Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *R. K. v. Canada Employment Insurance Commission,* 2017 SSTGDEI 89

Tribunal File Number: GE-16-4336

BETWEEN:

**R. K.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

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# SOCIAL SECURITY TRIBUNAL DECISION
## General Division – Employment Insurance Section

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DECISION BY: Amanda Pezzutto

HEARD ON: May 25, 2017

DATE OF DECISION: June 19, 2017

Canada

## REASONS AND DECISION

## PERSONS IN ATTENDANCE

The Appellant – R. K.

## INTRODUCTION

[1] The Appellant established a benefit period after he was laid off from his employment. Some months after his benefit period started, he notified the Commission that he would be receiving a pension from his employer. The Commission determined that a portion of the pension monies were earnings and would be allocated from the week of December 27, 2015, the week of his final separation from employment, creating an overpayment. The Appellant requested a reconsideration, but the Commission maintained its initial decision. The Appellant appealed to the Tribunal.

[2] The hearing was held by videoconference for the following reasons:

a) The fact that the credibility is not anticipated to be a prevailing issue.

b) The fact that the Appellant will be the only party in attendance.

c) The 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.

## ISSUES

[3] The Tribunal must determine whether the pension monies the Appellant received from his employer were earnings, and if so, the Tribunal must determine whether the monies were correctly allocated.

## EVIDENCE

[4] The Appellant applied for employment insurance regular benefits (GD3-3 to GD3-12). His employer submitted a Record of Employment (ROE) stating that he stopped working due to

a shortage of work and that he received some money on separation (GD3-13). Based on this evidence, the Commission established a benefit period commencing October 25, 2015.

[5] In March 2016, the Appellant notified the Commission that he was permanently severing ties with his employer and would receive an "eighty and out" pension payout based on his age and years of service. He stated that he expected to receive about $450,000, with about $200,000 going into a sheltered investment and the remainder into RRSPs. The Commission advised the Appellant that any "locked-in" portion would not be allocated, but any other portion of the employer's contributions would be allocated to the week of separation. The Appellant stated that he formally severed his employment relationship as of January 1, 2016 (GD3-15).

[6] In July 2016, the Appellant contacted the Commission with specific details about the sums of money he received from his employer. He submitted a letter from his employer's actuaries addressed to his bank stating that the Appellant would receive a total of $448,467.95. The letter stated that the amount of $201,954.65 could be transferred directly into an investment fund and would be tax-sheltered. The letter also stated that the Appellant had provided evidence that he had RRSP contribution room, so the remainder, $246,513.30, could be transferred directly to an RRSP without the deduction of income taxes (GD3-20).

[7] The Appellant submitted a bank statement showing that he transferred the entire amount directly to his bank (GD3-21 to GD3-22). The Appellant also submitted information from his collective agreement stating that, in the event of a mine closure, the full about of the pension benefit would become vested and payable (GD3-24).

[8] The Commission contacted the Appellant for details. He stated that he did not have access to the tax-sheltered amount ($201,954.65) until his retirement except in very limited circumstances. He stated that he had access to the other amount transferred to the RRSP ($246,513.30) but it would be taxed if he withdrew any of it. He stated that all of the money he received was employer contributions. He stated that he did not receive the money from his employer until May 2016, but his employment relationship permanently ended on January 1, 2016, and that he had agreed on the form of the pension payout in February (GD3-25).

[9] The Commission contacted the employer. The employer stated that the pension fund was completely funded by the employer (GD3-26).

[10] The Commission determined that the portion that was not locked-in ($246,513.30) was earnings and would be allocated at the rate of his normal weekly earnings from December 27, 2015, the week of separation (GD3-28 to GD3-29). Because the Appellant had already received benefits for this period, the decision resulted in an overpayment (GD3-27).

[11] The Appellant requested a reconsideration. On his reconsideration request, he stated that he earned the money over a period of 31 years of work, it had rested in an account with London Life, and then changed accounts untaxed (GD3-30 to GD3-31).

[12] The Commission contacted the Appellant. He stated that he had not paid taxes on the money because he had moved it directly to an RRSP and so did not think it should affect his entitlement to benefits (GD3-32).

[13] The Commission maintained its decision that the monies were earnings and were to be allocated from the week of separation at the rate of his normal weekly earnings (GD3-33 to GD3-34).

[14] The Appellant appealed to the Tribunal. On his notice of hearing, he stated that he had taken control of his pension but the money had merely changed accounts and had not been taxed (GD2-3 to GD2-5).

[15] At the hearing, the Appellant stated that, after he was laid off, his employer gave him the option to take control of his pension. He stated that he thought it would be safer to have control over the pension because his family was acquainted with an elderly couple who had lost their pension when their former employer went out of business.

[16] He described the circumstances that led to the closure of the mine where he worked. He described his role at the mine and his duties as a member of the union health and safety committee.

[17] The Appellant stated that his employer offered everyone options with the pension money. He stated that some of his former colleagues took something called “thirty and out”

where they received a monthly benefit from the employer until age 65, and then at 65, if the pension was still available, they would receive their usual pension. He stated that he opted for "eighty and out" so that he could take control of his own pension money and also because he feared that if he took "thirty and out" he would not be permitted to return if the mine ever reopened.

[18] The Appellant stated that about $200,000 of his pension money went directly into an investment and he was not allowed to access it. He stated that he asked if he could put the remainder into the same investment vehicle, but the bank told him it was not permitted.

[19] After the hearing, the Appellant submitted additional documents describing his pension. He submitted a letter from his employer stating that he had the option of receiving an immediate pension or a lump sum payment (GD5-2 to GD5-3). The letter included a page outlining his entitlement if he took the option of the immediate monthly pension benefit (GD5-4) and another page explaining his entitlement if he took the option of a lump sum payment. The document stated that he was entitled to a sum of money representing the commuted value of his deferred pension and noted that a portion of about $200,000 had to be "locked-in" and the remainder was in excess of the maximum transfer limited permitted by the Canada Revenue Agency and had to be taken in cash. The Appellant selected the option of transferring the locked-in portion to a Locked-In Retirement Account (LIRA) (GD5-12). The letter also defined the terms and stated that "locked-in" meant that he could not withdraw the money until he retired (GD5-6).

[20] The Appellant also submitted a letter from an insurance company explaining that the Appellant was transferring funds from a registered pension plan to a LIRA and to an RRSP. Included with the letter were copies of cheques (GD5-8 to GD5-11).

**SUBMISSIONS**

[21] The Appellant submitted that:

a) It was not fair that his employment insurance benefits were cut off after he took control of his pension; furthermore, it was unfair that the Commission expected him to pay back benefits he had already received.

b) His pension money was not taxed by the Canada Revenue Agency, so he could not see how the Commission considered it earnings for benefit purposes.

c) He has always tried to be responsible with his money and save for retirement; furthermore, the government encourages people to save for retirement. He feels like the Commission is penalizing him in this case for being responsible with his retirement savings.

[22] The Respondent submitted that:

a) Sums received from an employer are presumed to be earnings and so must be allocated unless they are specifically excluded in the *Employment Insurance Regulations* (Regulations).

b) Monies received as the result of a separation from employment must be allocated pursuant to subsection 36(9) of the Regulations. The earnings must be allocated from the week of separation to each subsequent week in an amount equal to the Appellant's normal weekly earnings. In this case, the Commission determined that the Appellant received $246,513.30 in earnings and allocated those earnings at the rate of $1977.36 from the week beginning December 27, 2015, since his separation from employment occurred on January 1, 2016.

c) The taxation of his separation monies does not have any bearing on how the monies affect his entitlement to employment insurance benefits.

**ANALYSIS**

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

**Which portion of the pension money is relevant to this appeal?**

[24] The Tribunal finds that the non-locked-in portion of the money ($246,513.30) is relevant to this appeal. The Tribunal declines to interfere with the Commission's decision on the locked-in portion ($201,954.65).

[25] The Commission did not make submissions on the locked-in portion of the Appellant's money; based on the evidence on file, it is unclear whether the Commission determined that the locked-in portion was not earnings, or whether the Commission simply determined that the locked-in portion was not to be allocated from the week of separation. In any event, the Tribunal notes that the Appellant does not appear to dispute the Commission's decisions about the locked- in portion of the monies. Accordingly, the Tribunal accepts the Commission's decision on the locked-in portion.

[26] For the purposes of this appeal, the Tribunal will focus solely on the issues related to the non-locked-in portion of the earnings ($246,513.30).

**Was the money the Appellant received from his employer earnings?**

[27] The Tribunal finds that the money the Appellant received from his employer in the amount of $246,513.30 is earnings for the purposes of determining the amount to be deducted from benefits. The Tribunal also finds that the earnings are a lump sum paid in lieu of a pension, as described in paragraph 35(2)(f) of the Regulations.

[28] The Appellant does not dispute that he received the money from his employer because of his employment relationship. Furthermore, he has consistently described the money he received from his employer as a pension and the Tribunal notes that he submitted a letter from the employer specifically describing the money as a lump sum representing the commuted value of his pension.

[29] The Commission argues that any money received from an employer is presumed to be earnings and refers to the money as a "return of employer contributions."

[30] The Tribunal gives weight to the employer's letter describing the nature of the money. The employer, in their dealings with the Appellant and the Appellant's bank, has consistently described the money as a pension. The Tribunal notes that the employer gave the Appellant the option of receiving his pension pay-out as a lump sum or a monthly pension, and so the Tribunal is satisfied that the money, no matter which option the Appellant chose, should be considered a pension.

[31] The Tribunal notes that paragraph 35(2)(f) of the Regulations specifically includes moneys paid in a lump sum on account of or in lieu of a pension as earnings to be taken into account when determining the amount to be deducted from benefits. The Tribunal is also guided by *Pleau v. Commission (Attorney General of Canada)*, A-721-95, where the Federal Court of Appeal held that a lump sum could be considered a pension when both the employer and the claimant had an agreement that the sum was intended to meet the claimant's ongoing financial needs into retirement.

[32] The Tribunal finds that the money arose as a result of the employment relationship and so finds that the money should be considered earnings. The Tribunal also finds that the employer and the Appellant agreed that the money paid to the Appellant was intended to be a pension, but that the Appellant had the freedom to invest the money as he chose. Accordingly, the Tribunal finds that the money was paid as a lump sum in lieu of a pension and so is specifically included as earnings under paragraph 35(2)(f) of the Regulations.

**How is the money to be allocated?**

[33] The Tribunal finds that the earnings were paid to the Appellant as a lump sum in lieu of a pension, and so the earnings should be allocated in accordance with subsections 36(15) and (17) of the Regulations.

[34] The Tribunal notes, again, that the Appellant has consistently described the earnings as a pension and that he has submitted documentation from his employer describing the earnings as a lump sum representing the commuted value of his pension. The Appellant has also consistently stated that he became entitled to his pension earnings on January 1, 2016.

[35] The Commission argues that the Appellant received the earnings by reason of his final separation from employment and so the earnings should be allocated from the week of the separation (December 27, 2015) at the rate of his normal weekly earnings, pursuant to subsection 36(9) of the Regulations.

[36] Since neither party appears to dispute the event that triggered the payment or the date that the earnings became payable, the Tribunal accepts that the earnings are payable from the week beginning December 27, 2015.

[37] The Tribunal acknowledges that the payment of the earnings appear to be linked to the Appellant's separation from employment. However, the Tribunal gives weight to the employer's documents and the Appellant's statements characterizing the earnings as a pension and finds that the earnings should be considered a lump sum paid in lieu of a pension, for reasons already described above.

[38] The Tribunal notes that section 35 of the Regulations distinguishes earnings paid as a pension from other kinds of earnings arising from employment. Subsection 36 of the Regulations sets out distinct approaches for allocating earnings paid by reason of separation and earnings paid as a lump sum in lieu of a pension. The Tribunal notes that the Regulations do not provide specific guidance on how to reconcile subsection 36(9) with subsections 36(15) and (17). However, given the fact that the Regulations appear to treat pension earnings as distinct from other kinds of earnings, the Tribunal finds that the allocation rules set out in subsections 36(15) and (17) of the Regulations should supersede the allocation rules set out in subsection 36(9). In other words, the Tribunal finds that since the Appellant's earnings should be considered pension earnings, they should be allocated as pension earnings and not as earnings paid by reason of separation.

[39] Subsection 36(15) states that pension monies paid as a lump sum are to be allocated from the first week the monies are paid or payable and that the weekly amount is to be calculated according to the formula set out in subsection 36(17) of the Regulations.

[40] In order to apply the formula set out in subsection 36(17) of the Regulations, the Tribunal is guided by the tables set out in section 5.13.6.4 of the *Digest of Benefit Entitlement Principles* (available at https://www.canada.ca/en/employment-social-development/programs/ei/ei- list/reports/digest/chapter-5/money-arising-pension-fund.html#a5_13_6_4).

[41] On December 27, 2015, the Appellant was 51 years old. He received $246,513.30 as a lump sum payment. According to the table and calculation guidelines set out in the *Digest*, the lump sum amount must be divided by 1000 and then multiplied by 0.82, resulting in a weekly allocation of $202.

[42] Accordingly, the Tribunal finds that the pension amount of $202 should be allocated from the week of December 27, 2015, pursuant to subsections 36(15) and 36(17) of the Regulations.

**Is the Appellant obligated to repay benefits as a result of the allocation?**

[43] The Tribunal finds that the pension earnings must be allocated to the Appellant's benefit period, despite the fact that he invested the money into an RRSP, and that he must repay any overpayment that arises from the allocation.

[44] Subsection 19(2) of the *Employment Insurance Act* (EI Act) states that earnings during any week of unemployment must be deducted from the benefits payable, subject to regulations setting out allowable earnings.

[45] The Tribunal acknowledges that the Appellant has submitted evidence demonstrating that he immediately invested the money into an RRSP and that he did not pay income tax on the earnings. However, the Tribunal notes that money subject to income taxes and earnings for employment insurance benefit purposes are distinct concepts and so the taxability of the Appellant's income does not have any bearing on the effect of his earnings on his entitlement to employment insurance.

[46] The Tribunal is guided by the Umpire decision in CUB 67176, where the Umpire affirmed that a personal decision to invest any earnings in an RRSP does not exempt a claimant from the allocation requirements set out in section 36 of the Regulations.

[47] Section 43 of the EI Act requires a claimant to repay any benefits that the claimant was not entitled to receive. Accordingly, the Tribunal finds that the Appellant is obligated to repay any overpayment resulting from the allocation of his pension.

[48] However, the Tribunal also notes that allocating the Appellant's earnings as a pension, rather than at the rate of his normal weekly earnings, results in a much lower weekly allocation, and so this is likely to have a significant effect on the calculation of the overpayment. The Appellant's benefit rate or any allowable earnings provisions affecting the Appellant were not issues under appeal. As a result, the Tribunal declines to consider the calculation of the Appellant's overpayment. However, the Tribunal requests that the Commission contact the

Appellant to discuss the recalculation of his overpayment as a result of the Tribunal's findings on the issue of allocation.

**CONCLUSION**

[49] The appeal is allowed in part.

Amanda Pezzutto
Member, General Division - Employment Insurance Section

## ANNEX

## THE LAW

### Employment Insurance Act

**(2)** Subject to subsections (3) and (4), if the claimant has earnings during any other week of unemployment, there shall be deducted from benefits payable in that week the amount, if any, of the earnings that exceeds

**(a)** $50, if the claimant's rate of weekly benefits is less than $200; or

**(b)** 25% of the claimant's rate of weekly benefits, if that rate is $200 or more.

**43** A claimant is liable to repay an amount paid by the Commission to the claimant as benefits

**(a)** for any period for which the claimant is disqualified; or

**(b)** to which the claimant is not entitled.

### Employment Insurance Regulations

**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:

$$B = \left[\sum_{t=0}^{\infty} \left({}_tP_x / (1+i)^t\right) - 0.5\right] \times 52$$

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 probablity 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.