



Citation: *NB v Canada Employment Insurance Commission*, 2023 SST 1829

Social Security Tribunal of Canada General Division – Employment Insurance Section

Decision

Appellant: N. B.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (563545) dated April 27, 2023 (issued by Service Canada)

Tribunal member: Suzanne Graves

Type of hearing: In person

Hearing date: September 20, 2023

Hearing participant: Appellant

Decision date: October 10, 2023

File number: GE-23-1437

Decision

[1] The appeal is dismissed. The Appellant received earnings, and the Canada Employment Insurance Commission (Commission) allocated (in other words, assigned) those earnings to the correct weeks.

Overview

[2] The Appellant was laid off from his job on August 27, 2020, and received salary continuance pay until July 14, 2021. He applied for employment insurance (EI) benefits on January 6, 2021.

[3] The law says that all earnings have to be allocated to certain weeks. Which weeks the earnings are allocated to depends on why you received the earnings.

[4] The Commission decided that the Appellant's salary continuance payments are "earnings" under the law. It allocated the Appellant's earnings starting from the week of January 3, 2021, at an amount of \$1,351 per week.

[5] The Appellant doesn't dispute that he received earnings, the amount of his salary continuance, or the weeks they were allocated to.

[6] He says that he never intended to claim EI benefits but was told to do so by a Service Canada officer. The officer also instructed him not to report the salary he received because there had been changes to the law. He says that he would never have claimed EI benefits if he had known that the salary continuance payments would affect those benefits.

Issues

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

- a) Are the Appellant's salary continuance payments earnings?
- b) If the payments are earnings, did the Commission allocate the earnings correctly?

Analysis

Is the money that the Appellant received earnings?

[8] Yes, the weekly \$1,351 payments that the Appellant received in salary continuance are earnings. 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.¹ 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.²

[11] **Employment** is any work that you did or will do under any kind of service or work agreement.³

[12] The Appellant has to prove that the money is **not** earnings. He 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.

[13] The Appellant doesn't dispute that his salary continuance payments are earnings under the law. He testified that he was laid off by his employer due to COVID-19 in August 2020. He decided to receive salary continuance rather than a lump sum severance payment. Since he was getting salary continuance from his employer, he chose not to claim any COVID-related benefits.

[14] In January 2021, the Appellant went into a Service Canada office to discuss the start date of his Canada Pension Plan (CPP) benefits. The Appellant testified that he never intended to claim EI benefits, but a Commission officer told him that he should apply right away. That officer helped him to apply for EI benefits. He says that he didn't

¹ See section 35(2) of the *Employment Insurance Regulations* (EI Regulations).

² See section 35(1) of the EI Regulations.

³ See section 35(1) of the EI Regulations.

hide any details and gave his record of employment (ROE) to Service Canada, which clearly showed that he was continuing to receive his salary.⁴

[15] The Appellant also testified that the Service Canada representative told him not to declare the salary continuance he received because the law had changed and it wouldn't affect his EI benefits.

[16] The Appellant's former employer continued to pay the Appellant his salary between January 3, 2021, and July 14, 2021. The Commission decided that since this money was paid as salary continuance, it is earnings under the law.

[17] I find that the Commission correctly decided that the Appellant's salary continuance was earnings under the law.

Did the Commission allocate the earnings correctly?

[18] The law says that earnings have to be allocated to certain weeks. Which weeks earnings are allocated to depends on why you received the earnings.⁵

[19] The parties agree that the Appellant's earnings are salary continuance payments. The Appellant's employer continued to pay his salary for several months from August 27, 2020, until July 14, 2021, after he was separated from his job.

[20] Earnings you get have to be allocated to the week they were earned, even if you didn't get those earnings at that time.⁶ The Appellant started claiming EI benefits during the week of January 3, 2021. He was still receiving salary continuance from January 3, 2021, until July 14, 2021.

[21] The amount of money to be allocated starting the week of January 3, 2021, is \$1,351 per week.⁷ This is because \$1,351 is the amount the Appellant continued to

⁴ The Appellant's record of employment (ROE) is at GD3-19 to 20.

⁵ See section 36 of the EI Regulations.

⁶ See section 36(9) of the EI Regulations.

⁷ The Commission initially allocated an amount of \$1,541 per week in earnings, which included the amount of the Appellant's pension from his employer. On April 27, 2023, the Commission reversed its decision to allocate the Appellant's private pension. (GD3-66 to 67)

receive as regular weekly earnings. The parties don't dispute the amount of his earnings, and I accept it as fact.

[22] So, I find that the Commission allocated the Appellant's earnings to the correct weeks.

[23] I accept the Appellant's forthright testimony that he followed advice from a Service Canada officer when he began claiming EI benefits in January 2021. He informed the officer he was receiving salary continuance. The officer assured him that he was entitled to EI benefits, and that the salary continuance wouldn't affect his claim.

[24] I have compassion for the Appellant's situation, particularly since he now has an overpayment of benefits to repay. But the *Employment Insurance Act* (EI Act) sets out a strict test and I have to apply the law, even if the Commission made errors.⁸ I have to follow the rules set out in the EI Act and cannot make exceptions for special cases even in the interest of compassion.⁹

The Appellant's benefit period start date isn't before the Tribunal

[25] The Commission says that the Appellant's benefits claim was established in error on January 3, 2021, because he hadn't yet experienced an interruption in earnings.¹⁰ It says that his benefit period should have started on July 18, 2021. This is because the Appellant's employer continued to pay his salary until July 14, 2021.

[26] The Commission says that it will review and recalculate the Appellant's claim once the Tribunal process is complete.

[27] I make no decision on the start date of the Appellant's benefit period, as that issue is not before the Tribunal.

⁸ *Robinson v. Canada (Attorney General)*, 2013 FCA 255.

⁹ In *Canada (Attorney General) v Lévesque*, 2001 FCA 304, the Federal Court of Appeal held that the legislation has to be followed, regardless of the personal circumstances of the appellant (see also *Pannu v Canada (Attorney General)*, 2004 FCA 90).

¹⁰ The Commission makes this argument at GD4-4.

[28] **The Appellant should contact the Commission to discuss the recalculation of his claim, and whether it will affect the amount of his overpayment.**

Conclusion

[29] The Appellant received earnings. Those earnings were correctly allocated from the week of January 3, 2021, until July 14, 2021, at \$1,351 per week.

[30] The law requires me to dismiss the appeal.

Suzanne Graves
Member, General Division – Employment Insurance Section