, 2019 and his claim would extend through June 30, 2020. This determination resulted in a significant overpayment. When his claim benefits was changed to, what appears to be, CERB EI in March of 2020 his overpayment status was lifted and full EI entitlement was paid totalling \$7,111 causing an overpayment balance of \$7,111. The Claimant asserts that he followed all the Commission's directions including the repayment of his assessed overpayment from his benefits only to be faced with the additional overpayment. Why pay the benefits if he was not eligible to receive benefits? The Commission asserts that when a claimant receives an amendment to the separation monies they have received, such can require adjustment to the allocation. Frequently, the outcome of such an adjustment, as is in this case, results in the overpayment of benefits. The Tribunal must decide if the Claimant's amended severance and vacation pay are to be considered earnings as per section 35(2) & (7) of the Regulations, if so, was it to be allocated as per section 36(12) of the Employment Insurance Regulations (Regulations).

[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 June 17, 2018 at an amount of \$3,586 per week. This is the week that the Commission said that the Claimant was separated

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

from his employment. The Commission said that being separated from his job is why the Claimant received the earnings.

[5] The Claimant agrees with the weekly salary and the severance / vacation pay amounts.

Issues

[6] I have to decide the following issues:

Issue # 1: Was the Claimant's revised severance payout and vacation pay considered earnings as per the Regulations?

Issue #2: If so, were these earnings subject to allocation?

Issue #3: If so, were these earnings allocated correctly?

Analysis

Was the Claimant's revised severance payout and vacation pay considered earnings as per the Regulations?

[7] Yes. 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

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.

[11] The Claimant's former employer gave the Claimant a severance payout as well as a vacation pay payout. The Commission decided that this money earnings under the law.

[12] Section 35 clearly defines what constitutes income, any pecuniary or non-pecuniary income that is or will be received by a claimant from an employer or any other person, including a trustee in bankruptcy, and severance payments fall within this definition as they are a direct result of employment.

[13] The Claimant here argues that he followed all directions given by the Commission throughout the application and antedate process but still ended up with a large overpayment. He made the choice to accept the terms of the payout, maybe without considering all the implications. That doesn't change the fact that this payout is considered, in its totality, to be earnings. I find Claimant's revised severance payout and vacation pay are to be considered earnings.

The Federal Court of Appeal reaffirmed the principle that amounts paid because of the severance of the employment relationship constitute earnings within the meaning of section 35 of the Regulations and must be allocated in accordance with subsection 36(9) of the Regulations. **Canada (AG) v. Boucher Dancause, 2010 FCA 270; Canada (AG) v. Cantin, 2008 FCA 192**

If so, were these earnings subject to allocation?

[14] Yes.

[15] Subject to subsections (10) and (11) of the Regulations, all earnings paid or payable to a claimant by reason of a lay-off or separation from an employment shall, regardless of the period in respect of which the earnings are purported to be paid or payable, be allocated to a number of weeks that begins with the week of the lay-off or separation in such a manner that the total earnings of the claimant from that employment are, in each consecutive week except the last, equal to the claimant's normal weekly earnings from that employment.

[16] I find that, having not been subject to any of the exceptions outlined in section 35(7) of the regulations, the Claimant's income here is to "be allocated to the weeks in respect of which the payments are paid or payable" as per section 36(12) of the Regulations.

If so, did the Commission allocate the earnings correctly?

[17] The law says that earnings have to be allocated to certain weeks. What weeks earnings are allocated to depend on why you received the earnings.⁶

[18] The Claimant's earnings are severance pay and vacation pay. The Claimant's employer gave the Claimant those earnings because the Claimant was separated from his job due to the employer's restructuring of the company.

[19] The law says that the earnings you get for being separated from your job have to be allocated starting the week you were separated from your job. It doesn't matter when you actually receive those earnings. The earnings have to be allocated starting the week your separation starts, even if you didn't get those earnings at that time.⁷

[20] I find that the Claimant was separated from his job starting the week of June 17, 2018. I find this because it is an uncontested piece of evidence submitted by both parties.

[21] The amount of money to be allocated starting that week is \$3,586. This is because \$3,586 is the Claimant's normal weekly earnings. The parties don't dispute this amount, and I accept it as fact. This means that starting the week of June 17, 2018 \$3,586 is allocated to each week. If there is any amount of earnings that is left over, it will be allocated to the last week.

[22] Having carefully reviewed the calculations, I find the Commission correctly calculated the amount to be allocated and the number of weeks involved.

[23] I further find the Commission acted in a judicial manner according to the legislative requirements when making its determinations and calculations here.

[24] The only explanation for the Commission paying the benefits from March 8, 2020 through to June 7, 2020 in the amount of \$7,111 is that all who were on a claim were automatically transferred to CERB EI and paid benefits. In this case this transfer caused the

⁶ See section 36 of the EI Regulations.

⁷ See section 36(9) of the EI Regulations.

overpayment but doesn't change the fact that the Claimant received benefits to which he was not entitled.

[25] Regarding the Claimant's request that the overpayment be waived, this is a decision that can only be made by the Commission, the Tribunal has no jurisdiction in this matter and the Commission's decision regarding same is not appealable to the Tribunal. The Commission submits "Unfortunately, although the claimant anticipated his claim taking care of itself upon adjustment to the amendment of his separation monies, his request to waive the repayment of benefits is unable to be performed, as it has been appropriately established."

[26] I do not have the authority to reduce or write off the overpayment. The Tribunal does not have the jurisdiction to decide on matters relating to debt reduction or write off. It is the Commission who holds the authority to reduce or write-off an overpayment.

[27] The Claimant requests that the overpayment be erased. He says that he asked the Commission to remove the overpayment but they refused as is their right. I agree with the Commission and I note that the law states that their decision regarding writing off an amount owed can't be appealed to the Social Security Tribunal. This means that I cannot determine matters relating to a request for a write-off or reduction of an overpayment.

[28] The Federal Court of Canada has the jurisdiction to hear an appeal relating to a write-off issue. This means that if the Claimant wishes to pursue an appeal regarding his request to write off the overpayment, he needs to do so through the Federal Court of Canada.

[29] As a final matter, I cannot see any evidence in the file that the Commission advised the Claimant about the debt forgiveness program through Canada Revenue Agency (CRA). If immediate repayment of the overpayment pursuant to section 44 of the EI Act will cause him financial hardship, he can call the Debt Management Call Centre of CRA at 1-866-864-5823. He may be able to make alternative repayment arrangements based on his individual financial circumstances.

Conclusion

[30] Having given careful consideration to all the circumstances, I find the Claimant's revised severance payout along with his vacation pay were earnings as per the EI Regulations and as such were to be allocated against his claim for benefits and , in fact this allocation was done correctly by the Commission. The appeal is dismissed

John Noonan

Member, General Division - Employment Insurance Section

HEARD ON:	February 10, 2021
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	S. J., Appellant / Claimant