



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *TK v Canada Employment Insurance Commission*, 2021 SST 184

Tribunal File Number: GE-21-274

BETWEEN:

T. K.

Claimant

and

Canada Employment Insurance Commission

Commission

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Audrey Mitchell

HEARD ON: March 5, 2021

DATE OF DECISION: March 18, 2021

DECISION

[1] The appeal is dismissed. The Claimant received earnings and the Commission allocated these earnings to the correct weeks. The Commission correctly calculated the overpayment that the Claimant is required to repay.

OVERVIEW

[2] The Claimant got \$11,424 from his former employer. The Commission decided that the money was earnings in the form of severance pay. The law says that all earnings have to be allocated. The weeks to which the earnings are allocated depends on the reason why the earnings were received.

[3] The Commission allocated the earnings starting the week of January 26, 2020. This is the week that the Commission said that the Claimant was laid off from his employment. The Commission said that being laid off from his employment is the reason why the earnings were paid. Originally, the earnings were allocated until the week of March 15, 2020. The Commission modified the allocation to the week of March 22, 2020.

[4] The Claimant does not disagree with the allocation of his earnings. However, he says that he should receive 45 weeks of benefits just like other Claimants who applied for benefits during the pandemic. I find that the Claimant's severance pay is earnings and that the Commission allocated the earnings correctly.

AMOUNT OF WEEKS OF BENEFITS TO WHICH THE CLAIMANT IS ENTITLED

[5] The Claimant said that the reason for his appeal is that the Commission changed the rules to help people during the pandemic by giving 45 weeks of benefits to those who applied for them. The Claimant applied for benefits before the pandemic and rule changes to which he referred. However, he received the severance pay that the Commission allocated after the start of the pandemic.

[6] In his notice of appeal, the Claimant said that his entitlement to only 36 weeks of benefits based on where he lives is "unfair and prejudicial". I asked the Claimant if he was arguing that the *Employment Insurance Act* is treating him unfairly. The Claimant said he was not, but feels

that he should get 45 weeks of benefits especially since the pandemic hit the area he lives harder than any other area in Canada. He told the Commission that he was looking for an exception to the number of weeks of benefits due to financial hardship.

[7] I sympathize with the Claimant since he is affected by the pandemic, but has not benefited from the changes to employment insurance benefits resulting from the onset of the pandemic. However, I do not find that the issue of the number of weeks of benefits to which the Claimant is entitled is before me. In other words, I do not have jurisdiction to decide this issue. The issue before me is allocation of earnings.

[8] The Claimant testified that if he could not get 45 weeks of benefits like others, he should not have to repay the overpayment, which he says amounts to eight weeks of benefits. Because the overpayment results from the Commission's allocation of the Claimant's severance pay, I will consider this issue below.

ISSUES

[9] I have to decide:

1. Is the money that the Claimant received earnings?
2. If it is earnings, did the Commission allocate it correctly?
3. Is the Claimant required to repay the overpayment of \$4,011?

ANALYSIS

Did the Claimant receive earnings?

[10] Yes, the \$11,424 that the Claimant received is earnings. My reasons for deciding this are explained below.

[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

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

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 law also says that severance pay is earnings.⁴

[12] The Claimant’s former employer paid him \$11,424. The Commission decided this money was severance pay, so it is earnings under the law. The Claimant agrees.

[13] The Claimant is the party who has to prove that it is more likely than not that the money is not earnings.

[14] I find that the severance pay the Claimant’s employer paid him is earnings. The Claimant testified that his employer agreed to pay him additional severance because of a drop in his pension. The employer confirmed that they paid the Claimant an additional eight weeks of severance pay on May 14, 2020.

[15] The Claimant confirmed that he received severance pay. He agrees that the severance is earnings. Because the Claimant does not dispute the Commission’s evidence that the employer paid him \$11,424 in severance pay, I find sufficient connection between the Claimant’s employment and the severance pay paid to him. For the same reason, I find that the severance pay arose out of the Claimant’s employment with the employer.

[16] I find that the severance constituted earnings within the meaning of the Regulations.

Did the Commission allocate the earnings correctly?

[17] The law says that earnings have to be allocated.⁵ Earnings are allocated depending on the nature of the earnings: why were the earnings paid?

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

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

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

⁵ Section 36 of the *Employment Insurance Regulations*.

[18] The Claimant's earnings are severance. The Claimant's employer paid it because the Claimant was separated from his employment, for the reasons I set out earlier. There is a section in the law on allocation that applies to earnings that are paid or payable for this reason.⁶

[19] The law says that earnings paid or payable because of lay-off are allocated starting the week of the Claimant's lay-off from employment. The allocation starts on that week despite when the earnings were paid or payable.⁷

[20] The Claimant's employer laid him off. They then paid him a salary continuance from May 28, 2018 to January 29, 2020 as shown on the ROE they issued on February 6, 2020. Because of this, I find that the week of the Claimant's effective lay-off is January 26, 2020.

[21] The Commission submitted that the Claimant had earnings of \$842 earnings in his last week of employment. This is because the salary continuance ended on January 29, 2020. Because of this, the Commission allocated \$562 to the week of January 26, 2020. They allocated \$1,404 to each week after that, because this is the Claimant's normal weekly earnings. In the week of March 15, 2020, the Commission allocated the remaining amount of \$1,428.

[22] The Claimant did not disagree with the way the Commission originally allocated his earnings. He reiterated that the only issue he has relates to the number of weeks of benefits the Commission paid him.

[23] In updated submissions, the Commission detailed how they allocated the Claimant's earnings. Specifically, they clarified that they the correct allocation is \$1,404 from January 30 2020 to March 21, 2020, with a balance of \$1,034 allocated in the week of March 22, 2020. I gave the Claimant an opportunity after the hearing to comment on the Commission's updated allocation. He did not respond.

[24] I have found that the Claimant had earnings of \$11,424, and that these earnings are severance pay. The Claimant does not dispute his normal weekly earnings. From their updated

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

⁷ Subsection 36(9) of the *Employment Insurance Regulations*.

submissions, I find that the Commission correctly allocated the earnings as detailed in their submission from the week of layoff until the week of March 22, 2020.

Is the Claimant required to repay the overpayment of \$4,011?

[25] The Claimant is required to repay the overpayment of \$4,011.

[26] The law says that a person who gets benefits they are not entitled to has to return the benefits.⁸

[27] As noted above, the Claimant does not dispute that he has earnings or how the Commission allocated them. However, he argues that he should be entitled to the same number of weeks of benefits as others who applied during the pandemic. If that does not happen, he says that he should not have to repay the \$4,011 overpayment the Commission identified. He does not argue that the Commission incorrectly calculated the overpayment.

[28] Again, I sympathize with the Claimant. I understand his frustration that because of timing, he has not received benefits to which he believes he is entitled.

[29] I have reviewed how the Commission calculated the overpayment. They say that the overpayment is seven weeks of benefits at \$573 per week, which equals \$4,011. I find that the Commission correctly calculated the amount of the overpayment as \$4,011. I also find that the law requires the Claimant to repay this amount.

CONCLUSION

[30] The appeal is dismissed. The Claimant received \$11,424 in earnings. These earnings are allocated in the amount of \$1,404 per week, starting the week of January 26, 2020. The Commission correctly calculated the overpayment that the Claimant is required to repay.

Audrey Mitchell

Member, General Division - Employment Insurance Section

⁸ Section 44 of the *Employment Insurance Act*.

HEARD ON:	March 5, 2021
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	T. K., Claimant