



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *EO v Canada Employment Insurance Commission*, 2021 SST 448

Tribunal File Number: GE-20-2204

BETWEEN:

**E. O.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**General Division – Employment Insurance Section**

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DECISION BY: Amanda Pezzutto

DATE OF DECISION: March 15, 2021

## **Decision**

[1] E. O. is the Claimant. The Canada Employment Insurance Commission (Commission) made several decisions that affected his Employment Insurance (EI) benefits. He is appealing these decisions to the Social Security Tribunal (Tribunal).

[2] I am allowing the Claimant's appeal in part. Much of the money he received from his employer is earnings. Specifically, the money the employer paid him in lieu of medical and dental benefits is earnings. However, the legal fees are not earnings. I find that the total amount of his earnings is lower than the amount the Commission decided was earnings.

[3] I understand that the Claimant is unhappy about the client service he received from the Commission. However, I do not have the authority to order any remedy for his experiences.

## **Overview**

[4] The Claimant stopped working for his employer in 2013. Several years later, he got a settlement payment of \$148,000 from his former employer. The Commission decided that only some of the money was "earnings" under the law. The Commission decided that \$69,707 of the settlement payment was earnings. The Commission added this to the \$3,503 he received in 2013 when he stopped working, for a total of \$73,210.

[5] 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.<sup>1</sup>

[6] The Commission allocated the earnings starting from the week the Claimant stopped working. This is because the Commission decided that the employer paid the money because of the separation from employment.

[7] The Claimant disagrees with the Commission. The Claimant says that not all of the money is earnings. He says that the payment for medical and dental benefits is not earnings.

[8] The Claimant also says that the Tribunal should order a remedy for him because he says he experienced poor client service from the Commission.

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<sup>1</sup> See section 36 of the *Employment Insurance Regulations* (EI Regulations).

## **Matters I have to consider first**

### **The form of hearing**

[9] The Claimant asked for an in-person hearing. He asked for an in-person hearing because he has a disability that would make it difficult for him to participate in a hearing by teleconference or videoconference.

[10] The Tribunal usually tries to respect claimants' requests for form of hearing. Even so, it is up to me to make the final decision about the form of hearing.<sup>2</sup>

[11] The Tribunal is not holding in-person hearings because of the Covid-19 pandemic. It is difficult to guess when the Tribunal can start holding in-person hearings again. I decided to hold this hearing by way of written questions and answers. I made this decision because I have to proceed as quickly as the circumstances and the interests of natural justice allow.<sup>3</sup> The Claimant has already been waiting for a decision for many months. I did not think it would be fair to the Claimant to make him keep waiting for many more months until the Tribunal can start holding in-person hearings again. Also, the Claimant's submissions made me think he was comfortable with communicating in writing. I do not think I am being unfair to the Claimant or the Commission by holding the hearing by way of written questions and answers.

### **I will not accept the documents sent in after the hearing**

[12] The Commission sent more submissions after the Claimant responded to my questions, and after the deadline for a response to my questions.<sup>4</sup> I will treat these documents as if the Commission sent them after the hearing. I will not accept these documents, and I will not use them as I make my decision.

[13] I did not ask the Commission to respond to any questions on the notice of hearing. I did not ask the Commission to reply to the Claimant's response to the notice of hearing. The deadline for a response was March 9, 2021, and the Commission sent these submissions after the deadline. I do not think it would be fair to the Claimant if I accepted documents from the Commission after the hearing, because he had to respect the deadline.

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<sup>2</sup> Section 21 of the *Social Security Tribunal Regulations*.

<sup>3</sup> Subsection 3(1) *Social Security Tribunal Regulations*.

<sup>4</sup> Coded as GD17.

[14] Also, I do not think the Commission's new submissions add any new information. The Commission repeats several of the arguments it already made in its first set of submissions. Even if the Commission makes some new arguments, these are arguments the Commission could have made before the hearing, based on the information that was already in the Claimant's notice of appeal. Finally, I do not think there is anything in the Commission's new submissions that would change my decision.

### **Issues**

[15] The Claimant received a settlement package from his employer after he stopped working. I have to decide the following two issues:

- a) Which parts of the settlement payment are earnings?
- b) If the money is earnings, did the Commission allocate the earnings correctly?

[16] The Claimant also has problems with the service he received from the Commission. He is asking me to make decisions about a remedy for his experiences.

### **Analysis**

#### **Is the money that the Claimant received earnings?**

What kind of payments did the Claimant receive from his employer?

[17] The Claimant received some money from his employer when he stopped working. The Record of Employment (ROE) says he received the following:

- Vacation pay: \$41.54
- Pay in lieu of notice: \$3,461.54

[18] Several years later, he also received \$148,000 of settlement money from his employer. This is how the settlement agreement breaks down the payment:

- Three months' pay in lieu of notice: \$45,000
- Medical and dental benefits for three months: \$6,250

- Compensation for vacation and flex days for three months: \$5,200
- General damages for emotional distress/loss of dignity/reputation/pain and suffering: \$67,000
- Legal fees/costs: \$23,283
- Cost of disbursements: \$1,267

[19] The Commission decided that some of the money is earnings. Some of the money is not earnings. The Claimant agrees with some of the Commission's decisions about his earnings, but he does not agree with all of their decisions.

The Claimant and the Commission agree about some of the earnings decisions

[20] The Commission decided that the following sums of money are not earnings:

- \$67,000 for general damages for emotional distress;
- \$1,267 for costs of disbursements.

[21] The Claimant does not say that he disagrees with the Commission's decisions about these payments. Nothing in the file makes me think these sums are earnings. I accept that the general damages and costs of disbursement are not earnings.

[22] The Commission decided that the following sums of money are earnings:

- Vacation pay: \$41.54
- Pay in lieu of notice: \$3,461.54
- Three months' pay in lieu of notice: \$45,000
- Medical and dental benefits for three months: \$6,250
- Compensation for vacation and flex days for three months: \$5,200

- A portion of the legal fees: \$13,257

[23] The Claimant agrees that some of these sums are earnings. In his response to my questions, he agrees that the following sums are earnings:

- Vacation pay: \$41.54
- Pay in lieu of notice: \$3,461.54
- Three months' pay in lieu of notice: \$45,000
- Compensation for vacation and flex days for three months: \$5,200

[24] Both parties agree that these sums of money are earnings. Nothing in the file makes me doubt that these sums are earnings. I find that the vacation pay, both of the payments in lieu of notice, and the compensation for vacation days are earnings.

[25] The Claimant disagrees with the Commission's decisions about the medical and dental benefit payment, and the calculation of the portion of the legal fees. He says that the medical and dental benefit payment is not earnings. He says that the Commission did not correctly calculate how much of the legal fees are earnings. I will focus on these two sums of money in my decision.

Is the payment for medical and dental benefits earnings?

[26] I find that the payment for medical and dental benefits is earnings. This is because it is income arising from employment.

[27] The law says that earnings are the entire income that you get from any employment.<sup>5</sup> The law defines both "income" and "employment."

[28] **Income** can be anything that you got or will get from an employer or any other person. It does not have to be money, but it often is.<sup>6</sup>

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<sup>5</sup> See section 35(2) of the EI Regulations.

<sup>6</sup> See section 35(1) of the EI Regulations.

[29] **Employment** is any work that you did or will do under any kind of service or work agreement.<sup>7</sup>

[30] The Claimant has to prove that the money is not earnings. The Claimant has to prove this on a balance of probabilities. This means that he has to show that it is more likely than not that the money is not earnings.<sup>8</sup>

[31] The Claimant described the nature of the payment in his response to my questions. He says that the employer did not pay for his medical and dental insurance premiums for his three-month notice period. He says that the employer released this sum to him when they came to a settlement agreement. The Commission does not describe the money differently. I accept that this sum of money represents three months of the employer-paid premiums for the medical and dental insurance plan.

[32] The Commission argues that this sum of money is a payment in lieu of benefits. The Commission says that payments in lieu of benefits are earnings.

[33] The Claimant disagrees. He gives several reasons for why he disagrees with the Commission's decision:

- He says that I must ask for an insurability ruling because the nature of the money is not clear.
- He says that this payment is not taxable income under the *Income Tax Act*. He says that non-taxable income is never earnings for the purposes of EI benefits.
- He says that the payment is not related to any work he performed for the employer. He says it is a reimbursement of a job-related expense.<sup>9</sup>

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<sup>7</sup> See section 35(1) of the EI Regulations.

<sup>8</sup> The Federal Court of Appeal says that the standard of proof is the balance of probabilities for employment insurance matters in its decision *Canada (Attorney General) v. Corner*, A-18-93.

<sup>9</sup> This is how I interpret the Claimant's argument in the second box at GD16-11.

- He says that Service Canada's website and the *Employment Insurance Regulations* (EI Regulations) do not explicitly include this type of payment as earnings, so it must follow that it is not earnings.

[34] I disagree with each of the Claimant's arguments about why this sum of money is not earnings. First, I will address the Claimant's argument about the insurability ruling.

[35] The Claimant is correct on one point: only the Canada Revenue Agency (CRA) has the power to make a decision about the insurability of a sum of money.<sup>10</sup> I do not have the power to decide whether or not this money is insurable.

[36] However, the insurability of the money is not relevant to the decision I have to make. I am only looking at whether the sum of money is earnings to be deducted from the Claimant's EI benefits. The EI Regulations say that earnings can come from both insurable and non-insurable employment.<sup>11</sup> The Commission will still deduct non-insurable earnings from EI benefits. It would not matter if the CRA were to rule that the sum of money was not insurable because I would still have to make a decision about whether it was earnings. Asking the CRA for an insurability ruling would not help me with my decision, and so I will not ask for a ruling.

[37] Now, I will look at the Claimant's argument about taxable income under the *Income Tax Act*.

[38] The Claimant says that the list of taxable and non-taxable income under the *Income Tax Act* is comparable to the list of which kinds of money are earnings for the purposes of EI benefits. He says that money that is not taxable can never be earnings.

[39] I agree that there might be some overlap between the *Income Tax Act* and the EI Regulations. However, this does not mean that I am supposed to look at the *Income Tax Act* when I am deciding whether a sum of money is earnings. These are different laws for different purposes. The EI Regulations do not direct me to the *Income Tax Act* except in one specific

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<sup>10</sup> Subsection 90(1) of the *Employment Insurance Act*.

<sup>11</sup> Paragraph 35(1)(a) of the EI Regulations.



circumstance.<sup>12</sup> If I were supposed to look to the *Income Tax Act* when making every decision about earnings, the law would direct me to do this. It does not. Instead, the EI Regulations explain how to decide whether a sum of money is earnings. I will rely on the instructions described in this law. I do not have to look at the *Income Tax Act* for help with my decision. I find that the taxability of a sum of money is not relevant to the question of whether that kind of money is earnings for the purposes of EI benefits.

[40] Next, the Claimant argues that the money is not connected to any work he performed for the employer. He says that it is a reimbursement of a job-related expense. I disagree with the Claimant's argument on this point.

[41] The EI Regulations say that earnings are the income from any employment, even if you do not do any work to get that income.<sup>13</sup> It does not matter if the Claimant did not do any work to get this money.

[42] Also, I do not see how the sum of money is a reimbursement of any of the Claimant's expenses. He has not shown me that the employer was paying him back for anything. He says that the sum of money represents the "employer-paid" premiums. The employer was not paying back the Claimant's own payments into the insurance plan. Instead, the employer paid the money to the Claimant that it otherwise would have spent on paying the Claimant's insurance premiums.

[43] Finally, I will address the Claimant's argument about the list of included earnings on Service Canada's website and in the EI Regulations. The Claimant says that money paid for medical and dental benefits are not explicitly included as earnings, and so it follows that they are not earnings.

[44] I disagree with the Claimant. He wants me to start with the assumption that any sum of money is not earnings unless the law specifically says that the money is earnings. In fact, the law starts with the opposite assumption. The law defines earnings very broadly: earnings are the

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<sup>12</sup> Paragraph 35(7)(f) of the EI Regulations. This refers to benefits or allowances meant to cover specific expenses for an employee with a disability.

<sup>13</sup> Subparagraph 35(1)(a)(i) of the EI Regulations.

“entire income” out of “any employment.”<sup>14</sup> This means that any sum of money from employment is earnings unless the law explicitly says that the money is not earnings.

[45] The Claimant says that the employer paid the money to him instead of paying for three months of medical and dental premiums. I find that this means that the employer paid the money to the Claimant in lieu of providing him with medical and dental benefits for three months. It was a payment from the employer, to the Claimant, because they had an employment relationship. There is no evidence that this money was meant to reimburse the Claimant for any of his expenses. When I think about the broad definition of earnings – the entire income arising out of any employment – I have to conclude that a payment in lieu of benefits is earnings. This money was a financial benefit that arose from the Claimant’s employment relationship.

[46] I find that the money the employer paid for the Claimant’s medical and dental premiums is earnings. The Claimant has failed to prove that this sum of money is not earnings.

Are any of the legal fees earnings?

[47] I disagree with both the Claimant and the Commission. I find that the legal fees are not earnings.

[48] The Commission argues that some of the legal fees are earnings. The Commission’s argument on this point is confusing, but I think the Commission says that it has to divide the legal fees into two portions. The Commission says that the portion of the legal fees that went towards winning the Claimant’s pay in lieu of notice and other employment income are not earnings. The portion of the legal fees that went towards winning the payment for damages are earnings.

[49] The Claimant disagrees with the Commission’s calculation because he disagrees with the Commission’s decision about how much of the settlement payment was earnings. He does not say that he disagrees with the Commission’s decision to divide the legal fees into two portions.

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<sup>14</sup> Subsection 35(2) of the EI Regulations. See also Marceau’s concurring judgement in *Cote v Canada Employment Insurance Commission*, A-178-86: “Earnings in the broad sense are everything the worker derives in the form of pecuniary benefits from his work present or past.”

[50] I respectfully disagree with both the Claimant and the Commission. I do not think there is any reason to divide the legal fees into two portions. I find that the legal fees are not earnings.

[51] The Commission does not explain why it wants to divide the legal fees into two portions, but I think the Commission is relying on an Umpire decision.<sup>15</sup> I do not have to follow Umpire decisions, and I do not think that this particular Umpire decision is persuasive. There are many Federal Court of Appeal decisions that talk about legal fees, and so I do not think I need to look at Umpire decisions for guidance on this point.

[52] The Federal Court of Appeal says that legal fees are not earnings.<sup>16</sup> This is because it is money meant to compensate for an expense. It is not income arising from employment.

[53] There is not any confusion about how much of the settlement is meant to cover the Claimant's legal fees. The settlement agreement says that the total settlement payment includes \$23,283 for legal fees. I find that this sum was meant to cover legal expenses, and so the money earmarked for the Claimant's legal fees cannot be earnings.

So, how much of the settlement is earnings?

[54] I find that the following sums from the settlement payment are earnings:

- Three months' pay in lieu of notice: \$45,000
- Medical and dental benefits for three months: \$6,250
- Compensation for vacation and flex days for three months: \$5,200

[55] This is a total of \$56,450. The Claimant also received \$3,503 vacation pay and pay in lieu of notice, and so I find that his total earnings are \$59,953.

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<sup>15</sup> Chapter 5.12.11.4 of the *Digest of Benefit Entitlement Principles* refers to CUB 34664. This Umpire decision says that the Commission should divide legal fees into two portions.

<sup>16</sup> See *Canada (Attorney General) v Walford*, A-263-78. Also, *Canada (Attorney General) v Harnett*, A-34-91. In *Canada (Attorney General) v Radigan*, A-567-99, the Federal Court of Appeal, along with both of the parties to the appeal, seem to accept without argument that all the legal fees are excluded from earnings, even though the settlement payment includes both earnings and sums that are not earnings.

**Did the Commission allocate the earnings correctly?**

[56] 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.<sup>17</sup>

[57] The Claimant's earnings are vacation pay, pay in lieu of notice, and pay in lieu of benefits. The Claimant's employer gave the Claimant these earnings because the Claimant separated from his job.

[58] The ROE says that the Claimant received pay in lieu of notice and vacation pay because he stopped working. The Claimant says that he agrees that this is why the employer paid this money. I accept that the employer paid the \$3,503 of vacation pay and pay in lieu of notice because of his separation from employment.

[59] The Claimant also agrees that the employer paid most of the settlement money because of his separation from employment. He disagrees about the payment for the medical and dental benefits.

[60] I have to look at the reason for the payment when I decide how to allocate the earnings. This means that I have to look for the trigger for the payment.<sup>18</sup>

[61] I find that the employer paid the settlement payment to the Claimant because of his separation from employment. If the Claimant were still working for the employer, he would not have received the settlement payment. The fact that he separated from the employer triggered the settlement payment, even though the employer paid it to him several years later. I find that all of the earnings in the settlement payment is money that the employer paid because of the Claimant's separation from employment.

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<sup>17</sup> See section 36 of the EI Regulations.

<sup>18</sup> *Canada (Attorney General) v. Savarie*, A-704-95.

[62] The law says that the earnings you get for separating from your job have to be allocated starting with the week of the separation. It does not matter when you actually receive those earnings. The earnings have to be allocated starting with of the separation, even if you did not get those earnings at that time.<sup>19</sup>

[63] I find that the Claimant separated from his employment starting the week starting January 27, 2013. I make this finding because the ROE says his last day of work was January 29, 2013. The Claimant has not given me any reason to doubt this date.

[64] The Claimant and the Commission agree that his normal weekly earnings were \$3462.<sup>20</sup> I accept this as fact. The Commission must use the Claimant's normal weekly earnings to allocate the earnings. The Commission must allocate \$3462 to each week, starting with the week of his separation. If there are any earnings left over, the Commission must allocate the balance to the last week.

## **Other Matters**

### The Claimant asked for a settlement conference

[65] The Claimant is disappointed by the client service he received from the Commission. He raised concerns about the length of time it took the Commission to come to a decision about his settlement pay. He says that the Commission made errors when calculating his entitlement. Commission agents used jargon and confused him. He found the Commission's letters vague and confusing. The Commission did not communicate with him in a way that accommodated his disability. He thinks that the Commission has been dishonest with him. He calls it a "miscarriage of justice."

[66] The Claimant asks for a settlement conference to discuss remedies. He wants the Commission to write off his overpayment.

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<sup>19</sup> See section 36(9) of the EI Regulations.

<sup>20</sup> I acknowledge that I wrote both \$3462 and \$3642 on the GD1 – Notice of Hearing – Written Questions and Answers. \$3642 was a typo.

[67] The law gives me the power to hold a settlement conference.<sup>21</sup> However, I do not think a settlement conference is appropriate in this case.

[68] I do not have to hold a settlement conference just because one party would like one. The law says that I “may” choose to hold a settlement conference. This means it is my decision to hold a settlement conference. Furthermore, a settlement conference is supposed to be for resolving the appeal, and I do not think a settlement conference is necessary to resolve this appeal.

[69] This appeal is about whether some sums of money are earnings, and if they are, how the Commission should allocate those earnings. I will explain in more detail below, but I do not have the power to order the Commission to write off an overpayment. I cannot resolve this appeal if I hold a settlement conference just to talk about writing off the overpayment. The easiest and fastest way to resolve this appeal is for me to make a decision about the Claimant’s earnings and how the Commission should allocate the earnings.

[70] I am always supposed to conduct proceedings in the fastest and most informal way that the circumstances and considerations of fairness will allow.<sup>22</sup> I think the fastest, most informal, and fairest way to resolve this appeal is to make a decision on the merits about the issues that are within my jurisdiction.

Is the Claimant entitled to any more EI benefits?

[71] The Commission suggests that the Claimant might be able to claim more benefits after it deals with the allocation of his settlement money. Part of the Claimant’s complaint about the client service he received is about the lack of details from the Commission about this further entitlement.

[72] I do not have the authority to make any decisions about the Claimant’s entitlement to further EI benefits. This is because I only have the authority to hear an appeal if there is already a reconsideration decision.<sup>23</sup> There is no evidence that the Commission has ever made any initial

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<sup>21</sup> Subsection 17(1) of the *Social Security Tribunal Regulations*.

<sup>22</sup> Paragraph 3(1)(a) of the *Social Security Tribunal Regulations*.

<sup>23</sup> Section 113 of the *Employment Insurance Act*.

or reconsideration decisions about the Claimant's entitlement to benefits after allocating his earnings. Without a reconsideration decision, I cannot make a decision about whether the Claimant should receive more EI benefits.

[73] I understand that the Claimant has been frustrated by his experiences with the Commission. For this reason, I ask that the Commission carefully review his file and determine what kind of information it needs from the Claimant to make decisions about his entitlement to benefits. I also ask that the Commission communicate with the Claimant in a way that accommodates his disability.

Do I have the authority to order the Commission to write off the overpayment?

[74] The Claimant asks me to order the Commission to write off his overpayment. I do not have this power. Only the Commission has the discretion to write off an overpayment. I cannot order the Commission to exercise its discretion on this point.<sup>24</sup>

Do I have the authority to order any other remedy to the Claimant because of poor client service?

[75] The Claimant argues that the Tribunal has broad powers to order a remedy for his experiences. He says that he has experienced poor client service and that I should consider remedies such as writing off the overpayment, awarding damages, or formally rebuking the Commission agents who worked on his file.

[76] I do not have this kind of authority. I have the authority to hear appeals of the Commission's reconsideration decisions.<sup>25</sup> I may dismiss an appeal. I may confirm, rescind, or vary a reconsideration decision in whole or in part. If I think the Commission should have made a different decision, I can make that decision.<sup>26</sup> In other words, my authority is limited to looking at the Commission's decisions. The law does not give me the power to make any orders about how the Commission should act when it makes its decisions. I cannot write off overpayments. I cannot award damages. I cannot rebuke Commission employees.

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<sup>24</sup> *Canada (Attorney General) v. Woods*, 2002 FCA 91, at para. 1.

<sup>25</sup> Section 113 of the *Employment Insurance Act*.

<sup>26</sup> Subsection 54(1) of the *Department of Employment and Social Development Act*.

[77] The Commission's reconsideration decision was only about whether the settlement money was earnings, and how it should allocate those earnings. I do not have the authority to look at anything except the reconsideration decision.

[78] The Claimant can make a complaint about the service he received to the Department of Employment and Social Development's Office of Client Satisfaction, but I cannot offer him any remedy for his experiences with the Commission.

**Conclusion**

[79] I am allowing the Claimant's appeal in part.

[80] I find that the pay in lieu of benefits is earnings, but the legal fees are not earnings. This means that \$56,450 of the settlement payment is earnings. He had already received some earnings from his employer, and so I find that he received \$59,953 of earnings. The employer paid his money because of his separation from employment, and so the Commission must allocate the money from his last week of work, at the rate of his normal weekly earnings.

Amanda Pezzutto

Member, General Division - Employment Insurance Section

METHOD OF PROCEEDING:	Questions and answers
APPEARANCES:	E. O., Appellant