



Citation: *EG v Canada Employment Insurance Commission*, 2023 SST 1938

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

## Decision

**Appellant:** E. G.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (593043) dated June 8, 2023 (issued by Service Canada)

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**Tribunal member:** Linda Bell

**Type of hearing:** Teleconference

**Hearing date:** September 8, 2023

**Hearing participants:** None

**Decision date:** September 12, 2023

**File number:** GE-23-2273

## Decision

[1] E. G. is the Appellant. I am dismissing his appeal.

[2] The money the Appellant received as vacation pay is earnings. The earnings are allocated to his Employment Insurance (EI) claims from January 15, 2023, to March 18, 2023. This means the Appellant is not entitled to receive EI benefits during this period.

## Overview

[3] The Appellant applied for EI benefits when he lost his job on January 11, 2023. The Commission established his benefit period effective January 15, 2023.

[4] The employer issued a Record of Employment (ROE) listing \$18,321.91 paid for vacation pay. The Commission allocated this money to the Appellant's EI claims from January 15, 2023, to March 18, 2023.

[5] The Appellant disagrees with the Commission's allocation of his vacation pay. He appeals to the Social Security Tribunal. The Appellant asks that his vacation pay not be allocated to his EI claims because he needs money to cover his own cost of living and to send money to his family in Sudan.

## Matter I must consider first

### No one appeared at the hearing

[6] I think both parties received the Notice of Hearing the Tribunal sent by email on September 1, 2023. This is because there is no indication that the emails failed to send. But no one appeared at the hearing.

[7] The Notice of Hearing states the hearing may go ahead even if one of the parties is missing. A hearing can go ahead without a party if the Member is satisfied that they got the notice of hearing.<sup>1</sup> There is no indication that either party requested an

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<sup>1</sup> Section 58 of the *Social Security Tribunal Rules of Procedure* sets out this rule.

adjournment or contacted the Tribunal to advise they were unable to dial into the teleconference or attend the hearing.

[8] As I am satisfied the parties were notified of the teleconference hearing, I proceeded to determine the merits of this appeal based on the evidence on file.

## **Issues**

[9] Is the Appellant's \$18,321.91 vacation pay earnings, as defined by the *Employment Insurance Regulations* (Regulations)?

[10] If so, how are those earnings to be allocated to the Appellant's EI claims?

## **Analysis**

### **Earnings**

[11] The law says that the entire income from employment is earnings.<sup>2</sup> All pecuniary or non-pecuniary income that is or "will be" received from an employer is income.<sup>3</sup>

[12] There is no dispute that the Appellant received \$18,321.91 as vacation pay due to separation from his employment. This is income stemming directly from the Appellant's employment. There is nothing in the appeal documents that would make me find otherwise. Accordingly, I find as fact the Appellant received earnings of \$18,321.91 due to separation from his employment.

### **Allocation**

[13] Earnings that are paid or payable to a claimant are applied to their claims and deducted from their EI benefits. This is called allocation. The reason for allocating earnings is to avoid double compensation.<sup>4</sup>

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

<sup>3</sup> See section 35(1) of the Regulations.

<sup>4</sup> *Canada (Attorney General) v. Walford*, A-263-78.

[14] Earnings are allocated depending on the nature of the earnings: why were the earnings paid? The earnings are allocated based on the Appellant's normal weekly earnings.

[15] The law outlines the allocation that applies to earnings that are paid by reason of permanent separation from employment. The Federal Court of Appeal clarified that a payment is made "by reason of" separation from employment at the time the employment is terminated.<sup>5</sup>

[16] The allocation of these earnings starts the week of the Appellant's last day worked if he did not work a full workweek. The allocation starts the week after his last day worked in cases where his last week worked was a full workweek. The allocation starts in that week despite when the earnings were paid or payable.<sup>6</sup>

– **Normal weekly earnings**

[17] Normal weekly earnings are the ordinary or usual earnings a claimant earns on a regular basis at their employment.<sup>7</sup> This does not include money paid due to separation.

[18] Where a claimant is paid wages at an hourly rate, the normal weekly earnings are calculated by multiplying the number of hours normally worked by the hourly rate of pay. If the normal hours worked varies from week to week, the normal weekly earnings are the average of the weekly gross wages for the weeks under review.<sup>8</sup>

[19] I disagree with the Commission's submission that the Appellant's average normal weekly earnings were \$1,953. Instead, I find the Appellant's average normal weekly earnings were \$1,984.

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<sup>5</sup> *Canada (Attorney General) v. Savarie*, FCA A-704-95.

<sup>6</sup> Subsection 36(9) of the Regulations

<sup>7</sup> See *Canada (Attorney General) v Fox*, A-841-96.

<sup>8</sup> For example, see *Chaulk v Canada (Attorney General)*, 2012 FCA 190 and *D.S. v Canada Employment Insurance Commission*, AD-18-373.

[20] The earnings listed on the ROE on file support that the Appellant's wages varied each pay period. So, his normal weekly earnings are the average of the weekly gross wages during full weeks worked.

[21] Upon review of the ROE, I recognize the Appellant's last day paid is Wednesday, January 11, 2023, and the pay period end date is January 15, 2023. The pay period type is biweekly. This means the Appellant did not work a full two weeks in the final pay period. I also recognize that pay period 1 on the ROE includes his \$18,321.91 vacation pay plus his earnings in the last pay period.

[22] So, when determining the Appellant's average normal weekly earnings, I considered the earnings listed on the ROE in the 26 pay periods from 2 thru 27 (complete biweekly pay periods), which total \$103,172.08. As stated above the pay periods were biweekly, so \$103,172.08 divided by 26 pay periods, and divided by 2 to convert from biweekly to weekly, equals average weekly earnings of \$1,984.08.

[23] Based on the foregoing, the Appellant's normal weekly earnings to be considered for the allocation are \$1,984.08. I will now determine the allocation of the separation money.

– **Earnings in the last week**

[24] The Commission determined the Appellant's earnings in his last week worked were \$472.68.<sup>9</sup> This was discussed with the Appellant on June 8, 2023. I see nothing in the appeal documents that would change this. So, I find as fact that the Appellant's earnings in his last week worked were \$472.68.

– **Allocation of vacation pay**

[25] After careful consideration of the evidence, as set out above, I find the \$18,321.91 earnings (vacation pay) paid due to separation, is allocated as follows. This is based on the Appellant's \$1,984.08 normal weekly earnings (NWE) and his \$472.68 earnings last week paid.

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<sup>9</sup> See page GD3-27.

<b>Amount allocated</b>	<b>Allocated to the week(s)</b>
\$ 1,511.40	Jan 8, 2023 – Jan 14, 2023 (\$1,984.08 NWE - \$472.68 last week worked)
\$15,872.64	Jan 15, 2023, to March 11, 2023 (8 weeks x \$1,984.08 NWE)
<u>\$ 937.87</u> \$18,321.91	March 12, 2023, to March 18, 2023,

[26] So, the Appellant's earnings (vacation pay paid due to separation) of \$18,321.91 is allocated from January 8, 2023, to March 18, 2023.<sup>10</sup> I recognize that the Appellant's claim (benefit period) did not start until January 15, 2023. This means his earnings are allocated to his EI claims from January 15, 2023, to March 18, 2023. He is not entitled to receive EI benefits during this period.

[27] Although I have determined the Appellant's average normal weekly earnings to be higher than that calculated by the Commission, this does not change the outcome of the allocation. This is because the amounts allocated to his EI claims from the weeks of January 15, 2023, to March 18, 2023, still prevent the payment of EI benefits.

[28] I sympathize with the Appellant given the circumstances he presented. But my decision is not based on fairness or financial hardship. Instead, my decision is based on the facts before me and the application of the EI law. There are no exceptions and no room for discretion. I cannot interpret or rewrite the EI Act or Regulations in a manner that is contrary to their plain meaning, even in the interest of compassion.<sup>11</sup>

## **Conclusion**

[29] The appeal is dismissed.

Linda Bell  
Member, General Division – Employment Insurance Section

<sup>10</sup> See section 36(9) of the Regulations.

<sup>11</sup> *Canada (Attorney General) v Knee*, 2011 FCA 301