



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *A. G. v. Canada Employment Insurance Commission*, 2017 SSTGDEI 3

Tribunal File Number: GE-16-1864

BETWEEN:

A. G.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Teresa M. Day

HEARD ON: November 9, 2016

DATE OF DECISION: January 10, 2017

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Appellant attended the hearing of her appeal via teleconference.

INTRODUCTION

[1] The Appellant made an initial claim for employment insurance regular benefits (EI benefits) on September 18, 2015. The Respondent, the Canada Employment Insurance Commission (Commission) reviewed the amended Record of Employment (ROE) provided by the Appellant's employer and, on February 25, 2016, allocated separation monies received by the Appellant against her claim from September 13, 2015 to November 14, 2015 (the pay in lieu of notice) and from November 22, 2015 to April 30, 2016 (the vacation pay and retiring allowance). The allocation of the pay in lieu of notice created an overpayment in the amount of \$4,716.00.00.

[2] On March 8, 2016, the Appellant requested the Commission reconsider its decision, stating that the pay in lieu of notice was only payable when she was permanently laid off on November 25, 2015 and, therefore, was not paid or payable to her during the period it had been allocated to her claim. The Commission maintained its decision and, on May 12, 2016, the Appellant appealed to the General Division of the Social Security Tribunal (Tribunal).

[3] The hearing was held by teleconference because that form of hearing respects the requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

ISSUE

[4] Whether the monies received by the Appellant from her employer upon separation from employment are considered earnings and, if so, whether they were properly allocated.

EVIDENCE

[5] On September 18, 2015, the Appellant made an initial claim for EI benefits after losing her employment with SNC- Lavalin Inc. (Lavalin) due to shortage of work (GD3-3 to GD3-12). The Appellant gave her last day of work as September 15, 2015, 2015 and indicated it was “unknown” as to whether she would be returning to work with this employer (GD3-5).

[6] Also on September 18, 2015, Lavalin issued an ROE indicating that the Appellant’s last day of work was September 15, 2015 and that her expected date of recall was “unknown”. The ROE included the comment: “Temporary lay off” (GD3-13).

[7] The Appellant established a claim effective September 20, 2015 (GD4-1).

[8] On November 30, 2015, Lavalin issued an amended ROE (GD3-14), which again indicated that the Appellant’s last day of work was September 15, 2015, but which now included the comment: “Permanent lay off effective November 25, 2015”. The amended ROE also confirmed the following payments to the Appellant:

- (a) \$3,140.80 for vacation pay
- (b) \$1,175.23 for banked overtime
- (c) \$13,431.20 for pay in lieu of notice
- (d) \$35,256.90 for retiring allowance (severance)

[9] On December 21, 2015, an agent of the Commission contacted the Appellant by telephone regarding the monies paid to her on separation from employment and documented their conversation in a Supplementary Record of Claim (GD3-15 to GD3-16). The Appellant confirmed the amounts and indicated that payment was received on December 9, 2015 following her permanent lay off from Lavalin (GD3-15).

[10] The Commission allocated the \$13,431.20 for pay in lieu of notice against the Appellant’s claim for EI benefits to the weeks from September 13, 2015 to November 14,

2015. The Appellant was advised of the allocation by letter dated February 25, 2016 (GD3-17 to GD3- 18), and a Notice of Debt was issued to her on February 27, 2016 for an overpayment of \$4,716.00 on account of the allocation (see overpayment calculation at GD3-35 and the Notice of Debt at GD3-36).

[11] The Commission performed a second allocation, namely the allocation of \$38,397.70 for vacation pay and severance against the Appellant's claim for EI benefits for the weeks from November 22, 2015 to April 30, 2016. The Appellant was advised of this allocation by letter dated February 25, 2016 (GD3-19 to GD3-20).

[12] On February 25, 2016, the Appellant contacted the Commission to advise that she started a new job on February 16, 2016, and to query the allocations (see Supplementary Record of Claim at GD3-21). The Commission's agent advised the Appellant that "notice pay is allocated from lay off in September and vacation pay and severance from week of separation in November".

[13] The Appellant requested the Commission reconsider its decision (GD3-22 to GD3-28), noting that the \$13,431.00 of pay in lieu of notice was not paid to her for the period September 13, 2015 to November 14, 2015 (the allocation period). The Appellant attached an explanation letter (GD3- 24) and two letters from Lavalin (GD3-25 to GD3-28). In the explanation letter, the Appellant stated:

"Please refer to the attached two letters received from the SNC Lavalin Inc. dated September 15, 2015 and November 25, 2015. As noted in these letters, I was temporarily laid off from September 16, 2015 to November 25, 2015. I didn't receive any money from SNC during the above period and I received \$4,500 from EI during the same period. SNC Lavalin Inc. terminated my employment effective November 25, 2015. As noted in your letter dated February 25, 2016, I received \$13,431 in pay in lieu of notice from SNC Lavalin Inc. on December 9, 2015. As you also noted, I received \$38,397.70 from SNC Lavalin Inc. on February 17, 2016.

Since I lost my job, I tried to get employed in other groups of SNC Lavalin Inc. from December 2015. I was told that since my employment was terminated on November 25, 2015 and they paid me in two occasions for 29 weeks starting from November 25, 2015, SNC Lavalin Inc. can't employ me until June 2016.

It is pretty clear from the above that SNC Lavalin Inc. paid me for the period starting November 25, 2015 and I didn't get any money from SNC Lavalin during my

temporary layoff period between September and November 2015, when I was paid by EI. The \$4,500 I received from EI was particularly helpful in my time of greatest need which I spent to cover my expenses related to family and child care expenses.

Therefore, I sincerely urge you to reconsider your decision to pay back \$4,500 that I received from EI.” (GD3-24)

[14] The first letter from Lavalin is dated September 15, 2015 (GD3-25 to GD3-26) and advised the Appellant that she will be placed on a temporary lay off due to shortage of work effective September 16, 2015. The second letter from Lavalin is dated November 25, 2015 (GD3-27 to GD3-28) and advised the Appellant that her employment has been terminated effective November 25, 2015. It is in the second letter (the termination letter) that Lavalin sets out the payments to be made upon separation from employment, including the following:

- (a) “An indemnity in lieu of notice pursuant to the Employment Standards Act and at Common Law representing twenty nine (29) weeks, less the applicable deductions at source.”
- (b) “Payment of any accrued by unused vacation or banked time, if any, less the applicable deductions at source.”
- (c) “During the duration of your eight (8) week statutory notice period from your Termination date, your current benefits will be maintained.”

[15] On April 20, 2016, an agent of the Commission telephoned the Appellant regarding her request for reconsideration and documented their call in a Supplementary Record of Claim (GD3-29). The agent documented the explanation provided to the Appellant as follows:

“Advised the claimant the wages in lieu of notice were actually payable to her when she was laid off temporarily on 15/09/15. The delay in paying the monies does not change the reason for the payment. Because the monies were payable at that time, they were allocated from the last day of work to 14/11/15.

The vacation pay and severance pay (retiring allowance) did not become payable until the permanent layoff, therefore those monies were allocated from the week of 22/11/15 to 30/04/16. The benefit period was extended by 31 weeks because of the allocations.

The claimant states the employer did not advise her of these rules. She requested a reduction in the overpayment amount. Advised the claimant the amount cannot be reduced or written off. She should contact the Canada Revenue Agency to make repayment arrangements.”

[16] By letter dated April 20, 2016, the Commission advised the Appellant that its allocation decisions of February 25, 2016 were maintained (GD3-30 to GD3-31). The Commission specifically advised that the wages in lieu of notice were payable when the Appellant was temporarily laid off on September 15, 2015 and therefore were allocated correctly from that date; and that the vacation pay and retiring allowance were payable when she was permanently laid off on November 25, 2015 and therefore were allocated correctly from that date.

[17] In her Notice of Appeal (GD2), the Appellant referenced the termination letter and the fact that she would be paid for eight weeks statutory notice starting from her termination date on November 25, 2015. The Appellant stated that she received the eight weeks “\$13,431 in pay in lieu of notice” on December 9, 2015 and \$38,397 for vacation and severance pay on February 17, 2016, and attached copy of a pay stub and cheque dated February 17, 2016 for \$13,515.14 (GD2-11).

At the Hearing

[18] The Appellant testified that the \$13,515.14 paid to her on December 9, 2015 was for the eight (8) weeks of notice that Lavalin was required to give her for terminating her employment, which they did on November 25, 2015. She stated that she was not entitled to pay in lieu of notice until she was permanently laid off and, therefore, the allocation of this amount against her claim during the prior period of her temporary lay off is incorrect.

[19] The Appellant further testified that she has paid into the employment insurance program for 10 years and needed her EI benefits to bridge the time she was between jobs. The Appellant stated that “it doesn’t make sense” that she should have to pay money back when she not only didn’t get the money when she was on EI benefits but it wasn’t even payable to her “back then”.

[20] The Appellant referred to the termination letter, which the Tribunal noted appeared to be incomplete. The Appellant was asked to provide a complete copy of the termination letter following the hearing, which she did (see GD6).

[21] The Appellant did not dispute the Commission's allocation of the \$38,397.70 for vacation pay and severance against her claim for the weeks from November 22, 2015 to April 30, 2016.

SUBMISSIONS

[22] The Appellant submitted that the pay in lieu of notice was not payable to her until her employment was terminated, which occurred when she was permanently laid off on November 25, 2015; and that the pay in lieu of notice should have been allocated against her claim from November 25, 2015. The Commission's allocation of these separation monies from the date of her temporary lay off in September 2015 is, therefore, incorrect.

[23] The Respondent submitted that it is the reason or motive for the payment, and not the date of payment that determines the date from which an allocation must begin. The pay in lieu of notice received by the Appellant constituted "earnings" pursuant to subsection 35(2) of the *Employment Insurance Regulations* (EI Regulations) and was made to compensate the Appellant because Lavalin was unable to provide sufficient notification of layoff on September 15, 2015. Consequently, the pay in lieu of notice was allocated pursuant to subsection 36(9) of the EI Regulations according to her normal weekly earnings from September 13, 2015 to November 14, 2015. By contrast, the vacation pay and severance, while also "earnings", were made to compensate the Appellant for the loss of her employment. These monies did not become payable until the permanent lay off occurred on November 25, 2015 and, consequently were allocated pursuant to subsection 36(9) of the EI Regulations according to her normal weekly earnings from November 22, 2015 to April 30, 2016.

ANALYSIS

[24] The relevant legislative provisions are reproduced in the Annex to this decision.

[25] Where a claimant is in receipt of monies during a benefit period, consideration must be given to whether the monies received are considered ‘earnings’ and, if so, whether these earnings should be allocated to the benefit period. Sections 35 and 36 of the EI Regulations define what monies are considered ‘income’, what is considered ‘earnings’ for the purposes set out in section 35, and how these earnings are to be allocated to the benefit period.

[26] The Appellant’s submissions in both her appeal materials and at the hearing were specifically directed to the Commission’s allocation of the \$13,431.20 pay in lieu of notice against her claim for EI benefits for the weeks from September 13, 2015 to November 14, 2015. The Tribunal notes that the Appellant does not dispute the Commission’s determination that these funds are considered “earnings” pursuant to subsection 35(2) of the EI Regulations. Rather, the Appellant takes issue with how the Commission has allocated the pay in lieu of notice against her claim for EI benefits, specifically the time period of the allocation.

[27] The Tribunal further notes that the Appellant made no submissions in either her appeal materials or at the hearing regarding the other allocation, namely the Commission’s allocation of \$38,397.70 for vacation pay and severance against her claim for the weeks from November 22, 2015 to April 30, 2016. The Tribunal, therefore, makes no findings with respect to this other allocation.

[28] With respect to the pay in lieu of notice, the Tribunal finds that these monies are considered “income” pursuant to subsection 35(1) of the EI Regulations because they were received by the Appellant from her employer. The Tribunal further finds that this income is considered “earnings” pursuant to subsection 35(2) of the EI Regulations because these monies arose directly from the Appellant’s employment.

[29] The Tribunal is supported in its analysis by the abundant jurisprudence in which the Federal Court of Appeal has ruled that monies received upon separation from employment, such as vacation pay, *pay in lieu of notice* and severance pay, are considered earnings and should be allocated pursuant to subsections 36(9) and 36(10) of the EI Regulations (*Blais 2011 FCA 320, Cantin 2008 FCA 192, Lemay 2005 FCA 433, Tremblay A-106-96, Stone A-496-94*).

[30] In the present case, the Appellant was paid \$13,515.14 explicitly identified by the employer as “Pay in lieu of notice” (GD3-14). The Appellant herself identified this amount as the equivalent of eight (8) weeks of her pay. According to the Appellant, eight (8) weeks is the statutory notice period that Lavalin should have given her prior to terminating her employment under the applicable employment standards legislation (in this case, the *Employment Standards Act* of Ontario). However, instead of providing the Appellant with advance notice of her termination and having her work the eight (8) weeks of notice (in which she would have earned eight (8) weeks of wages), Lavalin elected to simply pay her for eight (8) weeks of work and terminate her employment effective immediately on a date of its choice, which was November 25, 2015. These funds were paid to the Appellant on December 9, 2015.

[31] The Commission submitted that the pay in lieu of notice was paid to the Appellant to compensate her because Lavalin was unable to provide sufficient notice of the temporary lay off. The Tribunal cannot agree. Pay in lieu of notice is, by its very nature, payable as a consequence of termination of employment and, therefore, payable only upon termination. Indeed, under the *Employment Standards Act*, an employer is not required to provide employees with notice of a temporary layoff (which is defined as a layoff of not more than 13 weeks in any period of 20 weeks) and, by extension, is not required to remit pay in lieu of notice when notice of a temporary lay off is not given. The Appellant was temporarily laid off on September 15, 2015 and permanently laid off on November 25, 2015, some ten (10) weeks later. Therefore, as of November 25, 2015, there was no pay in lieu of notice due to the Appellant on account of the temporary lay off that occurred on July 15, 2015. It was only due to her because of the permanent lay off that occurred on November 25, 2015.

[32] The Tribunal therefore finds that the Commission erred when it concluded that the pay in lieu of notice paid to the Appellant was “payable” when the Appellant was temporarily laid off on September 15, 2015 (GD3-30 to GD3-31).

[33] However, the Appellant is nonetheless bound by the provisions of subsection 36(9) of the EI Regulations. Since the pay in lieu of notice was earnings paid to the Appellant by reason of her separation from employment, these monies must be allocated as prescribed by

subsection 36(9) of the EI Regulations. That is, they must be allocated to the number of weeks that begins with the separation prescribed in subsection 36(9) of the EI Regulations and in accordance with the Appellant's regular weekly earnings from her employment. It is not within the Tribunal's discretion to move, postpone or otherwise allocate earnings other than as prescribed in the EI Regulations.

[34] Subsection 36(9) of the EI Regulations provides as follows:

“all earnings paid or payable to a claimant by reason of a lay-off or separation from employment shall, ***regardless of the period in respect of which the earnings are purported to be paid or payable***, be allocated to a number of weeks that begins with the week of the lay-off or separation in such a manner that the total earnings of the claimant from that employment are, in each consecutive week except the last, equal to the claimant's normal weekly earnings from that employment (emphasis added).”

[35] While the Tribunal agrees with the Commission that it is the reason for the payment of monies and not the date of the payment that determines the date from which the allocation must begin (Gd4-3), the Tribunal finds that the Commission erred when it concluded that the pay in lieu of notice must be (and was) allocated from the week beginning with the week of the Appellant's temporary lay off on September 15, 2015 (namely from September 13, 2015 to November 14, 2015) pursuant to subsection 36(9) of the EI Regulations.

[36] According to subsection 36(9) of the EI Regulations, amounts paid by reason of a lay off are to be allocated to the weeks immediately following the lay off, and amounts paid by reason of a separation are to be allocated to the weeks immediately following the separation. The Tribunal is supported in this analysis by the Umpire decisions in *CUBs 24158 and 73115*, wherein it was held that amounts paid pursuant to a separation from employment are to be allocated to the weeks following the severing of ties from the employer rather than to the period following a prior lay-off. Justice Rothstein, sitting as an Umpire in *CUB 24158*, explicitly stated that amounts “referable to a lay-off” are to be “allocated to the weeks immediately following the *lay-off*”, and amounts “referable to a separation” are to be “allocated to the weeks immediately following the *separation*” (*emphasis added*).

[37] A further Umpire decision from 2009 is particularly relevant to the present case. In *CUB 73115*, the claimant was temporarily laid off due to a shortage of work on July 8, 2008.

Approximately nine (9) weeks later, she was permanently laid off and her employment terminated (on September 3, 2008). On September 17, 2008, she received pay in lieu of notice, vacation pay and severance pay. The Commission allocated her pay in lieu of notice and vacation pay to the weeks of her claim immediately following the initial lay off on July 8, 2008, and the severance pay to the weeks following her final separation from employment on September 3, 2008; an overpayment resulted. The claimant appealed, arguing that all of the monies should have been allocated from the final separation from employment. The Chief Umpire Designate allowed the claimant's appeal and, citing Justice Rothstein in *CUB 24158*, ruled that there was no legal basis for the Commission's decision to allocate the Claimant's pay in lieu of notice and vacation pay to the weeks following her temporary lay off in July 2008:

“That reasoning is equally applicable in the case at bar. The claimant received the monies in question as a result of her final separation from employment in September of 2008 and, in accordance with Regulation 36(9), all of the monies should have been allocated to the weeks following that separation. The monies are not in any way connected with the claimant's temporary lay-off in July of 2008 and no portion of them therefore, should be retroactively allocated to the weeks following that lay-off. There is no legislative mandate for allocating monies paid upon separation to a period following a prior lay-off.”

[38] In the present case, the Tribunal finds that the Appellant received pay in lieu of notice by reason of her final separation from employment, which occurred when she was permanently laid off on November 25, 2015. The Tribunal further finds that, in accordance with subsection 36(9) of the EI Regulations, the pay in lieu of notice received by the Appellant must be allocated against her claim to the weeks following her separation from employment on November 25, 2015.

CONCLUSION

[39] The Tribunal finds that the pay in lieu of notice received by the Appellant upon separation from her employment is considered earnings and must be allocated against her claim for EI benefits in accordance with subsection 36(9) of the EI Regulations.

[40] The Tribunal finds that the pay in lieu of notice received by the Appellant must be allocated to the weeks following her separation from employment on November 25, 2015.

[41] The Tribunal finds that the Commission has not properly allocated the pay in lieu of notice received by the Appellant. It is now up to the Commission to perform a recalculation by allocating the pay in lieu of notice received by the Appellant to the weeks following her separation from employment on November 25, 2015.

[42] The appeal is allowed.

Teresa M. Day
Member, General Division - Employment Insurance Section

ANNEX

THE LAW

35 (1) The definitions in this subsection apply in this section.

employment means

(a) any employment, whether insurable, not insurable or excluded employment, under any express or implied contract of service or other contract of employment,

(i) whether or not services are or will be provided by a claimant to any other person, and

(ii) whether or not income received by the claimant is from a person other than the person to whom services are or will be provided;

(b) any self-employment, whether on the claimant's own account or in partnership or co- adventure; and

(c) the tenure of an office as defined in subsection 2(1) of the *Canada Pension Plan*. (*emploi*)

income means any pecuniary or non-pecuniary income that is or will be received by a claimant from an employer or any other person, including a trustee in bankruptcy. (*revenu*)

pension means a retirement pension

(a) arising out of employment or out of service in any armed forces or in a police force;

(b) under the *Canada Pension Plan*; or

(c) under a provincial pension plan. (*pension*)

self-employed person has the same meaning as in subsection 30(5). (*travailleur indépendant*)

(2) Subject to the other provisions of this section, the earnings to be taken into account for the purpose of determining whether an interruption of earnings under section 14 has occurred and the amount to be deducted from benefits payable under section 19, subsection 21(3), 22(5), 152.03(3) or 152.04(4) or section 152.18 of the Act, and to be taken into account for the purposes of sections 45 and 46 of the Act, are the entire income of a claimant arising out of any employment, including

(a) amounts payable to a claimant in respect of wages, benefits or other remuneration from the proceeds realized from the property of a bankrupt employer;

(b) workers' compensation payments received or to be received by a claimant, other than a lump sum or pension paid in full and final settlement of a claim made for workers' compensation payments;

(c) payments a claimant has received or, on application, is entitled to receive under

(i) a group wage-loss indemnity plan,

(ii) a paid sick, maternity or adoption leave plan,

(iii) a leave plan providing payment in respect of the care of a child or children referred to in subsection 23(1) or 152.05(1) of the Act,

(iv) a leave plan providing payment in respect of the care or support of a family member referred to in subsection 23.1(2) or 152.06(1) of the Act, or

(v) a leave plan providing payment in respect of the care or support of a critically ill child;

(d) notwithstanding paragraph (7)(b) but subject to subsections (3) and (3.1), the payments a claimant has received or, on application, is entitled to receive from a motor vehicle accident insurance plan provided under a provincial law in respect of the actual or presumed loss of income from employment due to injury, if the benefits paid or payable under the Act are not taken into account in determining the amount that the claimant receives or is entitled to receive from the plan;

(e) the moneys paid or payable to a claimant on a periodic basis or in a lump sum on account of or in lieu of a pension; and

(f) where the benefits paid or payable under the Act are not taken into account in determining the amount that a claimant receives or is entitled to receive pursuant to a provincial law in respect of an actual or presumed loss of income from employment, the indemnity payments the claimant has received or, on application, is entitled to receive pursuant to that provincial law by reason of the fact that the claimant has ceased to work for the reason that continuation of work entailed physical dangers for

(i) the claimant,

(ii) the claimant's unborn child, or

(iii) the child the claimant is breast-feeding.

(3) Where, subsequent to the week in which an injury referred to in paragraph (2)(d) occurs, a claimant has accumulated the number of hours of insurable employment required by section 7 or

7.1 of the Act, the payments referred to in that paragraph shall not be taken into account as earnings.

(3.1) If a self-employed person has sustained an injury referred to in paragraph (2)(d) before the beginning of the period referred to in section 152.08 of the Act, the payments referred to in that paragraph shall not be taken into account as earnings.

(4) Notwithstanding subsection (2), the payments a claimant has received or, on application, is entitled to receive under a group sickness or disability wage-loss indemnity plan or a workers' compensation plan, or as an indemnity described in paragraph (2)(f), are not earnings to be taken into account for the purpose of subsection 14(2).

(5) Notwithstanding subsection (2), the moneys referred to in paragraph (2)(e) are not earnings to be taken into account for the purposes of section 14.

(6) Notwithstanding subsection (2), the earnings referred to in subsection 36(9) and allowances that would not be deducted from benefits by virtue of subsection 16(1) are not earnings to be taken into account for the purposes of section 14.

(7) That portion of the income of a claimant that is derived from any of the following sources does not constitute earnings for the purposes referred to in subsection (2):

(a) disability pension or a lump sum or pension paid in full and final settlement of a claim made for workers' compensation payments;

(b) payments under a sickness or disability wage-loss indemnity plan that is not a group plan;

(c) relief grants in cash or in kind;

(d) retroactive increases in wages or salary;

(e) the moneys referred to in paragraph (2)(e) if

(i) in the case of a self-employed person, the moneys became payable before the beginning of the period referred to in section 152.08 of the Act, and

(ii) in the case of other claimants, the number of hours of insurable employment required by section 7 or 7.1 of the Act for the establishment of their benefit period was accumulated after the date on which those moneys became payable and during the period in respect of which they received those moneys; and

(f) employment income excluded as income pursuant to subsection 6(16) of the *Income Tax Act*.

(8) For the purposes of paragraphs (2)(c) and (7)(b), a sickness or disability wage-loss indemnity plan is not a group plan if it is a plan that

(a) is not related to a group of persons who are all employed by the same employer;

(b) is not financed in whole or in part by an employer;

(c) is voluntarily purchased by the person participating in the plan;

(d) is completely portable;

(e) provides constant benefits while permitting deductions for income from other sources, where applicable; and

(f) has rates of premium that do not depend on the experience of a group referred to in paragraph (a).

(9) For the purposes of subsection (8), "portable", in respect of a plan referred to in that subsection, means that the benefits to which an employee covered by the plan is entitled and the rate of premium that the employee is required to pay while employed by an employer will remain equivalent if the employee becomes employed by any other employer within the same occupation.

(10) For the purposes of subsection (2), "income" includes

(a) in the case of a claimant who is not self-employed, that amount of the claimant's income remaining after deducting

(i) expenses incurred by the claimant for the direct purpose of earning that income, and

(ii) the value of any consideration supplied by the claimant; and

(b) in the case of a claimant who is self-employed in farming, the gross income from that self-employment, including any farming subsidies the claimant receives under any federal or provincial program, remaining after deducting the operating expenses, other than capital expenditures, incurred in that self-employment;

(c) in the case of a claimant who is self-employed in employment other than farming, the amount of the gross income from that employment remaining after deducting the operating expenses, other than capital expenditures, incurred therein; and

(d) in the case of any claimant, the value of board, living quarters and other benefits received by the claimant from or on behalf of the claimant's employer in respect of the claimant's employment.

(11) Subject to subsection (12), the value of the benefits referred to in paragraph (10)(d) shall be the amount fixed by agreement between the claimant and the claimant's employer and shall be an amount that is reasonable in the circumstances.

(12) Where the claimant and the employer do not agree on the value of the benefits referred to in paragraph (10)(d), or where the value fixed for those benefits by agreement between the claimant and the claimant's employer is not reasonable in the circumstances, the value shall be determined by the Commission based on the monetary value of the benefits.

(13) The value of living quarters referred to in paragraph (10)(d) includes the value of any heat, light, telephone or other benefits included with the living quarters.

(14) Where the value of living quarters is determined by the Commission, it shall be computed on the rental value of similar living quarters in the same vicinity or district.

(15) Where the remuneration of a claimant is not pecuniary or is only partly pecuniary and all or part of the non-pecuniary remuneration consists of any consideration other than living quarters and board furnished by the employer, the value of that consideration shall be included in determining the claimant's income.

(16) For the purposes of this section, living quarters means rooms or any other living accommodation.

36 (1) Subject to subsection (2), the earnings of a claimant as determined under section 35 shall be allocated to weeks in the manner described in this section and, for the purposes referred to in subsection 35(2), shall be the earnings of the claimant for those weeks.

(2) For the purposes of this section, the earnings of a claimant shall not be allocated to weeks during which they did not constitute earnings or were not taken into account as earnings under section 35.

(3) Where the period for which earnings of a claimant are payable does not coincide with a week, the earnings shall be allocated to any week that is wholly or partly in the period in the proportion that the number of days worked in the week bears to the number of days worked in the period.

(4) Earnings that are payable to a claimant under a contract of employment for the performance of services shall be allocated to the period in which the services were performed.

(5) Earnings that are payable to a claimant under a contract of employment without the performance of services or payable by an employer to a claimant in consideration of the claimant returning to or beginning work shall be allocated to the period for which they are payable.

(6) The earnings of a claimant who is self-employed, or the earnings of a claimant that are from participation in profits or commissions, that arise from the performance of services shall be allocated to the weeks in which those services are performed.

(6.1) The earnings of a claimant who is self-employed, or the earnings of a claimant that are from participation in profits or commissions, that arise from a transaction shall be allocated

(a) if the aggregate amount of earnings that arise from a transaction occurring in a week is greater than the maximum yearly insurable earnings referred to in section 4 of the Act

divided by 52, to the weeks in which the work that gave rise to the transaction was performed, in a manner that is proportional to the amount of work that was performed during each of those weeks or, if no such work was performed, to the week in which the transaction occurred; or

(b) if the aggregate amount of earnings that arise from a transaction occurring in a week is less than or equal to the maximum yearly insurable earnings referred to in section 4 of the Act divided by 52, to the week in which the transaction occurred or, if the claimant demonstrates that the work that gave rise to the transaction occurred in more than one week, to the weeks in which the earnings were earned, in a manner that is proportional to the amount of work that was performed during each of those weeks.

(6.2) The earnings of a claimant who is self-employed, or the earnings of a claimant that are from participation in profits or commissions, that do not arise from the performance of services or from a transaction shall be allocated equally to each week falling within the period in which the earnings were earned.

(7) The earnings of a claimant who is self-employed in farming shall be allocated

(a) if they arose from a transaction, in accordance with subsection (6.1); and

(b) if they were received in the form of a subsidy, to the week in which the subsidy was paid.

(8) Where vacation pay is paid or payable to a claimant for a reason other than a lay-off or separation from an employment, it shall be allocated as follows:

(a) where the vacation pay is paid or payable for a specific vacation period or periods, it shall be allocated

(i) to a number of weeks that begins with the first week and ends not later than the last week of the vacation period or periods, and

(ii) in such a manner that the total earnings of the claimant from that employment are, in each consecutive week, equal to the claimant's normal weekly earnings from that employment; and

(b) in any other case, the vacation pay shall, when paid, be allocated

(i) to a number of weeks that begins with the first week for which it is payable, and

(ii) in such a manner that, for each week except the last, the amount allocated under this subsection is equal to the claimant's normal weekly earnings from that employment.

(9) Subject to subsections (10) to (11), all earnings paid or payable to a claimant by reason of a lay-off or separation from an employment shall, regardless of the period in respect of which

the earnings are purported to be paid or payable, be allocated to a number of weeks that begins with the week of the lay-off or separation in such a manner that the total earnings of the claimant from that employment are, in each consecutive week except the last, equal to the claimant's normal weekly earnings from that employment.

(10) Subject to subsection (11), where earnings are paid or payable to a claimant by reason of a lay-off or separation from an employment subsequent to an allocation under subsection (9) in respect of that lay-off or separation, the subsequent earnings shall be added to the earnings that were allocated and, regardless of the period in respect of which the subsequent earnings are purported to be paid or payable, a revised allocation shall be made in accordance with subsection

(9) on the basis of that total.

(10.1) The allocation of the earnings paid or payable to a claimant by reason of a lay-off or separation from an employment made in accordance with subsection (9) does not apply if

(a) the claimant's benefit period begins in the period beginning on January 25, 2009 and ending on May 29, 2010;

(b) the claimant contributed at least 30% of the maximum annual employee's premium in at least seven of the 10 years before the beginning of the claimant's benefit period;

(c) the Commission paid the claimant less than 36 weeks of regular benefits in the 260 weeks before the beginning of the claimant's benefit period; and

(d) during the period in which the earnings paid or payable by reason of the claimant's lay-off or separation from an employment are allocated in accordance with subsection (9) or, if the earnings are allocated to five weeks or less, during that period of allocation or within six weeks following the notification of the allocation, the claimant is referred by the Commission, or an authority that the Commission designates, under paragraph 25(1)(a) of the Act, to a course or program of instruction or training

(i) that is full-time,

(ii) that has a duration of at least 10 weeks or that costs at least \$5,000 or 80% of the earnings paid or payable by reason of the claimant's lay-off or separation from employment,

(iii) for which the claimant assumes the entire cost, and

(iv) that begins during one of the 52 weeks following the beginning of the claimant's benefit period.

(10.2) If any of the conditions under which the Commission may terminate the claimant's referral under paragraph 27(1.1)(b) of the Act exists, the earnings paid or payable to the

claimant by reason of a lay-off or separation from an employment shall be re-allocated under subsection (9).

(11) Where earnings are paid or payable in respect of an employment pursuant to a labour arbitration award or the judgment of a tribunal, or as a settlement of an issue that might otherwise have been determined by a labour arbitration award or the judgment of a tribunal, and the earnings are awarded in respect of specific weeks as a result of a finding or admission that disciplinary action was warranted, the earnings shall be allocated to a number of consecutive weeks, beginning with the first week in respect of which the earnings are awarded, in such a manner that the total earnings of the claimant from that employment are, in each week except the last week, equal to the claimant's normal weekly earnings from that employment.

(12) The following payments shall be allocated to the weeks in respect of which the payments are paid or payable:

(a) payments in respect of sick leave, maternity leave or adoption leave or leave for the care of a child or children referred to in subsection 23(1) or 152.05(1) of the Act;

(b) payments under a group sickness or disability wage-loss indemnity plan;

(c) payments referred to in paragraphs 35(2)(d) and (f);

(d) workers' compensation payments, other than a lump sum or pension paid in full and final settlement of a claim made for workers' compensation payments;

(e) payments in respect of the care or support of a family member referred to in subsection 23.1(2) or 152.06(1) of the Act; and

(f) payments in respect of the care or support of a critically ill child.

(13) A payment paid or payable to a claimant in respect of a holiday or non-working day that is observed as such by law, custom or agreement, or a holiday or non-working day immediately preceding or following a holiday or non-working day that occurs at the establishment of the employer or former employer from whom the claimant receives that payment, shall be allocated to the week in which that day occurs.

(14) The moneys referred to in paragraph 35(2)(e) that are paid or payable to a claimant on a periodic basis shall be allocated to the period for which they are paid or payable.

(15) The moneys referred to in paragraph 35(2)(e) that are paid or payable to a claimant in a lump sum shall be allocated beginning with the first week that those moneys are paid or payable to the claimant in such a manner that those moneys are equal in each week to the weekly amount, calculated in accordance with subsection (17), to which the claimant would have been entitled if the lump sum payment had been paid as an annuity.

(16) The moneys allocated in accordance with subsection (14) or (15) shall not be taken into account in the allocation of other earnings under this section.

(17) The weekly amount shall be calculated in accordance with the following formula, according to the claimant's age on the day on which the lump sum payment is paid or payable:

$$A / B$$

where

A is the lump sum payment; and

B is the estimated actuarial present value* of \$1 payable at the beginning of every week starting from the day on which the lump sum payment is paid or payable and payable for the claimant's lifetime, as calculated each year in accordance with the following formula and effective on January 1 of the year following its calculation:

$$B = [\sum_{t=0 \text{ to infinity}} ({}_tP_x / (1+i)^t) - 0.5] \times 52$$

where

{}_tP_x is the probability that the claimant will survive for "t" years from the claimant's age "x" using the latest Canadian mortality rates used in the valuation of the Canada Pension Plan prorated in equal parts between males and females,

i is the annualized long-term Government of Canada benchmark bond yields averaged over the 12-month period beginning on the September 1 and ending on the August 30 before the January 1 on which the estimated actuarial present values are effective, expressed as a percentage and rounded to the nearest one tenth of a percentage, and

t is the number of years that the claimant survives according to the claimant's age for which the probability of survival is estimated by *{}_tP_x*.

*Note: The estimated actuarial present values are published annually on the Service Canada website.

(18) Earnings that are payable to a claimant under a government program intended to encourage re-employment and that are payable to the claimant as a supplement to earnings arising from a contract of employment shall be allocated to the period for which they are payable.

(19) Where a claimant has earnings to which none of subsections (1) to (18) apply, those earnings shall be allocated

(a) if they arise from the performance of services, to the period in which the services are performed; and

(b) if they arise from a transaction, to the week in which the transaction occurs.

(20) For the purposes of this section, a fraction of a dollar that is equal to or greater than one half shall be taken as a dollar and a fraction that is less than one half shall be disregarded.