



Citation: *NG v Canada Employment Insurance Commission*, 2024 SST 1056

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

Decision

Appellant: N. G.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (603714) dated September 19, 2023 (issued by Service Canada)

Tribunal member: Angela Ryan Bourgeois

Type of hearing: Teleconference

Hearing date: January 10, 2024

Hearing participant: Appellant

Decision date: February 22, 2024

File number: GE-23-3308

Decision

[1] The appeal is dismissed. The Appellant received earnings. The Canada Employment Insurance Commission (Commission) was correct in allocating the earnings, but it didn't allocate the right amounts to the right weeks.

Overview

[2] The Appellant had to take time off work because of illness. While her disability insurer considered whether she was entitled to disability benefits, the Appellant had no income.

[3] So, she applied for EI benefits and an initial claim was started as of June 19, 2016.

[4] The Commission paid the Appellant EI benefits from June 19, 2016, to December 17, 2016.

[5] In January 2017, the Appellant was successful in her appeal to obtain short-term disability benefits. Because of this, her employer had to make various accounting changes to the money it had paid the Appellant. Her employer paid her the \$4,847.32 in vacation pay that it should have paid her on September 23, 2016.¹

[6] In February 2017, the insurer decided that the Appellant had been entitled to benefits since September 2016. It paid her a lump sum of \$12,210.86 for payments it should have made earlier.²

[7] The Commission decided that these payments were "earnings" under the law because it was wage-loss insurance and vacation pay.

[8] The law says that all earnings must be allocated to certain weeks. Which weeks earnings are allocated to, depends on why the earnings were paid.³

¹ See page GD3-38.

² This is the gross, not net amount. See page GD3-100.

³ See section 36 of the *Employment Insurance Regulations* (EI Regulations).

[9] The Commission originally allocated earnings starting the week of June 19, 2016. But since the Appellant hadn't misrepresented her earnings, the Commission was only allowed to reconsider her claim from November 2016, onward. This is because the original decision wasn't made until October 2019, and the Commission only had 36 months to reconsider her claims.⁴

[10] The Appellant disagrees with the Commission. The Appellant says that she didn't do anything wrong. She says without EI benefits she would have been homeless. She says that even with the EI benefits she needed to borrow money to survive, and when she got the lump sum from her insurer, she had to repay that money.

Other matters I needed to consider

[11] The Commission's evidence and representations didn't show how it calculated the amount of earnings it allocated to each week. So, I asked the Commission for clarification.⁵ The Commission responded by the deadline.⁶ I then gave the Appellant time to respond to this new information.⁷ The Appellant responded, and I have considered her response.⁸

Issues

[12] I must decide the following two issues:

- a) Is the money the Appellant received earnings?
- b) If the money is earnings, did the Commission allocate the earnings correctly?

Analysis

[13] The law says that:

⁴ This time is extended when there has been a false or misleading statement made about the claim.

⁵ See GD06.

⁶ See GD07.

⁷ See GD08. At the hearing we focused on her wage-loss earnings because the Commission didn't mention vacation pay in the decision part of its representations. See GD4-6 to GD4-9. So the Appellant needed time to consider and provide a response, which she did.

⁸ See GD09.

- “earnings” include income paid under a group wage-loss indemnity plan and vacation pay⁹
- payments under a group sickness or disability wage-loss indemnity plan are allocated to the weeks in respect of which the payments are paid or payable¹⁰
- vacation pay that is not paid for a specific vacation period is allocated to a number of weeks that begin with the first week for which it is payable, in such a manner that for each week except the last, the amount allocated is equal to the claimant’s normal weekly earnings from that employment.¹¹

[14] The Appellant must prove that it is more likely than not that the money she received as vacation pay and disability benefits are not earnings, or that the Commission made a mistake in how it allocated them.

Do the disability benefits constitute earnings?

[15] Yes, the Appellant’s disability benefits are earnings. This is because they were paid to her under a group wage-loss indemnity plan.

[16] Disability benefits are a wage-loss indemnity plan because they are meant to replace a person’s wages when they can no longer work.

[17] I find that the Appellant’s benefits are part of a group plan because the employer told the Commission that it was.

[18] Since the benefits are earnings, they must be allocated to weeks.

⁹ See section 35 of the EI Regulations. Earnings are the entire income of a claimant arising out of any employment. “Income” includes any income that a claimant did or will get from an employer or any other person, whether it is in the form of money or something else. “Employment” includes any employment under any contract of service or employment. Section 35(2)(c)(i) of the EI Regulations specifies that payments a claimant receives or is entitled to receive under a group wage-loss indemnity plan are earnings.

¹⁰ See section 36(12)(b) of the EI Regulations.

¹¹ See section 36(8)(b) of the EI Regulations.

How should the disability benefits be allocated?

[19] By law, the Commission must allocate wage-loss indemnity payments to the weeks in which the payments are paid or payable.¹²

[20] It is undisputed that the Appellant received a lump sum payment of \$12,210.86 in February 2017 that represented a monthly payment of \$2,861.92 from September 23, 2016, to January 31, 2017.¹³

[21] It is also undisputed that the Commission can only go back 36 months in its review of the Appellant's claim because there was no misrepresentation made on her claim. This means that the Commission can only allocate earnings starting in November 2016.

[22] So, the Appellant's earnings are allocated as follows:

Week of	Earnings
November 6, 2016	\$658 ¹⁴
November 13, 2016	\$658
November 20, 2016	\$658
November 27, 2016	\$658
December 4, 2016	\$658
December 11, 2016	\$658

¹² Sections 35(2)(c)(i) and 36(12)(b) of the EI Regulations says that payments made under a group disability wage-loss indemnity plan are allocated to the weeks in respect of which payments are paid or payable.

¹³ See page GD3-100 to GD3-101.

¹⁴ The vacation pay earnings must be added to this amount to get the total earnings allocated to this week. See paragraph 40 of this decision.

[23] The Appellant's earnings are allocated at the rate of \$658 because she received \$12,210.86 for the period of September 23, to January 31, 2017 (130 days). This represents earnings of \$658 per week.

[24] These are my calculations:

$$\$12,211 \div 130 \text{ days} \times 7 = \$658 \text{ per week}$$

[25] The Commission allocated these earnings at \$660 per week. It calculated this amount using the monthly payment amount.¹⁵ I have used \$658 per week because it is based on the actual amount paid to the Appellant for the specific period in question.

Vacation pay

[26] As per the employer's policy, the Appellant had to exhaust her vacation before she was laid off for the summer. She stopped working in March 2016, and used her vacation leave until June 16, 2016.¹⁶ This exhausted her vacation leave.

[27] Then, in January 2017, the Appellant's appeal about her short-term disability was approved. She was put on short-term disability effective May 16, 2016.

[28] So, the employer credited the Appellant the vacation leave she used in May and June 2016.

[29] The Appellant's short-term disability ended on September 23, 2016, but she didn't return to work. The employer considered this a separation of employment and paid out her vacation. Since the disability wasn't approved until January 2017, the actual payment for her vacation pay wasn't made until February 3, 2017. The employer updated the Appellant's record of employment on February 2, 2017, to show the payment of her vacation pay in the amount of \$4,847.32.¹⁷

¹⁵ See page GD7-1.

¹⁶ See second paragraph on page GD3-28.

¹⁷ See page GD3-35.

[30] The Appellant received vacation pay, and under the law, vacation pay is considered earnings. This means that her vacation pay must be allocated. So I must decide to which weeks the vacation pay gets allocated. I also have to determine the Appellant's normal weekly earnings.

[31] As mentioned above, vacation pay that is paid upon separation of employment (and not for a specific vacation period) is allocated to a number of weeks that begin with the first week for which it is payable, in such a manner that for each week except the last, the amount allocated is equal to the claimant's normal weekly earnings from that employment.¹⁸

[32] So, first I'll decide what the Appellant's normal weekly earnings are.

[33] The Commission allocated the Appellant's vacation pay at a weekly rate of \$976. It doesn't explain how it determined the Appellant's normal weekly earnings to be \$976.

[34] I find that the Appellant's normal weekly earnings were \$735. According to her record of employment, her biweekly salary was \$1,462.13.¹⁹ So, her normal weekly earnings are \$1,462.13 divided by 2, rounded to the nearest dollar, which is \$735.

[35] The Appellant's vacation pay was paid in February 2017, but the payment should have been made upon her separation from employment on September 23, 2016.²⁰

[36] So the allocation would have been:

Week of	Earnings
September 25, 2016	\$735
October 2, 2016	\$735
October 7, 2016	\$735

¹⁸ See section 36(8)(b) of the EI Regulations.

¹⁹ See amended record of employment on page GD3-35.

²⁰ See page GD3-38.

October 16, 2016	\$735
October 23, 2016	\$735
October 30, 2016	\$735
November 6, 2016	\$437
Total vacation pay allocated	\$4,847

[37] Since only the week of November 6, 2016, falls within the 36 months from when the Commission could reconsider the Appellant's claims, this is the only week of allocation that stands, and is the only week that can potentially affect the amount of benefits payable to the Appellant.

[38] The Commission didn't explain why it started the allocation of vacation pay on September 4, 2016, and continued the allocation until December 11, 2016.²¹ Allocating \$4,847 at \$976 a week, the Appellant's total vacation pay would have been fully allocated after five weeks.

[39] Based on my findings about when the Appellant's vacation pay became payable and the amount of her normal weekly earnings, vacation pay in the amount of \$437 is allocated to the week of November 6, 2016.

[40] So, for the week of November 6, 2016, the total allocated earnings are \$658 in wage-loss earnings plus \$437 in vacation pay, totalling \$1,095.

[41] The Appellant says she doesn't understand how vacation pay could be issued during a sick leave.²² Her vacation pay was payable in September 2023 because, as I mentioned above, after her short-term disability benefits were approved, her employer gave back the vacation credits that she used in May and June 2016. Then, upon the

²¹ See page GD4-5 and GD7-1.

²² See page GD9-1.

separation of her employment (when her short-term benefits ended and she didn't return to work), her vacation pay became payable. Even though it wasn't paid until February 2017, it was payable on September 23, 2023, so that is the relevant date when it comes to allocating these earnings.

Retroactive wage increase and special allowance

[42] The parties agree that these earnings are not allocated to weeks that affect the amount of EI benefits payable.²³ I accept this as fact as I see no evidence to the contrary.

Overpayment

[43] The Appellant is upset with everything that happened after her fall, which led to her sick leave, and her claim for EI benefits. She had no control over how her employer, her insurer and the Commission managed matters, and the Commission's delay in making its decision led her to believe everything was okay.

[44] She told me that she's been vulnerable throughout the entire process and now she is stuck with an overpayment that she can't possibly repay. She is asking me to forgive the debt for compassionate reasons.

[45] I sympathize with the Appellant's situation. It isn't clear how my decision about the allocation of earnings will impact the amount of her overpayment. But when a person receives more EI benefits than they were entitled to receive, they must repay then. I have no authority to ignore an allocation or forgive a debt for compassionate reasons. The law simply doesn't give me this power.

Conclusion

[46] The earnings are allocated as follows:

²³ I'm referring to the retroactive wage increase of \$439 that would have been allocated to a period before her initial claim started, and a bonus of \$825, that would have been allocated to a period before September 1, 2016, when the services were performed. See section 36(4) of the EI Regulations.

Week of	Earnings
November 6, 2016	\$1,095 (vacation pay and wage-loss earnings)
November 13, 2016	\$658 (wage-loss earnings)
November 20, 2016	\$658 (wage-loss earnings)
November 27, 2016	\$658 (wage-loss earnings)
December 4, 2016	\$658 (wage-loss earnings)
December 11, 2016	\$658 (wage-loss earnings)

[47] This means that the appeal is dismissed, but I am changing the allocations.

Angela Ryan Bourgeois
Member, General Division – Employment Insurance Section