



Citation: *JS v Canada Employment Insurance Commission*, 2021 SST 809

Social Security Tribunal of Canada General Division – Employment Insurance Section

Decision

Appellant: J. S.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (423723) dated June 22, 2021
(issued by Service Canada)

Tribunal member: Raelene R. Thomas

Type of hearing: Teleconference

Hearing date: August 17, 2021

Hearing participant: Appellant

Decision date: August 27, 2021

File number: GE-21-1187

Decision

[1] The appeal is allowed in part. The money the Claimant received from the Wage Earner Protection Plan (WEPP) is earnings. But the Canada Employment Insurance Commission (Commission) didn't allocate (in other words, assign) those earnings to the right weeks.

[2] This means the amount of EI benefits the Claimant has to pay back for Employment Insurance benefits that she was not entitled to receive is \$1,738.

Overview

[3] The Claimant was laid off on December 21, 2018, when her employer ceased operations. She got \$4,218 from the WEPP on April 10, 2019, for severance pay and wages in lieu of notice. The Commission decided that the money was "earnings" under the law because it was severance pay and wages in lieu of notice.

[4] The law says that all earnings have to be allocated to certain weeks. The weeks the earnings are allocated to depends on why you received the earnings.¹

[5] The Commission allocated some of the earnings in the week of December 23, 2018 and the rest of the earnings starting the week of December 30, 2018, at an amount of \$930 per week. The Commission said that being separated from her job is why the Claimant received the earnings. This decision resulted in an overpayment of \$2,290 in EI benefits.

[6] The Claimant disagrees with the Commission. The Claimant says that she should not have to pay back any EI benefits. She was entitled to receive the money that she worked for. She is a low user of EI and not an abuser of EI. She received the money after her EI benefits stopped. The Claimant said that during the COVID 19 pandemic deducting severance pay has been waived and that law should apply to her.

¹ See section 36 of the *Employment Insurance Regulations* (EI Regulations).

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] Yes, the \$4,128 that the Claimant received is earnings. Here are my reasons for deciding that the money is earnings.

[9] The law says that earnings are the entire income that you get from any employment.² The law defines both “income” and “employment.”

[10] **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.³ Case law says that severance pay is earnings.⁴

[11] **Employment** is any work that you did or will do under any kind of service or work agreement.⁵

[12] The Claimant's former employer stopped operating and filed for bankruptcy. The Claimant did not receive any severance pay or notice pay from her employer. She testified that with the help of a Member of the Legislative Assembly she and other employees applied for money under the WEPP.

[13] The WEPP paid the Claimant \$4,189 on April 10, 2019. The payment was for \$2,282 in severance pay and \$1,846 in wages in lieu of notice. The Commission

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

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

⁴ See *Blais v Canada (Attorney General)*, 2011 FCA 320. This is how I refer to court decisions that apply to the circumstances of this appeal.

⁵ See section 35(1) of the EI Regulations.

decided that this money was severance pay and wages paid on termination of employment. So, it said that the money is earnings under the law.

[14] The Claimant agrees that she received \$4,128 from the WEPP. She applied for and got the money because her employer was no longer operating. I see no evidence to contradict this.

[15] I find that the \$4,128 paid to the Claimant on April 10, 2019, by the WEPP is earnings because it was paid due to her employment ending when her former employer ceased operating. This means that the money arose out of her former employment and, as a result, I find that it is earnings for the purposes of the Employment Insurance Act (EI Act) and EI Regulations.

Did the Commission allocate the earnings correctly?

[16] 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.⁶

[17] The Claimant's earnings are severance pay and wages in lieu of notice. The WEPP gave the Claimant those earnings because the Claimant was laid off from her job when the company stopped operating.

[18] The law says that the money you get for being separated from your employment has to be allocated starting the week you were separated from your job. It doesn't matter when you actually receive those earnings or if those earnings are paid by someone other than your employer.⁷ The earnings have to be allocated starting the week your separation starts, even if you didn't get those earnings at that time.⁸

[19] The Claimant says that she did not receive the money until after her EI benefits stopped. She lost 10 years of employment and was entitled to the severance pay. She said people who lose their jobs now and are paid severance pay are not having that money deducted from their EI. She wants the same treatment. The Claimant said she

⁶ See section 36 of the EI Regulations.

⁷ See section 35(1) of the EI Regulations

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

is a low user of EI and has not abused the system. She does not agree with the law. It is not correct to have a law that vacation pay and severance pay count against EI. She noted that people continue to receive EI although where she lives COVID-19 restrictions are lifted and people can return to work. She said the system is broken. She said that she knew of others who could keep their severance while on EI and it is only because of the timing of their layoff.

[20] The Commission says that the money the Claimant received was because she was separated from her employment. It says that the law requires that money received because of separation from employment must be allocated from the Claimant's last day worked. It says that it allocated the money at the rate of her normal weekly earnings of \$931 from December 30, 2018 to February 2, 2019 and \$79 was allocated to the week of December 23, 2018 as it was considered to be earnings in the waiting period and was deducted from the week of January 27, 2019. It noted that it is not the date that the money is paid but the reason for the payment that determines the date from which the allocation must begin. In this case the payment was made due to separation from employment and had to be allocated from the date of separation.

[21] The Commission says that it cannot speak to the actions taken on other people's claims for EI benefits. It noted that the Claimant received the payment from the WEPP on April 19, 2019, which is a year before the COVID-19 pandemic.

[22] I note that the law says 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.⁹

[23] For the purposes of the EI Act a week means a period of seven days beginning on and including Sunday.¹⁰ In the Claimant's case she was laid off on Friday, December 21, 2018. Her final pay period ended on Saturday, December 22, 2018.

⁹ See *Canada (Attorney General) v. Savarie*, FCA A-704-95

¹⁰ See section 2, EI Act

This means that her separation from employment began on Sunday, December 23, 2018. As a result, I find that the \$4,128 the Claimant received is to be allocated from this week.

[24] The Claimant did not disagree that her normal weekly earnings were \$931 a week. I see no evidence to contradict this. This means that the amount used for the weekly allocation of the \$4,128 was correctly set at \$931.

[25] The Commission has provided a table showing the allocation beginning with \$79 in the week of December 23, 2018, then four weeks of allocation at \$512 each week from the week beginning December 30, 2018, and an amount of \$325 in the week of January 27, 2019. This is not correct.

[26] The law says that the earnings paid or payable to a claimant by reason of a layoff from employment are to be allocated to a number of weeks that begins with the week of the separation from employment.¹¹

[27] As noted above the Claimant's separation from employment began with the week of December 23, 2018. The allocation of the \$4,128 at a rate of \$931 per week should have begun in that week. This means that the allocation should have run from December 23, 2018 until January 26, 2019 at the rate of \$931 each week with the balance of \$404 being allocated from January 20, 2019 to January 26, 2019.

[28] Earnings received while receiving EI are allocated at the rate of \$.50 for every dollar earned up to 90% of the claimant's weekly insurable earnings. Amounts above 90% of the claimant's weekly insurable earnings are allocated dollar for dollar.

[29] In the Claimants case, 90% of her \$931 weekly earnings is \$838. This means the first \$838 dollars of earnings are deducted at the rate of 50% and amounts above the \$838 are deducted dollar for dollar. In the Claimant's case, \$931 of earnings results in a deduction of \$512 from her weekly EI benefits for the weeks from December 23,

¹¹ See section 36(9) of the EI Regulations

2018 to January 19, 2019.¹² The allocation of \$404 to the week beginning January 20, 2019 results in a deduction of \$202 from that week's benefits ($\$404 \times 50\% = \202).

[30] The Commission should have deducted \$512 from the week beginning on December 23, 2018, and the following three weeks and then deducted \$202 from the week beginning January 20, 2019. The Claimant received EI benefits at a rate of \$512 a week beginning with the week of December 30, 2018. This means that the Claimant must repay the \$512 of EI Benefits that she received in each of those three weeks and \$202 in EI benefits that she received in the week of January 20, 2019. This means the Claimant's overpayment is \$1,738.¹³

Other Matters

[31] The Claimant argued that the overpayment was only some \$300. She said that the Commission found EI benefits that she was entitled to receive but was not paid and used those to reduce the overpayment. She asked that I only decide on the approximately \$300 that she owes.

[32] I do not agree that the issue is the balance of the overpayment that the Claimant owes. The issue is whether the entire amount of money she received from the WEPP is earnings for the purposes of the EI Act and the EI Regulations. The Commission determined that the overpayment of EI benefits was \$2,290.¹⁴ That the Commission determined the Claimant had not received EI benefits that she was entitled to receive and used those benefits to reduce the overpayment to \$294 is not determinative of the issue before me.¹⁵

[33] I do not agree with the Claimant's argument that she should not have to repay the EI benefits because she has paid EI premiums. Even if the Claimant makes contributions to the EI program, this does not automatically entitle her to receive

¹² $\$931 \times 50\% = \838 . $\$931 - \$838 = \$93$. $(\$838 \times 50\%) + (\$93 \times 100\%) = \$419 + \$93 = \$512$

¹³ $(\$512 \times 3) + \$202 = \$1,738$

¹⁴ See page GD3-30

¹⁵ See page GD4-2

benefits during a period of unemployment. A claimant must meet all the requirements of the EI Act to qualify for those benefits.¹⁶

[34] With respect to the Claimant's argument that the law currently waives the allocation of severance pay from EI benefits, I note that the changes to the law were made in response to the COVID-19 pandemic. The Claimant was separated from her employment in December 2018. That loss of employment was not due to the COVID-19 pandemic. She received the money from the WEPP in April 2019. The law waiving the allocation of severance pay specifies that it applies only to benefit periods that begin on or after September 27, 2020. The Claimant's benefit period began on December 23, 2018. As a result, she does not meet the requirements of this provision and the WEPP money must be allocated to her EI benefits.

Conclusion

[35] The appeal is allowed in part.

[36] The Claimant received \$4,128 in earnings. These earnings should be allocated starting with the week of December 23, 2018 at the rate of \$931 per week until January 19, 2019 with the left over amount allocated to the week beginning January 20, 2019.

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

¹⁶ *Pannu v. Canada (Attorney General)*, 2004 FCA 90