



Citation: *AE v Canada Employment Insurance Commission*, 2022 SST 60

Social Security Tribunal of Canada General Division – Employment Insurance Section

Decision

Appellant:

A. E.

Respondent:

Canada Employment Insurance Commission

Decision under appeal:

Canada Employment Insurance Commission
reconsideration decision (440126) dated November 26,
2021 (issued by Service Canada)

Tribunal member:

Linda Bell

Type of hearing:

Videoconference

Hearing date:

January 25, 2022

Hearing participant:

Appellant

Decision date:

January 29, 2022

File number:

GE-21-2525

Decision

[1] I am allowing the appeal in part. I agree with A. E. (Appellant) that she didn't receive salary continuance up to January 8, 2021.

[2] The Appellant received salary continuance until December 1, 2020. She also received \$4,032.00 as pay in lieu of notice, due to separation from her employment on December 1, 2020.

[3] The Appellant's claim for Employment Insurance (EI) benefits is to be recalculated effective November 29, 2020. This is the week that she suffered an interruption of earnings.

Overview

[4] The Appellant submitted an application for regular EI benefits. The Commission started her claim (benefit period) effective November 1, 2020.

[5] On January 28, 2021, the employer submitted a Record of Employment (ROE). This ROE lists October 28, 2020, as the last day paid, \$24,974.85 as the total insurable earnings, and \$7,200.00 paid as severance pay.¹ Based on this ROE information, the Commission determined that the Appellant's weekly benefit rate was \$573.00.

[6] On March 19, 2021, the employer submitted an amended ROE. This ROE lists January 8, 2021, as the last day paid, \$23,498.07 as the total insurable earnings, and no severance pay.²

[7] The Commission conducted a review of the claims. It determined that the Appellant received salary continuance until January 8, 2021. When the Commission recalculated the Appellant's claim, using the earnings listed on the amended ROE, her weekly benefit rate dropped from \$573.00 to \$531.00. This resulted in a \$1,974.00

¹ See the ROE on page GD3-17.

² See the ROE on page GD3-26.

overpayment of benefits. The Commission maintained this recalculation upon reconsideration.

[8] The Appellant submitted an appeal to the Social Security Tribunal. She says she continued to receive biweekly payments for pay in lieu of notice, not salary continuance. Her group insurance ended shortly after her last day worked on October 28, 2020. She should not have to repay an overpayment of benefits caused from her employer's errors.

Matters I must consider first

Late documents

[9] In the interest of justice, I have accepted all documents and submissions received after the January 25, 2022, hearing. Here is what I considered when determining whether I would accept the late documents.

[10] The Tribunal has a Practice Direction outlining the procedure for when to send supporting documents.³ This says that the Tribunal Member may grant a party permission to submit late documents, after the hearing started.

[11] The Appellant appeared at the January 25, 2022, hearing, without representation. She said that her employment didn't continue until January 8, 2021. Instead, her employment ended on October 28, 2020, and her employer cancelled her group insurance shortly afterwards. She also said that her employer issued her a termination letter and a release document on October 28, 2020.

[12] At the hearing, the Appellant requested permission to submit the termination documents. I granted her permission to submit the late documents, after the hearing. She submitted those documents the same day, on January 25, 2022.⁴

³ <https://www.sst-tss.gc.ca/en/your-appeal/ei-general-division-appeal>

⁴ See page GD5-1 to GD5-60.

[13] The Tribunal provided copies of the Appellant's late documents to the Commission. The Commission responded by submitting supplementary representations.

[14] The Appellant's late documents were relevant to the issues under appeal. The Commission had the opportunity to make submissions on the late documents. So, I find that there would be no prejudice to either party if the late documents and submissions were accepted.

Concession

[15] I don't agree with the Commission's concession because it doesn't meet the requirements of the law.⁵ In its supplementary representations, the Commission states that it concedes the issues under appeal and will recalculate the claim to its original state.⁶

[16] I don't agree that the claim should be recalculated to its original state. This is because the Commission established the initial benefit period effective November 1, 2020. It considered that the Appellant received \$7,200.00 as severance pay due to separation from her employment on October 28, 2020.

[17] I find that the benefit period is to be recalculated effective November 29, 2020, because this is the week the Appellant suffered an interruption of earnings. During the recalculation, the Commission needs to consider that the Appellant received \$4,032.00 as severance pay (pay in lieu of notice), due to separation from her employment on December 1, 2020. I have set out my reasons in more detail below.

Issues

[18] Did the Appellant receive salary continuance preventing an interruption of earnings? If so, when did the salary continuance end?

⁵ See section 7 of the *Employment Insurance Act* (Act) and sections 14, 35, and 36 of the *Employment Insurance Regulations* (Regulations).

⁶ See the GD6-1.

[19] How much money did the Appellant receive as pay in lieu of notice, due to separation from her employment?

[20] What is the start date of the Appellant's benefit period?

Analysis

Interruption of earnings

[21] To be eligible for benefits, a claimant must have suffered an interruption of earnings and have enough hours of insured employment.⁷ An interruption of earnings occurs when the following criteria are met:

- the claimant is laid off or terminated from their employment,
- the claimant doesn't work for seven consecutive days for that employer, and
- the claimant doesn't receive any earnings arising from that employment⁸

[22] An interruption of earnings occurs at the beginning of the week in which the claimant's earnings reduce more than 40% of their normal weekly earnings.⁹ This usually occurs at the time of lay-off or separation from employment.

[23] The payment of separation money, including pay in lieu of notice, doesn't prevent an interruption of earnings from occurring.¹⁰ In most cases, an interruption of earnings still occurs where an employer chooses to pay the separation money in periodic payments.¹¹

[24] However, an interruption of earnings doesn't occur in cases where a claimant stops working, continues to receive periodic payments of earnings, and continues to

⁷ See section 7 of the Act.

⁸ See section 14(1) of the Regulations.

⁹ See section 14(2) of the Regulations. Section 2 of the Act states that a week is seven consecutive days and starts on a Sunday.

¹⁰ See section 35(6) of the Regulations.

¹¹ See CUBs 16698A and 15884.

benefit from the employer's group insurance. Instead, those claimants remain employed under a contract of employment until their group insurance ends.¹²

[25] In this case, I find the Appellant remained employed, under a contract of employment until December 1, 2020. This is because she continued to receive biweekly earnings as salary continuance while she remained covered under the employer's group insurance, until December 1, 2020.¹³

[26] In addition, I find that the Appellant suffered an interruption of earnings in the week of December 1, 2020. This is when she met all the criteria to establish an interruption of earnings. Specifically, she was no longer employed when her salary continuance and group insurance ended, she hadn't worked for that employer for more than seven consecutive days, and her earnings from the salary continuance in this week were 40% of her normal weekly earnings. I also considered the earnings she received after December 1, 2020, were pay in lieu of notice and didn't prevent an interruption of earnings from occurring.

How much money did the Appellant receive as pay in lieu of notice, due to separation from her employment?

[27] I find the Appellant received \$4,032.00 as pay in lieu of notice, due to separation from her employment. I considered the following when determining this amount.

- The employer paid the Appellant \$1,440.00 biweekly (\$144.00 per weekday), from October 29, 2020, to January 9, 2021.
- The Appellant remained employed, in receipt of salary continuance until December 1, 2020. So the money she received after December 1, 2020, was separation money (pay in lieu of notice).
- The letter of termination states that the Appellant is to receive 2 weeks of statutory termination pay in lieu of notice plus an additional 6 weeks of pay in lieu of notice.¹⁴

¹² See *Canada (Attorney General) v Verreault*, 1986, 86 N.R. 389 FCA.

¹³ See the termination documents at pages GD5-1 to GD5-6.

¹⁴ See page GD5-3.

- The employer paid the Appellant \$4,032.00 from December 2, 2020, to January 9, 2021.¹⁵

[28] The Appellant agrees that she received pay in lieu of notice. She doesn't dispute that this pay in lieu of notice is earnings paid due to separation from her employment.

Benefit period start date

[29] A benefit period begins on the later of

- the Sunday of the week in which the interruption of earnings occurs, and
- the Sunday of the week in which the initial claim for benefits is made.

[30] The Appellant submitted her application (initial claim) for benefits on November 10, 2020. As stated above, she suffered an interruption of earnings in the week of December 1, 2020. This means that her claim (benefit period) is effective on Sunday, November 29, 2020.

Conclusion

[31] The appeal is allowed in part.

[32] The benefit period is to be recalculated effective November 29, 2020. The Appellant received \$4,032.00 as pay in lieu of notice, due to separation from her employment on December 1, 2020.

Linda Bell
Member, General Division – Employment Insurance Section

¹⁵ See the amounts listed in each pay period on the ROE on page GD3-26. The Appellant agrees that the employer paid 10 weeks of pay in lieu of notice in biweekly payments of \$1,440.00.