



[TRANSLATION]

Citation: *NV v Canada Employment Insurance Commission*, 2023 SST 822

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

## Decision

**Appellant:** N. V.  
**Representative:** Alex Pelchat

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (560859) dated January 12, 2023 (issued by Service Canada)

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**Tribunal member:** Normand Morin

**Type of hearing:** Videoconference  
**Hearing date:** May 16, 2023  
**Hearing participants:** Appellant  
Appellant's representative

**Decision date:** June 16, 2023  
**File number:** GE-23-347

## Decision

[1] The appeal is dismissed. I find that the \$64,482 the Appellant received from Canada World Youth (employer) in the form of severance pay and vacation pay is earnings.<sup>1</sup> This means that this amount has to be allocated or deducted from her Employment Insurance (EI) benefits.<sup>2</sup> The Canada Employment Insurance Commission (Commission) allocated these earnings to the correct weeks of the Appellant's EI benefit period.<sup>3</sup>

## Overview

[2] From June 15, 1999, to October 21, 2022, inclusive, the Appellant worked as a finance coordinator for the employer and stopped working for it because of a shortage of work.<sup>4</sup>

[3] On November 7, 2022, she made an initial claim for EI benefits (regular benefits).<sup>5</sup> A benefit period was established effective October 23, 2022.<sup>6</sup>

[4] On November 17, 2022, the Commission told her that the \$64,482 she had received from her employer would be applied against her benefits—\$63,804, for the period from October 23, 2022, to October 21, 2023, and \$678 for the week starting October 22, 2023.<sup>7</sup>

[5] On January 12, 2023, after a reconsideration request, the Commission told her that it was upholding the November 17, 2022, decision.<sup>8</sup>

[6] The Appellant explains that she received the amount of money that the Commission allocated. She says that the severance pay she received from the

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<sup>1</sup> See section 35 of the *Employment Insurance Regulations* (Regulations).

<sup>2</sup> See section 36 of the Regulations.

<sup>3</sup> See section 36 of the Regulations.

<sup>4</sup> See GD2-18 and GD3-3 to GD3-15.

<sup>5</sup> See GD3-3 to GD3-13.

<sup>6</sup> See GD3-1 and GD4-1.

<sup>7</sup> See GD3-19 and GD3-20.

<sup>8</sup> See GD3-26.

employer, in the amount of \$61,363, was deposited into a registered retirement savings plan (RRSP) and that she didn't collect it. The Appellant argues that this amount isn't earnings and should not be allocated. On January 30, 2023, the Appellant challenged the Commission's reconsideration decision. This decision is being appealed to the Tribunal.

## Issues

[7] I have to decide whether the \$64,482 the Appellant received from her employer is earnings<sup>9</sup> and, if so, whether those earnings were correctly allocated.<sup>10</sup> To do this, I have to answer the following questions:

- Is the money the Appellant received from her employer earnings?
- If so, did the Commission allocate the earnings correctly?

## Analysis

[8] Section 35 of the *Employment Insurance Regulations* (Regulations) defines what constitutes income and employment, and specifies what types of income must be considered earnings. Section 36 sets out how earnings are to be allocated or deducted from a claimant's EI benefits.

[9] Earnings are the claimant's entire income, meaning the entire income arising out of any employment.<sup>11</sup> An amount received won't be considered earnings if it falls within the exceptions set out in the Regulations<sup>12</sup> or if it doesn't arise out of employment.

[10] Income can be anything that a person has received or will receive from an employer or another person. It isn't necessarily money, but that is often the case.<sup>13</sup>

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<sup>9</sup> See section 35 of the Regulations.

<sup>10</sup> See section 36 of the Regulations.

<sup>11</sup> See section 35 of the Regulations.

<sup>12</sup> See section 35(7) of the Regulations.

<sup>13</sup> See section 35(1) of the Regulations.

Employment is any work that a person has done or will do under a contract of employment or service.<sup>14</sup>

[11] The Act says that all earnings have to be allocated.<sup>15</sup> The weeks to which earnings are allocated depend on why the person received the earnings.<sup>16</sup>

[12] The claimant has to show that the money they received or is entitled to isn't earnings. They have to prove this on a balance of probabilities. This means that they have to prove that it is more likely than not that the amount of money in question isn't earnings.

### **Issue 1: Is the money the Appellant received from her employer earnings?**

[13] I find that the \$64,482 the Appellant received from her employer is earnings.<sup>17</sup> This is money that was paid to her in return for the work she did. It is income that was owed to her after she worked for the employer.

[14] The Federal Court of Appeal (Court) has established that an amount of money will be considered earnings if it is obtained through or in return for work, or if there is a "sufficient connection" between the claimant's employment and the amount received.<sup>18</sup>

[15] The Court says that severance pay is earnings.<sup>19</sup>

[16] The evidence on file shows that the Appellant received a total of \$64,498.58 from her employer.<sup>20</sup>

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<sup>14</sup> See section 35(1) of the Regulations.

<sup>15</sup> See section 36 of the Regulations.

<sup>16</sup> See section 36 of the Regulations.

<sup>17</sup> See section 35 of the Regulations.

<sup>18</sup> The Court established this principle in *Roch*, 2003 FCA 356.

<sup>19</sup> See the Court's decision in *Blais*, 2011 FCA 320.

<sup>20</sup> See GD3-14 to GD3-17 and GD3-23.

[17] That amount includes the following:

- \$61,363 in severance pay (retirement pay or retirement leave credits)
- \$3,136 (\$3,135.58) in vacation pay<sup>21</sup>

[18] The two amounts in question total \$64,499.<sup>22</sup>

[19] The employer says that the \$61,363 in severance it paid the Appellant is for one year's salary.<sup>23</sup>

[20] Although the Commission says that it considered the \$64,499 (\$64,498.58) to be the earnings deducted from the benefits paid to the Appellant,<sup>24</sup> its initial decision dated November 17, 2022, refers to an amount of \$64,482.<sup>25</sup> That decision says that \$63,804 was applied against the Appellant's benefits from October 23, 2022, to October 21, 2023, and that \$678 would be applied against her benefits for the week starting October 22, 2023 ( $\$63,804 + \$678 = \$64,482$ ).<sup>26</sup>

[21] Even though the difference between the amount paid to the Appellant, \$64,499 (\$64,498.58), and the amount the Commission referred to in its November 17, 2022, decision, \$64,482, is minimal, I note that it is the amount of \$64,482 that was allocated according to that decision.<sup>27</sup> The January 12, 2023, reconsideration decision upheld the original November 17, 2022, decision. The reconsideration decision dated January 12, 2023, was appealed to the Tribunal.

[22] In this case, the Appellant acknowledges that she received \$64,499 (\$64,498.58), which was \$61,363 in severance pay (retirement pay or retirement leave

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<sup>21</sup> See GD3-14 and GD3-15. These amounts have been rounded to the nearest dollar, as required by section 6(2) of the Act and section 36(20) of the Regulations.

<sup>22</sup> Amount rounded to the nearest dollar as per section 6(2) of the Act and section 36(20) of the Regulations.

<sup>23</sup> See GD3-23.

<sup>24</sup> See GD4-1.

<sup>25</sup> See GD3-19 and GD3-20.

<sup>26</sup> See GD3-19 and GD3-20.

<sup>27</sup> See GD3-19 and GD3-20.

credits) and \$3,136 (\$3,135.58) in vacation pay, following her termination of employment on October 21, 2022.

[23] She says that she doesn't dispute that the \$3,135.58 she received as vacation pay is earnings.

[24] The Appellant's representative says that the dispute is related only to the \$61,363 in severance pay (retirement pay or retirement leave credits) paid to the Appellant.

[25] The Appellant's testimony and statements indicate the following:

- a) The amount of \$61,363 she received as severance pay should not be considered earnings.<sup>28</sup>
- b) This amount was deposited directly into an RRSP. She chose to put that money into an RRSP.
- c) She didn't collect any amount from her severance.<sup>29</sup>
- d) She hasn't received any earnings since the termination of her employment.
- e) Her colleagues from when she worked for the employer were laid off in 2015 and 2022 and, like her, received severance or termination pay after being laid off. But, the payments these colleagues received weren't deducted from their EI benefits.

[26] The representative argues as follows:

- a) The Appellant worked for the employer for 23 years. As part of her duties, she worked as an [translation] "auditor" and was a member of the employer's finance directorate.

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<sup>28</sup> See GD3-21.

<sup>29</sup> See GD3-21.

- b) The Appellant has good knowledge of earnings and employment issues. At her job, she had to handle employee compensation files (for example, severance files).
- c) In 2015, she processed the file of colleagues who were laid off at the time. Those colleagues received money from the employer after they were laid off. They weren't penalized when they received EI benefits.
- d) In 2022, another of the Appellant's colleagues stopped working shortly before her. After his termination of employment, he was [translation] "exempted" from having his earnings allocated because he was able to benefit from the [translation] "amnesty" in force because of the government's COVID-19 pandemic measures,<sup>30</sup> which lasted until September 2022. This means that, after those measures were adopted, the payments the employees received after being separated from their job benefitted from a [translation] "complete amnesty" from the allocation of the payments in question.
- e) The Appellant could not benefit from measures similar to those of her colleagues, meaning she [translation] "missed her window" to be able to receive benefits without an allocation of the payment she received.
- f) The Appellant was shocked to learn that the Commission was refusing to pay her benefits, given that several of her colleagues were able to receive benefits without issue in 2015 and 2022 despite the fact that they, like her, had received compensation when they were separated from their job.
- g) Since October 21, 2022, the Appellant hasn't received earnings within the meaning of the Act.<sup>31</sup>

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<sup>30</sup> Coronavirus disease 2019.

<sup>31</sup> See section 10(1)(b) of the Act.

- h) The money she received was put into an RRSP. She won't receive this payment in the near future, since she isn't retiring soon. She has made efforts to work.
- i) The Appellant acted as a reasonable person would have by placing her severance pay into an RRSP.
- j) Over several years with the employer, the Appellant saw many examples of employees who were able to get EI benefits after receiving severance pay.
- k) The Appellant had a reasonable expectation of receiving benefits.
- l) Not being able to receive benefits hampers her day-to-day life.

[27] The Commission explains that, regardless of what the Appellant chose to do with the payment she received, the amount of that payment must be considered earnings for EI purposes, as set out in the Regulations.<sup>32</sup>

[28] It says that the Appellant isn't receiving any earnings because she chose to put all of her severance pay into an RRSP.<sup>33</sup>

[29] The Commission points out that the right to receive benefits depends on many conditions set out in the Act, as with any insurance policy.<sup>34</sup>

[30] I find that the severance pay the Appellant received is earnings because it is part of her entire income arising from her employment, as the Regulations say.<sup>35</sup> The same is true of the vacation pay she received.

[31] Even though the Appellant put her severance pay into an RRSP, that situation doesn't change the fact that it is earnings.

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<sup>32</sup> See section 35(2) of the Regulations. See also GD4-3.

<sup>33</sup> See GD4-3.

<sup>34</sup> See GD4-3.

<sup>35</sup> See section 35(2) of the Regulations.



[32] The Appellant had the choice of collecting this payment when it was paid to her or of placing it in an RRSP account.

[33] This payment is related to the job the Appellant had with the employer in return for the work she performed.

[34] The argument that the Appellant's colleagues who received severance pay when their jobs ended in 2015 and 2022 could receive benefits without having their severance pay deducted from their benefits can't be accepted in favour of the Appellant.

[35] Although changes were made to the Regulations in 2015 and 2022,<sup>36</sup> for example, the Appellant hasn't shown how the measures that allowed several of her colleagues to receive benefits at any of those times—without their payments being considered earnings and without them being deducted from their benefits—could apply to her case.

[36] The provisions of the Regulations that apply to the Appellant's case are those that were in effect when the Appellant was separated from her job on October 21, 2022.<sup>37</sup>

[37] These provisions show that the Appellant's severance pay, along with her vacation pay, is earnings.<sup>38</sup>

[38] Also, those amounts of money in severance and vacation pay aren't subject to the exceptions in the Regulations that would allow them not to be considered earnings.<sup>39</sup>

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<sup>36</sup> Changes to the Regulations were made in June 2015 (see *Regulations Amending the Employment Insurance Regulations*). Due to COVID-19, changes were also made to the Act and Regulations. Changes to the Regulations have, among other things, meant that earnings paid or payable to a claimant by reason of a lay-off or separation from their job weren't earnings and weren't deducted from their benefits (see *Budget Implementation Act, 2021, No. 1* in the part on *Employment Insurance Regulations - Amendment to the Regulations*). Changes of this nature were in effect from September 26, 2021, to September 25, 2022, inclusive.

<sup>37</sup> See sections 35 and 36 of the Regulations.

<sup>38</sup> See section 35(2) of the Regulations.

<sup>39</sup> See section 35(7) of the Regulations.

## **Issue 2: Did the Commission allocate the earnings correctly?**

[39] I find that the Appellant's earnings of \$64,482, which includes the \$61,363 in severance pay, were correctly allocated in accordance with the provisions of the Regulations, since this amount is earnings.<sup>40</sup>

[40] The Act says that earnings have to be allocated to certain weeks. The weeks to which earnings are allocated depend on why the person received the earnings.

[41] The Regulations say that earnings paid or payable to a claimant by reason of a lay-off or separation have to be allocated to a number of weeks that begins with the week of the lay-off or separation.<sup>41</sup>

[42] The Regulations also say that when earnings have already been allocated after being laid off or separated from a job and other earnings have been paid to a claimant for that same lay-off or separation, those earnings are added to those already allocated and a revised allocation is to be made on the basis of that total.<sup>42</sup> This allocation is then made over a number of weeks that begins with the week of the lay-off or separation, without regard to the period for which the earnings are purported to be paid or payable.<sup>43</sup>

[43] The Court has determined that amounts that constitute earnings under section 35 of the Regulations are to be allocated under section 36 of the Regulations.<sup>44</sup>

[44] The Court tells us that the amounts you get for being separated from your job and that are earnings within the meaning of section 35 of the Regulations have to be allocated in accordance with section 36(9) of the Regulations.<sup>45</sup>

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<sup>40</sup> See sections 36(9) and (10) of the Regulations.

<sup>41</sup> See section 36(9) of the Regulations.

<sup>42</sup> See section 36(10) of the Regulations.

<sup>43</sup> See section 36(10) of the Regulations.

<sup>44</sup> The Court established this principle in *Boone et al*, 2002 FCA 257.

<sup>45</sup> The Court established this principle in *Boucher Dancause*, 2010 FCA 270; and *Cantin*, 2008 FCA 192.

[45] The Court also tells us that the entire income of a claimant arising out of any employment has to be taken into account in calculating the amount to be deducted from benefits.<sup>46</sup>

[46] The Appellant and her representative haven't made arguments about the Commission's allocation of the earnings she received from her employer. Their arguments are about how the severance pay the Appellant received should not be considered earnings—not about the period the allocation was made over or the Commission's calculations to make that allocation.

[47] The Commission says that the amount in severance pay the Appellant received must be allocated regardless of what the Appellant chose to do with that payment.<sup>47</sup>

[48] It says that any compensation received from the loss of employment is considered earnings for EI purposes and must be allocated to avoid double compensation.<sup>48</sup>

[49] The Commission says that it allocated the Appellant's earnings starting the week that began on October 23, 2022, based on her normal weekly earnings of \$1,227.<sup>49</sup>

[50] It says that the allocation it made, based on the Appellant's normal weekly earnings, delays the date on which she would be entitled to EI benefits.<sup>50</sup>

[51] I find that the \$64,482 the Appellant received should be allocated in accordance with the provisions of sections 36(9) and 36(10) of the Regulations, since it is earnings she was paid for being laid off or separated from her job.<sup>51</sup>

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<sup>46</sup> The Court established this principle in *McLaughlin*, 2009 FCA 365.

<sup>47</sup> See GD4-3.

<sup>48</sup> See GD4-3.

<sup>49</sup> See GD4-3 and GD4-4.

<sup>50</sup> See GD4-4.

<sup>51</sup> See sections 36(9) and (10) of the Regulations.

[52] These sections say that the Appellant's earnings are to be allocated to a number of weeks that begins with the week of separation, regardless of the period for which they are purported to be paid or payable.<sup>52</sup>

[53] This means that the Appellant's earnings must be allocated to a number of weeks that begins with the week of separation—in other words, to a number of weeks beginning on October 23, 2022.<sup>53</sup>

[54] In summary, I find that the earnings paid to the Appellant of \$64,482, including the severance pay of \$61,363, were correctly allocated by the Commission.<sup>54</sup>

## **Conclusion**

[55] I find that the \$64,482 the employer paid the Appellant is earnings. These earnings must be allocated or deducted from the Appellant's benefits. The Commission correctly allocated these earnings.

[56] This means that the appeal is dismissed.

Normand Morin

Member, General Division – Employment Insurance Section

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<sup>52</sup> See sections 36(9) and (10) of the Regulations.

<sup>53</sup> See sections 36(9) and (10) of the Regulations.

<sup>54</sup> See sections 36(9) and (10) of the Regulations.