



Citation: *TP v Canada Employment Insurance Commission*, 2021 SST 1001

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

Decision

Appellant: T. P.
Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (411523) dated February 16, 2021 (issued by Service Canada)

Tribunal member: Charlotte McQuade

Type of hearing: Videoconference

Hearing date: April 6, 2021

Hearing participants: Appellant

Decision date: April 26, 2021

File number: GE-21-368

Decision

[1] The appeal is allowed in part.

[2] T. P (the “Claimant”) received earnings and the Canada Employment Insurance Commission (the “Commission”) allocated those earnings to the right weeks. The appeal is dismissed on this issue.

[3] The Claimant’s benefit period should not have been cancelled retroactive to its start date of November 10, 2019. The appeal is allowed on this issue.

Overview

[4] The Claimant received \$7,950.00 from his former employer. The Commission decided that this money is “earnings” under the law because it is vacation pay and pay in lieu of notice.

[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.¹

[6] The Claimant’s employer told the Commission that the Claimant was paid vacation pay of \$450.00 and pay in lieu of notice of \$7500.00 as separation payments. The Commission allocated the total earnings of \$7950.00 starting the week of January 12, 2020 to July 4, 2020, at the rate of \$315.28 per week. The balance of \$68.00 was allocated to the week beginning July 5, 2020. The Commission started the allocation the week of January 12, 2020 as this is the week that the Commission said that the Claimant was laid off from his employment. The Commission said that being laid off from his job was why the Claimant received the earnings. An overpayment \$316.00 arose as a result of this allocation.

[7] The Claimant does not dispute that the vacation payment of \$450.00 and the \$7500.00 pay in lieu of notice payment are earnings. He also does not dispute the Commission’s allocation of those earnings.

¹ See section 36 of the *Employment Insurance Regulations* (EI Regulations).

[8] On June 5, 2020, the Commission cancelled the Claimant's benefit period retroactive to its start date of November 10, 2019, after the Claimant had been paid some benefits. This created an overpayment of \$6626.00. The Claimant says he did not request the cancellation, nor was he told by the Commission they were going to cancel his benefit period. Benefit periods cannot be cancelled once benefits have been paid.² The Commission concedes it should not have cancelled the Claimant's benefit period retroactive to its start on November 10, 2019.

Matters I have to consider first

The Claimant wished to proceed with his hearing

[9] The Commission conceded in its submissions to the Tribunal that it should not have cancelled the Claimant's benefit period retroactive to its start on November 10, 2019. The Commission submitted, however, that if the benefit period cancellation were revoked, the impact will be that the Claimant does not have enough insurable hours to establish the subsequent benefit period that he established on October 11, 2020. The Commission says if its concession is accepted, although the overpayment arising from the cancellation of the benefit period will be eliminated, it intends then to assess an overpayment of all the benefits paid to the Claimant in his subsequent benefit period. The Commission says that overpayment will be greater than the overpayment relating to the cancelled benefit period.

[10] I scheduled a pre-hearing conference to discuss this issue with the Claimant. Due to technical difficulties, the pre-hearing conference did not proceed. However, at the beginning of the Claimant's hearing, I explained to the Claimant the Commission's intention to re-assess his eligibility for his subsequent benefit period if I accepted the Commission's concession that the Claimant's benefit period starting on November 10, 2019 should not have been cancelled. I explained the law I have to apply to the Claimant about the cancellation of a benefit period. I also explained to the Claimant if he proceeded with his appeal, there was the risk that if I accepted the Commission's

² Subsection 10(6) of the *Employment Insurance Act*.

concession, he could potentially end up with a larger overpayment than he currently had.

[11] I confirmed to the Claimant that I could not review the Commission's intention to assess an overpayment relating to his subsequent benefit period as part of this appeal because the Commission has not actually made such a decision yet. I explained that I can only review reconsideration decisions made by the Commission. That is what the law says my jurisdiction is limited to.³

[12] I told the Claimant that he could either proceed with his hearing on both issues under appeal, or he could withdraw his appeal on the issue concerning the cancellation of the benefit period. I explained to the Claimant that I could not provide him with advice on what to do. However, because of the fact the pre-hearing conference had not proceeded, I asked the Claimant if he would like time to consider what to do, or to seek legal advice. He confirmed he did not wish to adjourn the matter. He wanted to proceed. I was satisfied this was an informed choice by the Claimant. The Commission had twice explained in its submissions, its intention, if the concession was accepted, to re-assess the Claimant's subsequent benefit period which would result in a larger overpayment than he had.⁴ I reviewed that risk with the Claimant. As the Claimant still wished to proceed, I proceeded with the hearing.

The Claimant wanted an explanation of why his most recent statement of account was not consistent with the Commission's submissions as to the amount of his overpayment

[13] The Claimant said at his hearing that he had received a notice of debt dated January 9, 2021 from the Commission that showed his overpayment was \$3149.00,⁵ yet the Commission said in their submissions that his overpayment was \$6942.00. The

³ Section 112 and section 113 of the *Employment Insurance Act* say this. The exception to this is the Tribunal's jurisdiction to review Commission's decisions about whether a claimant can have an extension of time to pursue a reconsideration request. That exception is not relevant in this appeal.

⁴ GD4-7 and Tribunal's request for an investigation and report at GD5 and Commission's response at GD6.

⁵ GD8-2.

Claimant wanted an explanation of why there was such a difference. I agreed that it was important to clarify this. I advised the Claimant I would seek that information from the Commission after the hearing and give him a chance to comment on the Commission's response.

[14] On April 10, 2021 I requested that the Commission explain the amount on the statement of account.⁶ The Commission responded on April 19, 2021.⁷ This information was sent to the Claimant with an opportunity to respond. The Claimant provided submissions on April 22, 2020.⁸ He reiterated the same arguments he had made at his hearing. He also said that he does not agree with the Commission's position that if the Commission's reinstates his claim he would not have enough working hours to qualify for EI benefits.

Issues

[15] I have to decide the following issues:

- a) Is the money that the Claimant received earnings?
- b) If the money is earnings, did the Commission allocate the earnings correctly?
- c) Should the Claimant's benefit period been cancelled retroactive to its start date of November 10, 2019?

Analysis

Is the money that the Claimant received earnings?

[16] Yes, the \$7950.00 that the Claimant received is earnings. Here are my reasons for deciding that the money is earnings.

⁶ GD9.

⁷ GD10.

⁸ GD12.

[17] The law says that earnings are the entire income that you get from any employment.⁹ The law defines both “income” and “employment.”

[18] **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.¹⁰

[19] **Employment** is any work that you did or will do under any kind of service or work agreement.¹¹

[20] The Claimant’s former employer provided a Record of Employment (“ROE”) dated January 28, 2020 to the Commission. It said the Claimant’s last day paid was January 9, 2020 and that he received separation payments of \$450.00 vacation pay and \$7500.00 pay in lieu of notice.¹²

[21] The Commission decided that this money was vacation pay and pay in lieu of notice. So, it said that the money is earnings under the law.

[22] 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 likely than not that the money isn’t earnings.

[23] The Claimant agrees he received \$7950.00 from his former employer and he does not dispute that this money is earnings. He says what his employer provided him was not separated into two amounts but he did receive that total amount. He explained that he worked full-time for this employer and then he became a part-time employee. He said his employer told him that since he was being released, he was being paid the \$7500.00 for notice based on the years he had worked. He is not sure what the \$450.00 was for but he is not disputing that it was for vacation pay.

[24] I find that both the vacation pay and pay in lieu of notice are earnings. The Claimant received earnings in the total amount of \$7950.00 upon separation from his

⁹ See section 35(2) of the EI Regulations.

¹⁰ See section 35(1) of the EI Regulations.

¹¹ See section 35(1) of the EI Regulations.

¹² GD3-25.

former employer. The payments are earnings because they are income arising directly from the Claimant's employment.

Did the Commission allocate the earnings correctly?

[25] Yes. The Commission has correctly allocated the earnings.

[26] The law says that earnings have to be allocated to certain weeks. What weeks the earnings are allocated to depend on why you received the earnings.¹³

[27] The Claimant's earnings are vacation pay and pay in lieu of notice. The Claimant's employer says it gave the Claimant those earnings because the Claimant was laid off his job.

[28] The Commission says the vacation pay and pay in lieu of notice were made because the Claimant was laid off his job. The Claimant agrees the payments were made because he was laid off.

[29] The law says that the earnings you get for being laid off or separated from your job have to be allocated starting the week you were laid off or separated from your job. It doesn't matter when you actually receive those earnings. The earnings have to be allocated starting the week your lay-off or separation starts, even if you didn't get those earnings at that time.¹⁴

[30] I find that the Claimant was laid off from his job starting the week of January 12, 2020. I find this because the Claimant's employer says in the ROE that the Claimant's last day paid was January 9, 2020 and the Claimant agrees this was his last day of work.

[31] The Commission says the earnings of \$7950.00 are to be allocated starting the week of January 12, 2020 to July 4, 2020, at the rate of \$315.28 (\$315.00 rounded up) per week, which is the Claimant's normal weekly earnings. The balance of \$68.00 is to be allocated to the week beginning July 5, 2020. The Commission started the allocation

¹³ See section 36 of the EI Regulations.

¹⁴ See section 36(9) of the EI Regulations.

the week of January 12, 2020 as this is the week that the Commission said that the Claimant was laid off from his employment. The Commission said that being laid off from his job was why the Claimant received the earnings.

[32] I find the Claimant's normal weekly earnings are \$315.28. The parties don't dispute this amount, and I accept it as fact. This means that starting the week of January 12, 2020 to July 4, 2020, \$315.28 (\$315.00 rounded up) is to be allocated to each week. The balance of \$68.00 is to be allocated to the week of July 5, 2020. This means the Commission has properly allocated the Claimant's earnings.

[33] The Commission says an overpayment of \$316.00 arises from this allocation. I have reviewed the Commission's calculation and find it is correct.¹⁵ The Claimant was paid \$488.00 each in the weeks of January 12 and January 19, 2020. After the allocation of earnings of \$315.00 to those weeks, he only should have been paid \$330.00.00 in each of those weeks. The Claimant was overpaid \$158.00 in each of those two weeks, amounting to a total overpayment of \$316.00.

[34] The Tribunal has no authority to write off an overpayment.¹⁶ That authority rests with the Commission.

Should the Claimant's benefit period be cancelled retroactive to its start date of November 10, 2019?

[35] No. The benefit period should not have been cancelled.

[36] On June 5, 2020 the Commission cancelled the Claimant's benefit period retroactive to its start on November 10, 2019. This caused an overpayment of \$6626.00 to arise.

[37] A cancelled benefit period is deemed never to have begun.¹⁷

¹⁵ GD6-3.

¹⁶ Section 112.1 and 113 of the *Employment Insurance Act*.

¹⁷ Subsection 10(7) of the *Employment Insurance Act*.

[38] Once a benefit period has been established, whether or not it has ended, a claimant can only request that the Commission cancel that portion of the benefit period immediately before the first week for which benefits are paid or payable.¹⁸

[39] Once a benefit period has been established for a claimant, the Commission may cancel the benefit period if it has ended and no benefits were paid or payable during the period.

[40] The Commission concedes that it should not have cancelled the Claimant's benefit period. The Commission says it cancelled the claimant's benefit period without his authorization. The Commission also says the Claimant did not request a cancellation of his claim and an agent did not advise him of the advantages and disadvantages related to a cancellation of his claim.

[41] The Commission also says the Claimant was paid benefits in his benefit period. The Commission says the Claimant served his waiting period and received ten weeks of employment insurance from November 10, 2019 to January 25, 2020. On June 3, 2020, the Commission revised the claim and issued the claimant seven further weeks of employment insurance from January 26, 2020 to March 14, 2020.¹⁹

[42] The Claimant testified he never asked for, or authorized the cancellation of his benefit period. He received a call from an agent from Service Canada who said he wanted to update his information on or about June 6, 2020. The Claimant explained to him that he had not received any benefits since January 29, 2020 and then he received an EI payment on June 3, 2020 for \$2233.00. He also told the agent he had applied for CERB and he had received three CERB payments. The Claimant asked whether he should stop applying for CERB. He was told he should do this as his EI file was now active. Soon after, the Claimant found his online reporting was disabled and he could not apply for CERB over the phone. The Claimant had some conversations with Service Canada agents and in July, 2020 someone corrected his file. He was then paid on July

¹⁸ Paragraph 10(6)(b) of the *Employment Insurance Act*. There are other requirements set out in this provision that a claimant must meet to cancel the portion of the benefit period immediately before the first week for which benefits are paid or payable.

¹⁹ GD3-22 to GD3-24.

27, 2020. The Claimant said he was not told by any agent that his benefit period was going to be cancelled. He says that he should have been told about this, and his consent should have been obtained. He spoke with the Commission at least three times trying to sort things out but that was not mentioned to him.

[43] The Claimant also testified that he did not receive any payments from EI and the Canada Recovery Benefit Program (“CERB”) at the same time. The Claimant says that he did receive his biweekly EI payments between November 10, 2019 and January 25, 2020. He says he then had to apply for the CERB as his EI benefits stopped. The Claimant said he received CERB payments for the period from March 15, 2020 to June 6, 2020. However, he did not actually receive the first CERB payment until April 22, 2020. The Claimant says he does not understand why the notice of debt he received refers to a CERB overpayment. The Claimant says he never received any EI benefits after January 29, 2020. His next payment was the first CERB payment on April 22, 2020. The Claimant related that he received his next EI payment on June 5, 2020 in the amount of \$2223.00. A Service Canada agent called him and the Claimant says he voluntarily reported that he had received three CERB payments. The agent told him not to apply for further CERB payments. The Claimant said he then received an EI payment on July 27, 2020 for \$1000.00. The Claimant outlined subsequent payments he had received up until December, 2020.

[44] I reviewed the Commission’s overpayment calculation with the Claimant.²⁰ The Claimant said he did receive his weekly EI payments between November 10, 2019 and January 25, 2020. The Commission says that on June 3, 2020, the Commission revised the claim and issued the Claimant seven further weeks of employment insurance from January 26, 2020 to March 14, 2020. The Claimant said that after January 29, 2020 he did not receive any further EI benefits until he received a retroactive amount of \$2223.00 on June 5, 2020. The Claimant says he does not see how his retroactive payment of \$2223.00 amounts to benefits for the period from January 26, 2020 to March 14, 2020.

²⁰ GD6-3.

[45] Both the Claimant and Commission agree that the Claimant never requested the cancellation of his benefit period. They also agree that the Claimant was paid benefits during the benefit period that began on November 10, 2019, prior to its cancellation on June 5, 2020.

[46] I accept the Commission's concession. I find the benefit period starting November 10, 2019 should not have been cancelled. The Commission could not cancel the benefit period as benefits were paid to the Claimant during the benefit period beginning on November 10, 2019.²¹ The Commission also could not cancel the benefit period retroactive to November 10, 2019 because the Claimant never requested such cancellation and benefits were paid in the benefit period.²²

[47] This means the overpayment of \$6626.00 relating to the cancellation of the benefit period retroactive to its start on November 10, 2019 is eliminated.

[48] As I explained to the Claimant, the overpayment has nothing to do with receiving payments from the CERB and EI at the same time. The overpayment relates to the Commission's cancellation of the EI benefit period retroactive to November 10, 2019. I reviewed the Commission's overpayment calculation and find it to be correct. It covers EI benefits the Claimant received from the week of November 10, 2019 to the week of March 8, 2020. The Claimant testified he received biweekly benefits from November 10, 2019 to January 25, 2020. However, he says he does not see how the \$2233.00 he received on June 5, 2022 reflects a payment for seven weeks of benefits from January 26, 2020 to March 14, 2020. I find that it does. The Commission's records show that on June 5, 2020, the Claimant was paid seven weeks of benefits at the rate of \$330.00, after the allocation of the earnings of \$315.00, as explained above, to each of those weeks.²³ The Commission's records show that, after a tax deduction, the net amount paid for each of these seven weeks was \$319.00.²⁴ Seven weeks paid at \$319.00 per week amounts to \$2223.00, which is what the Claimant says he received. So, there is

²¹ Paragraph 10(6)(a) of the *Employment Insurance Act*.

²² Paragraph 10(6)(b) of the *Employment Insurance Act*.

²³ GD6-3.

²⁴ GD3-23.

no discrepancy. In any event, the entire overpayment of \$6626.00 is to be eliminated as a result of this decision.

[49] The Claimant raised a concern that his last statement of account did not reflect the amount of overpayment the Commission says he owes. The statement of account says the overpayment amount was \$3149.00.²⁵ The Commission says that is because the statement of account only represents the overpayment of EI benefits for the 2019 tax year (i.e., \$2,833.00) along with the overpayment resulting from the allocation of earnings (\$316.00). The Commission says that the CRA coded the remaining EI overpayment of \$3,793.00 as EI ERB on the Notice of Debt ²⁶ so it was not listed on the statement of account. The Commission says the amount noted on the statement of account does not change its position that the total amount of the overpayment is \$6942.00 (\$316 relating to the allocation of earnings and \$6626.00 relating to the cancellation of the benefit period).

[50] I accept the Commission's explanation for the overpayment amount noted on the statement of account. However, that does not change my decision. The overpayment relating to the allocation of earnings is \$316.00. That overpayment has been validly created. The overpayment relating to the cancellation of the benefit period, \$6626.00, is to be removed.

[51] The Claimant raised a number of concerns with the Commission's notes of February 10, 2021.²⁷ He testified that these notes are not accurate. The Claimant says he never told the agent there was fraud, as was noted. He says he was called a fraud. He also says he never swore at the agent. The Claimant says he was upset because he was accused of fraud during that call but he never used the words that the Commission's agent said he did. He says he does not use that kind of language. He feels that words were added to portray him as an aggressive character. The Claimant

²⁵ GD8-2.

²⁶ GD3-55

²⁷ GD3-65.

says that the inaccuracies in the Commission's notes cause him to question the Commission's decisions.

[52] I acknowledge the Claimant's testimony regarding the Commission's notes. However, the information the Claimant says was not recorded accurately is not relevant to the issues under appeal and does not change the decisions I have made.

[53] The Claimant said in his final submission to the Tribunal that he does not agree with the Commission's position that if his claim is reinstated, he would not have enough working hours to qualify for EI benefits. As I explained to the Claimant, I have no jurisdiction over that matter. If the Commission makes a decision regarding the Claimant's subsequent benefit period, the Claimant can, if he chooses, request a reconsideration from the Commission about that decision and if he disagrees with the Commission's reconsideration decision, he can appeal that reconsideration decision to the Tribunal.

Conclusion

[54] The appeal is allowed in part.

[55] The Claimant received \$7950.00 in earnings. These earnings are allocated starting the week of January 12, 2020 at \$315.00 per week. \$68.00 is to be allocated to the week of July 5, 2020. The overpayment arising from this allocation of \$316.00 remains. The appeal is dismissed on this issue.

[56] I accept the Commission's concession regarding the cancellation of the benefit period. The Claimant's benefit period, beginning on November 10, 2019, should not have been cancelled. The overpayment of \$6626.00 is eliminated. The appeal is allowed on this issue.

Charlotte McQuade
Member, General Division – Employment Insurance Section