



Citation: *CW v Canada Employment Insurance Commission*, 2022 SST 598

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

Decision

Appellant: C. W.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (456760) dated February 19, 2022 (issued by Service Canada)

Tribunal member: Linda Bell

Type of hearing: Videoconference

Hearing date: May 30, 2022

Hearing participant: Appellant

Decision date: June 3, 2022

File number: GE-22-1262

Decision

[1] I am allowing the appeal. I agree with the Claimant.

[2] The \$17,121.16 the Claimant received as pay in lieu of notice is earnings. These earnings are to be applied (allocated) to their weekly EI claims from August 25, 2019, to the week starting December 1, 2019.

[3] The \$27,195.30 severance pay the Claimant received is earnings. These earnings are to be allocated to their weekly Employment Insurance (EI) claims from May 3, 2020, to the week starting September 13, 2020.

Overview

[4] The Claimant applied for EI benefits when their employer eliminated their job as of June 28, 2019. The Commission initially established the benefit period effective August 25, 2019.

[5] The employer issued a Record of Employment (ROE) stating the last day paid was August 23, 2019. The ROE also states the employer paid the Claimant \$17,035.82 pay in lieu of notice. The Commission allocated this money to the Claimant's EI claims from August 25, 2019, to the week starting on December 1, 2019.¹

[6] On September 23, 2019, the employer issued an amended ROE listing the last day paid as June 28, 2019. It also lists \$17,121.16 as the amount the employer paid as pay in lieu of notice.²

[7] In response to the September 23, 2019, amended ROE, the Commission informed the Claimant that the start date of their benefit period was June 30, 2019. The Commission also amended the allocation of the \$17,121.16 pay in lieu of notice to be from June 30, 2019, to the week starting on September 22, 2019.³

¹ See page GD3-14.

² See page GD3-18.

³ See page GD3-20.

[8] The employer issued a third ROE on May 13, 2020.⁴ This amended ROE lists the last day paid as June 28, 2019. It also lists \$17,121.16 paid as pay in lieu of notice plus \$27,195.30 paid as severance pay.

[9] The Commission determined that the severance pay was paid due to separation from employment on June 28, 2019. It added the \$27,195.30 severance pay to the \$17,121.16 pay in lieu of notice and allocated the total amount from the beginning of the benefit period, based on the Claimant's normal weekly earnings being \$1,363.00. The Commission allocated the total amount of \$44,316.46 separation earnings from June 30, 2019, to February 15, 2020.⁵ This amended allocation results in a \$7,306.00 overpayment of EI benefits.

[10] The Claimant disagrees and appeals to the Social Security Tribunal. They say that their severance pay wasn't paid due to their lay off on June 28, 2019. Instead, the Claimant says the employer paid the severance pay in May 2020, when their recall rights expired, in accordance with their union agreement.

Matters I must consider first

Late documents

[11] In the interests of justice, I have accepted the late documents submitted by the Claimant, after the May 30, 2022, hearing.⁶ Here is what I considered when determining whether I would accept the late documents.

[12] The Tribunal has a Practice Direction outlining the procedure for when to send supporting documents.⁷ This says that the Tribunal Member may grant a party permission to submit late documents after the hearing started.

⁴ See page GD3-26.

⁵ See page GD3-28.

⁶ See the GD06 documents.

⁷ <https://www.sst-tss.gc.ca/en/your-appeal/ei-general-division-appeal>

[13] The Appellant appeared at the May 30, 2022, hearing, without representation. They asked for permission to submit additional documents that speak to the expiration of their recall rights and payment of their severance pay.

[14] I received one submission of late documents from the Appellant on June 2, 2022.⁸ The Tribunal provided copies to the Commission.

[15] The Appellant's late documents are relevant to the issues under appeal. So, I find that there would be no prejudice to either party if the late documents were accepted. Instead, I find that it would be in the interest of justice to accept the late documents.

Issues

[16] Is the \$27,195.30 severance pay and \$17,121.16 pay in lieu of notice earnings, as defined by the *Employment Insurance Regulations* (Regulations)?

[17] If so, how are those earnings to be allocated to the Claimant's EI claims?

Earnings

[18] The law says that the entire income from employment is earnings.⁹ All pecuniary or non-pecuniary income that is or "will be" received from an employer is income.¹⁰

[19] Both parties agree that the \$27,195.30 severance pay and \$17,121.16 pay in lieu of notice are earnings. This is because it is income stemming directly from their employment.

[20] Accordingly, I find as fact that both the \$27,195.30 severance pay and \$17,121.16 pay in lieu of notice meet the definition of earnings, as set out above.

⁸ See pages GD6-1 to GD6-9.0

⁹ See section 35(2) of the Regulations.

¹⁰ See section 35(1) of the Regulations.

Allocation

[21] Earnings that are paid or payable to a claimant are applied to their claims and deducted from their EI benefits. This is called allocation. The reason for allocating earnings is to avoid double compensation.¹¹

[22] Earnings are allocated depending on the nature of the earnings: why were the earnings paid? The earnings are allocated based on the Claimant's normal weekly earnings.

[23] There are sections in the law outlining the allocation that applies to earnings that are paid because of a temporary separation from employment. The allocation of earnings paid because of a temporary separation start the week following the claimant's last day worked if they worked a full workweek in their last week. The allocation starts in this week despite when the earnings were paid or payable.¹²

[24] The law also outlines the allocation that applies to earnings that are paid by reason of permanent separation from employment. The Federal Court of Appeal clarified that a payment is made "by reason of" separation from employment at the time the employment is terminated. Put another way, the payment is "triggered" by the expiration of the employment, which occurs on the date that recall rights expire.¹³

[25] The Commission submits that once moneys are determined to be earnings paid or payable by reason of a lay-off or separation, the allocation always starts from the week of the lay-off or separation, whichever event was the reason for the payment. I disagree because as set out above, the difference between a temporary lay off and permanent separation determines the start date of the allocation.

[26] The Claimant agrees that their normal weekly earnings were \$1,363.00. They disagree with the Commission's allocation of their severance pay because it wasn't payable until they resigned and gave up their recall rights.

¹¹ *Canada (Attorney General) v. Walford*, A-263-78.

¹² See section 36(9) of the Regulations.

¹³ *Canada (Attorney General) v. Savarie*, FCA A-704-95.

[27] The Claimant submitted additional evidence after the hearing. This evidence supports that the employer paid the severance pay due to the expiration of their recall rights on May 4, 2020.¹⁴ It includes an email from the Claimant's union dated September 27, 2019, which clearly outlines the details of the Claimant's last day work, pay in lieu of notice, and severance pay that became payable upon expiration of the Claimant's recall rights.

[28] After careful consideration of the forgoing, I find as fact that the Claimant suffered a temporary lay off on June 28, 2019. The Claimant was entitled to payment for pay in lieu of notice as of June 28, 2019, due to the temporary lay off. This was a temporary lay off because the Claimant retained recall rights with the employer.

[29] Once the Claimant's recall rights expired, by way of their written resignation letter, they incurred a permanent separation effective May 4, 2020. This permanent separation ended the Claimant's recall rights and "triggered" the payment of severance pay.

– **Allocation of pay in lieu of notice**

[30] After careful consideration of the evidence, as set out above, I find that the \$17,121.16 pay in lieu of notice was payable to Claimant due to their temporary lay off on, June 28, 2019. So, the pay in lieu of notice is to be allocated to their claims starting June 30, 2019.¹⁵

[31] The Claimant worked a full workweek ending June 28, 2019. Their normal weekly earnings were \$1,363.00. So this means the \$17,121.16 is allocated starting June 30, 2019, to September 21, 2019 ($12 \times \$1,363.00 = \$16,356.00$).¹⁶ With the balance of \$765.16 allocated to the week starting September 22, 2019.

¹⁴ See pages GD6-1 to GD6-9.

¹⁵ See section 36(9) of the Regulations.

¹⁶ Subsection 36(9) of the Regulations

– **Allocation of the severance pay**

[32] As set out above, the \$27,195.30 severance pay became payable upon the expiration of the Claimant's recall rights on May 4, 2020, in accordance with their union agreement.

[33] It was the expiration of the recall rights, as a result of the Claimant's resignation, which resulted in the permanent separation from employment. The expiration of the recall rights is what triggered the payment of the severance pay.¹⁷ So, this means the severance pay allocation starts the week of May 3, 2020.

[34] The Claimant's normal weekly earnings were \$1,363.00. So this means the \$27,195.30 severance pay is allocated from May 3, 2020, to September 12, 2020 (19 x \$1,363.00 = \$25,897.00). The balance of \$1,298.30 is allocated to the week starting September 13, 2020.

[35] As per the payment spreadsheet provided by the Commission, the Claimant didn't receive EI benefits after January 4, 2020.¹⁸ As set out above, the allocation of their severance pay starts four months later, on May 3, 2020. This means the allocation of the severance money, from May 3, 2020, to the week starting on September 13, 2020, doesn't result in an overpayment of EI benefits.

Conclusion

[36] The appeal is allowed.

Linda Bell
Member, General Division – Employment Insurance Section

¹⁷ *Canada (Attorney General) v. Savarie*, FCA A-704-95.

¹⁸ See pages GD3-23 to GE3-25.