



Citation: *JR v Canada Employment Insurance Commission*, 2021 SST 643

Social Security Tribunal of Canada General Division – Employment Insurance Section

Decision

Appellant: J. R.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (421392) dated April 21, 2021
(issued by Service Canada)

Tribunal member: Raelene Thomas

Type of hearing: Teleconference

Hearing date: July 7, 2021

Hearing participant: Appellant

Decision date: July 26, 2021

File number: GE-21-999

Decision

[1] The appeal is dismissed. I do not agree with J. R., the Claimant.

[2] The Canada Employment Insurance Commission (Commission) allocated (in other words, deducted) the Claimant's severance pay at the correct rate for the correct number of weeks.

Overview

[3] The Claimant was working for a large organization that laid off a significant number of employees at the same time. The employer developed a severance pay formula that it applied to all the laid off employees. The severance pay was calculated at three weeks of pay per year of service to a maximum of 24 years. The week's pay rate was set at 44 hours per week at the employee's current hourly rate of pay.

[4] The Commission allocated the Claimant's severance pay at the rate of his normal weekly earnings. The Claimant disagreed with this allocation. He worked less than 44 hours a week. This meant that the total severance pay when divided by his normal weekly earnings was allocated over more weeks than the 72 weeks. The Claimant says that his severance pay should be allocated at the weekly rate used in the calculation and not his normal weekly earnings. The Commission has refused this request.

Matter I have to consider first

I will accept the documents sent in after the hearing

[5] During the hearing the Claimant made reference to a number of conversations he and his Member of Parliament's constituency assistant had with Service Canada agents. But, those conversations were not in the Reconsideration file prepared by the Commission.

[6] After the hearing, I asked the Commission to provide all records of conversations with the Claimant and the constituency assistant. The Commission provided the records and a copy has been sent to the Claimant.

[7] I am admitting the records into evidence because the records show the conversations surrounding the treatment of the severance pay.

[8] After the hearing, the Claimant also sent in a letter from his former employer that set out the calculation it used for the severance pay and a breakdown of the amounts paid to the Claimant. I am admitting the letter into evidence because the information it contains is directly relevant to the issue of the amount of severance pay and its allocation.

Issues

[9] I have to decide the following two issues:

- a) Is the money that the Claimant received earnings?
- b) If the money is earnings, did the Commission allocate the earnings correctly?

Analysis

Is the money that the Claimant received earnings?

[10] Yes, the \$119,168.93 that the Claimant received is earnings. Here are my reasons for deciding that the money is earnings.

[11] The law says that earnings are the entire income that you get from any employment.¹ The law defines both “income” and “employment.”

[12] **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.² Case law says that severance pay is earnings.³

[13] **Employment** is any work that you did or will do under any kind of service or work agreement.⁴

¹ See section 35(2) of the Employment Insurance Regulations (EI Regulations).

² See section 35(1) of the EI Regulations.

³ See *Blais v Canada (Attorney General)*, 2011 FCA 320. This is how I refer to the courts’ decisions that apply to the circumstances of this appeal.

⁴ See section 35(1) of the EI Regulations.

[14] Neither party, that is the Claimant and the Commission, dispute that the Claimant received the severance pay in the amount of \$116,088.83 and vacation pay in the amount of \$3,080.10 for a total of \$119,168.93. The Claimant testified that he received the money because his employer ended his employment.

[15] I find that the \$119,168.93 is earnings because it was paid to the Claimant by his former employer when his employment was ended by his former employer.

Did the Commission allocate the earnings correctly?

[16] Yes, the Commission correctly allocated the earnings. My reasons for this finding follow.

[17] The law says that earnings have to be allocated to certain weeks. The weeks the earnings are allocated to depend on why you received the earnings.⁵

[18] The Claimant's earnings are severance pay and vacation pay paid on separation from employment. The Claimant's employer paid the Claimant those earnings because the Claimant was separated from his job.

[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 at the rate of normal weekly earnings. 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.⁶

[20] The Claimant was separated from his job on Friday, December 13, 2019. I find this because the last day for which he was paid was December 13, 2019.⁷ The Commission started the allocation of his severance pay beginning on December 15, 2019.

[21] The Claimant testified that he was a day worker. His work week could be up to 40 hours a week. The Claimant and his employer recognized that he did not need to

⁵ See section 36 of the EI Regulations.

⁶ See section 36(9) of the EI Regulations.

⁷⁷ See the Record of Employment at page GD3-13

spend 8 hours a day at the worksite to complete his duties. So they agreed that he could clock out when his duties finished. This meant that he averaged 36 or so hours a week.

[22] The Claimant explained that he was one of approximately 80 employees laid off at the same time from his employer. The majority were shift workers. The shift workers worked four twelve-hour shifts in a row then had three days off. The shifts were worked over an 8 week cycle. During the first week the four shifts would start on a Monday, in the second week the shifts would start on a Tuesday, and so on. The Claimant explained that with the pay week running from Sunday to Saturday the shift employees averaged 44 hours a week.

[23] The Claimant testified that the severance pay offered by the employer was approved by a government agency because there was a large number of employees affected. The severance pay was calculated at the rate of three weeks of pay for each year of service up to a maximum of 24 years service (or 72 weeks). The weekly rate of pay was set at 44 hours a week at the employee's regular hourly rate, regardless if the employee was a day worker or a shift worker.

[24] The Claimant had over 24 years service, so he received the maximum of 72 weeks calculated at 44 hours a week at his regular hourly rate of pay.

[25] The Commission allocated the severance pay from December 15, 2019 to July 31, 2021, with a balance of \$764 to be applied in the week beginning on August 1, 2021.⁸ This means the Commission allocated the severance pay at the rate of \$1,392.99 for 85 weeks and the remaining \$764 in the week beginning August 1, 2021.⁹

[26] The Claimant submits that the allocation should be for the number of weeks that were used to calculate the severance pay, in his case 72 weeks, and not the rate of his normal weekly earnings, which results in the allocation taking 86 weeks.

⁸ See page GD3-15 of the appeal file

⁹ December 15, 2019 to July 31, 2021 is 85 weeks. $(\$119,168.93 - \$764) / 85 \text{ weeks} = \$1,392.99$

[27] The Commission submits that the severance pay was allocated according to the law that requires that money received on separation from employment be allocated at the rate of the Claimant's normal weekly earnings. It says that the normal weekly earnings were obtained from the Claimant's record of employment (ROE). The Claimant did not work 44 hours a week and was not paid 44 hours a week, so to use that amount would not be an accurate reflection of his weekly earnings. The Commission says that even though the employer was generous with the severance pay setting it at 44 hours a week, that does not change the fact how the earnings must be allocated for Employment Insurance purposes.

[28] The Claimant testified that his hourly rate of pay was \$34.57. The Commission has not provided how it calculated the normal weekly earnings. The initial letter it issued said the Claimant received \$119,168.93 in monies on separation from his employment that would be allocated from December 15, 2019, with the remaining amount of \$764 allocated in the week of August 1, 2021. December 15, 2019, to July 31, 2021 is 85 weeks. Subtracting the final week's allocation from the \$119,168.93 leaves \$118,404.93. Dividing that amount by 85 weeks means the Commission used a weekly rate of \$1,392.99 as the Claimant's normal weekly earnings to allocate the severance pay. Dividing that amount by the Claimant's hourly rate means the Commission determined the Claimant's average weekly hours were 40.29 hours a week.

[29] The Claimant testified that as a day worker he was expected to work 40 hours a week. He and his employer agreed that when he was finished with his work for the day he could clock out. This meant that he did not normally work 40 hours a week.

[30] The employer created a formula to calculate the severance pay for its employees. It is true that the formula was based a number of weeks of pay for each year of service. It is also true that the employer decided that it would use a 44 hour work week for all of its employees. But that is simply a number that the employer settled on. The employer could have equally chosen to set the severance pay at a dollar figure for each year of service. The formula the employer uses to calculate the severance pay does not dictate how the severance pay is allocated for EI purposes.

This is because the law says that the payments you receive when your employment ends must be allocated at the rate of the Claimant's normal weekly earnings.¹⁰

[31] The law does not define normal weekly earnings. The term normal weekly earnings means the ordinary, usual earnings that a claimant receives or earns on a regular basis.¹¹

[32] The Claimant testified that his position required that he regularly work at most 40 hours a week, although he had an arrangement with his employer to work less hours a week, and often did so. As noted above, the Commission's allocation of the Claimant's severance pay meant that it determined the Claimant's normal weekly earnings were \$1,392.99 each week. As a result, I find that the Commission has correctly allocated the Claimant's earnings at a rate based on his normal weekly earnings.

Conclusion

[33] The appeal is dismissed.

[34] The Claimant received \$119,168.93 in earnings on separation from his employment. The Commission has correctly allocated the earnings over a period of 86 weeks.

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

¹⁰ See section 36(8)(b) and section 36(9) of the EI Regulations.

¹¹ *Canada (Attorney General) v. Fox*, A-841-96