



AG v Canada Employment Insurance Commission, 2022 SST 491

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

Decision

Appellant: A. G.
Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (431894) dated November 24,
2021 (issued by Service Canada)

Tribunal member: Solange Losier
Type of hearing: Videoconference
Hearing date: February 24, 2022
Hearing participant: Appellant (Claimant)
Decision date: April 28, 2022
File number: GE-22-12

Decision

[1] The appeal is dismissed with modification. This means that I partially agree with the Claimant, but not on all issues that I decided.

[2] The Claimant received earnings in the form of vacation pay and pay in lieu of notice and the Canada Employment Insurance Commission (Commission) allocated (in other words, assigned) those earnings to the right weeks.

[3] The Claimant also received a retiring allowance. However, it is not employment income and not considered earnings, so the Commission cannot allocate this amount.

Overview

[4] The Commission says that the Claimant got \$56,907.24 and \$56,400.08, totalling \$113,307.32 from his former employer. The employer issued two separate records of employment (ROE) at different time periods.¹

[5] The Commission first decided that all of the money was “earnings” under the law because it was vacation pay, pay-in-lieu of notice, retiring allowance and severance pay.² They also decided that his pension money was earnings. This resulted in an overpayment.³

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

[7] The Commission allocated the total earnings starting the week of November 25, 2018 because he separated from his employment.⁵ The pension earnings were allocated from March 3, 2019. This allocation period was then shortened from December 2, 2018 to the week of March 10, 2019.⁶

¹ See records of employment at GD3-18 and GD3-39.

² See initial decision at GD3-37 and reconsideration decision at GD3-88.

³ See GD3-46.

⁴ See section 36 of the *Employment Insurance Regulations* (EI Regulations).

⁵ See GD3-44 to GD3-45.

⁶ See GD15-1 to GD15-2.

[8] The Claimant disagrees with the Commission because some of the money he received was not considered income as it was invested. He argues that he was entitled to all of the benefits he received and it was the Commission's error for paying him.⁷ He also has health issues and paying back the overpayment would create financial hardship.

Matter I have to consider first

I asked for a Canada Revenue Agency (CRA) ruling

[9] The Claimant told the Commission that he disagrees with the amounts of separation payments on the ROE.⁸ He also wrote that the amounts were incorrect.⁹

[10] As the Claimant and Commission dispute the amount that was paid to him, I asked the Commission to obtain a CRA ruling to determine the amount of the Claimant's insurable earnings.¹⁰ The Commission asked for an extension to provide this information and their request was granted.¹¹

[11] At the hearing, I asked the Claimant if the amounts paid as listed on the ROE's were correct. He said that they were correct to the best of his knowledge. I put the file in abeyance (paused) as the CRA ruling was already in-progress.¹²

CRA Ruling issued April 20, 2022

[12] The Commission sent the Tribunal a copy of the CRA ruling on April 27, 2022.¹³ It says the following:

- We found that, for the period under review [Start Date (02/12/2018) End Date (26/12/2020)], the vacation pay and pay in lieu of notice totalling \$14,890.24

⁷ See appeal forms at GD2-1 to GD2-18.

⁸ See supplementary record of claim dated July 29, 2021 at GD3-49.

⁹ See Claimant's written statement at GD3-53.

¹⁰ See Investigation and Report request at GD5-1 to GD5-2 and section 90(1) of the EI Act.

¹¹ See Commission's request for an extension at GD6-1 and my letter granting their request at GD7-1 to GD7-2.

¹² I sent several letters to obtain a status update about the CRA ruling at GD7; GD11; GD12 and GD14.

¹³ See supplementary representations and CRA ruling at GD15-1 to GD15-2.

was insurable under paragraph 2(1)(a) of the *Insurable Earnings and Collection of Premiums*.”

- We have also ruled that, after your employment ended with (Employer X), you received a retiring allowance of \$98,417.08.¹⁴ It is not employment income. It is not included in insurable earnings under paragraph 2(3)(b) of the *Insurable Earnings and Collection of Premiums Regulation*.

Issues

[13] 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?

[14] The law says that earnings are the entire income that you get from any employment.¹⁵ The law defines both “income” and “employment.”

[15] **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.¹⁶ Case law says that severance pay is earnings.¹⁷

[16] **Employment** is any work that you did or will do under any kind of service or work agreement.¹⁸

[17] The Claimant has to prove that the money is **not** earnings. The Claimant has to prove this on a balance of probabilities. This means that he has to show that it is more

¹⁴ This amount appears to include \$56,400.08 identified as severance and \$42,017.00 as a retiring allowance, totalling \$98,417.08 – see GD3-39.

¹⁵ See section 35(2) of the EI Regulations.

¹⁶ See section 35(1) of the EI Regulations.

¹⁷ See *Blais v Canada (Attorney General)*, 2011 FCA 320.

¹⁸ See section 35(1) of the EI Regulations.

likely than not that the money is not earnings. There are some exceptions in law for sources that would not be considered earnings.¹⁹

The Commission suggests a modification to their initial decision

[18] I find that the Claimant's employer paid him a total of \$113,307.32. This is consistent with the evidence in the file, such as the record of employment and CRA ruling.

[19] The Commission first decided that the money was a combination of vacation pay, pay in lieu of notice and a retiring allowance.²⁰ They said that all of the money was earnings under the law, including a pension he started receiving in March 2019.

[20] The Commission changed their position after the hearing took place and once they reviewed the CRA ruling.²¹ They submit that their original decision needs to be modified because only \$14,890.24 is earnings and income arising out of his employment. They agree with the CRA ruling that the remainder of \$98,417.08 was not employment income and not insurable earnings.²²

[21] I find that the Claimant that the sum of \$14,890.24, which represents vacation pay and pay in lieu of notice, is considered earnings according to the law. It is income arising out of his employment. The employer gave the Claimant that money because he separated from his job. This means that this amount must be allocated.

[22] I also find that the Claimant that the sum of \$98,417.08, representing a retiring allowance is not earnings.²³ I was persuaded by the CRA ruling that said this amount

¹⁹ See section 35(7) of the EI Regulations.

²⁰ See initial decision at GD3-37 and reconsideration decision at GD3-88.

²¹ See GD15-1 to GD15-2.

²² See paragraph 2(1)(a) of the *Insurable Earnings and Collection of Premiums* and paragraph 2(3)(b) of the *Insurable Earnings and Collection of Premiums Regulation*.

²³ This amount appears to include \$56,400.08 identified as severance and \$42,017.00 as a retiring allowance, totalling \$98,417.08 – see GD3-39.

was not employment income and not insurable earnings.²⁴ This means that this amount will not be allocated.

Did the Commission allocate the earnings correctly?

[23] The law says that earnings have to be allocated to certain weeks. What weeks earnings are allocated to depend on why you received the earnings.²⁵

[24] 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. It does not matter when you actually receive those earnings. The earnings have to be allocated starting the week your separation starts, even if you did not get those earnings at that time.²⁶

[25] I find that the vacation pay and pay in lieu of notice totalling \$14,890.24 must be allocated to the Claimant's EI claim. The Claimant's last day of work was November 30, 2018.

[26] I accept that the Claimants' normal weekly earnings were \$1,049.02. The allocation will run from December 2, 2018 to March 9, 2019.²⁷ The balance of \$204.00 will be allocated the week of March 10, 2019.

[27] The parties do not appear to dispute that the Claimant's pension earnings should be allocated. The pension earnings were allocated from March 3, 2019 at \$138.00 per week to the end of his claim. Accordingly, I accept it as fact.

[28] As noted above, the retiring allowance of \$98,417.08 will not be allocated to the Claimant's EI claim because it was not earnings according on the CRA ruling.

²⁴ See section 90(1) of the EI Act; GD15-2.

²⁵ See section 36 of the EI Regulations.

²⁶ See section 36(9) of the EI Regulations.

²⁷ The previous allocation ran from November 25, 2018 to December 26, 2020.

Can the Commission reconsider the claim?

[29] Yes, the Commission has the authority to reconsider and recalculate a claim within 36 months after benefits have been paid or would have been payable.²⁸ The Commission's decision to reconsider the claim was made within the 36 month period that the law allows. I am bound by the law and cannot change the law.

[30] Even if the Commission had possession of both ROE's and made an error by paying the Claimant some benefits that he was not entitled to receive, the law still allows them to reconsider the claim and collect any debt owing.

What about writing off the overpayment?

[31] The Claimant presented compassionate circumstances, however I do not have the authority to write-off the overpayment.²⁹ He has to make his write-off request based on financial hardship either to the Commission and/or Canada Revenue Agency directly.

[32] However, since the allocation no longer includes the \$98,417.08 retiring allowance, the Claimant may choose to ask for an updated "overpayment breakdown"³⁰ chart from the Commission reflecting the new allocation and updated debt owing.

Conclusion

[33] The appeal is dismissed with modification.

[34] The Claimant received some earnings that need to be allocated (vacation and pay in lieu of notice). These earnings are allocated starting the week of December 2, 2018. The retiring allowance is not earnings, so it will not be allocated.

Solange Losier

Member, General Division – Employment Insurance Section

²⁸ See section 52(1) of the Act.

²⁹ See section 56 of the EI Regulations.

³⁰ See overpayment breakdown chart at GD3-44 to GD3-45.