



[TRANSLATION]

Citation: *ML v Canada Employment Insurance Commission*, 2023 SST 1891

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant: M. L.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (580337) dated April 12, 2023
(issued by Service Canada)

Tribunal member: Mylène Fortier

Type of hearing: In person

Hearing date: August 15, 2023

Hearing participant: Appellant

Decision date: September 5, 2023

File number: GE-23-1241

Decision

[1] The appeal is allowed. The Appellant received earnings, and the Canada Employment Insurance Commission (Commission) didn't allocate (in other words, assign) those earnings to the right weeks.

Overview

[2] The Appellant received a notice of debt from the Commission. The Commission is asking him to pay back an overpayment of \$638. The overpayment stems from a decision by the Commission about the allocation of earnings.

[3] The Appellant disagrees with the amount of the overpayment. He says it should be \$234, not \$638. However, he argues that he should not have to pay this amount, since the overpayment was the result of a Commission error.

[4] The Appellant says that too many different people at the Commission worked on his file. This led to confusion and several errors in his file that he wants to bring to the Tribunal's attention.

[5] The Appellant got \$10,959 from his former employer. The Commission decided that the money is "earnings" under the *Employment Insurance Act* (Act) because it is vacation pay.

[6] 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

[7] The Commission allocated the earnings over seven weeks starting the week of December 4, 2022, at an amount of \$1,692 per week. This is the week that the Commission said that the Appellant was separated from his employment. The Commission said that being separated from his job is why the Appellant received the earnings.

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

[8] The Commission admitted to allocating the Appellant's earnings incorrectly. It had allocated the amount over six weeks instead of seven. This resulted in an overpayment of \$638.

Matters I have to consider first

Can the Commission's errors justify not paying back the overpayment?

[9] The Appellant has asked not to pay the overpayment the Commission says he owes. In his opinion, it isn't fair that he has to pay it, since it was due to a Commission error. He is also of the view that other errors were made in his file, and he isn't happy with the Commission.

[10] The Act says that the Commission may reconsider a claim within 36 months after the benefits have been paid.² When benefits are underpaid or overpaid as in this case, the Commission must calculate the amount and notify the claimant.³ That is what the Commission did.

[11] Concerning the Commission error that resulted in an overpayment, it is well established in case law that Commission errors don't entitle you to benefits that would not be payable under the Act.⁴ In other words, the Commission was entitled to claim an overpayment even though the overpayment was due to its error.

[12] I don't have the authority to write off an overpayment. Only the Commission has that authority.

[13] However, I have jurisdiction—in other words, the ability—to make decisions about a person's entitlement to benefits and the amount of those benefits, which can result in an overpayment or a recalculation of the overpayment.

² See section 52(1) of the *Employment Insurance Act* (Act).

³ See section 52(2) of the Act.

⁴ See *Granger v Canada Employment and Immigration Commission*, A-684-85.

[14] This means that I can decide whether the Appellant's vacation pay is earnings under the Act and whether those earnings were allocated correctly.

[15] So, I will address these issues.

[16] The other errors the Appellant raised have to do with the large number of Commission agents he spoke to and the different information they received. He says he isn't happy with the Commission.

[17] While I understand the Appellant's frustration, I have no authority over this matter. I informed the Appellant of his right to contact the Commission's client services and file a complaint.

The Appellant no longer wants to dispute the length of the benefit period

[18] The Appellant also initially disputed the length of the benefit period. At the hearing, he said that he no longer disputed the length of the benefit period or the maximum number of weeks of benefits he was entitled to.

[19] So, I won't address these issues in my analysis and conclusion. I find that there is no longer any dispute about the length of the benefit period or the maximum number of weeks of benefits.

Issues

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

- a) Is the money that the Appellant received earnings?
- b) If the money is earnings, did the Commission allocate the earnings correctly?

Analysis

Is the money that the Appellant received earnings?

[21] Yes, the \$10,959 that the Appellant received is earnings. Here are my reasons for deciding that the money is earnings.

[22] The law says that earnings are the entire income that you get from any employment.⁵ The Act defines both “income” and “employment.”

[23] **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.⁶ Case law says that severance pay is earnings.⁷

[24] **Employment** is any work that you did or will do under any kind of service or work agreement.⁸

[25] Initially, the Appellant indicated on his renewal application for benefits that he had received \$2,400 in vacation pay from his former employer.

[26] The employer issued a first Record of Employment (ROE) indicating that the amount of the vacation pay was actually \$7,659.

[27] The employer then provided a second ROE. The amount of the vacation pay was now \$10,959.

[28] The Commission decided that this money was vacation pay received because of separation from employment. So, it said that the money is earnings under the law.

[29] The Appellant agrees with the Commission. He says that the money is vacation pay he got because he left that employer.

⁵ See section 35(2) of the Regulations.

⁶ See section 35(1) of the Regulations.

⁷ See *Blais v Canada (Attorney General)*, 2011 FCA 320.

⁸ See section 35(1) of the Regulations.

[30] I find that the money is earnings under the law. It was paid as vacation pay because the Appellant ended his employment with that employer. The money he got is income from his employment.

[31] The Appellant and the Commission agree that the actual amount of the vacation pay is \$10,959.

[32] I find that the total amount of earnings is \$10,959.

Did the Commission allocate the earnings correctly?

[33] No, the Commission didn't allocate the Appellant's earnings correctly.

[34] The law says that earnings have to be allocated to certain weeks. What weeks earnings are allocated to depends on why you received the earnings.⁹

[35] The Appellant's earnings are vacation pay. The Appellant's employer gave him those earnings because he was separated from his job.

[36] The law says that the earnings you get for being separated 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.¹⁰

[37] The ROEs show that the Appellant's last day paid was December 1, 2022. I have no reason to doubt that. So, I find that the Appellant was separated from his job starting the week of November 27, 2022.

[38] The amount of money to be allocated starting that week is \$1,692. This is because \$1,692 is the Appellant's normal weekly earnings. The parties don't dispute this amount, and I accept it as fact. This amount is what the Appellant normally receives from his employer each week.

⁹ See section 36 of the Regulations.

¹⁰ See section 36(9) of the Regulations.

[39] This means that starting the week of November 27, 2022, \$1,692 has to be allocated to each week. If there is any amount of earnings that is left over, it will be allocated to the last week.

[40] So, I find that the \$10,959 has to be allocated over seven weeks. Specifically, the total amount of normal weekly earnings is allocated to the first six weeks, and any amount left over is allocated to the seventh week. This means that no benefits are paid for those first six weeks, and the remaining earnings allocated to the seventh week are deducted from his benefits.

[41] There is no waiting period; the benefit period was reactivated, which means that the Appellant has already served a waiting period.

[42] The Commission acknowledged its error concerning the number of weeks of allocation. After recalculating to allocate over seven weeks, the Commission determined that there was an overpayment of \$638.

[43] However, the Commission started the allocation in the wrong week. It has to start the week of November 27, 2022, not the week of December 4, 2022. So, the Commission will have to recalculate with that in mind.

Conclusion

[44] The appeal is allowed.

[45] The Appellant received \$10,959 in earnings. This amount has to be allocated over seven weeks starting the week of November 27, 2022, at \$1,692 per week. Any amount left over is allocated to the last week.

Mylène Fortier
Member, General Division – Employment Insurance Section