



Citation: *DT v Canada Employment Insurance Commission*, 2021 SST 439

**Social Security Tribunal of Canada
General Division – Employment Insurance Section**

Decision

Appellant: D. T.
Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (0) dated December 17, 2020
(issued by Service Canada)

Tribunal member: Katherine Wallocha
Type of hearing: Teleconference
Hearing date: June 30, 2021
Hearing participants: Appellant
Decision date: July 8, 2021
File number: GE-21-755

DECISION

[1] The appeal is dismissed. The Claimant (D. T.) received \$17,271.97 in earnings from his employer when his job ended. The Canada Employment Insurance Commission (Commission) correctly allocated those earnings starting the week beginning September 29, 2019.

OVERVIEW

[2] The Claimant became unemployed on October 1, 2019, and applied for employment insurance (EI) benefits. The record of employment (ROE) says the Claimant received \$9,213.53 from his employer when his job ended. The Commission decided this money was “earnings” under the law because it was paid to the Claimant as vacation pay and pay in lieu of notice.

[3] The employer submitted an amended ROE. This time it indicated that the Claimant received \$17,271.97 in vacation pay and pay in lieu of notice. Five months after receiving the amended ROE, the Commission decided the additional monies were also earnings and allocated those earnings to the Claimant’s EI claim. This caused an overpayment.

[4] The Claimant requested that the Commission reconsider its decision. He said he received some money before his termination day giving the example of accepting an offer for a peaceful separation. He didn’t believe this money should be used in the calculation of his separation from employment. Even if it is used, this will cause problems with his taxes and he should be compensated since it’s the Commission’s fault for not reviewing the ROE sooner.

[5] The Claimant was contacted by the Commission and confirmed that he received \$17,271.97 from his employer, but some was paid before termination and some after termination. The Commission maintained its decision to allocate the full amount.

[6] The Claimant appealed the decision to the General Division (GD) of the Social Security Tribunal (SST) saying the money he received was a bonus that he would have

received even if he hadn't been terminated from his job. The GD dismissed the appeal finding that the \$17,271.97 was earnings and the Commission allocated it correctly.

[7] The Claimant appealed to the Appeal Division (AD) of the SST. The AD allowed the appeal noting that the Claimant submitted new evidence. The appeal was returned to the GD for a new hearing and to give the Claimant a full and fair opportunity to have all of his evidence considered.

[8] After reviewing the file, I asked both the Claimant and the Commission to provide additional submissions. As suggested by the AD, I asked the Claimant to provide a readable copy of his termination letter. The AD also suggested I asked the Commission to investigate the nature and composition of the \$17,271.97 received by the Claimant.

[9] The Commission investigated with the employer's third party payroll provider, and submitted that evidence to the Tribunal before the hearing. Following the hearing, the Commission was able to speak to the employer and submitted that evidence.

POST-HEARING DOCUMENTS

[10] The Claimant argued that I should not accept the Commission's post-hearing documents because the Commission didn't respect the hearing process. It sent the employer's information after the hearing date and time.

[11] I am accepting the Commission's post-hearing documents for the following reasons:

- The Commission was specifically asked to investigate with the employer the nature and composition of the \$17,271.97 received by the Claimant;
- The Commission provided updates up until the date of the hearing showing it continued to make efforts to contact the employer;
- The Commission submitted the employer's evidence on the day of the hearing, but after the hearing had concluded;
- The evidence is relevant to the issue under appeal and was submitted in a timely manner.

[12] I gave the Claimant an opportunity to respond to this evidence in writing, which he did.

[13] In making my decision, I have considered all the information that was in the appeal file before the GD in the original hearing, the recording of the original hearing, the new evidence provided to the AD and the information received at my request, including the post-hearing documents.

WHAT I MUST DECIDE

[14] There are two issues under appeal:

1. Is the money the Claimant received from his employer earnings?
2. If so, did the Commission allocate the earnings correctly?

REASONS FOR MY DECISION

[15] When a claimant for EI benefits receives an amount of money from an employer, it has to be decided whether that money is “earnings” under the law¹. If the money is determined to be earnings, then the earnings need to be allocated to certain weeks².

[16] Claimants have the burden of proving³ that the payments they received aren't earnings⁴.

Is the money the Claimant received from his employer earnings?

[17] Yes, the Claimant received \$17,271.97 in earnings from his employer in the form of vacation pay, pay in lieu of notice and severance pay.

[18] The law says that earnings are the entire income of a claimant arising out of any employment⁵. The law defines “income” as any income that a claimant did or will get

¹ See section 35 of the *Employment Insurance Regulations* (Regulations).

² See section 36 of the Regulations.

³ The Claimant must prove this on a balance of probabilities which means more likely than not.

⁴ See the Federal Court of Appeal (FCA) decision *Bourgeois v Canada (Attorney General)*, 2004 FCA 117.

⁵ See subsection 35(2) of the Regulations.

from an employer or any other person, whether it is in the form of money or something else⁶.

[19] To be considered earnings, there must be “sufficient connection” between the employment and the money received⁷.

[20] The Commission says that the Claimant was paid \$4,689.70 in vacation pay owed to him. He is no longer an employee and any accrued vacation pay owing must be paid in money rather than time off.

[21] The Commission says the amount of \$12,582.27 represents pay in lieu of notice of termination and was paid to the Claimant in lieu of a proper notice period.

[22] The Claimant agrees that he was paid \$17,271.97. But he doesn't agree that it should all be considered earnings. I will first look at his arguments regarding his vacation pay. Then I will consider his arguments regarding his pay in lieu of notice.

Vacation pay

[23] The Commission says the amount of \$4,689.70 represents the vacation pay owed to the Claimant. The Claimant is no longer an employee of the employer and therefore the accrued vacation pay owing must be paid in money rather than time off. This money is considered earnings.

[24] The Claimant agrees that he was paid vacation pay in the amount of \$4,689.70. However, he says some of his vacation days were carried over from a previous year. His employer was supposed to pay him out in July 2019, but that didn't happen. The vacation days carried over should not be used towards his claim.

[25] I don't accept this argument. I find that the Claimant's vacation pay is earnings because it is income arising from employment.

⁶ See subsection 35(1) of the Regulations.

⁷ See the FCA decision *Canada (Attorney General) v Roch*, 2003 FCA 356.

[26] Whether the Claimant carried over his vacation days from previous years, or his employer was late paying him out doesn't change the fact that the employer paid the Claimant his accumulated vacation pay when his job ended.

[27] I find the money the employer paid the Claimant as vacation pay is considered earnings under the law. The Claimant hasn't proven that this money isn't earnings.

Pay in lieu of notice

[28] The Claimant doesn't agree that he received \$12,582.27 as pay in lieu of notice. He says he was paid a bonus of \$8,058.44 for the year 2019, and he would have been paid this bonus even if he hadn't lost his job.

[29] After the hearing with the AD, the Claimant submitted a picture of his termination letter dated October 1, 2019. The AD determined that this was new evidence, and encouraged me to ask the Claimant to submit a photocopy of the letter that could be read. The Claimant submitted a one and half page letter with no signature block.

[30] The termination letter states that the employer paid the amount of \$9,515.11 less statutory deductions. This amount represents 3 weeks' salary and 15.55 days of vacation pay in addition to one day of salary owing to him for today.

[31] This information is reproduced in the first ROE. The ROE shows the Claimant's final paycheque was \$9,515.11. He received \$4,689.70 in vacation pay, and \$4,523.83 pay in lieu of notice [$4,689.70 + 4,523.83 = 9,213.53 + 301.58$ (one day's pay) = \$9,515.11].

[32] The Commission spoke to the employer who also submitted a copy of the Claimant's termination letter. This letter is three pages and includes a signature block and a release, with a photo of the actual signed release.

[33] The employer's copy of the termination letter shows additional paragraphs, two of which say the following:

"In addition, although [employer] has no legal obligation to do so, we are prepared to offer you the further amount of \$8058.44 less statutory deductions in recognition of your service to [employer]. This amount represents 5 weeks' additional salary and an additional 1.72 days of vacation pay.

However, as a condition of this offer, we will require that you sign and return to [employer] by Tuesday 8th October 2019 the Release attached to this letter (the "Release")."

[34] The information from the first paragraph above is reproduced in the amended ROE. This ROE increased the pay in lieu of notice to \$12,582.27. This represents an increase of \$8,058.44 [$\$12,582.27 - \$4,523.83$ (amount of pay in lieu of notice from first ROE = \$8,058.44)].

[35] The Claimant was given an opportunity to respond to the Commission's post-hearing documents. The employer had also submitted a copy of the Claimant's employment agreement and his final paystub. The Claimant responded saying the employment agreement was from 2016, when he was a new employee and not to receive a bonus that year. He continued to argue that he was entitled to receive a bonus in 2019. He provided a name and email address of someone he says will confirm he was entitled to a bonus. But the Claimant didn't say anything about the complete termination letter submitted by the employer.

[36] I prefer the Commission's evidence showing the Claimant didn't receive a bonus, but received severance pay in the amount of \$8,058.44. I prefer this evidence over the Claimant's evidence because the termination letter provided by the employer is complete. It explains how the severance pay was calculated and the terms to be met for the Claimant to be paid this money. It was signed by the Claimant on October 3, 2019.

[37] The termination letter provided by the Claimant ends abruptly mid-page and doesn't show the information regarding the severance pay, a signature block or the release form.

[38] In its post-hearing representations, the Commission talked about the termination letter and its explanation of the severance pay twice. It provided the letter and a picture of the signed release submitted by the employer. I didn't find it necessary to reconvene a hearing to give the Claimant an opportunity to speak to this evidence, or explain why the letter he submitted was incomplete. The Claimant was given an opportunity to respond to this evidence in writing, but he chose not to.

[39] From this, I find the employer's evidence to be more credible. So, I accept the termination letter dated October 1, 2019, provided by the employer to be reliable. While the ROE shows that the Claimant was paid an additional \$8,058.44 in pay in lieu of notice, I find the employer's description of why this money was paid is consistent with what is usually considered severance pay rather than pay in lieu of notice. Therefore, I find the Claimant was paid \$8,058.44 as severance pay.

[40] The Claimant argued that he was paid a bonus when his employment ended. He provided documents showing that he was paid a bonus in January 2019, for the work he did in 2018. He says he was entitled to a bonus this year, but because he was laid off before the end of the year, he was paid this bonus at the time his employment ended.

[41] I am not convinced the Claimant was paid a bonus when his employment ended. The Claimant provided evidence that he received a bonus for 2018, paid in January 2019. But the Claimant hasn't provided evidence to show that he was to receive or that he did receive a bonus when his employment ended in October 2019.

[42] However, the Commission has provided evidence that the Claimant was paid \$4,523.83 pay in lieu of notice and \$8,085.44 severance pay for a total of \$12,582.27. Both ROEs have accurately represented the information in the termination letter.

[43] The third party payroll provider confirmed to the Commission that the Claimant was paid \$4,523.83 in pay in lieu of notice. Then at a later date, another pay in lieu of notice of \$8,058.44, which totals \$12,582.27.

[44] The employer confirmed with the Commission that no one was paid a bonus in 2019. The complete termination letter shows how the employer calculated the additional income in the amount of \$8,058.44, and the conditions the Claimant must meet to receive payment.

[45] I find the Claimant received earnings from his employer when his employment ended. He received:

- \$4,689.70 vacation pay;
- \$4,523.83 pay in lieu of notice;
- \$8,058.44 severance pay

[46] I placed a lot of weight on the termination letter provided by the employer as this letter provided a full explanation of the monies paid to the Claimant when his employment ended. The Claimant admitted he signed a “peaceful agreement” to receive this payment. I find the Claimant signed the release on October 3, 2019, and he was paid severance pay as a result of a peaceful agreement to end his employment.

[47] The Claimant says the ROE was submitted in October 2019, but the Commission didn’t process the ROE or contact him until April 2020. He said that because of this delay, he can no longer contact the employer to attempt to resolve this. This will also lead to having to redo his taxes and this will cost him and inconvenience him.

[48] I respect the Claimant’s argument and understand how the Commission’s delay can be frustrating. But the Commission is allowed up to 36 months to reconsider a claim after benefits have been paid⁸. Further, the SST is independent from the Commission, so I have no authority to supervise the Commission or to award compensation.

⁸ See subsection 52(1) of the EI Act.

[49] I find it is more likely than not that the employer paid \$17,271.97 to the Claimant as vacation pay, pay in lieu of notice and severance pay. He was paid this amount because his employment ended. I find there is sufficient connection between the Claimant's employment and the money he received from his employer when his job ended. This means that the money he received from his employer is earnings under the law and must be allocated.

Did the Commission correctly allocate the Claimant's earnings?

[50] Yes, the Commission correctly allocated the Claimant's vacation pay, pay in lieu of notice and severance pay.

[51] The law says that earnings have to be allocated⁹. Earnings are allocated depending on why the earnings were paid. The Claimant was paid vacation pay, pay in lieu of notice and severance pay because his job ended.

[52] The law says that all earnings paid or payable because of separation of employment are allocated starting the week of the Claimant's loss of employment according to his normal weekly earnings. The allocation starts on that week despite when the earnings were paid or payable¹⁰.

[53] The Commission allocated the Claimant's earnings from the event of the separation at the normal weekly earnings of \$1,630. The Claimant's allocation started in his last week worked beginning September 29, 2019, to December 14, 2019, with the balance of \$74 allocated to the week beginning December 15, 2019.

CONCLUSION

[54] The appeal is dismissed. The Commission correctly calculated and allocated the Claimant's vacation pay, pay in lieu of notice and severance pay.

K. Wallocha

Member, General Division - Employment Insurance Section

⁹ See subsection 36(1) of the EI Regulations.

¹⁰ See subsection 36(9) of the EI Regulations.