



Citation: *MG v Canada Employment Insurance Commission*, 2023 SST 796

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

Decision

Appellant: M. G.
Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (570402) dated February 22, 2023 (issued by Service Canada)

Tribunal member: Marisa Victor
Type of hearing: Videoconference
Hearing date: May 5, 2023
Hearing participant: Appellant
Decision date: May 19, 2023
File number: GE-23-1016

Decision

[1] The appeal is dismissed with a modification.

[2] The Appellant received vacation and severance pay as earnings. But the Canada Employment Insurance Commission (Commission) didn't allocate (in other words, assign) those earnings to the right weeks. Therefore, the start date of the allocation has been changed.

Overview

[3] The Appellant got \$47,099.66 from his former employer. The Commission decided that the money is "earnings" under the law because it is vacation pay and severance pay paid after the Appellant's job was terminated.¹

[4] 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

[5] The Commission allocated the earnings starting the week of December 4, 2022 at an amount of \$1,976.38 per week. This is the week that the Commission said that the Appellant was laid off from his employment. The Commission said that being laid off is why the Appellant received the earnings.

[6] The Appellant disagrees with the Commission. The Appellant says that the vacation pay should be allocated to the time period before he was laid off because that was when he earned the pay. The Appellant does not dispute the allocation of his severance pay.

Issues

[7] I have to decide the following two issues:

- a) Is the money that the Appellant received earnings?

¹ The Appellant he does not dispute the allocation of the severance pay, only the vacation pay.

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

b) If the money is earnings, did the Commission allocate the earnings correctly?

Analysis

Is the money that the Appellant received earnings?

[8] Yes, the \$47,099.66 that the Appellant received is earnings. This amount is the total of \$9304.38 in vacation pay combined with \$37,795.28 in severance pay. Here are my reasons for deciding that the money is earnings.

[9] The law says that earnings are the entire income that you get from any employment.³ The law defines both “income” and “employment.”

[10] 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 This includes vacation pay and severance pay.⁵

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

[12] The Appellant's former employer gave him \$47,099.66. The Commission decided that this money was vacation pay together with severance pay. So, it said that the money is earnings under the law.

[13] The Appellant doesn't dispute that the vacation pay and severance pay are earnings from his work for his employer.

[14] I find that vacation pay and severance pay are earnings under the EI Regulations.

Did the Commission allocate the earnings correctly?

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.

[15] 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.⁷

[16] The law says that the earnings you get for being laid off from your job have to be allocated starting the week you were laid off. It doesn't matter when you actually receive those earnings. The earnings have to be allocated starting the week your lay-off starts, even if you didn't get those earnings at that time.⁸

[17] The Appellant was paid his vacation pay and severance pay after he was laid off from his job. The Appellant testified that he knew the company was going to lay him off. He decided not to take vacation but instead decided to work until his lay-off date and not take any paid vacation.

[18] The Appellant also testified that his last day of work was November 30, 2022 and not December 4, 2022. He had previously said he had applied for EI on the day that he was laid off. His application was submitted on December 4, 2022. There were several Record of Employment (ROEs) issued. One says his last day of work was November 30, 2022. The other was issued for the time period of just December 1 to December 4, 2022.

[19] The Commission recommended a modification to the allocation of the earnings so that they begin the week of separation, which was November 30, 2022. This was because it had tried to contact the employer but was unable to confirm through the employer what the last day of work was.

[20] I find that the vacation pay and severance pay are earnings. This is because the Appellant earned them through his work for the employer. Secondly, he was paid these amounts because he was laid off from work. Being laid off is what triggered the payments. As a result, both the vacation pay and the severance pay are earnings that need to be allocated.

⁷ See section 36 of the EI Regulations.

⁸ See section 36(9) of the EI Regulations.

[21] I find that the Appellant was laid off from his job on November 30, 2022. The Appellant testified that his last day of work was Wednesday, November 30, 2022. The Appellant was persuasive that his last day of work was on November 30, 2022 and that the ROE indicating work was done December 1 to December 4, 2023 was an error made by the company's HR department. The Commission also agreed that the allocation should begin the week of the lay off which was the week of November 27, 2022.

[22] Section 36(9) of the EI Regulations says that earning shall be allocated to a number of weeks that begins with the week of the lay-off. I accept that the Appellant's last day of work was November 30, 2022, and, according to the ROE, he was paid some salary that week (\$796.22) but not his usual amount (\$1976.38).⁹ The allocation of the earnings must start the week of the layoff and therefore the week of November 27, 2022 in accordance with subsection 36(9) and 36(10) of the EI Regulations.¹⁰

[23] The amount of money to be allocated is \$1976.38 per week.¹¹ This is because \$1976.38 is the Appellant's normal weekly earnings. The parties don't dispute this amount, and I accept it as fact. This means that starting the week of November 27, 2022, the Appellant's earnings should equal \$1976.38 and each week thereafter for the same amount. If there are any amount of earnings left over, it will be allocated to the last week.

[24] I understand that the Appellant is frustrated that the vacation pay earned while employed is allocated to the period beginning with the date of his lay-off from his employer. Unfortunately, this is how the EI Regulations specify that vacation pay is to be allocated for all individuals who receive earnings from their employer as a result of being laid off.¹² The Tribunal must follow the EI Regulations.

⁹ This amount totals \$2772.71, the amount he was paid for his last two weeks of work. Payment was bi-weekly.

¹⁰ See [Canada Employment Insurance Commission v WC, 2022 SST 595 at paras. 19 and 20.](#)

¹¹ There was no dispute regarding the calculation of the amount of money to be allocated.

¹² See section 36(9) of the EI Regulations.

Conclusion

[25] The appeal is dismissed with a modification.

[26] There is a modification to the start of the allocation weeks. The Appellant received \$47,099.66 in earnings. These earnings are allocated starting the week of November 27, 2022 at \$1976.38 per week. Any amount left over is allocated to the last week.

Marisa Victor

Member, General Division – Employment Insurance Section