



Citation: *IS v Canada Employment Insurance Commission*, 2024 SST 424

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant: I. S.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (620480) dated October 27, 2023
(issued by Service Canada)

Tribunal member: Gerry McCarthy

Type of hearing: Teleconference

Hearing date: January 18, 2024

Hearing participant: Appellant

Decision date: January 25, 2024

File number: GE-23-3149

Decision

[1] The appeal is dismissed. The Appellant received earnings (“Pay in Lieu of Notice”). And the Canada Employment Insurance Commission (Commission) allocated (in other words, assigned) those earnings to the right weeks.

Overview

[2] The Appellant received \$5,961.54 in “Pay in Lieu of Notice” from his former employer (“X”). The Commission decided the money was “earnings” under the law because the “Pay in Lieu of Notice” payment was made by reason of the Appellant’s separation from his employment.

[3] 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

[4] The Commission allocated a portion of the Appellant’s “Pay in Lieu of Notice” (\$3,128.00) from August 13, 2023, to August 19, 2023, and the balance of \$599.00 to the week of August 20, 2023. The total amount allocated was \$3,727.00.

[5] The Commission says the Appellant was terminated on July 7, 2023, and then received four-weeks of compensation for the period of July 11, 2023, until August 7, 2023. As a result, the Commission says August 7, 2023, was the Appellant’s last day paid (GD3-24). The Commission says a portion of the Appellant’s “Pay in Lieu of Notice” was *considered payable* during the last week of employment from August 7, 2023, to August 12, 2023, which was why not all of the “Pay in Lieu of Notice” of \$5,962.54 was allocated to his claim.

[6] The Appellant disagrees with the Commission. The Appellant says his “Pay in Lieu of Notice” was paid in place of his regular salary for two-weeks. The Appellant says from the week of dismissal (June 26, 2023) to the end of the contract period (August 7, 2023) there were six-weeks, and he received his regular amount of salary for exactly six

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

weeks (per contract) plus the vacation bank and nothing more. The Appellant says he didn't see any reason the amount of \$5,961.54 (regardless of what it is called) should be applied against his claim after August 13, 2023 (GD13).

Matters I have to consider first

Post-Hearing documents

[7] The Commission submitted post-hearing representations and information from the Appellant's former employer (GD12-1 to GD12-2). The post-hearing representations were dated January 19, 2024. I accepted these documents as relevant to the appeal. I further provided the Appellant until **January 24, 2024**, to provide a response to the Commission's supplementary representations and the additional information from his former employer.

[8] The Appellant also submitted post-hearing documents. I accepted these documents as relevant to the appeal and they were automatically shared with the Commission. The documents were listed in the Appeal Record as GD11 and GD13.

Issues

[9] 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?

[10] Yes, the \$5,961.54 the Appellant received as "Pay in Lieu of Notice" was earnings. Here are my reasons for deciding that the money is earnings.

[11] The law says that earnings are the entire income that you get from any employment.² The law defines both “income” and “employment.”

[12] **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.³ Case law has affirmed the principle that amounts paid because of the severance of the employment relationship were earnings.⁴

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

[14] The Appellant’s former employer gave the Appellant \$5,961.54. The Commission decided this money was “Pay in Lieu of Notice” and given to the Appellant because of the severance of the employment relationship. So, the Commission said the money was earnings under the law.

[15] The Appellant doesn’t agree. He says the “Pay in Lieu” in question was paid in place of his regular salary for two-weeks.

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

[17] I find the \$5,961.54 the Appellant received as “Pay in Lieu of Notice” was earnings for the following reasons:

[18] First: The “Pay in Lieu of Notice” provided to the Appellant was made to compensate him for the severance of the employment relationship. In short, the monies were provided **by reason** of the Appellant’s separation from his employer. I realize the Appellant submitted the monies were in place of his regular salary for two-weeks.

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

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

⁴ See *Blais v Canada (Attorney General)*, 2011 FCA 320; *Boucher Dancause v Canada (Attorney General)*, 2010 FCA 270; *Cantin v Canada (Attorney General)*, 2008 FCA 192.

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

However, the employer (O. M./Payroll) confirmed the Appellant's "Pay in Lieu of Notice" was paid over two payments. Specifically, O. M. stated the Appellant was paid \$1,788.46 on July 6, 2023, and \$4,173.08 on July 20, 2023, for a total of \$5,961.54 (GD12-2).

[19] Second: The Appellant's "Pay in Lieu of Notice" didn't meet any of the exemptions listed for income as listed in the regulations.⁶

Did the Commission allocate the earnings correctly?

[20] Yes, the Commission has allocated the Appellant's "Pay in Lieu of Notice" correctly. Here are my reasons for making this finding.

[21] The law says that earnings have to be allocated to certain weeks. What weeks earnings are allocated to depend on why you received the earnings.⁷

[22] The Appellant's earnings were for "Pay in Lieu of Notice." The Appellant's employer gave the Appellant those earnings because the Appellant was separated from his employment. So, I find the "Pay in Lieu of Notice" was paid to the Appellant because of the separation from his employment and his last day paid was August 7, 2023 (GD3-17).

[23] The law says that the earnings you get for being separated from your job have to be allocated starting the week you were separated. 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.**⁸

[24] I find the Appellant was separated from his job starting the week of August 7, 2023. I find this because the Appellant's last day paid on his Record of Employment was listed as August 7, 2023. I further find the employer (O. M.) stated that the Appellant's salary continuance was covered until August 7, 2023 (GD12-2). So, I agree with the Commission that a portion of the Appellant's "Pay in Lieu of Notice" was

⁶ See section 35(7) of the EI Regulations.

⁷ See section 36 of the EI Regulations.

⁸ See section 36(9) of the EI Regulations.

considered payable during the last week of the Appellant's employment from August 7, 2023, to August 12, 2023.

[25] The amount of money to be allocated starting the week of August 13, 2023, is \$3,128.00. This is because \$3,128.00 is the Appellant's normal weekly earnings. The parties don't dispute this amount, and I accept it as fact (GD3-25). This means that starting the week of August 13, 2023, \$3,128.00 is allocated to each week. If there is any amount of earnings that is left over, it will be allocated to the last week. In the Appellant's case, a balance of \$599.00 was applied against his benefits for the week of August 20, 2023.

Additional Submissions from the Appellant

[26] I recognize the Appellant wrote that the "pay in lieu" in question was paid in place of his regular salary for two-weeks and this was indicated on his termination letter (GD13). However, the employer (O. M.) specifically provided the breakdown for the Appellant's "Pay in Lieu of Notice" which was paid over **two payments**: \$1,788.46 on July 6, 2023, and \$4,173.08 on July 20, 2023 (totalling \$5,961.54) (GD12-2). As mentioned, the "Pay in Lieu of Notice" was paid to the Appellant for the severance of the employment relationship.

[27] I especially wish to emphasize the employer (O. M.) provided further details of the Appellant's salary continuance as distinguished from his "Pay in Lieu of Notice." O. M. explained that the Appellant's salary continuance covered the period from July 10, 2023, to August 7, 2023. Specifically, the Appellant's salary continuance was in three transactions: July 20, 2023 (\$1,788.46); August 3, 2023 (\$5,961.54 paid via wire transfer, meant to represent 80 hours); and August 17, 2023 (\$3,576.92). O. M. further confirmed there were two payments made to the Appellant on July 20, 2023.

[28] Finally, I recognize the Appellant was frustrated and displeased his "Pay in Lieu of Notice" was applied against his claim starting the week of August 13, 2023. However,

I must apply the law and regulations to the evidence. In other words, I cannot ignore or re-fashion the law even for compassionate reasons.⁹

Conclusion

[29] The appeal is dismissed.

[30] The Appellant received \$5,961.54 in earnings. A portion of these earnings were allocated starting the week of August 13, 2023, at \$3,128.00 per week. Any amount left over is allocated to the last week. In the Appellant's case, a balance of \$599.00 was applied against his benefits for the week of August 20, 2023.

Gerry McCarthy

Member, General Division – Employment Insurance Section

⁹ *Knee v Canada (Attorney General)*, 2011 FCA 301.