



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *SC v Canada Employment Insurance Commission*, 2018 SST 1428

Tribunal File Number: GE-17-1536

BETWEEN:

S. C.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Audrey Mitchell

HEARD ON: November 9, 2017

DATE OF DECISION: February 19, 2018

REASONS AND DECISION

OVERVIEW

[1] The Appellant made an initial claim for employment insurance maternity benefits on August 21, 2012. On January 23, 2017, the Respondent notified the Appellant that it had determined that she received \$33,828.83 in settlement moneys from her employer, and that this income, before deductions, is considered earnings and would be allocated to the weeks of August 19, 2012 to February 2, 2013. The Appellant requested a reconsideration of this decision, and on April 4, 2017, the Respondent maintained its initial decision. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal) on May 2, 2017.

[2] The Tribunal must decide whether the Appellant had earnings and if so, whether they were allocated correctly, in accordance with sections 35 and 36 of the *Employment Insurance Regulations* (Regulations).

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

- a) The fact that credibility is not anticipated to be a prevailing issue.
- b) The fact that the Appellant will be the only party in attendance.
- c) The fact that the Appellant or other parties are represented.
- d) 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.

[4] The following people attended the hearing: the Appellant and her representatives, Martha Cook and Christopher Park.

[5] The Tribunal finds that the Appellant had earnings that were properly allocated, in accordance with sections 35 and 36 of the Regulations. The reasons for this decision follow.

EVIDENCE

[6] On August 9, 2012, the employer issued a record of employment (ROE) that listed quit as the reason for issuing the ROE. The ROE included the comment that the Appellant declined to sign an employment contract with the new owner, and indicated that the Appellant was paid \$240.91 in vacation pay. The last day for which the Appellant was paid was July 18, 2012.

[7] On August 21, 2012, the Appellant made an initial claim for maternity and parental benefits and a benefit period was established effective August 19, 2012.

[8] The Appellant's representative sent a letter to the Respondent dated January 2, 2017, indicating that she had settled litigation concerning the Appellant's wrongful dismissal action resulting from her termination of employment in the amount of \$40,000 for damages and lost wages, and prejudgment interest and a payment of \$10,000 towards her legal fees. The representative identified that the Appellant's legal fees, disbursements and HST totaled \$16,171.17. She also requested a notice of debt resulting from any potential overpayments of employment insurance benefits arising from resolution of the wrongful dismissal litigation.

[9] The Appellant's Member of Parliament sent an email to the Respondent dated January 20, 2017, attaching a letter from the Appellant's representative concerning the notice of debt. Minutes of settlement resulting from the wrongful dismissal litigation were also attached to the email.

[10] On January 23, 2017, the Respondent notified the Appellant that \$33,828.83 of the settlement moneys from her employer, before deductions, is considered earnings and would be allocated to the weeks from August 19, 2012 to February 2, 2013. It stated that a notice of debt would be sent to her shortly. The Respondent noted that the earnings from the settlement were \$50,000.00 less the legal fees of \$16,717.17, which equaled \$33,828.83.

[11] On February 4, 2017, the Respondent issued a notice of debt in the amount of \$11,352.00 resulting from the Appellant's earnings not having been deducted which caused an overpayment.

[12] The Appellant's representative sent a reconsideration request to the Respondent dated February 16, 2017.

[13] The Appellant's representative sent a letter to the Respondent dated February 28, 2017. The letter stated that none of the settlement amount reflected moneys that the Appellant would have earned during the period August 19, 2012 to February 2, 2013, if her employment had not been terminated and that excluding the Appellant's maternity and parental benefits for this period would be consistent with section 45 of the *Employment Insurance Act* (Act) in that the Appellant would have received employment insurance benefits during the leave period if her employment had not been terminated and she would not have been paid earnings by the employer during that time. The representative stated that equating the settlement amount to earnings effectively disentitles the worker from her statutory benefits after the fact and does not reflect what would have happened if the employment had not been terminated. She added that if the Appellant had to repay her employment insurance benefits from the settlements funds, she would be left significantly undercompensated and this would be inconsistent with the overall special benefits scheme contemplated under the Act.

[14] On April 3, 2017, the Respondent spoke to the Appellant's representative. She confirmed to the Respondent that the Appellant was requesting that it reconsider the requirement to repay the overpayment and the determination that the settlement moneys were earnings. The Respondent explained that under subsections 35(2) and 36(9) of the Regulations, the settlement earnings must be allocated at a rate of the Appellant's normal weekly earnings from her last day of pay. The Respondent explained that under subsection 35(2) of the Regulations, the entire income of the claimant arising out of employment is earnings. It said that the fact that the settlement resulted from the Appellant having employment meant that it is part of the entire income arising from employment. The Respondent also advised that there is no right of reconsideration concerning the requirement to repay a debt, and that the Appellant would need to appeal this to the Federal Court.

[15] On April 4, 2017, the Respondent confirmed with the Appellant that her representative had been in contact and had told her of the Respondent's decision. The Respondent notified the Appellant that it was maintaining its initial decision made on January 23, 2017. The Respondent also notified the Appellant's representative that the requirement to repay a debt is not an issue that is subject to reconsideration under section 112 of the Act, and that her recourse on that matter is with the Federal Court.

[16] On May 2, 2017, the Appellant, through her representative, filed a notice of appeal with the Tribunal. In it, the Appellant indicated that she appealed the Respondent's decision to apply \$33,828.83 in settlement moneys against her claim for maternity and parental benefits, and disputed the notice of debt that indicated that she received an overpayment of \$11,352.00 in maternity and parental benefits. The Appellant stated that her main ground of appeal concerns the Respondent's misinterpretation of section 45 of the Act. She also identified alternative grounds of appeal concerning the Respondent's decision, including failure to provide reasons, the delivery of two inconsistent decisions, failure to consider compensation for losses other than lost income, and failure to account for taxes already paid. The Appellant's representative attached documents to the notice of appeal, including the following:

- a notice of debt dated February 4, 2017 showing a total balance of \$11,352;
- excerpts from the Act and the Regulations;
- excerpts from Part XIV of the *Employment Standards Act*;
- excerpts from the *Department of Employment and Social Development Act*;
- excerpts from the *Social Security Tribunal Regulations*;
- an offer of employment from the former employer to the Appellant dated April 30, 2002;
- employment insurance benefit statements dated September 19, 2012 and August 25, 2013, showing a weekly benefit rate of \$485, federal tax of \$59 and a deposit of \$426;
- an amended Statement of Claim between the Appellant and the employer setting out the details of the Appellant's claim, in which the Appellant claimed \$75,000 for wrongful dismissal and breach of contract, \$15,000 for mental and emotional distress caused by the defendant's bad faith conduct, \$10,000 in punitive damages, special damages for expenses incurred while seeking alternative employment, a declaration that the Appellant was wrongfully dismissed, prejudgment and post-judgment interest in accordance with sections 128 and 129 of the *Courts of Justice Act*, respectively, and costs of the proceeding;

- a statement of defence and crossclaim of the former employer setting out the former employer's position;
- a statement of defence and crossclaim of the employer setting out its position;
- handwritten minutes of settlement dated November 29, 2016, signed by the Appellant, the both former employers, that indicates that parties shall agree to the allocation of the settlement amount between damages, prejudgment interest and legal costs;
- the Appellant's mental health records that detail a history of her illness as experiencing severe anxiety in pregnancy due to complications in her employment situation;
- the Appellant's notices of assessment dated March 27, 2014 for the tax year 2013, and May 11, 2015 for the tax year 2014.

SUBMISSIONS

[17] The Appellant, through her representative, submitted that if she had continued in her employment, she would have been entitled to receive her employment related compensation and the value of her maternity and parental benefits. The Appellant argued that if she had been given proper notice of termination by the employer, or pay in lieu, she would have received employment insurance benefits prior to her maternity and parental leave, in which case she would have retained the full value of her employment insurance special benefits without regard to the termination pay she would have received. The Appellant submitted that the Respondent's failure to give reasons concerning its reconsideration decision breached its duty of procedural fairness in that the decision was highly significant to the Appellant and section 113 of the Act militates in favour of a requirement that reasons be provided. She argued that the simultaneous release of two inconsistent decisions by the same decision-maker concerning one issue is an error of law that ought to render both of the Respondent's decisions invalid. She stated that both decisions are entirely devoid of justification, transparency and intelligibility, and that they do not provide a link to the outcome, they do not set out the basis for the outcome, and they are not readily comprehensible.

[18] The Appellant submitted that not all of the settlement moneys that the Appellant received from the employer was intended to compensate her for lost wages and that the settlement of \$33,828.83 was for both general and aggravated damages together with prejudgment interest on the damages award. She conceded there was no compensation for punitive damages or special damages, but stated that since no formal document specifically allocating the Appellant's settlement funds exists, the damages should be allocated proportionally in accordance with the Appellant's Statement of Claim among prejudgment interest, and the claimed general and aggravated damages as follows: 1.3% of the settlement for 1,595 days, or \$2,081.00 in prejudgment interest; 83.33% of \$31,747.83, or \$26,456.53 in general damages; and 16.66% of \$31,747.83, or \$5,291.00 in aggravated damages.

[19] Finally, the Appellant submitted that the Respondent erred in determining the amount she owes by failing to account for the taxes already paid during her initial receipt of maternity and parental benefits, and that her repayment obligation to the Respondent concerning both the maternity and parental benefits should be reduced.

[20] The Respondent submitted that the settlement award of \$33,828.83 that the Appellant received constituted earnings pursuant to subsection 35(2) of the Regulations because the payment was made to compensate her for lost wages and damages. It stated that the Appellant's wages in her last week of work, or the week commencing July 15, 2012 were \$819, and that the Appellant was paid vacation pay of \$240.91 which should have been allocated to the week commencing July 15, 2012 under subsections 35(2) and 36(9) of the Regulations, so that only \$179.09 of the settlement monies could be allocated to that week, which would bring her earnings up to her normal weekly earnings of \$1,239.00. The Respondent submitted that it allocated the remainder of the settlement award in the amount of \$33,649.74, at the Appellant's normal weekly earnings of \$1,239 from her last week worked, or the week commencing July 15, 2012, to January 26, 2013, with the remaining balance of \$196.74 allocated in the week ending February 2, 2013. It argued that it gave the Appellant and her representative an explanation for its reconsideration decision, and that it had issued only one decision on the issue of earnings and it informed the Appellant that the requirement to repay a debt was not an issue subject to reconsideration under section 112 of the Act.

[21] The Respondent submitted that subsection 36(9) of the Regulations does not indicate that the type of benefit paid that should be taken into consideration when allocating earnings. It stated that damages for wrongful dismissal are presumed to be compensation for the loss of income from employment and are therefore earnings arising out of employment unless it can reasonably be concluded that the money did not represent lost wages, and that the settlement award cannot be considered to be for anything other than damages for lost income from employment. Finally it argued that the Appellant's employment was terminated and she did receive moneys that were required to be allocated pursuant to subsection 36(9) of the Regulations and she could have requested further benefits following the end of her parental benefits.

ANALYSIS

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

[23] The Tribunal will first examine two arguments made by the Appellant's representative that relate to the issue to be decided. In the first, the Appellant submitted that the Respondent's reconsideration decision is deficient because it does not give the Appellant an understanding of the basis for the decision, and therefore the Respondent has breached its duty to procedural fairness. While it is true that there are no reasons given in the Respondent's reconsideration decision, because appeals before the Tribunal are *de novo*, and the Tribunal is not limited by the file that was before the Respondent, the adequacy of the Respondent's decision is not a relevant consideration for the Tribunal.

[24] The Appellant also submitted that the Respondent issued two simultaneous, inconsistent reconsideration decisions, one in which it declined to exercise jurisdiction concerning a matter that was properly before it, and that because the Respondent failed to turn its mind to the determination of a justifiable, transparent and/or intelligible outcome, both decisions should be rendered invalid. The Tribunal notes that the first decision to which the Appellant refers is the Respondent's reconsideration made under section 112 of the Act, and the second "decision" concerns the Appellant's request that the Respondent reconsider the requirement to repay the overpayment. The Tribunal does not find that the Respondent's simultaneous notifications to the Appellant are inconsistent; rather the Tribunal finds that the first is the reconsideration decision

to which the Appellant was entitled under section 112 of the Act, and the second was not a reconsideration decision, but was information given to the Appellant reflecting that under section 112.1 of the Act, which states that a decision of the Commission made under the *Employment Insurance Regulations* respecting the writing off of any penalty owing, amount payable or interest accrued on any penalty owing or amount payable is not subject to review under section 112, and therefore the Respondent cannot reconsider the requirement to repay overpayments but recourse is at the Federal Court. Given that the Tribunal's jurisdiction under section 113 of the Act is to consider appeals of decisions made by the Respondent under section 112 of the Act, the Tribunal will now consider the Respondent's reconsideration decision on the issue whether the Appellant had earnings, and if so, whether they were properly allocated.

Allocation of earnings

Earnings

[25] Subsection 35(1) of the Regulations defines employment as any employment, whether insurable, not insurable or excluded employment, under any express or implied contract of service or other contract of employment.

[26] Subsection 35(1) of the Regulations defines income as 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.

[27] Subsection 35(2) of the Regulations states that earnings include the entire income of a claimant arising out of any employment.

[28] The Federal Court of Appeal has held that a settlement payment made in respect of an action for wrongful dismissal is income arising out of employment unless the claimant can demonstrate that due to "special circumstances", some portion of it should be regarded as compensation for some other expense or loss.

Canada (AG) v. Radigan, A-567-99

[29] The onus is on the Appellant to show that sums received as a result of dismissal amounted to something other than earnings.

Bourgeois v. Canada (AG), 2004 FCA 117; *Canada (AG) v. Radigan*, A-567-99

[30] The Appellant's representative argued that the settlement money should not be considered earnings because none of the settlement moneys paid to the Appellant reflected moneys that she would have earned during the period August 19, 2012 to February 2, 2013, (being the period during which she was paid benefits) if her employment had not been terminated. She argued that excluding her maternity and parental benefits received from calculating the overpayment amount would be consistent with section 45 of the Act, in that the Appellant would have received employment insurance benefits if her employment had not been terminated, in which case she would not have been paid earnings by the employer during this period.

[31] Section 45 of the Act states that if a claimant receives benefits for a period and, under a labour arbitration award or court judgment, or for any other reason, an employer, a trustee in bankruptcy or any other person subsequently becomes liable to pay earnings, including damages for wrongful dismissal or proceeds realized from the property of a bankrupt, to the claimant for the same period and pays the earnings, the claimant shall pay to the Receiver General as repayment of an overpayment of benefits an amount equal to the benefits that would not have been paid if the earnings had been paid or payable at the time the benefits were paid.

[32] The Tribunal does not find the Appellant's argument to be clear, particularly because it is undisputed that she was terminated from her employment, she received settlement moneys from the employer, and that she received employment insurance benefits from August 19, 2012 to February 2, 2013. The Tribunal does not agree with the statement that the Respondent has misinterpreted section 45 of the Act, but finds that section 45, without reference to the type of benefits received or the circumstances that gave rise to an overpayment, requires the repayment of an overpayment of benefits. Contrary to the representative's argument, the Tribunal does not see any room for discretion or exception for the requirement to repay an overpayment. The Tribunal notes the representative's statement that if the Appellant had to repay the benefits that she received, she would be left significantly undercompensated and that this would be

inconsistent with the overall special benefits scheme contemplated under the Act. However, the Tribunal does not find that section 45 of the Act makes any distinction between regular benefits and special benefits; rather, it requires that a claimant repay an overpayment.

[33] The Tribunal finds that the moneys paid to the Appellant constituted a settlement payment from an action for wrongful dismissal. The Respondent determined that of the \$50,000 in settlement moneys the employer paid to the Appellant, \$16,717.17 was for legal fees, and that the remaining \$33,828.83 was earnings. It argued that damages for wrongful dismissal are presumed to be compensation for the loss of income from employment and are therefore earnings unless it can reasonably be concluded that the money did not represent lost wages. The Tribunal notes that the minutes of settlement states that the parties shall agree to the allocation of the settlement amount between damages, prejudgment interest and legal costs. Because the Respondent has excluded the \$16,717.17 in legal fees as not being earnings, the Tribunal finds that the amount that the Appellant disputes as being earnings is the remaining \$33,828.83.

[34] The Appellant submitted that not all of the settlement moneys were intended to compensate her for lost wages, and that the \$33,828.83 was for general and aggravated damages together with prejudgment interest on the damages award. The Appellant's Statement of Claim indicated that the general damages were for wrongful dismissal and breach of contract, and the aggravated damages she sought were for mental and emotional distress caused by the defendant's bad faith conduct. The Appellant acknowledged that no formal document specifically allocating her settlement funds exists and that there was no award for punitive damages and special damages, but submitted that the damages should be allocated proportionally based on the Statement of Claim, specifically \$2,081.00 in prejudgment interest, \$26,456.53 in general damages, and \$5,291.00 in aggravated damages.

[35] The Tribunal agrees that the minutes of settlement are not explicit concerning how it attributed the settlement moneys, which led the Respondent to conclude that the settlement moneys exclusive of legal fees was compensation for loss of income from employment and therefore earnings. Although the parties to the minutes of settlement intended that the moneys be allocated for reasons other than for damages, and in spite of how the Appellant requested in her statement of claim that damages be allocated, the Tribunal does not find that the Appellant has

rebutted the presumption that the \$33,828.83 is earnings. Concerning the Appellant's representative's submission that the damage award be proportionally allocated, the Tribunal is not persuaded that special circumstances exist such that the damages paid to the Appellant can be considered anything other than for the loss of income resulting from her wrongful dismissal. The Tribunal acknowledges that in her Statement of Claim, the Appellant claimed \$75,000 in damages for wrongful dismissal and breach of contract and \$15,000 in aggravated, moral damages for mental and emotional distress, and prejudgement interest in accordance with section 128 of the *Courts of Justice Act*. However, the minutes of settlement do not provide a breakdown of the damages paid.

[36] While the Tribunal understands the logic behind the proposed proportional breakdown of the \$33,828.83 based on the amounts of general damages, aggravated damages and prejudgement interest claimed by the Appellant, there is insufficient evidence to determine how the damage award was attributed, therefore the Tribunal finds that there is insufficient evidence to conclude that the damages were to compensate the Appellant other than for lost income. The Tribunal is supported in this finding by the Federal Court of Appeal that held in the decision *Minister of Employment and Immigration v. Mayor*, A-667-88 that although the claimant, in his suit against his former employer, referred to injury to his reputation, emotional upset and expenses incurred looking for other employment, there was nothing that would allow a trier of fact to determine what, if any part was received in the settlement for these factors rather than for the more usual salary in lieu of notice. The Tribunal finds that the damages paid to the Appellant in the amount of \$33,828.83 constitute earnings because they were paid to her as a result of her separation from her employment and is therefore income arising out of employment.

[37] The Tribunal notes that the Respondent submitted that it did not take the \$240.91 vacation pay paid to the Appellant into account in its reconsideration decision. Notwithstanding that the Respondent omitted the vacation pay in its reconsideration decision, because it was part of the moneys paid to the Appellant for the same reason as settlement moneys, specifically as a result of the Appellant's separation from her employment, the Tribunal finds that the \$240.91 vacation pay was implicitly part of the reconsideration decision, because the Respondent explained to the Appellant's representative that at the reconsideration stage that under subsection 35(2) of the Regulations, the entire income of the claimant arising out of employment is

earnings. Because it is not in dispute that the Appellant was paid \$240.91 in vacation pay as indicated on the ROE, the Tribunal finds that the \$240.91 in vacation pay was income arising out of her employment because it was paid to her by the employer on separation from her employment. Accordingly, the Tribunal finds that the settlement moneys and vacation pay, totalling \$34,069.74 constitute earnings within the meaning of the Act.

Allocation

[38] Subsection 36(9) of the Regulations states that 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.

[39] Having found that the \$34,069.74 in settlement moneys and vacation pay paid to the Appellant by the employer are earnings, the Tribunal also finds that the Respondent has correctly allocated the earnings. The Tribunal finds that subsection 36(9) of the Regulations applies in this case because the Appellant's earnings were paid to her by reason of separation from her employment. The Tribunal is guided by subsection 36(9) of the Regulations concerning the manner in which earnings paid or payable to a claimant are to be allocated, specifically that earnings paid or payable by reason of lay-off or separation are to be allocated beginning with the week of separation in a manner equal to the claimant's normal weekly earnings in each consecutive week except the last.

[40] The Respondent submitted that it allocated the Appellant's earnings at her normal weekly earnings of \$1,239.00 from her last week worked, or the week commencing July 15, 2012, taking into account that she earned \$819.00 in that week, to January 26, 2013, with the remaining balance of \$196.74 allocated to the week ending February 2, 2013. In the absence of evidence indicating otherwise concerning the Appellant's normal weekly earnings and earnings in her last week worked, the Tribunal accepts the Respondent's submission as fact. The Tribunal therefore finds that the Respondent correctly allocated \$420.00 to the week commencing January 15, 2012,

which is the Appellant's last week worked, \$1,239.00 in each of the 27 weeks from the week commencing July 22, 2012 to January 26, 2013, and the remaining balance \$196.74 to February 2, 2013, for a total allocation of \$34,069.74.

[41] The Appellant's representative submitted that the Respondent failed to take into account the taxes already paid by the Appellant while she received maternity and parental benefits, and that her repayment obligation should be reduced. The Tribunal again turns to section 45 of the Act for guidance concerning the obligation to repay an overpayment. Section 45 refers to repayment of an overpayment of benefits in an amount equal to the benefits that would not have been paid if the earnings had been paid or payable at the time the benefits were paid. In the absence of any reference to repayment of benefits less deductions, the Tribunal does not find that the overpayment should be reduced because of the payment of taxes, but that the obligation is to repay benefits that were paid or payable.

[42] Finally, the Tribunal notes that one of the bases for the Appellant's appeal is the notice of debt. The Appellant does not appear to be disputing the amount of the overpayment, but the requirement to repay the debt. In the same way that the Respondent does not have the jurisdiction to reconsider the requirement to repay an overpayment under section 112.1 of the Act, the Tribunal does not have the jurisdiction to consider this requirement, and the Respondent has previously informed the Appellant of the proper avenue of recourse. Again, notwithstanding the Appellant's argument concerning the sufficiency of reasons given by the Respondent, the hearing before the General Division of the Tribunal is *de novo*, and it is the role of the Tribunal to apply the law.

[43] The Tribunal finds that the Appellant's settlement and vacation pay were earnings, which were properly allocated in accordance with sections 35 and 36 of the Regulations.

CONCLUSION

[44] The appeal is dismissed.

Audrey Mitchell
Member, General Division - Employment Insurance Section

ANNEX

THE LAW

Employment Insurance Act

45 If a claimant receives benefits for a period and, under a labour arbitration award or court judgment, or for any other reason, an employer, a trustee in bankruptcy or any other person subsequently becomes liable to pay earnings, including damages for wrongful dismissal or proceeds realized from the property of a bankrupt, to the claimant for the same period and pays the earnings, the claimant shall pay to the Receiver General as repayment of an overpayment of benefits an amount equal to the benefits that would not have been paid if the earnings had been paid or payable at the time the benefits were paid.

112 (1) A claimant or other person who is the subject of a decision of the Commission, or the employer of the claimant, may make a request to the Commission in the prescribed form and manner for a reconsideration of that decision at any time within

- (a) 30 days after the day on which a decision is communicated to them; or
- (b) any further time that the Commission may allow.

(2) The Commission must reconsider its decision if a request is made under subsection (1).

(3) The Governor in Council may make regulations setting out the circumstances in which the Commission may allow a longer period to make a request under subsection (1).

112.1 A decision of the Commission made under the *Employment Insurance Regulations* respecting the writing off of any penalty owing, amount payable or interest accrued on any penalty owing or amount payable is not subject to review under section 112.

113 A party who is dissatisfied with a decision of the Commission made under section 112, including a decision in relation to further time to make a request, may appeal the decision to the Social Security Tribunal established under section 44 of the *Department of Employment and Social Development Act*.

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:

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

where

P_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.