



Citation: *WC v Canada Employment Insurance Commission*, 2021 SST 988

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

Decision

Appellant: W. C.
Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (437421) dated October 25, 2021
(issued by Service Canada)

Tribunal member: Raelene R. Thomas
Type of hearing: Videoconference
Hearing date: December 1, 2021
Hearing participant: Appellant
Decision date: December 23, 2021
File number: GE-21-2112

Decision

[1] The appeal is allowed in part.

[2] The money the Claimant received for vacation pay, pay in lieu of notice and severance pay is earnings. The Canada Employment Insurance Commission did not allocate the money to the right weeks.

[3] The money the Claimant received as bonus for meeting metrics is earnings and should be allocated to the period it was earned.

Overview

[4] The Claimant got \$41,819.86 from his former employer.¹ The money was paid to the Claimant in a number of partial payments. The Commission decided that the money is “earnings” under the law because it is severance pay and vacation pay.

[5] 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.²

[6] The Commission allocated the earnings starting the week of March 1, 2020 at an amount of \$2,082 per week. This is the week that the Commission said that the Claimant was separated from his employment. The Commission said that being separated from his job is why the Claimant received the earnings.

[7] The Claimant disagrees with the Commission. The Claimant says that the Commission has not correctly allocated the money. He says the Commission allocated the money over 21 weeks when it should have been allocated over 20 weeks. As a result, he is being asked to pay back more Employment Insurance (EI) benefits than he should have to pay back.

¹ This amount does not include \$10,500 for legal fees.

² See section 36 of the *Employment Insurance Regulations* (EI Regulations).

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 \$41,819.86 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.³ 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.⁴ Case law says that severance pay is earnings.⁵

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

[13] The Claimant's former employer initially paid the Claimant \$12,613.66 for unused vacation pay and \$620.62 for bonus. It later paid him \$4,085.58 pay in lieu of notice. Some time later the Claimant and his former employer reached a settlement. The settlement provided that the Claimant would be paid \$35,000 less \$10,500 which was allocated towards his legal fees. The Commission decided that \$41,819.86 of money

³ See section 35(2) of the EI Regulations.

⁴ See section 35(1) of the EI Regulations.

⁵ See *Blais v Canada (Attorney General)*, 2011 FCA 320.

⁶ See section 35(1) of the EI Regulations.

the Claimant received was severance pay and vacation pay.⁷ So, it said that the money is earnings under the law.

[14] The Claimant agrees that the money is earnings. I see no evidence to contradict that the money the Claimant received is earnings. The money arose from his employment. This means that it is earnings within the meaning of the EI Act.

Did the Commission allocate the earnings correctly?

[15] No. The Commission did not correctly allocate the bonus money paid the Claimant because it allocated the bonus money to weeks after it was earned, it started the allocation of the severance and vacation pay in the week following the Claimant's separation from his employment, and it allocated some of those earnings to his waiting period.

[16] 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.⁸

[17] The Claimant's former employer identified the money he was paid as a bonus, vacation pay, pay in lieu of notice and severance pay.

[18] The Claimant's former employer paid him \$620.62 for bonus when he stopped working. The Claimant testified he participated in a performance bonus plan where a bonus was paid every three months if certain metrics were met. The Claimant said the bonus he received when he stopped working was for meeting the metrics up to and including February 28, 2020.

[19] The law says that earnings that are payable to a claimant under a contract of employment for the performance of services shall be allocated to the period in which the services were performed.⁹ The Claimant was paid the \$620.62 for meeting metrics in the months before his employment ended. It was not paid to him because he was

⁷ Legal fees spent to obtain money from an employer are not considered earnings and are deducted from the money received from the employer. I am paraphrasing section 35(10) of the EI Regulations.

⁸ See section 36 of the EI Regulations.

⁹ See section 36(4) of the EI Regulations.

separated from his employment. As a result, I find that the \$620.62 the Claimant was paid in bonus should be allocated to the weeks prior to February 28, 2020, when he performed the services to earn the bonus and not after that date. This means the Commission incorrectly allocated the \$620.62 bonus money when it allocated that money starting March 1, 2020.

[20] The law says that the earnings you get for being separated from your job have to be allocated starting the week you were separated. It doesn't matter when you actually receive those earnings. The earnings have to be allocated starting the week your separation starts, even if you didn't get those earnings at that time.¹⁰

[21] The Record of Employment (ROE) says that the Claimant's last day paid was February 28, 2020. I see no reason to doubt this. For this reason, I find that the Claimant was separated from his job starting the week of February 23, 2020.

[22] The Claimant received \$12,613.66 for unused vacation pay. He also received \$4,085.58 for pay in lieu of notice and \$35,000.00 in settlement. These amounts total \$51,699.24. The Claimant spent \$10,500.00 in legal fees to obtain the settlement. Legal fees are considered an expense incurred by a claimant to earn income.¹¹ Therefore, the legal fees are not allocated to a claimant's EI benefits. This means that the total amount of earnings to be allocated is \$41,199.¹²

[23] The weekly amount of money to be allocated starting with the week of February 23, 2020 is \$2,082.00. This is because \$2,082.00 is the Claimant's normal weekly earnings. The parties don't dispute this amount, and I accept it as fact. This means that starting the week of February 23, 2020, \$2,082.00 is to be allocated to each week. If there is any amount of earnings that is left over, it will be allocated to the last week.

¹⁰ See section 36(9) of the EI Regulations.

¹¹ See section 36(10) of the EI Regulations.

¹² Allocation amounts are made in whole dollars. Amounts greater than or equal to 50¢ are rounded up to the nearest dollar and amounts less than 50¢ are disregarded.

[24] As a result, I find the \$41,199 should be allocated for 19 weeks from February 23, 2020 to July 4, 2020, inclusive, with the remaining \$1,641 being allocated to the week beginning July 5, 2020.¹³

[25] As noted above the Claimant's former employer paid him various sums at different dates. The Commission provided a spreadsheet showing the initial allocation and two further allocations.¹⁴

[26] The Commission initially allocated \$13,235 from the week beginning March 1, 2020 to the week beginning April 12, 2020. This is a period of seven weeks. For this period it allocated \$2,082 in each of the first six weeks and the remaining \$743 was allocated in the seventh week.

[27] The law says when earnings are paid subsequent to an allocation the subsequent earnings are added to the earnings that were allocated and a revised allocation shall be made on the basis of the initial allocation.¹⁵ This means that the revised allocation must begin on the same date as the initial allocation and must use the same weekly earnings amount to allocate the increased earnings.

[28] The Claimant notified the Commission in March 2021 that he had reached a settlement with his employer.

[29] The Commission made a second allocation beginning with the week of April 12, 2020 and ending with the week beginning July 5, 2020. This is a period of 13 weeks. For this period it allocated \$2,082 in each of first 12 weeks and the remaining \$261 was allocated in the 13th week beginning July 5, 2020.

[30] Changing the allocation in the week of April 12, 2020 from \$743 to \$2,082 had the effect of allocating \$2,825 to that week. This was incorrect because the weekly allocation amount was \$2,082.

¹³ $\$2,082 \times 19 = \$39,558 + \$1,641 = \$41,199$

¹⁴ See page GD3-48

¹⁵ See section 36(10) of the EI Regulations

[31] The Commission made a third allocation. It allocated \$2,082 to the weeks beginning July 5, 2020 and July 12, 2020 and \$182 to the week beginning July 19, 2020.

[32] Changing the allocation in the week of July 5, 2020 from \$261 to \$2,082 had the effect of allocating \$2,264 to that week. This was incorrect because the weekly allocation amount was \$2,082.

[33] I note that in the spreadsheet provided by the Commission the vacation pay, pay in lieu of notice and the severance pay have been allocated in varying amounts to weeks that are indicated as being the Claimant's waiting period. This is incorrect.

[34] The law says that a claimant is not entitled to be paid benefits in a benefit period until, after the beginning of the benefit period the claimant has served a waiting period of one week of unemployment for which no benefits are payable.¹⁶

[35] As noted above, the law says that money received due to separation from employment is to be allocated to the week beginning with the week the separation occurred.¹⁷ The money is allocated at the rate of the Claimant's normal weekly earnings until an amount less than the normal weekly earnings remains to be allocated and that amount is allocated in the final week. As such, earnings received due to separation from employment cannot be allocated to the waiting period.

[36] Typically a claimant will serve the one-week waiting period at the start of their benefit period. However, because the law requires that money received on separation from employment be allocated starting with the week of separation the waiting period is most often served in the week after the final week of allocation.

[37] Having allocated the vacation pay, pay in lieu of notice and severance pay from February 23, 2020 to July 11, 2020, inclusive, I find the Claimant's one-week waiting

¹⁶ See section 13 of the EI Act

¹⁷ See section 9 of the EI Regulations

period should fall in the week beginning July 12, 2020. This means the Claimant should not receive any EI benefits during this week.

[38] The Claimant received no benefits for the eight weeks from March 1, 2020 to April 25, 2020 inclusive. As found above, the allocation of the vacation, pay in lieu of notice and severance pay ends on July 11, 2020, which is a period of 11 weeks from April 25, 2020. As found above, the Claimant's waiting period, during which no benefits are payable is the week of July 12, 2020. The Claimant was received \$573 of EI benefits in each of these weeks. This means that the Claimant must repay \$6,876 in EI benefits.¹⁸

Conclusion

[39] The appeal is allowed in part.

[40] The Claimant received \$41,199 in earnings. These earnings are to be allocated starting the week of February 23, 2020 at \$2,082 per week with \$1,641 being allocated to the week beginning July 5, 2020. The Claimant must repay \$6,303 in EI benefits received during these weeks.

[41] The Claimant's waiting period is the week of July 12, 2020. He must also repay \$573 in EI benefits received during that week.

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

¹⁸ \$573 x 12 weeks = \$6,876.