



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *KS v Canada Employment Insurance Commission*, 2020 SST 1255

Tribunal File Number: GE-20-495

BETWEEN:

**K. S.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**General Division – Employment Insurance Section**

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DECISION BY: Glen Johnson

HEARD ON: March 5, 2020

DATE OF DECISION: March 5, 2020

## **DECISION**

[1] The appeal is allowed in part. The Claimant settled a wrongful dismissal claim against her employer. The Commission allocated some of the settlement funds as earnings against her employment insurance (EI) benefits. However, they incorrectly calculated the amount to be allocated.

## **OVERVIEW**

[2] The Claimant applied for and collected employment insurance (EI) benefits after becoming separated from her employment. Later, she settled a wrongful dismissal action against his employer.

[3] The Commission decided that the amount of funds she got from her employer after she left work on November 27, 2018 to be allocated to the weeks beginning November 25, 2018 to April 25, 2020 is \$33,435. This resulted in an overpayment of EI benefits to the Claimant of \$9287.

[4] The Claimant agrees that some of the funds she received from her employer need to allocated against EI benefits paid and there is an overpayment. However, she says that she disagrees with the Commission's calculation of the amount to be allocated, the period over which the funds are to be allocated and the weekly amount to be allocated are incorrect.

[5] I find that the Claimant received \$29,050 from her employer as earnings, not \$33,435 as calculated by the Commission and it is to be allocated to the weeks beginning November 25, 2018 to April 25, 2020 against EIs he collected.

## **ISSUE**

[6] I have to decide:

1. Is the money that the Claimant received earnings?
2. If it is earnings, did the Commission allocate it correctly?

## ANALYSIS

### Did the Claimant receive earnings?

[7] Yes, the Claimant admits to receiving earnings from employment while collecting EI benefits, resulting in an overpayment of benefits. However, she disputes the calculation of the amount the Commission decided was earnings to be allocated, the period over-which the funds are to be allocated and the weekly amount to be allocated.

[8] I find that the Claimant received earnings from employment after becoming separated from her job. The amount to be allocated to the weeks beginning November 25, 2018 to April 25, 2020 against his EI benefits is \$29,050 and not \$33,435 as decided by the Commission. The difference in the amount of earnings to be allocated is due to a larger legal fee deduction from the settlement she received.

[9] I find that the period over-which the funds are to be allocated and the weekly amount to be allocated are correct. The Claimant has not provided information or a legal argument to support that the Commission made an error. She just says that it seems unfair to her that the average weekly earnings to be applied is not based on a higher annual wage she had been paid in years past.

[10] The parties agree that he was initially paid \$17,819 as vacation pay, pay in lieu of notice and severance pay and later on settlement of a wrongful dismissal action she received a further \$45,000. They disagree on the amount of settlement funds are to be allocated as earnings from employment and the period of allotment and weekly amount of allotment.

[11] The law says that earnings are the entire income of a claimant arising out of any employment.<sup>1</sup> The law defines both “*income*” and “*employment*.” “*Income*” includes any income that a claimant did or will get from an employer or any other person, whether it is in the form of money or something else.<sup>2</sup> “*Employment*” includes any employment under any kind of contract of service or employment.<sup>3</sup>

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<sup>1</sup> Subsection 35(2) of the *Employment Insurance Regulations*.

<sup>2</sup> Subsection 35(1) of the *Employment Insurance Regulations*.

<sup>3</sup> Subsection 35(1) of the *Employment Insurance Regulations*.

[12] The Claimant is the party who has to prove that it is more likely than not that the money is not earnings.

[13] The Commission decided that the amount to be allocated as earnings from employment is \$33,435. She initially received \$17,819 as vacation pay, pay in lieu of notice and severance pay and later on settlement of a wrongful dismissal action she received a further \$45,000.

[14] Minutes of settlement of the Claimant's wrongful dismissal claim show that the settlement amount of \$45,000 is made up as follows:

- \$20,000 as general damages for a human rights violation claim,
- \$5000 as a contribution to the Claimant's legal fees and
- \$20,000 as a retiring allowance.

[15] The parties agree that the total legal fees for the wrongful dismissal claim is \$13,768 and after the \$5000 contribution toward legal fees is applied, the balance is \$8769. The parties agree that \$20,000 received toward the human rights violation claim is not earnings from employment and is not to be allocated against EI benefits.

[16] The Commission found that only half of the legal fee balance of \$8769 (which is \$4384) should be deducted from the \$20,000 paid to the Claimant as a retiring allowance. Therefore, they claim that the amount of earnings to be allocated is \$33,435, which is the initial payment from the employer upon separation of \$17,819 plus the net amount paid as a retiring allowance, \$15,616 (\$20,000 - \$4384).

[17] I find that all of the legal fee balance of \$8769 should be deducted from the retiring allowance of \$20,000 as shown in the clear wording of the Minutes of Settlement.

[18] The Minutes of Settlement (GD3-36) clearly say that \$20,000 of the settlement amount will be firstly allocated "*as a contribution to the Employee's legal fees, without deductions*". It also says that \$20,000 is paid as damages toward a human rights violation claim "*without deductions*". I interpret this to mean that the parties agreed that any legal fee balance would not reduce the general damages. Therefore, the entire legal fee balance of \$8769 should be applied to

the retirement allowance of \$20,000, leaving \$11,231 to be allocated as earnings from employment.

[19] An email between the Claimant and her lawyer (GD3-41) supports that they intended that the entire balance of legal fees owing of \$8769 should be applied against the retiring allowance and not the general damage claim.

[20] The total to be allocated is \$29,050, which is the initial funds paid by the employer to the Claimant of \$17,819 plus the net retiring allowance of \$11,231, after deduction of the legal fee balance of \$8769.

**Did the Commission allocate the earnings correctly?**

[21] Yes: I find that the allocation of earnings from employment is for the weeks beginning November 25, 2018 to April 25, 2020. The Claimant last worked on November 27, 2018 and the beginning of that week is November 25. She has not provided information to support that there is an error in the allocation weeks or the normal weekly earnings used to apply the allocation. Normal weekly earnings are based on insurable employment for benefit purposes, as indicated in the Record of Employment from the employer and not on prior years total earnings from her T4s.

**CONCLUSION**

[22] The appeal is partly allowed. The Claimant received earnings from employment while collecting EI benefits of \$29,050 to be allocated to the weeks beginning November 25, 2018 to April 25, 2020.

Glen Johnson

Member, General Division - Employment Insurance Section

HEARD ON:	March 5, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	K. S., Claimant