



Citation: *AO v Canada Employment Insurance Commission*, 2023 SST 1340

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

Decision

Appellant: A. O.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (542856) dated October 13, 2022 (issued by Service Canada)

Tribunal member: Mark Leonard

Type of hearing: Teleconference

Hearing date: April 14, 2023

Hearing participants: Appellant

Decision date: April 17, 2023

File number: GE-22-3585

Decision

[1] The appeal is dismissed.

[2] The Appellant received earnings and the Canada Employment Insurance Commission (Commission) allocated (in other words, assigned) those earnings to the correct weeks. The resultant overpayment of Employment Insurance benefits is properly calculated and remains subject to recovery from the Appellant.

Overview

[3] The Commission established an initial claim for Employment Insurance (EI) sickness benefits for the Appellant on May 26, 2019.

[4] The Appellant received payment for the full 15 weeks of sickness benefits. The Commission says that it later investigated and found that the Appellant had worked while in receipt of benefits but did not report the income.

[5] The law says that all earnings have to be allocated to certain weeks. The weeks that earnings are allocated to depends on why you received the earnings.¹ When earnings are allocated after benefits have been paid, it usually results in an overpayment of EI benefits subject to recovery from the claimant.

[6] The Commission allocated the Appellant's earnings starting the week of July 14, 2019. This is the first week that the Appellant had employment earnings while in receipt of benefits. After all earnings were allocated, the Commission established an overpayment of EI benefits equal to \$2,027.00, subject to recovery from the Appellant.

[7] The Appellant disagrees with the Commission. The Appellant says that the amount noted as earnings by his employer is wrong. He says that not reporting his earnings was a mistake and asks for compassion to allow him not to repay the EI benefits he received.

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

Matters I must consider first

The Appellant asked me to reschedule the Hearing

[8] The hearing was scheduled for Friday, April 14, 2023, at 1:00 p.m., 4:00 p.m. Eastern time by teleconference.

[9] The Social Security Tribunal (Tribunal) sent the Appellant notice of the hearing on April 11, 2023, informing him of the hearing date and time. The Tribunal called the Appellant on April 13, 2023, and left him a message reminding him of the hearing.

[10] At 10 minutes past the appointed hearing time, I contacted the Social Security Tribunal registry office to determine if the Appellant had contacted the Tribunal to explain why he was not present on the call.

[11] The Appellant had not informed the Tribunal of any issues with his attendance; however, the Tribunal did contact the Appellant who told them he was scheduled to work the afternoon and asked that the hearing be rescheduled to May 2023.

[12] I refused the request because I granted two previous requests to reschedule the hearing. In his second request, he proposed that the hearing be scheduled for a Friday afternoon to accommodate his work schedule. I accommodated that request which resulted in scheduling the hearing for April 14, 2023, at 1:00 p.m. Pacific time. The Appellant provided no other reason he could not attend at this time other than his work schedule. He did not provide any proof that he had attempted to obtain time off from work to attend the hearing.

[13] The Appellant was informed that he needed to call into the hearing, or the hearing would proceed without him. The Appellant declined to attend the hearing.

The Appellant wasn't at the Hearing

[14] The Appellant wasn't at the hearing. A hearing can go ahead without the Appellant if the Appellant got the notice of hearing.² I am satisfied that the Appellant

² Section 58 of the *Social Security Tribunal Rules of Procedure* sets out this rule.

received the notice of hearing because he had received all other correspondence from the Tribunal and had made requests for rescheduling. He had also received a reminder call on April 13, 2023, from the Tribunal wherein the Tribunal left him a voice message confirming the date and time. The Appellant could have contacted the Tribunal with any issues well before the time the hearing began.

[15] I am satisfied that the Appellant was aware of the hearing date. Given the two previous rescheduling's requested by the Appellant, and the most recent date and time granted at his request, I am not satisfied that the Appellant provided a reasonable excuse for not attending the hearing.

[16] So, the hearing proceeded but without the Appellant.

[17] I will note that the Canada Employment Insurance Commission did not attend the hearing either.

Issues

[18] I must 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?

[19] Yes, the money that the Appellant received is earnings. Here are my reasons for deciding that the money is earnings.

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

³ See section 35(2) of the EI Regulations.

[21] **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

[22] **Employment** is any work that you did or will do under any kind of service or work agreement.⁵

[23] The Appellant worked for his former employer from July 19, 2019, until his separation from employment on September 13, 2019

[24] The Appellant's former employer paid the Appellant \$4,608.00 for work completed for the week beginning July 14, 2019, to the week ending September 14, 2019. In addition, the employer paid the Appellant \$184.32 vacation pay for a total of \$4,792.32.⁶ The amounts as listed on both the Appellant's Record of Employment (RoE) and the report to the Commission about his earning match.

[25] The Commission decided that this money was earnings from work and vacation pay.

[26] The Appellant doesn't dispute that he worked and received pay during the noted period. However, he claims that the amounts noted by his employer are incorrect. He says that the pay amounts are wrong as well as the payment dates.

[27] In a response to a Request for Clarification sent to the Appellant he responded that the amounts shown are a weekly amount, and he submitted that he was paid biweekly. He says that he was paid roughly \$1,000.00 per month and there should only be two cheques (payments) not four as listed on the request for the month of August 2019.⁷

[28] The Commission requests the amount of earnings by the week. While it is accepted that the Appellant was paid biweekly, the employer was still required to break

⁴ See section 35(1) of the EI Regulations.

⁵ See section 35(1) of the EI Regulations.

⁶ See GD3-21 Appellant's Record of Employment.

⁷ See GD3-30 to 31.

his earnings down into amounts earned each week because EI benefits are paid based on each week of unemployment.

[29] The Appellant did not provide any pay stubs or other verifying information such as deposit amounts to his bank to support his claim that the amounts were wrong.

[30] The Appellant must prove that the money is **not** earnings. The Appellant must prove this on a balance of probabilities. This means that he must show that it is more likely than not that the money isn't earnings.

[31] The Appellant has not shown that the amounts noted by the employer as his earnings are wrong. So, based on the submissions of the Commission and supported by the documents provided to them by the employer, I am convinced that the amounts listed are the correct earnings and vacation pay attributable to the Appellant.

Did the Commission allocate the earnings correctly?

[32] I find that the Commission correctly allocated the Appellant's earnings.

[33] The law says that earnings must be allocated to certain weeks. What week's earnings are allocated to depend on why you received the earnings.⁸

[34] Earnings from working while in receipt of benefits must be allocated to the weeks in which those earnings occurred.⁹ "Vacation Pay" paid because of a separation from employment is considered earnings and must be allocated to the week in which the separation occurs.¹⁰

[35] The Appellant's earnings are wages he received from working for the employer between July 19, 2019, and September 13, 2019, plus vacation pay. The Appellant's employer paid the Appellant those earnings because of the Appellant working during those weeks. It paid him vacation pay when he was separated from his employment.

⁸ See Section 36 of the EI Regulations.

⁹ See Section 36(4) of the EI Regulations.

¹⁰ See Section 36(9) of the EI Regulations.

The employer issued a RoE confirming the amounts, the weeks in which they were paid, the reason and date the Appellant was separated from his employment.

[36] The law says that the earnings you get while working must be allocated to the weeks you worked and earned that money. It doesn't matter when you actually receive those earnings. The earnings have to be allocated in the week you earned them, even if you didn't get those earnings at that time.¹¹

[37] I find that the Appellant started working the week of July 14, 2019. the RoE states this his first day of work was July 19, 2019. The Appellant continued working until September 13, 2019, which falls in the week beginning September 8, 2019, and ending September 14, 2019, The Appellant did not dispute that he worked during the weeks listed by the employer.

[38] The employer provided the Commission a breakdown of the Appellant's weekly earnings, noting that he worked a total of nine weeks and earned \$4,608.00. In addition, it paid him 184.32 in Vacation pay in the week of September 8, 2019, for a total of \$4,792.32. The Appellant's RoE matches the report provided by the employer to the Commission.

[39] The Commission submitted a recap that details the weeks in which the Appellant both received benefits and worked. It shows the allocation of the amounts provided by the employer to the same weeks in which the Appellant worked.¹²

[40] I am satisfied that the Commission correctly allocated the Appellant's earnings. It took the earnings information provided by the employer and applied those amounts to the same weeks in which the Appellant received benefits.

[41] It completed the requisite calculations and determined that the Appellant had been paid excess benefits of \$2,027.00, to which he was not entitled. It issued an

¹¹ See section 36(9) of the EI Regulations.

¹² See GD7

overpayment requesting the repayment of the benefit to which the Appellant was not entitled.

Did the Commission Act Judicially when it Reconsidered the Appellant's claim?

[42] I find that the Commission acted judicially when it reconsidered the Appellant's claim.

[43] The Commission **may** reconsider a claim under the *Employment Insurance Act* (Act) when it does so within 36 months after the benefits have been paid.¹³

[44] Where the EI Act uses the word may, it means that the Commission has the discretion to choose whether to act or not. When the Commission exercises its discretion to act, it is expected that the Tribunal will not interfere with the Commission's decision unless it can be shown that the Commission,

- acted in bad faith, acted for an improper purpose or motive,
- took into account an irrelevant factor,
- ignored a relevant factor,
- or acted in a discriminatory manner.

[45] The Appellant was paid benefits for the weeks beginning July 14, 2019, to September 14, 2019. It contacted the Appellant to obtain clarification of his employment while in receipt of benefits on October 11, 2021, and issued its decision July 6, 2022. I am satisfied that the Commission reconsidered the Appellant's claim within the legislated 36 months from when the benefits in question were paid to the Appellant.

[46] I am satisfied that the Commission considered the relevant factors necessary to determine that the Appellant had earnings subject to allocation. The Commission became aware that the Appellant may have received earnings from work while in receipt of benefits. It contacted both the employer and the Appellant to obtain clarifying information. Based on that information and in accordance with the legislation, it found

¹³ See Section 52(1) of the *Employment Insurance Act*.

that the Appellant had received earnings and it allocated those earnings as it was obligated to do.

[47] There is no evidence that the Commission considered an irrelevant factor. Nor can I find any evidence that it acted in bad faith or for an improper purpose. The Commission is obligated to determine that EI benefits are only paid to eligible claimants and only in the amounts authorized by law. That is what they did in this case.

[48] There is no evidence that it acted in a discriminatory manner. From my experience and on the reliance of the presented evidence, I am satisfied that it followed its usual procedures as it does in all similar situations for the allocation of earnings.

[49] The Appellant raised the issue that because he was ill and had been in hospital, he says that he was unaware that he needed to report the earnings.

Did the Appellant have to Report the Income?

[50] The Appellant says that he did not think he had to report the income because he was on sickness benefits.

[51] Although the Appellant was receiving sickness benefits, he was required to submit biweekly reports. His benefit statement would have told him so and he must have completed the reports to have received the benefits. His biweekly reports required him to answer whether he worked during a week in which he was claiming sickness benefits.

[52] He submits that he was confused coming out of hospital and thought he did not have to declare the income. He says he made a mistake and asks for grace and leniency. He suggests that he was very trusting of others who were assisting him and handling sensitive information. He says that it was an error in understanding that led to this issue. He requests that he not be required to repay the overpayment of EI benefits.

[53] The Commission submits that despite the Appellant knowing he was working while receiving sickness benefits, it allowed leniency by not imposing a violation or

penalty. It considered his health issues mitigating circumstances. However, it asserts that it has no discretion to disregard the allocation of earnings.

[54] I am satisfied that the Appellant was aware that if he worked, he was obligated to report the earnings. He had to answer the question regarding whether he is working on his biweekly report. If he was well enough to work, he was well enough to know to report it on his biweekly claims for benefits.

[55] Regardless, even if he did not know he had to report his earnings, or did not know how to make the report, the law is clear. All earnings must be allocated. There is no exemption from allocation of earnings because the Appellant was in hospital, confused, or otherwise unaware of the impacts of earnings on EI benefits.

[56] The allocation of earnings is a legislative mandate which the Commission properly and accurately carried out.

Conclusion

[57] The appeal is dismissed.

[58] The Appellant received \$4,608.00 in employment earnings. In addition, he received \$184.32 in vacation pay resulting from his separation of employment. All these monies are earnings under the Act subject to allocation to the appropriate weeks in which they were earned or paid.

[59] Since the Appellant received sickness benefits during those weeks when he had earnings, the Commission correctly allocated those earnings to the appropriate weeks which reduced his benefits payable. The resulting \$2,027.00 overpayment of benefits is correctly calculated and remains subject to recovery from the Appellant.

Mark Leonard
Member, General Division – Employment Insurance Section