



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

[TRANSLATION]

Citation: *D. E. v. Canada Employment Insurance Commission*, 2017 SSTGDEI 155

Tribunal File Number: GE-17-498

BETWEEN:

D. E.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Charline Bourque

HEARD ON: August 2, 2017

DATE OF DECISION: September 7, 2017

REASONS AND DECISION

PERSONS IN ATTENDANCE

D. E., the Appellant (Claimant), attended the teleconference hearing.

INTRODUCTION

[1] The Appellant filed a claim for Employment Insurance starting on November 27, 2016. On December 7, 2016, the Canada Employment Insurance Commission (the “Commission”) notified the Claimant that he had received vacation pay from his employer. This amount, before deductions, was considered income, and a total of \$3,915.00 was allocated to the benefits from November 27, 2016, to December 31, 2016. \$429.00 was allocated to the benefits of the week of January 1st, 2017. On January 31, 2017, following his request for reconsideration, the Commission informed the Claimant that the decision regarding the earnings would stand. The Claimant appealed that decision to the Social Security Tribunal of Canada (the “Tribunal”) on February 6, 2017.

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

- a) The complexity of the issue or issues;
- b) the information in the file, including the need for additional information;
- c) This method of proceeding respects the requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness, and natural justice permit.

ISSUE

[3] The Claimant is appealing a Commission decision concerning the allocation of earnings under sections 35 and 36 of the *Employment Insurance Regulations* (the “Regulations”).

EVIDENCE

[4] The evidence in the file is as follows:

- a) The Record of Employment indicates that the last day of work was November 25, 2016, and shows vacation pay in the amount of \$4,351.53 (GD2-6).
- b) Pay stubs (GD2-13/14).
- c) CUB 20723A and the corresponding Federal Court decision A-217-93 (GD2-15 to GD2-17).
- d) Statement from the plumbing/heating/ventilation company X outlining the company's policy to distribute vacation pay every six months. This policy applies to all of the other employees, including administrative personnel. The employer states that the Claimant has not taken his vacation since he was hired on March 9, 2015, because he wanted to save this time and take it later, in January 2017. The accumulated vacation pay for 2015 was \$1,474.68, and for 2016 it was \$3,000.85. He was paid \$4,321.53 on his last pay, which was November 30, 2016. \$124 is still payable (GD2-19).
- e) Excerpt of the *Labour Standards Act* (GD2-20/21).
- f) The Claimant states that last July, he worked during the construction holiday (the company was closed) and asked that his vacation pay be held so that he could have it later. He did not expect to be laid off due to a shortage of work on November 25, 2016. He was paid his banked vacation pay when he stopped working, as he was owed. He disputed this decision, saying that company policy was to pay out vacation in the summer and at the end of the year. More than 80% of the payroll is for construction employees. He agrees with the principle of paying out vacation pay at the end of employment, but what he wants is to go back and collect the vacation pay he should have had in July 2016, a total of \$3,359.48. In doing so, he would have had \$992.05 (4,351.53 - 3,359.48) remaining at the end of his employment. He asserts that [translation] "the amount due and

payable, \$3,359.48, was not paid due to dismissal; the amount of \$992.05 was” (GD3-22).

- g) The employer states that he pays out vacations in two parts: in July and in December of each year. In July, the Claimant chose not to collect his vacation pay. He asked to leave it banked so he could take it all in December 2016, instead. He was dismissed on November 25, 2016, so the sums payable, totalling \$4,351.53, were paid due to stoppage of work. There is no employment contract. The company is a plumbing/ventilation company, and of its 80 employees, 70 are governed by the CCQ. For them, the holidays are in July and December each year. For the 10 employees working in the offices, they can choose to take their holidays in December or in January. The Claimant chose to work during the construction holiday and to postpone his vacation until January 2017 (GD3-24).
- h) The Claimant asks that a portion of his vacation pay—\$3,359.48—be applied to July 2016, rather than to the end of his employment in November 2016. He has submitted a Federal Court of Appeal judgement that he claims is his case (GD3-25).

[5] The evidence submitted at the hearing in the Appellant’s testimony is as follows:

- a) The Claimant states that he is known as an honest person with integrity. He believes that the decision is unfair and wishes to emphasize his rights.
- b) He states that he worked for the employer for 9 years and did not expect to lose his job.
- c) He worked for 70 weeks without taking vacation time. Normally, vacation pay is payable in July, but he asked his employer to set it aside so that he could take vacation in January. He states that in fact, his employer did pay him his vacation pay, but he asked his employer to take it back and set it aside. He thought of it as money set aside.
- d) He states that he wants the situation to be considered according to the spirit of the Act.
- e) He states that, under the Act, he is owed this money.

- f) He asks to allocate the sum of his accumulated vacation pay, minus the amount that should have been paid to him in July, not as a result of termination of employment.
- g) He was penalized because he only started receiving Employment Insurance benefits on January 31; he lost his job on November 30.

SUBMISSIONS OF THE PARTIES

[6] The Appellant argues that:

- a) The Claimant states that he is requesting a breakdown of the vacation pay that was paid to him at the end of his employment. He argues that the vacation pay paid at the end of his employment was not paid to him due to the loss of his employment. In fact, \$3,359.48 was due and payable on July 23, 2016. This sum was included in the total vacation pay of \$4,351.53 that was paid at the end of his employment. The Commission considers the sum of the amounts paid to be \$4,351.53. However, he states that he can show that no vacation pay had been paid to him since the start of his employment on March 9, 2015.
- b) He states that it was the boss' policy to distribute vacation pay every six months. In fact, he argues that he is the only one to blame. He hardly suspected that this would affect him later. He saw postponing his vacation as "putting money aside." He simply wanted to surprise my [*sic*] wife, thinking about taking a vacation in January 2017. Obviously, he had not foreseen the end of his employment on November 26, 2016, much less the impact on Employment Insurance. He states that he had to wait until January 30, 2017, a total of two months, to have his first Employment Insurance payment.

[7] The Respondent argues that:

- a) Amounts received from an employer are considered earnings and must therefore be allocated unless they fall within the exceptions set out in subsection 35(7) of the Regulations or do not arise out of employment.

- b) Amounts paid by an employer by reason of a lay-off or separation from an employment shall be allocated under subsection 36(9) of the Regulations. It is the reason for the payment—not its date—that determines when it must be allocated.
- c) Relying on the facts in the file, the Commission determined that the amounts the Claimant received as vacation pay constituted earnings under subsection 35(2) of the Regulations. A payment was made to the Claimant as a result of the Claimant's loss of employment.
- d) In fact, in this case, the employer accepted the Claimant's request to postpone the payment of his vacation pay, deviating from established practice. This means that the agreement under this policy no longer holds. As a result, in the event of loss of employment, as in this case, any sum that had not been paid to the Claimant becomes payable due to the loss of this employment.
- e) The Commission can understand the Claimant, who claims to have suffered an injustice, but it cannot deviate from the principles of the *Employment Insurance Act* on the matter. As a result, the sum was allocated, and must have been, under subsection 36(9) of the Regulations, based on the Claimant's usual weekly earnings from November 27, 2016, to January 7, 2017 (GD3-16 to GD3-17).
- f) The Claimant cites the following case law: "Did the employer's failure to pay them at that time and its paying them when the employee left have an effect in the case at bar of transforming a payment made "on the occasion of" the separation from employment into a payment made "by reason" of that separation? **According to the work contract, 4% of vacation pay was payable every 15 weeks, which was not done. The total amount was paid after 37 weeks, at the end of his employment. The due and payable portion (regarding the first 30 weeks) before the end of employment was not paid due to dismissal; the rest was. **It does not necessarily follow merely from the fact that under the contract of employment vacation pay became due and payable before the day of the lay-off that payment of that amount at the time of the lay-off is a payment "on the occasion" of the lay-off and not "by reason" of it. All of the provisions must be

considered.** The time at which vacation pay is paid to an employee may well coincide with that of his lay-off or separation from employment without the payment being made by reason of that event. In such a case the lay-off is only the occasion, not the cause, of the payment.” (*Canada (PG) v. Kinkead*, A-217-93).

- g) As the Commission explained to the Claimant (GD3-25), this judgement is not applicable to his own case because, in this judgement, there was a work contract of thirty (30) weeks in blocks of fifteen (15) weeks with a vacation period of two (2) weeks and a payment of vacation time owed between the blocks of fifteen (15) weeks of work. The person had taken his two (2) weeks of vacation, but the employer had failed to pay him the vacation pay he was owed. In the Claimant’s case, it was explained to him that it was his personal choice to not take vacation time in July 2016 and to postpone the payment of his vacation pay.
- h) The Commission submits that the case law supports its decision. The Court has confirmed the principle that amounts paid by reason of a lay-off or separation from an employment constitute earnings within the meaning of section 35 of the Regulations and must be allocated in accordance with subsection 36(9) of the Regulations (*Canada (AG) v. Boucher Dancause*, 2010 FCA 270; *Canada (AG) v. Cantin*, 2008 FCA 192).
- i) The claimant in this case was not in attendance. Her written submissions did not convince us that the umpire had committed an error in rejecting her appeal. The application for judicial review was dismissed with costs (*Crummer v. Canada (AG)*, A-207-99).
- j) This Federal Court of Appeal decision was related to the following umpire decision:

“The Commission notified the claimant that the vacation pay in amount of \$1,680.00 had been deducted from her benefits for the period of November 9, 1997 to November 22, 1997 and that a balance of \$278.00 was allocated to November 23, 1997. Exhibit 7 says:

“Regarding my current claim, I am appealing your decision to allocate vacation pay after the date of lay-off. As I have previously informed you dated Nov. 18/99 my employer incorrectly paid vacation pay in the final pay period.”

The employer advises that previously employees were permitted at anytime to request to be paid out their accumulated vacation pay. However, in April 1997 the payroll was relocated to the U.S.A. and employees were no longer paid vacation pay unless they were actually taking time off. If no vacation time was taken, then the accumulated vacation pay was paid upon lay off. In the claimant's case, no vacation time was taken, therefore, her accumulated vacation pay was paid because of the lay off on November 8, 1997. As this Umpire explained to the claimant and her representative, sections of the *Employment Insurance Act* must be interpreted by the Umpire. The Board of Referees made no reviewable error under subsection 115(2) of the Act. Accordingly, the appeal is dismissed.”

- k) As in the aforementioned case law, the Claimant did not take his vacation period and had his vacation pay postponed. His employment ended on November 25, 2016, such that his accumulated vacation pay was paid to him at that time.

ANALYSIS

The relevant legislative provisions are reproduced in an appendix to this decision.

[8] Following the termination of his employment, the Claimant received a sum of \$4,351.53 in vacation pay from his employer. The Claimant argues that this sum, \$3,359.48, was due and payable on July 23, 2016, because the employer's policy is to pay out accumulated vacation time every six months, at a set date. However, he had chosen to postpone his vacation so that he could use it later. He argues that only the sum of \$992.05 should be allocated at the time of separation from employment; this sum corresponds to the balance of his vacation at the time of the payment due on July 23, 2016.

[9] Subsection 35(2) of the Regulations provides that income arising from any employment, whether wages, benefits, or other remuneration, must be taken into account unless it falls within one of the exceptions set forth in subsection 35(7) of the Regulations.

[10] In *McLaughlin*, the Federal Court of Appeal stated the principle that “the entire income of a claimant arising out of any employment” is to be taken into account in calculating the amount to be deducted from benefits (*McLaughlin v. Canada (Attorney General)*, 2009 FCA 365).

[11] The Federal Court of Appeal also confirmed the principle whereby amounts that constitute earnings under section 35 of the Regulations must be allocated according to section 36 of the Regulations (*Boone et al v. Canada (Attorney General)*, 2002 FCA 257).

[12] The allocation of vacation pay falls under one of the three different provisions in the Regulations;

1. If paid due to the lay-off or separation from employment; it is allocated under subsection 36(9) of the Regulations;
2. If paid for a specific vacation period; it is allocated under paragraph 36(8)(a) of the Regulations;
3. In all other cases, it is allocated under paragraph 36(8)(b) of the Regulations.

[13] The Claimant does not dispute that he received earnings as vacation pay from his employer. He takes issue with the fact that the total income was allocated at the date of separation from employment, stating that part of this income should have been paid to him, according to the employer's policy, on July 23, 2016. He states that only the \$992.05 in income should have been allocated beginning on the date his employment ended, November 25, 2016.

[14] Based on the evidence and the submissions of the parties, the Tribunal is satisfied that the nature of these sums is not at issue and that it is a matter of vacation pay received following the termination of the Claimant's employment. As a result, the Tribunal is satisfied that these

amounts were indeed earnings within the meaning of section 35 of the Regulations. The Tribunal must therefore determine whether and when those earnings must be allocated.

[15] The Claimant confirms that he was laid off on November 25, 2016. The Record of Employment indicates a lack of work on November 25, 2016 (GD3-15).

[16] The Tribunal will take into consideration subsection 36(8) of the Regulations, which states:

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.

[17] The Tribunal will take into consideration the employer's note stating that vacation time is paid out every six months (GD2-19).

[18] The Tribunal notes that the Claimant's total vacation pay, \$4,351.53, was paid due to the termination of the Claimant's employment on November 25, 2016.

[19] The Tribunal finds that the Claimant does not meet the requirements of subsection 36(8) of the Regulations because the vacation pay was not paid to him regarding planned weeks of vacation, but rather due to the termination of his employment. As a result, the Tribunal is of the opinion that subsection 36(9) applies.

[20] Subsection 36(9) of the Regulations reads as follows:

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.

[21] In *Savarie*, the Federal Court of Appeal held as follows:

“In my opinion, a payment is made “by reason of” the separation from employment within the meaning of this provision when it becomes due and payable at the time of termination of employment, when it is, so to speak, “triggered” by the expiration of the period of employment, when the obligation it is intended to fulfil was simply a potentiality throughout the duration of the employment, designed to crystallize, becoming liquid and payable, when, and only when, the employment ended. The idea is to cover any part of the earnings that becomes due and payable at the time of termination of the contract of employment and the commencement of unemployment. For if an employee's savings, the monies that are already his, should not bar him from receiving benefits under the *Unemployment Insurance Act*, in return it would seem but normal that the earnings to which he is entitled at the time of his departure should be taken into consideration before he is eligible to receive those benefits. Accordingly, my construction of the expression “by reason of”, like that of

many umpires, corresponds to the manifest intention of Parliament and is consistent with the *Kinkead* decision, which the umpire claims to rely on but at the cost of altering its meaning” (*Canada (Attorney General) v. Savarie*, FCA, A-704-95).

[22] The Court has held that the word “payable” in what was referred to then as subparagraph 58(b)(i) refers to the point in time when vacation pay is due to a claimant in the sense that he is entitled by his contract of employment or by the general law to have it paid to him and his employer is under an obligation to pay it. In other words, payment is payable when a claimant is in the position at law to enforce payment (*Yannelis* A-496-94).

[23] As a result, the Tribunal is satisfied that the earnings received as vacation pay were paid because of the termination of the Claimant's employment. The Tribunal finds that this total income, \$4,351.53, must be allocated under subsection 36(9) of the Regulations 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.

[24] The Claimant argues that the allocation of his vacation pay would reduce his admissibility for Employment Insurance benefits. However, the Tribunal wishes to assure the Claimant that he can receive all of the Employment Insurance benefits for which he is eligible. Parliament has decided that an EI benefits claimant who receives a severance package upon separation of employment, including vacation pay, should be expected to first use that income for their living expenses according to their normal weekly earnings before they begin to receive EI benefits. He can then receive the number of weeks of benefits to which he is entitled.

[25] Based on the evidence and the submissions of the parties, the Tribunal is of the opinion that the total income received as vacation pay must be allocated as of November 27, 2016.

[26] The Tribunal takes into consideration that in *Wegener*, the Court stated:

“Noel J.A., speaking for the Federal Court of Appeal noted that there was no jurisdiction to waive a statutory requirement. To the same effect, Evans J.A., in *Canada (Attorney General) v Alaie*, 2003 FCA 416 (CanLII), noted that the Court

cannot decide cases on the basis that a party might have been misled about benefits. The Court cannot refuse to apply the law, even on the grounds of equity (*Wegener v. Canada (Attorney General)*, 2011 FC 137).”

[27] The Tribunal understands that the Claimant may find the situation unfair when he thought of postponing his vacation pay as money in the bank. The Tribunal’s role is to apply the Act, and the Tribunal cannot amend it simply to please the Claimant, who feels wronged. The Act establishes specific criteria regarding the allocation of income, and the Tribunal cannot ignore them.

CONCLUSION

[28] The appeal is dismissed.

Charline Bourque
Member, General Division – Employment Insurance Section

APPENDIX

THE LAW

Employment Insurance Regulations

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

- 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*)
- d) 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*)
- e) pension means a retirement pension
 - i. arising out of employment or out of service in any armed forces or in a police force;
 - ii. under the Canada Pension Plan; or
 - iii. 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
 - the claimant,
 - the claimant's unborn child, or
 - the child the claimant is breast-feeding.

[...]

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 they 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

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.