



Citation: *FS v Canada Employment Insurance Commission*, 2024 SST 430

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

## Decision

**Appellant:** F. S.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (507256) dated October 20, 2022 (issued by Service Canada)

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**Tribunal member:** Katherine Parker

**Type of hearing:** Teleconference

**Hearing dates:** March 1 and 21, 2023

**Hearing participant:** Appellant

**Decision date:** February 23, 2024

**File number:** GE-22-3718

## Decision

[1] The appeal is allowed in part. The Appellant received earnings. But the Canada Employment Insurance Commission (Commission) didn't allocate (in other words, assign) those earnings to the right weeks. The Commission also erred when it allocated the separation money based on weekly average earnings instead of normal weekly earnings.

[2] The \$26,464 that the Appellant received is earnings. These earnings are to be applied (allocated) based on normal weekly earnings of \$734.81 for 36 weeks. The allocation of earnings applies to the weeks of January 13, 2019, to September 21, 2019. The balance of \$11.23 is to be allocated to the week of September 22, 2019.

[3] The allocation, as set out above, may change the overpayment amount. I am not writing off or reducing the overpayment because I don't have the authority to do that.

## Overview

[4] The Appellant is appealing the calculation of overpayment. He said that there were too many calculations, changes, and that none of these changes were explained to him.

[5] Although the appeal is about allocation of earnings which resulted in a large overpayment, for the Appellant it is much more. The Tribunal felt it was important to provide some background in the decision because it involves layers of mistakes made by the Commission, one compounded by the other. These mistakes led to upset and confusion for an Appellant who had already experienced personal trauma and grief.

[6] The Commission and the Canada Revenue Agency (CRA) made numerous mistakes and clerical errors in its submissions. It took several investigations and letters to get the information the Tribunal needed to write this decision.

## **Matters I have to consider first**

### **Errors made by the Commission and the Canada Revenue Agency (CRA)**

[7] Although the appeal is about a large overpayment that resulted from an allocation of earnings and retroactive payment of benefits, for the Appellant it is much more. The Commission made multiple errors when processing the Appellant's amended Record of Employment (ROE), amending his claims, and paying additional benefits retroactively.<sup>1</sup> These mistakes led to upset and confusion for the Appellant who had already experienced personal trauma and grief.

[8] The Commission's errors continued in their submissions to the Tribunal. In addition, CRA made errors in its insurability ruling, which required further clarification.<sup>2</sup> It took several requests for investigations and letters to get accurate information needed to determine the issues under appeal.

[9] I apologize for the length of time it took to deliver this decision. But the delay was necessary in order to obtain accurate information needed to provide this decision.

## **Issues**

[10] Is the separation money that the Appellant received earnings?

[11] If the money is earnings, how are those earnings to be allocated?

[12] Can I write off or reduce the overpayment?

## **Analysis**

### **Is the separation money that the Appellant received earnings?**

[13] Yes, I find that the \$26,464.39 the Appellant received is earnings. This is comprised of \$2,950.49 vacation pay, \$5,878.46 pay in lieu of notice, and \$17,635.44

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<sup>1</sup> These errors can be reviewed in the Commission's submissions in GD7, GD12, and GD17.

<sup>2</sup> See GD14 for the CRA ruling. And GD15 when I asked for clarification. GD16 provided a revised CRA ruling with errors corrected.

severance pay, paid due to separation from his employment. Here are my reasons for deciding that the money is earnings.

[14] The law says that earnings are the entire income that you get from any employment.<sup>3</sup> The law defines both “income” and “employment.”

[15] **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.<sup>4</sup> Case law says that severance pay is earnings.<sup>5</sup>

[16] **Employment** is any work that you did or will do under any kind of service or work agreement.<sup>6</sup>

[17] The Appellant agrees that his former employer gave him \$17,635.44 in bi-weekly instalments at his normal weekly earnings of \$734.81. It paid him from January 13, 2019, to June 29, 2019. 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 \$17,635.44 due to separation from his employment.

### **How are the earnings to be allocated?**

[18] 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>7</sup>

[19] 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**.

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<sup>3</sup> See section 35(2) of the EI Regulations.

<sup>4</sup> See section 35(1) of the EI Regulations.

<sup>5</sup> See *Blais v Canada (Attorney General)*, 2011 FCA 320.

<sup>6</sup> See section 35(1) of the EI Regulations.

<sup>7</sup> *Canada (Attorney General) v. Walford*, A-263-78.

[20] Normal weekly earnings are the ordinary or usual earnings a claimant earns on a regular basis at their employment.<sup>8</sup> This does not include money paid due to separation.

[21] 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>9</sup>

[22] The allocation of these earnings starts the week the Appellant lost his employment, which in this case was the week of January 13, 2019. The allocation starts in that week despite when the earnings were paid or payable.<sup>10</sup>

[23] I find that the Appellant was laid off starting the week of January 13, 2019. This is because his ROE says that he was laid off.<sup>11</sup> CRA issued a ruling and said that these payments are earnings.<sup>12</sup>

[24] The Commission revised the allocation of earnings when it received information about the pay in lieu of notice and vacation pay. But it used the average weekly earnings to make the allocation instead of normal weekly earnings.<sup>13</sup> As stated above, the law says that the total amount of separation earnings has to be allocated using the claimant’s normal weekly earnings, not the average weekly earnings.<sup>14</sup>

[25] I find the Appellant’s normal weekly earnings were \$734.81. This is supported by the fact that the employer paid his severance pay biweekly, based on his normal biweekly salary of \$1,469.62. But the Commission allocated the separation money based on the Appellant’s average weekly earnings, but this isn’t what the law says it should do.

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<sup>8</sup> See *Canada (Attorney General) v Fox*, A-841-96.

<sup>9</sup> *Canada (Attorney General) v. Savarie*, FCA A-704-95.

<sup>10</sup> Subsection 36(9) of the Regulations

<sup>11</sup> See GD3-52.

<sup>12</sup> See GD14-1 to GD14-2, and GD16-1 for the revised CRA ruling after it corrected some clerical errors.

<sup>13</sup> See GD12-1, item 3.

<sup>14</sup> See section 36(9) and 36(11) of the *Employment Insurance Regulations* (the Regulations).

[26] So, I find that the Appellant's separation money of \$26,464.39 is to be allocated to his EI claims at \$734.81 per week for 36 weeks, from January 13, 2019, to September 21, 2019. The balance of \$11.23 is to be allocated to the week of September 22, 2019.

### **Can I write off or reduce the overpayment?**

[27] I don't have the jurisdiction to decide on requests to write off or reduce an overpayment. That authority belongs to the Commission.<sup>15</sup>

[28] But the law states that an amount payable for an overpayment under section 43 of the EI Act, may be written off by the Commission if the overpayment arises as a result of a delay or error made by the Commission.<sup>16</sup> It also states that an overpayment may be written off in cases where the benefits were received more than 12 months before the Commission notifies the debtor of the overpayment.

[29] The final overpayment amount is yet to be determined. It has been more than five years since these benefits became payable. These matters have been further delayed because of multiple errors and clerical mistakes by both the Commission and CRA.

[30] The Appellant says that he expected that his total earnings would have been allocated correctly from the beginning. He wasn't aware that when the Commission processed the revised ROE it caused a major revision of his benefits.

[31] On February 3, 2020, the Appellant received a large lump sum from the Commission of \$8,000. On February 8, 2020, the Commission sent the Notice of Debt owing of \$3,780.<sup>17</sup> Any benefits received between June 30, 2019, and September 21, 2019, would be considered an overpayment if the earnings were above the Earnings Threshold or no benefits payable amount.

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<sup>15</sup> See section 56 of the EI Regulations.

<sup>16</sup> See paragraph 56(2)(b) of the EI Regulations.

<sup>17</sup> See GD3-56.

[32] It's not clear why the Commission issued the Appellant retroactive payments for Family Caregiver Benefits for the weeks of January 13, 2019, to June 30, 2019, when he was receiving his full salary. It appears that the Commission did this when it processed the Appellant's request to back date his October 17, 2019, application. But he had only asked to have his claim backdated to September 22, 2019. This means the overpayment from this period was the result of errors made by the Commission.

[33] When the Commission issued benefits when the Appellant was receiving his full salary, it resulted in the issuing of partial benefits. For this reason, the extension to the benefit period got cancelled. The Commission issued a decision letter on December 13, 2019, advising the Appellant that his benefit period would be extended to May 23, 2020. This had been extended by the number of weeks he had been receiving his biweekly severance payments. But when the Commission allocated benefits during the Appellant's earnings period, he was no longer entitled to an extension of the benefit period. The consequence to the Appellant is that he lost out on the possibility of additional benefits.

[34] I recognize that the law states that an amount payable for an overpayment under section 43 of the EI Act, may be written off by the Commission if the Commission considers that, having regard to all the circumstances, the repayment of the amount, would result in undue hardship to the debtor (claimant).<sup>18</sup>

[35] However, a decision by the Commission about waiving or writing off an overpayment cannot be appealed to the Tribunal.<sup>19</sup> The Federal Court of Canada has the jurisdiction to hear an appeal relating to a write-off issue.<sup>20</sup>

[36] But in this case, I recommend that the Commission consider whether it could write off the Appellant's debt under section 43 of the EI Act, or 56(2) and 56(1)(f)(ii) of the EI Regulations. The Appellant has endured considerable trauma, confusion, and

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<sup>18</sup> See section 56(1)(f)(ii) of the EI Regulations.

<sup>19</sup> Section 112.1 of the EI Act.

<sup>20</sup> See *Steel v Canada (Attorney General)*, 2011 FCA 153, and *Bernatchez v Canada (Attorney General)*, 2013 FC 111.

had no control over the decisions and mistakes made by the Commission that resulted in an overpayment.

[37] I also ask that you consider whether the new allocation of earnings, as set out above, extends the benefit period. If so, give further consideration as to whether the Appellant may qualify for benefits during the extended period.

## **Conclusion**

[38] The appeal is allowed in part.

[39] The Appellant received earnings of \$26,464.39 due to separation from his employment. These earnings are allocated at \$734.81 per week for 36 weeks, from January 13, 2019, to September 21, 2019. The balance of \$11.23 is to be allocated to the week of September 22, 2019.

[40] I recommend that the Commission consider writing off the overpayment or consider whether the overpayment could be reduced by any benefits the Appellant may be entitled to receive if he qualifies for a benefit period extension.

Katherine Parker  
Member, General Division—Employment Insurance Section