



Citation: *LS v Canada Employment Insurance Commission*, 2021 SST 734

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

Decision

Appellant: L. S.
Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (424461) dated May 28, 2021
(issued by Service Canada)

Tribunal member: Raelene R. Thomas
Type of hearing: Teleconference
Hearing date: July 28, 2021
Hearing participant: Appellant
Decision date: August 16, 2021
File number: GE-21-1083

Decision

[1] The appeal is allowed in part.

[2] The money the Claimant received from her employer's Short-Term Disability Program (STDP) is not earnings because it was paid to her under a Supplemental Unemployment benefits plan (SUB plan). This money should not be deducted from (allocated to) the Claimant's EI benefits.

[3] The statutory holiday pay and the vacation pay the Claimant received is earnings and must be deducted from (allocated to) the Claimant's EI sickness benefits in the weeks that money was received.

Overview

[4] The Claimant experienced a major medical event in April 2017 that led to her being off work for a lengthy period of time. With the help of family and friends she applied for sickness EI benefits. At the same time her family and friends also applied for payment from her employer's STDP. While she was off work she also received payment for unused vacation and some statutory holidays.

[5] In May 2021, the Commission decided that the money the Claimant received for unused vacation, statutory holidays and from the STDP was earnings and had to be allocated to (deducted from) her EI benefits. This meant the Claimant owed the Commission \$4,255.

[6] The Claimant disagrees with the Commission's decision. She says that the applications for her EI benefits and the STDP were made at the same time because that is what the information her family and friends had said should be done. The Claimant says she thought the issue was settled in August 2018 when the Commission last contacted her about the money she received while receiving EI benefits.

Issues

[7] 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?

[8] Not all of the money the Claimant received is earnings.

[9] The money the Claimant received from the STDP is not earnings because the money her employer paid her came from a Supplemental Unemployment benefits plan. The vacation pay and statutory holiday pay the Claimant received is earnings because it was paid to the Claimant due to her employment. I will give my reasons for deciding the money from the STDP is not earnings first. My reasons for deciding the vacation pay and statutory holiday pay are earnings will follow.

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

[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.²

[12] **Employment** is any work that you did or will do under any kind of service or work agreement.³

Short Term Disability Program / Supplemental Unemployment Benefits Plan

[13] The Claimant was employed by a large corporation and was a member of union when she became ill on April 10, 2017. She was admitted to hospital and required major surgery a few days later. She remained off work for three years due to the initial major medical event and later complications.

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

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

³ See section 35(1) of the EI Regulations.

[14] The Claimant testified that during her initial hospital stay and following her surgery she was not capable of applying for EI benefits or for the employer's Short Term Disability Program. Friends and family members took over those duties for her. The Claimant said she was bedridden for a period of time. She was approved for long term disability benefits effective November 4, 2017. She returned to work three years later.

[15] The Claimant said that the Commission's web site said "You should apply as soon as possible after you stop working, even if your employer has not issued your ROE yet. If you delay applying for benefits later than four weeks after your last day of work, you risk losing benefits."

[16] The Claimant's application for sickness EI benefits was made on April 16, 2017. She initially received EI sickness benefits from May 7, 2017 to August 19, 2017. The Commission later advised the Claimant that because she was paid 14 weeks EI sickness benefits she was entitled to another week. It said it would process her EI sickness benefits for the week of August 20, 2017, and use those benefits to reduce the overpayment. This means that the Claimant received EI sickness benefits from May 7, 2017 to August 26, 2017.

[17] The Claimant's employer wrote to her on June 30, 2017. The subject of the letter was "STDP: It's time to apply for employment insurance." The letter explained that the Short-Term Disability Program was a 30-week program. The first 15 weeks of the STDP were paid by the employer and the remaining 15 weeks were paid by Service Canada and supplemented by the employer. The letter stated that to continue receiving the STDP payments the Claimant had to apply for EI.⁴

[18] The letter goes on to say the employer would send the ROE to Service Canada at week 15. The Claimant was required to report all non-STDP earnings on her EI claim reports. The letter says, "Do not claim your STDP payments as income or benefits.

⁴ This letter is in GD03 Volume 1 at pages GD3-34 and GD3-35.

They are what Service Canada refers to as a Supplemental Unemployment benefits (SUB) plan.” (emphasis added) ⁵

[19] The letter goes on to say that while the application for EI benefits was being processed the employer would continue to make the STDP payments. Those payments would be at the rate of 70% of the Claimant’s base salary or 95% if she had top-up credits available. If EI benefits were approved the employer would recover the equivalent of the EI payments from the earnings paid by the employer. If EI benefits were not approved the STDP payments would continue.

[20] The Claimant testified that she was covered by the employer’s STDP/SUB because she was their employee. She was required to be part of the plan. She could not take the coverage from the plan to another employer. She is not fully aware of how the STDP/SUB plan worked. She said her employer has not made any effort to recover any money from her. Her employer was not contacted by Service Canada to say she was already receiving EI benefits.

[21] The Claimant testified that she did not receive any EI benefits or any STDP/SUB plan payments after 15 weeks. She continued to be ill after the 15 weeks and remained off work. After 30 weeks off work due to illness, she applied for and received Long Term Disability benefits from November 3, 2017.

[22] The law sets out a number of requirements that a SUB plan must meet to be considered a SUB plan. The SUB plan must identify the group(s) of employees covered by the plan. It must cover any period of temporary unemployment for a number of reasons, including illness. The SUB plan must require employees to apply for and be in receipt of benefits to receive payments under the plan, but may provide for payments to an employee who has, among other reasons, received all the benefits to which the employee is entitled. The money received from the SUB plan and EI benefits cannot

⁵ This statement is in GD03 Volume 1 at page GD3-35.

exceed 95% of the employee's normal weekly earnings. The SUB plan must be submitted to the Commission prior to its effective date.⁶

[23] I find that the employer's STDP was a SUB plan. The employer wrote that Service Canada considered the STDP to be a SUB. The explanation of the steps the Claimant had to take to receive the money and the amounts she was entitled to receive are consistent with the requirements set out in the law for a SUB plan. Accordingly, I find the payments the Claimant received from her employer under the STDP were payments made under a SUB.

[24] The law says that payments received by a Claimant as an insured person under a supplemental unemployment benefit (SUB) plan are not earnings for the purposes of section 19, subsection 21(3), section 46, subsection 152.03(3) or section 152.18 of the EI Act.⁷

[25] Section 19 of the EI Act says that the earnings a Claimant receives shall be deducted from any EI benefits payable in that week. Section 37(1) of the EI Regulations says that money received by a claimant under a SUB plan is not earnings for the purposes of section 19 of the EI Act. The money the Claimant received from her employer was paid to her under a SUB plan. As a result, I find that money is not earnings and should not be deducted from (allocated to) the Claimant's EI benefits.

Statutory Holiday Pay

[26] While the Claimant was not working and receiving EI benefits her employer paid her \$104.15 in statutory holiday pay for the weeks of May 21, 2017, June 25, 2017, August 6, 2017, September 3, 2017 and October 8, 2017.

[27] The Commission submitted the statutory holiday pay the Claimant received for August 6, 2017, September 3, 2017 and October 8, 2017 constituted earnings and are allocable to the period payable.

⁶ See section 37(2), EI Regulations

⁷ See section 37(1) of the EI Regulations

[28] As noted above the Claimant received EI benefits from May 7, 2017 to August 26, 2017. The statutory holiday pay for September 3, 2017 and October 8, 2017, falls outside this period when the Claimant was not in receipt of EI benefits. Therefore, no allocation of the pay received for those two statutory holidays is required.

[29] The Claimant agrees that she received the money for the three statutory holidays during the weeks of May 21, 2017, June 25, 207 and August 6, 2017. These days fall within the period when she was receiving EI benefits. The Claimant said it was not until she received the letter from the Commission in April 2018 that she became aware she received this money because her employer directly deposited the money to her bank account.

[30] I find that the \$104.15 statutory holiday pay the Claimant received from her employer for the statutory holidays during the weeks of May 21, 2017, June 25, 207 and August 6, 2017 is earnings. Although the Claimant was not actively at work she remained an employee of her employer. She received the money from her employer to compensate her for the statutory holidays that occurred while she was off work. This means that the money she received was income that arose from her employment. As a result, I find that the \$104.15 statutory holiday pay should be deducted from (allocated to) the Claimant's EI benefits in each of the three weeks of May 21, 2017, June 25, 207 and August 6, 2017.

Vacation Pay

[31] The Claimant testified that she worked part-time for the employer. She would earn and bank vacation time and ask her supervisor for time off. While she was off work on vacation she would be paid the banked time. The Claimant said that she could not carry forward unused vacation time from one year to the next. She said unused vacation pay would probably be paid out to her.

[32] The employer paid the Claimant \$189.51 for the week of May 21, 2017. The Service Canada Request for Payroll Information Form comments state "Vac. Payout is a balance amount received in June for previous year."

[33] The Claimant said it was not until she received the letter from the Commission in April 2018 that she became aware she received the money for her vacation pay because that money was directly deposited to her bank account by the employer.

[34] I find that the vacation pay the Claimant received from her employer is earnings. Although the Claimant was not actively at work she remained an employee of her employer. She received the money from her employer to compensate her for the unused vacation time that she was not able to carry forward from the previous year. This means that the money she received was income that arose from her employment. It became payable in May 2017 because she was unable to use it in the previous year. As a result, I find that the vacation pay should be deducted from (allocated to) the Claimant's EI benefits in the week in which she received the vacation pay.

Other matters

[35] The Claimant submitted that she believed the Commission had closed her file and that she was not required to repay any money. She formed this belief when she had a conversation with a Service Canada agent in August 2018. She did not receive any letters from Service Canada looking for money. The Claimant said she was shocked to receive the letter in June 2021 that she now had to pay the money back.

[36] The Claimant said that it is over 36 months since she received EI benefits. It is not fair that she should be expected to pay back the money after that length of time and in the midst of a pandemic. It is financially overwhelming for her to repay this amount of money.

[37] The Claimant does not agree that she made false or misleading statements. She said that they followed what the employer said to do. She relied on what her friends and family told her the Commission's website said to do, that is, to apply for EI benefits as soon as possible to avoid losing EI benefits.

[38] The Commission has the power to revisit any of its decisions about benefits. But it has to follow the law about time limits when it receives its decisions. Usually, the

Commission has a maximum of three years to revisit its decisions.⁸ If the Commission paid a claimant benefits they were not entitled to receive, it can ask the claimant to repay the benefits.⁹

[39] In some cases, the Commission can go back even further than three years. The Commission can revisit decisions that it made as much as six years earlier if it thinks that that a claimant made an incorrect statement or failed to tell it something related to their EI claim.¹⁰ This does not mean that the Commission has to prove that a claimant made the incorrect statement or omitted to tell them something on purpose. It just means that the Commission has to have a reasonable reason for thinking that something a claimant said or did not say about their benefits was wrong. This could be an honest mistake.

[40] The Claimant received EI sickness benefits from May 7, 2017 to August 26, 2017. She did not report that received payments from the STDP/SUB plan during this period. She also did not report that she received pay for three statutory holidays and her unused vacation pay during that period.

[41] I accept the Claimant's explanation that she was not aware that she had received these monies until she received the letter from the Commission in 2018. The Commission has also recognized that the misrepresentations, that is, not telling it about the money, were not knowingly made by the Claimant.

[42] The Commission first contacted the Claimant about the payments from her employer on April 6, 2018. This is less than 36 months after she received her EI sickness benefits. The Commission had no further contact with the Claimant until it wrote to her on May 6, 2021, to tell her it was of the opinion that she had made misrepresentations by not reporting the money she received from the STDP, the

⁸ Subsection 52(1) of the Employment Insurance Act (EI Act) says that the Commission has 36 months to reconsider a claim for EI benefits.

⁹ Subsection 52(3) of the EI Act

¹⁰ Subsection 53(5) of the EI Act says that in these cases the Commission has 72 months to reconsider a claim for EI benefits.

statutory holiday pay and vacation pay. This is less than 72 months after she received her EI sickness benefits.

[43] I think it was reasonable for the Commission to think that the Claimant had not given them the correct information when she did not tell it about the money she received from her employer while she was receiving EI sickness benefits. This gave the Commission the power to go back more than three years to re-examine the Claimant's benefits. I do not think the Commission went beyond its authority when it extended its review period to look at the Claimant's benefits in 2017.

Conclusion

[44] The appeal is allowed in part.

[45] The money the Claimant received from her employer's STDP is not earnings because it was paid to her under a SUB plan. This money should not be deducted from (allocated to) the Claimant's EI benefits.

[46] The statutory holiday pay and the vacation pay the Claimant received is earnings and must be deducted from (allocated to) the Claimant's EI sickness benefits in the weeks that money was received.

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