



Citation: *BP v Canada Employment Insurance Commission*, 2021 SST 723

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

# Decision

**Appellant:** B. P.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission  
reconsideration decision (419172) dated March 24, 2021  
(issued by Service Canada)

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**Tribunal member:** Raelene R. Thomas

**Type of hearing:** Teleconference

**Hearing date:** May 10, 2021

**Hearing participant:** Appellant

**Decision date:** May 18, 2021

**File number:** GE-21-583

## Decision

[1] The appeal is allowed in part. B. P., the Claimant, received earnings. But the Canada Employment Insurance Commission (the Commission) did not deduct those earnings from the right weeks of the Claimant's employment insurance (EI) benefits.<sup>1</sup>

## Overview

[2] The Claimant received \$16,705.92 from his former employer. The Commission decided that the money he received was "earnings" under the law because it is severance pay.

[3] The law says that all earnings have to be allocated to (deducted from) certain weeks. The weeks the earnings are deducted from depends on why you received the earnings.<sup>2</sup>

[4] The Commission deducted the earnings starting the week of May 19, 2019, at an amount of \$1,499.60 per week. 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 job is why the Claimant received the earnings.

[5] The Claimant disagrees with the Commission. The Claimant says that the Commission did not allocate the earnings correctly because he did not receive the severance until July 31, 2019, when the employer stopped operating. He had been laid off on May 19, 2019, because the employer was re-locating its operations and he expected to be recalled to work. He did not know the employer was planning to close when he was laid off and applied for EI benefits.

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<sup>1</sup> Deducting earnings from weeks of employment insurance benefits is called "allocating earnings"

<sup>2</sup> See section 36 of the *Employment Insurance Regulations*.

## **Matter I have to consider first**

### **I am accepting documents sent in after the hearing**

[6] At the hearing the Claimant explained that he had emails from an owner / manager at his former company to his union's business agent. The Claimant was given the emails because he was a chief shop steward at the company. These emails confirm that the employer decided in mid-July 2019 that it would be ceasing operations and, because it was ceasing operations, would pay its employees severance pay in accordance with the provisions of the collective agreement. I have admitted the emails into evidence because the information in the emails is relevant to the issue of when the severance pay was payable and paid to the Claimant.

[7] The Commission was sent a copy of the emails. It reviewed the emails and provided a submission on the effect of the emails with respect to when the Claimant was separated from his employment and the date the allocation of severance pay should begin. I have taken the Commission's submissions into consideration.

## **Issues**

[8] 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?**

[9] Yes, the \$16,705.92 that the Claimant received is earnings. Here are my reasons for deciding that the money is earnings.

[10] The law says that earnings are the entire income that you get from any employment.<sup>3</sup> The law defines both "income" and "employment."

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<sup>3</sup> See section 35(2) of the *Employment Insurance Regulations*.

[11] **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.<sup>4</sup> Case law, that is decisions made by the courts, say that severance pay is earnings.<sup>5</sup>

[12] **Employment** is any work that you did or will do under any kind of service or work agreement.<sup>6</sup>

[13] The Claimant's former employer paid the Claimant \$16,705.92 on July 31, 2019. The Commission decided that this money was severance pay. So, it said that the money is earnings under the law.

[14] The Claimant does not dispute that he received the money. He also does dispute that it was severance pay that he received because the company was ceasing operations.

[15] I find that the \$16,705.92 paid to the Claimant on July 31, 2019, is earnings because it was paid to him by his former employer when the company ceased operations.

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

[16] No, the Commission did not allocate the earnings correctly because it did not allocate the earnings to the correct weeks. My reasons for deciding this follow.

[17] The law says that earnings have to be allocated to certain weeks. The weeks to which earnings are allocated depends on why you received the earnings.<sup>7</sup>

[18] The Claimant received the earnings because he was separated from his employment. These types of earnings are often called severance pay. Severance pay is characterized as such when it is paid because of a person's position, years of service, or salary.

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<sup>4</sup> See section 35(1) of the *Employment Insurance Regulations*.

<sup>5</sup> See *Blais v Canada (Attorney General)*, 2011 FCA 320. This is how I refer to the decisions of the court that apply to the circumstances of this appeal.

<sup>6</sup> See section 35(1) of the *Employment Insurance Regulations*.

<sup>7</sup> See section 36 of the *Employment Insurance Regulations*.

[19] The Claimant testified that he was employed as a welder. He is a member of union and is assigned to employers by the union hiring hall. In March the employer met with the employees to tell the employees that the company was relocating. The employer said that they would finish the work on site, lay off the employees, and then relocate. Once the relocation was complete, in six months to a year, the employees would return to work.

[20] The Claimant testified that he was laid off on May 15, 2019. Some time later he heard from his former co-workers that the employer was holding an auction to sell off its heavy equipment. The Claimant fully expected to return to work with his employer. On July 17, 2019, the Claimant was forwarded an email from the union's business agent. The company's general manager had emailed the union business agent on July 17, 2019, to say the company would be "packing it in." The general manager wrote he "applied the requirements of shown in article 26.01" and attached a list of employees with his notes showing that the severance pay ranged from 1 week up to the maximum 10 weeks. The general manager wrote, "There is no accrued vacation pay or normal wages outstanding, as everyone was paid in full at the time of their layoffs."

[21] On July 25, 2019, the general manager sent another email to the union business agent. He attached the calculations for the severance payouts (gross pay). He wrote, "we will be processing these payments next week." There is a pdf of a list of employees included with the email forwarded to the Claimant. The page is titled "[Company Name] Severance Calculations – Gross Pay – July 25, 2019." Below the title, is a list of 12 employees, with the start date, the base rate, premiums, vacation rate, total hours and gross pay for each employee. At the bottom of the page is "Prepared by [general manager's name]" and "July 25, 2019."

[22] The Claimant explained that he was entitled to 10 weeks of severance pay. The entitlement was in the collective agreement and it was calculated in accordance with the provisions of a collective agreement, was based on his years of service, and on his vacation rate. This evidence, taken together with the severance calculations prepared by the general manager tells me that the \$16,705.92 was, in fact, severance pay payable upon the separation of the Claimant's employment from the company.

[23] The law says that the earnings you get for being laid off or separated from your job have to be allocated starting the week you were laid off or separated from your job. It doesn't matter when you actually receive those earnings. The earnings have to be allocated starting the week the lay-off or separation starts, even if you did not get those earnings at that time.<sup>8</sup>

[24] The Commission initially allocated the \$16,705.92 to the week beginning on May 19, 2019. It said that because the payment was made by reason of the Claimant's separation from employment that it was allocated from the last day he worked. The Commission submitted that it had failed to contact the company to determine the exact date of separation. It submitted that severance pay may not always be allocated on the last day worked and if the date of separation could be verified, the severance pay should be allocated beginning the week the employment was severed.

[25] The Commission reviewed the emails from the general manager to the union's business agent. It submitted that it was likely the Claimant's employment was severed as of July 17, 2019, based on the employer's email stating the business was "packing it in." On this basis, the Commission submitted the allocation should be from the week starting July 14, 2019, as that was the week in which the July 17, 2019, separation fell.

[26] The Claimant says that the severance pay should be allocated to the week in which he received the severance pay and not before.

[27] The provision that governs the allocation of money when your employment stops speaks to two situations: you can stop working due to a lay-off; or, you can stop working due to a separation from employment. Amounts paid due to a layoff are to be allocated beginning with the week of the layoff and the following weeks. Amounts paid due to a separation from employment are to be allocated beginning with the week of the separation and the following weeks. "There is no scope for allocating amounts paid upon separation to a period following a prior lay-off. There is no connection between the two."<sup>9</sup>

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<sup>8</sup> See section 36(9) of the *Employment Insurance Regulations*.

<sup>9</sup> See Canada Umpire Benefits (CUB) 73115 and CUB 24158. Although I am not bound by CUBs, I consider the reasoning in these two CUBs to be persuasive and I will apply this principle to my decision.

[28] All earnings paid or payable to a claimant by reason of a layoff or separation from employment are “income arising out of employment.” A payment is made “by reason of” separation from employment when it becomes due and payable at the time the employment is terminated. That is to say, that the payment is “triggered” by the employment ending.<sup>10</sup>

[29] In the Claimant’s case, he was initially laid off on May 15, 2019. The general manager wrote that any money owing to the Claimant as a result of the layoff was paid to him at that time. On July 17, 2019, the general manager advised the union business agent that the company would be packing it in. The email subject line is Severance Eligibility. He attached a copy of the most recent seniority list with his comments regarding the number of weeks of pay for the eligible employees. This evidence tells me that the trigger for the payment of severance pay to the Claimant was the company’s decision to stop operating. The general manager gave the union business agent this decision on July 17, 2019, and attached a preliminary severance calculation to the email.

[30] I recognize the Claimant’s argument that the severance pay should not be allocated until he received it on July 31, 2019. I think that it does not matter that the amount of severance pay was not finalized until July 25, 2019, and not received until July 31, 2019. What matters is that once the company said it was ceasing operations on July 17, 2019, the Claimant could not continue his employment after July 17, 2019. As a result, I find as fact that the Claimant was separated from his employment on July 17, 2019.

[31] Accordingly, having found that the Claimant was separated from his employment on July 17, 2019, I further find that the severance pay became payable to the Claimant on that date and should be allocated beginning with in the week in which the separation occurred. In the Claimant’s case, the allocation is to begin in the week beginning July 14, 2019.

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<sup>10</sup> See *Canada (Attorney General) v. Savarie*, FCA A-704-95

## **Conclusion**

[32] The appeal is allowed in part. This means I am changing the Commission's original decision.

[33] The Claimant received \$16,705.92 in earnings. These earnings are to be allocated starting with the week of July 14, 2019 at the rate of \$1,499.60 per week. Any amount left over is allocated to the last week.

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