



Citation: *BP v Canada Employment Insurance Commission*, 2021 SST 640

Social Security Tribunal of Canada General Division – Employment Insurance Section

Decision

Appellant: B. P.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (422367) dated April 27, 2021
(issued by Service Canada)

Tribunal member: Raelene R. Thomas

Type of hearing: Teleconference
Hearing date: June 11, 2021
Hearing participant: Appellant

Decision date: June 21, 2021
File number: GE-21-847

Decision

[1] The appeal is allowed in part.

[2] The Claimant is required to serve a waiting period from December 20, 2020, to December 26, 2020.

[3] The pay for four statutory holidays received by B. P., the Claimant, is earnings. The Commission incorrectly allocated the statutory holiday pay. The Commission should have allocated two days at 100% and two days at 50% during the week the Claimant's Employment Insurance (EI) benefits were payable.

Overview

[4] The Claimant is a teaching assistant who is regularly laid off at Christmas, during March break and for the summer months. She has an established pattern of initiating a new claim for EI regular benefits when she is laid off in March. By starting a new claim in March, the Claimant serves her waiting period in March. She then renews her EI claim at the end of the school year and in December without serving a waiting period when her claim is renewed.

[5] The Claimant applied for EI benefits in March 2020, and initially received Canada Emergency Response Benefits (CERB). The CERB was later changed to the Employment Insurance Emergency Response Benefit (EI ERB). THE EI ERB was in effect until October 3, 2020. This meant that the Claimant received CERB/EI ERB for her claim in March 2020 and for the claim she made at the end of June 2020 when the school year ended.

[6] When the Claimant applied for benefits in December 2020 it was considered to be a new claim and she was required to serve a one-week waiting period. The Commission decided that the four days of statutory holiday pay her employer reported on her Record of Employment (ROE) was earnings in the waiting period. It deducted those amounts dollar for dollar from the EI benefits she received in December 2020. This meant the Claimant had an overpayment of \$465.

[7] The Claimant asked to have the waiting period waived. The Commission refused. She says she did not apply for CERB/EI ERB in March 2020. She applied for regular EI benefits and was placed on CERB/EI ERB without her knowledge or consent. She says that if March 2020 claim had been processed for EI regular benefits, she would not have to serve a waiting period in December 2020 and the amount deducted for the statutory holiday pay would be less.

Matter I have to consider first

I will accept the documents sent in after the hearing

[8] At the hearing, the Claimant testified that she received two days of the statutory holiday pay during the first week she was off work and two days with a later paycheque when she returned to work. The Claimant said her paystubs showed this. I asked the Claimant to submit her paystubs showing when she received the statutory holiday pay. She did so and the paystubs were received after the hearing. I am admitting the paystubs into evidence because the paystubs are directly relevant to the issue I must decide.

My jurisdiction is limited

[9] The Claimant is arguing that the Commission should not have given her CERB / EI ERB when she applied for regular EI benefits in March 2020. She says she applied for and should have received regular EI benefits. It is the treatment of her March 2020 claim, that led to her December 2020 claim being treated as a new claim which required her to serve a waiting period. Had she received regular EI benefits from her March 2020 claim she would not have been required to serve a waiting period for her December 2020 claim.

[10] I recognize the Claimant's argument on this point. However, my jurisdiction is limited to the claim the Claimant made in December 2020. This is because that is the only claim that the Claimant has asked the Commission to reconsider. Claimants must

first request reconsideration of a Commission decision, and the Commission must make a reconsideration decision before a Claimant can appeal to the Tribunal.¹

[11] Nothing in my decision prevents the Claimant from asking the Commission to reconsider its decision to give her CERB / EI ERB when she applied for benefits in March 2020.

Issue

[12] I have to decide the following three issues:

- a) Can the Claimant's waiting period be waived?
- b) Is the money for the statutory holidays that the Claimant received earnings?
- c) If the money is earnings, did the Commission allocate the earnings correctly?

Analysis

Can the Claimant's waiting period be waived?

[13] No, I find the Claimant must serve a one-week waiting period. This is because the Claimant's claim for regular EI benefits began on December 20, 2020, and it does not qualify to have the waiting period waived.

[14] The Commission says the waiting period cannot be waived because the Claimant did not meet any of the criteria for waiving a waiting period.

[15] The Claimant argues that the Commission should waive her waiting period because she should not have been required to start a new claim in December 2020 had she been allowed to claim for regular EI benefits in March 2020. The Claimant does not view the December 2020 claim as a new claim requiring that she serve a waiting period. It was the Commission's decision to place her in the CERB / EI ERB program. That choice was made without her input. The Claimant submitted that the legislation

¹ See sections 112 and 113 of the *Employment Insurance Act*.

said that CERB applies to those who would otherwise not be able to establish a claim. She was eligible for and able to establish a claim for EI benefits and should not have been placed in the CERB / EI ERB program.

[16] The law says that a claimant is not entitled to be paid benefits until after beginning the benefit period, the claimant has served a waiting period of one-week of unemployment for which benefits would otherwise be payable.² The waiting period can be waived where a claimant experiences an interruption in earnings and is claiming a special EI benefit such as sickness and receives sick leave pay from their employer.³

[17] The Government of Canada has made several changes to the waiting period requirement in response to the COVID-19 pandemic. The waiting period has been waived for anyone with a benefit period starting before October 25, 2020, and for anyone with a benefit period starting after January 31, 2021.⁴

[18] The Claimant's application for EI benefits was made on December 22, 2020. She applied for regular EI benefits. This means that her application was not made at a time when the waiting period was waived and that the benefits she requested were not of the type that allowed the waiting period to be waived. As a result, I find the Claimant must serve the one-week waiting period.

Is the money that the Claimant received earnings?

[19] Yes, the money the Claimant received for four days of statutory holiday pay is earnings.

[20] The law says that earnings are the entire income that you get from any employment.⁵ The law defines both "income" and "employment." Income can be

² See section 13 of the *Employment Insurance Act*

³ See section 40(2) of the *Employment Insurance Regulations*.

⁴ See section 153.191 of the *Employment Insurance Act* and Section 39.1 of the *Employment Insurance Regulations*, respectively.

⁵ See section 35(2) of the *Employment Insurance Regulations*.

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.⁶

[21] The Claimant testified that her union negotiated with the employer the dates when the statutory holidays would be paid out. She received the pay for the statutory holidays that would occur while she was laid off for two weeks over the Christmas break. This evidence tells me the Claimant received the money from her employer to compensate her for statutory holidays. As a result, I find that the money the Claimant received for the four statutory holidays is income from her employment and is earnings, as defined by the *Employment Insurance Act*.

Did the Commission allocate the earnings correctly?

[22] No, the Commission did not allocate the earnings correctly.

[23] 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.⁷

[24] The Claimant's employer recorded that the Record of Employment (ROE) was issued due to a shortage of work / end of contract season. It noted that she would be recalled to work on January 4, 2021. The employer reported that the Claimant's final pay period ending date was December 25, 2020. It also reported that she would be paid \$169.64 for each of December 24, 25 and 28, 2020 and January 1, 2021.

[25] The Claimant testified that she was paid biweekly. Her pay period covered two weeks from Monday in the first week to the Friday in the second week. Her pay cheque was deposited on the Thursday in the week following the last Friday that she worked.

[26] One of the Claimant's paystubs show that she was paid on December 31, 2020, for the pay period ending December 25, 2020. There is an entry for Stat Holiday with a rate of 23.08, for 14.00 hours, for a current amount of \$323.12. Under the heading

⁶ See section 35(1) of the *Employment Insurance Regulations*.

⁷ See section 36 of the *Employment Insurance Regulations*.

Timesheet Details is: 24-Dec-2020 Stat Holiday 7.00 and 25-Dec-2020 Stat Holiday 7.00”

[27] The other pay stub submitted by the Claimant shows that she was paid on January 15, 2021, for the pay period ending January 8, 2021. There is an entry for Stat Holiday with a rate of 23.08, for 14.00 hours, for a current amount of \$323.12. Under the heading Timesheet Details is: 28-Dec-2020 Stat Holiday 7.00 and 01-Jan-2021 Stat Holiday 7.00”

[28] The ROE reported the statutory holiday pay was \$169.64 for each of the four statutory holidays. Adding together two days totals \$339.28. That amount is inconsistent with the amount calculated for two statutory holidays on the Claimant’s paystubs.

[29] I prefer the evidence of the amount of statutory holiday pay as reported on the Claimant’s pay stubs over the amounts reported on the ROE. The pay stubs were produced at the same time the Claimant received her pay. The pay stub provides greater detail than the ROE which increases the reliability of the information on the pay stub over that provided in the ROE. The ROE indicates that vacation pay was paid with each pay. On the pay stubs, vacation pay is recorded as “Vac Pay % OCTEA” on a separate line with a separate amount. Vacation Pay is listed on the pay stub under the category of “Reg Hours Perm.” Statutory holiday pay is recorded as a separate item under the vacation pay on the pay stub. There is no evidence that vacation pay was applied to the four days of statutory holiday pay when those days were paid out to the Claimant. As a result, I find that the amount of statutory holiday pay paid to the Claimant was \$161.56 for each day.

[30] I find that the \$646 the Claimant received was statutory holiday pay because the information in the ROE, the information on the pay stubs and the Claimant’s testimony are all consistent on that point.

When should the earnings be allocated?

[31] The law gives two options for allocating statutory holiday pay.⁸ The first option is that pay for a statutory holiday is allocated to the week in which the holiday falls, regardless of when the time off is taken. The second option is available when a holiday falls on one day and an employee is given a different day off. I find that the statutory holiday pay paid to the Claimant must be allocated to the week in which the statutory holidays fell. This is because, in the Claimant's case she was not given a day off at a later date to observe the holidays because she was on layoff at the time the holidays were observed.

[32] For the purposes of EI, a week starts on Sunday and ends on Saturday.⁹

[33] The Claimant received statutory holiday pay for December 24, 2020 and December 25, 2020. Both of those days fell in the week beginning December 20, 2020. As a result, I find that the sum of \$323.12 should be allocated to the week beginning on December 20, 2020.

[34] The Claimant received statutory holiday pay for December 28, 2020 and January 1, 2021. Both of those days fell in the week beginning December 27, 2020. As a result, I find that the sum of \$323.12 should be allocated to the week beginning on December 27, 2020.

How much of the earnings should be allocated?

[35] Having decided when the statutory holiday pay should be allocated, I must now decide how much of the statutory holiday pay should be allocated.

[36] The Claimant's claim for EI benefits was established on December 20, 2020. The law says that claimants must serve a one-week waiting period.¹⁰ This means the Claimant's waiting period ran from December 20, 2020, to December 26, 2020.

⁸ See section 36(13) of the *Employment Insurance Regulations*

⁹ See section 2 of the *Employment Insurance Act*

¹⁰ See section 13 of the *Employment Insurance Act*

[37] The law also says that if a claimant has earnings during their waiting period, those earnings are to be deducted from any benefits payable for the first three weeks for which benefits are otherwise payable.¹¹

[38] I have found that the \$323.12 statutory holiday pay the Claimant received for December 24 and 25, 2020, fell in the week beginning December 20, 2020. This means that the full amount of the earnings must be deducted from the first three weeks that benefits are payable. The Claimant did not receive any benefits during the first week of her claim beginning December 20, 2020, because that was the one-week waiting period for her claim. This means the \$323 must be deducted from the week beginning December 27, 2020.¹²

[39] I have found that the statutory holiday pay the Claimant received for December 28, 2020 and January 1, 2021 fell in the week beginning December 27, 2020. Earnings received while receiving EI benefits are deducted at the rate of 50 cents for every dollar earned up to a maximum of 90% of the Claimant's weekly insurable earnings. Amounts earned above the 90% threshold are deducted dollar for dollar.¹³ The \$323.12 statutory holiday pay the Claimant does not exceed the Claimant's earning threshold. This means that \$162 must also be deducted from the week beginning December 27, 2020.

[40] When the Claimant completed her claim report for these two weeks she reported that she received statutory holiday pay for 14 hours in each week and that she was paid at the rate of \$23.07 per hour. The information was confused with the result that earnings of \$23 were reported and allocated in each of the two weeks.

[41] The Commission provided an overpayment breakdown which shows the Claimant's weekly benefit rate is \$500. For the week of December 20, 2020, there were no benefits paid as this was the Claimant's waiting period. For the week of December 27, 2020, it shows that \$465 as the benefits paid. This means the Commission initially

¹¹ See section 19(1) of the *Employment Insurance Act*

¹² Allocations can only be made in whole dollars, so amounts less than 50 cents are rounded down to the nearest dollar and amounts equal to or greater than 50 cents are rounded up to the nearest dollar. See section 36(20) of the *Employment Insurance Regulations*

¹³ See section 19(2) of the *Employment Insurance Act*

deducted the \$23 reported in each of the two weeks from the EI benefits paid for the week of December 27, 2020.¹⁴

[42] As found above the statutory holiday pay in each of the two weeks was \$323.12. The Claimant's weekly entitlement rate for EI benefits was \$500. Allocating both the statutory holiday pay received in the waiting period and that received in the second week of her claim to the second week of her claim reduces the Claimant's EI benefits to \$15 for the second week.

[43] The Claimant received \$465 in EI benefits in the second week of her claim when she should have received \$15. As a result, the overpayment is \$450.

Other matters

[44] I am sympathetic to the Claimant's financial circumstances that the repayment of these EI benefits has created. As tempting as it may be in such cases (and this may well be one), I am not permitted to re-write legislation or to interpret it in a manner that is contrary to its plain meaning.¹⁵ I must follow the law and render decisions based on the relevant legislation and precedents set by the courts.

[45] Nothing in my decision prevents the Claimant from asking the Commission to write-off the debt created by the overpayment. If the Claimant is not satisfied with the Commission's response, she may appeal to the Federal Court of Appeal.

Conclusion

[46] The appeal is allowed in part.

Raelene R. Thomas
Member, General Division – Employment Insurance Section

¹⁴ The \$23 reported for the week of December 20, 2020 was deducted dollar for dollar. The \$23 reported for the week of December 27, 2020 was deducted at a rate of 50 cents for each dollar. \$500 EI benefits - \$23 - \$12 = \$465 EI Benefits paid.

¹⁵ *Canada (Attorney General) v. Kneee*, 2011 FCA 301.