



Citation: *MW v Canada Employment Insurance Commission*, 2021 SST 531

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

Decision

Appellant: M. W.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (434737) dated October 12, 2021 (issued by Service Canada)

Tribunal member: Linda Bell

Type of hearing: Videoconference

Hearing date: November 30, 2021

Hearing participants: Appellant (Claimant)
Interpreter, T.L.

Decision date: December 7, 2021

File number: GE-21-2076

Decision

[1] I am dismissing the appeal.

[2] The \$117,965.51 the Claimant received upon separation from her employment is earnings to be allocated (applied) to her Employment Insurance (EI) claims. The allocation starts the week of November 17, 2019, and continues until the week ending December 18, 2021. This means the Claimant is not entitled to the EI benefits she received.

[3] I am not reducing or writing off the overpayment of EI benefits. This means the Claimant is liable (responsible) to repay the overpayment of EI benefits resulting from the retroactive allocation of earnings.

Overview

[4] The Claimant applied for regular EI benefits when she lost her employment on November 15, 2019. The Commission set up her claim (benefit period) effective November 17, 2019.

[5] On December 9, 2019, the Claimant's employer issued her electronic Record of Employment (ROE). The ROE reports that the employer paid the Claimant \$18,849.00 in separation money. This money consists of \$505.22 vacation pay, \$2,620.54 for pay in lieu of notice, and \$15,723.24 as severance pay. The Commission allocated these earnings to her claims starting from November 17, 2019.

[6] The Claimant says agreed to the initial amounts offered by the employer but disagreed with the total severance package. She engaged in negotiations for additional compensation from her employer. The employer agreed to pay the Claimant an additional \$99,116.51 as severance pay.

[7] On January 2020, the employer amended the ROE listing the initial separation money plus the second payment of severance pay. The amended ROE lists that the Claimant received a total of \$117,965.51 due to separation from her employment ($\$505.22 + \$2,620.54 + \$15,723.24 + \$99,116.51 = \$117,965.51$).

[8] Nineteen months later on August 12, 2021, the Commission amended their initial allocation of earnings. The amended allocation adds the \$99,116.51 severance pay to the \$18,849.00 initially paid due to separation. This amended allocation results in a \$20,232.00 overpayment of EI benefits.

[9] The Commission maintains the allocation upon reconsideration. The Claimant appeals to the Social Security Tribunal (Tribunal). She states that she should not have to repay the overpayment because the Commission delayed 19 months before reviewing the amended ROE. She says her benefits had already ended before they amended the allocation. She requests that I write off the overpayment.

Matters I need to consider first

Post-hearing documents

[10] The Tribunal received post-hearing documents from both parties. The Tribunal has a Practice Direction outlining the procedure for dealing with post-hearing documents.¹

[11] The Claimant submitted late evidence for her appeal. Specifically, she submitted an email on November 30, 2021, one hour before the hearing.² The Tribunal didn't have a chance to upload this email into the appeal file prior to the hearing so it is considered as a post-hearing document.

[12] The Claimant spoke about the content of her late email at the hearing. Specifically she requested copies of the letters issued by Service Canada listing her access code. As explained during the hearing, I do not have access to the Commission's files or electronic records other than what it submits to the Tribunal.

[13] On December 3, 2021, the Tribunal received post-hearing Supplementary Representations of the Commission.³ In this document, the Commission states it is

¹ The practice direction is listed at <https://www1.canada.ca/en/sst/rdl/gdpd2016eiposthearing.html>

² See page GD8-1.

³ See page GD9-1.

unable to provide the requested documents because they don't have access to them. This is for privacy and protection of the Claimant's information.

[14] No further action will be taken in response to the post-hearing documents, as set out above.

Interpretation Services

[15] The Tribunal arranged for a Mandarin speaking interpreter to attend the hearing at the Claimant's request. At the beginning of the hearing, the Claimant requested that the hearing proceed in English. She explained that she would ask for assistance from the interpreter as needed.

[16] I will now determine to the issues under appeal.

Issues

[17] Is the \$117,965.51 that the Claimant received from her employer earnings?

[18] If this money is earnings, did the Commission allocate the earnings correctly?

[19] Did the Commission complete the allocation within the required time limit?

[20] Is the Claimant responsible to repay the overpayment of EI benefits?

[21] Can I write off or reduce an overpayment of EI benefits?

Analysis

Is the money that the Claimant received earnings?

[22] Yes. I find that the \$117,965.51 is earnings, paid due to separation from the Claimant's employment. My reasons for deciding that this money is earnings are set out below.

[23] The law says that earnings are the entire income that you get from any employment.⁴ The law defines both “income” and “employment.”

[24] **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.⁵ Case law says that vacation pay, pay in lieu of notice, and severance pay are earnings.⁶

[25] **Employment** is any work that you did or will do under any kind of service or work agreement.⁷

[26] Money from a dismissal action or separation from employment is “income arising out of employment.” Unless the Claimant can show that, some of it is compensation for some other expense or loss.⁸ The Claimant has to prove this on a balance of probabilities.⁹

[27] The Claimant testified that she is not disputing that the vacation pay, pay in lieu of notice, and \$15,723.24 of severance money are earnings. These amounts total \$18,849.00.

[28] The Claimant states that she agreed to the additional \$99,116.51 severance pay after negotiations. She says that she considers this additional money as a reward and appreciation for her 28 years of contributions to the employer. She agrees that she would not have been entitled to this additional payment of severance pay if she had not been an employee. She also agrees that the payment of this money stems directly from her employment, which the employer paid due to her separation from employment.

⁴ See subsection 35(2) of the *Employment Insurance Regulations* (Regulations).

⁵ See subsection 35(1) of the Regulations.

⁶ See *Blais v Canada (Attorney General)*, 2011 FCA 320.

⁷ See subsection 35(1) of the Regulations.

⁸ *Canada (Attorney General) v Radigan*, A-567-99.

⁹ *Bourgeois v Canada (Attorney General)*, 2004 FCA 117; *Canada (Attorney General) v Radigan*, A-567-99). A balance of probabilities means that it is more likely than not.

[29] I find that the undisputed evidence supports that the Claimant received \$117,965.51 as earnings upon separation from her employment. This includes the amended ROE and the Claimants oral testimony at the hearing.¹⁰

[30] As stated above, the law says that the entire income from employment is earnings.¹¹ So, I find as fact that the total amount of earnings received by the Claimant, by reason of lay off or separation from her employment, is **\$117,965.51** (\$505.22 + \$2,620.54 + \$15,723.24 + \$99,116.51 = \$117,965.51). I will now consider how these earnings are to be allocated.

Allocation of earnings

[31] The Commission applies earnings to claims and deducts them from the Claimant's EI benefits. This is called allocation. The reason for allocating earnings is to avoid double compensation for the same period.¹²

[32] Earnings are allocated depending on the nature of the earnings and why the earnings were paid. The Claimant states that she is not disputing the fact that her employer paid these earnings because her employment ended. In other words, the earnings were paid due to her separation from her employment.

[33] The law says that the earnings you get due to separation from your job have to be allocated starting the week you were separated from your job. 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.¹³

[34] When a claimant receives additional earnings, after the Commission has completed a previous allocation in respect of the same lay-off or separation, the law states that the Commission adds the earnings to the initial amount. Then the

¹⁰ See the amended ROE at page GD3-20.

¹¹ Subsection 35(2) of the Regulations.

¹² *Canada (Attorney General) v Walford*, A-263-78.

¹³ See subsection 36(9) of the Regulations.

Commission completes a revised allocation using the new total amount of earnings.¹⁴ In this case, the revised amount to be allocated is **\$117,965.51**, as set out above.

[35] The amounts are allocated based on the Claimant's normal weekly earnings. The allocation of these earnings start the week of the Claimant's last day worked if she didn't work a full workweek. The allocation starts the week after her last day worked in cases where the last week worked was a full workweek. The allocation starts in that week despite when the earnings were paid or payable.¹⁵

[36] The Commission's "Calculation Result" document indicates that the Claimant's normal weekly earnings were \$1,155.35.¹⁶ The Commission's transcript states that it considered the employment history file as reflected on the ROE when determining the Claimant's normal weekly earnings.¹⁷

[37] At the hearing, the Claimant agreed that the employer listed her earnings correctly on the amended ROE. She confirmed that her last day worked was Friday November 15, 2019. So I find as fact that the Claimant worked a full workweek in her last week of work. I also accept that the Claimant's normal weekly earnings were \$1,155.35, as set out above.

[38] I agree with the Commission when it states the \$117,965.51 separation money is allocated from November 17, 2019, to November 13, 2021.¹⁸ This is based on the Claimant's \$1,155.35 normal weekly earnings. This results in a \$20,232.00 overpayment of EI benefits.

¹⁴ See subsection 36(10) of the Regulations.

¹⁵ Subsection 36(9) of the Regulations.

¹⁶ See page GD3-26.

¹⁷ See page GD3-22.

¹⁸ See the initial decision letter at page GD3-28.

Did the Commission complete the allocation within the required time limit?

[39] Yes. The law states that the Commission has 36 months after paying EI benefits, to reconsider a claim for benefits.¹⁹

[40] The law recognizes that the Commission can't review changes to claims at the exact time they happen due to the volume of claims it processes. It is precisely for that reason that the Act allows the Commission time to rescind or amend any decision given in any particular claim for EI benefits. Specifically, the Act provides significant delays of between 36 months and 72 months to allow the Commission time to retrace its steps and make retroactive adjustments.²⁰

[41] In this case, I recognize that the employer issued the amended ROE on January 15, 2020. It took the Commission almost 19 months before it amended the allocation of the separation money. It issued the decision letter on August 13, 2021.

[42] I recognize that the Claimant states she never received the August 13, 2021, letter. This said, she agrees that she was notified of the resulting overpayment around that time. She also had the opportunity to request reconsideration of the allocation. So even if she didn't receive the August 13, 2021, letter, it doesn't change the fact that she was aware of the allocation of the \$117,965.51 she received due to separation from her employment. Nor does it change the fact that these earnings have to be allocated to her EI claims.

[43] Therefore, because the Commission reviewed and amended the claims on or before August 13, 2021, they reconsidered the claims in less than 36 months. So, I find as fact that the Commission reconsidered the claims and completed the allocation within the required time limit.

¹⁹ See section 52 of the *Employment Insurance Act (Act)*. The 36-month period is extended to 72 months in cases where, in the opinion of the Commission, a false or misleading statement or representation has been made in connection to a claim.

²⁰ *Canada (Attorney General) v Landry*, A-532-98.

Is the Claimant responsible to repay an overpayment of EI benefits?

[44] Yes. The law states that a claimant is liable (responsible) to repay an amount paid by the Commission as EI benefits for which they are not entitled to receive.²¹

[45] The Claimant says that she should not have to repay the EI benefits because her claim had ended before the Commission amended the allocation. I disagree because the law doesn't stipulate that the Commission must amend allocations before the end of the claim. Instead, as set out above, the Commission has between 36 months and 72 months to retrace its steps and make retroactive adjustments.²²

[46] I acknowledge that the Claimant prefers that the Commission would have handled the allocation of her settlement earnings in a manner that didn't result in an overpayment of EI benefits. However, that is not always possible given the volume of claims the Commission has to review.

[47] After careful consideration of the evidence, as set out above, I find the Claimant is liable to repay the overpayment of EI benefits resulting from the amended allocation of her earnings.

Do I have the authority to reduce or write-off the overpayment?

[48] No, I do not have the authority to reduce or write-off an overpayment of EI benefits. The Commission holds that authority.²³

[49] The law states that the Commission's decision regarding waiving or writing off an amount owed can't be appealed to the Tribunal.²⁴ The Federal Court of Canada has the jurisdiction to hear an appeal relating to a write-off issue.²⁵ This means that I cannot

²¹ Section 43 of the Act.

²² *Canada (Attorney General) v Landry*, A-532-98.

²³ Subsection 56(2) of the Regulations sets out the circumstances when the Commission may write off an overpayment of EI benefits.

²⁴ See section 112.1 of the Act.

²⁵ *Steel v Canada (Attorney General)*, 2011 FCA 153; *Bernatchez v Canada (Attorney General)*, 2013 FC 111.

determine matters relating to a request for a write-off or reduction of an overpayment of EI benefits.

[50] I sympathize with the Claimant given the circumstances she presented. However, my decision is not based on fairness. Rather, my decision is based on the facts before me and the application of the law. There are no exceptions and no room for discretion. I cannot interpret or rewrite the Act in a manner that is contrary to its plain meaning, even in the interest of compassion.²⁶

Conclusion

[51] I am dismissing the appeal.

[52] The Claimant received \$117,965.51 as earnings that is to be allocated to her EI claims. The Commission allocated these earnings correctly. This means the Claimant is liable to repay the overpayment of EI benefits resulting from the allocation.

Linda Bell
Member, General Division – Employment Insurance Section

²⁶ *Canada (Attorney General) v Knee*, 2011 FCA 301.