



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

[TRANSLATION]

Citation: *I. H. v Canada Employment Insurance Commission*, 2018 SST 1085

Tribunal File Number: GE-18-495

BETWEEN:

**I. H.**

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: Normand Morin

HEARD ON: September 5, 2018

DATE OF DECISION: September 7, 2018

## **DECISION**

[1] The appeal is dismissed. The Tribunal finds that the amount of money the Appellant, I. H., received as vacation pay constitutes earnings under section 35 of the *Employment Insurance Regulations* (Regulations) and that those earnings were allocated according to section 36 of the Regulations.

## **OVERVIEW**

[2] The Appellant worked as a technician for the employer, X (employer). After she resigned from her employment as of June 5, 2017, the employer paid her vacation pay. The Respondent, the Canada Employment Insurance Commission (Commission), determined that the Appellant's earnings from the employer needed to be allocated. This meant that the earnings were deducted from the benefits paid to the Appellant. The Commission explained that it had not allocated the Appellant's vacation pay while paying the benefits. It indicated that it had reviewed the Appellant's file and made a decision on November 3, 2017, several months after it paid her the benefits. After this reconsideration, the Commission changed the amounts that had been deducted from the benefits the Appellant received. This resulted in the Commission asking her to repay the amounts overpaid to her (overpayment). The Appellant explained that she had declared the vacation pay she received from her employer. She argued that the Commission made an error in her file. The Appellant maintained that she did not have to reimburse the amount the Commission is asking her to repay. She disputed the Commission's decision after the Commission reconsidered it.

## **ISSUES**

[3] The Tribunal must determine whether the amount of money the Appellant received as vacation pay constitutes earnings under section 35 of the Regulations and, if necessary, whether the earnings were allocated according to section 36 of the Regulations.

[4] To make that finding, the Tribunal must answer the following questions:

- a) Does the amount of money paid to the Appellant as vacation pay constitute earnings?

- b) If so, how should these earnings be allocated?
- c) Do the overpaid benefits need to be reimbursed?

## **ANALYSIS**

[5] The relevant statutory provisions appear in the annex of this decision.

[6] The provisions on determination and allocation of earnings for benefit purposes are mentioned in sections 35 and 36 of the Regulations, respectively. Section 35 defines what constitutes income and employment. It also specifies what types of income must be considered earnings, whereas section 36 states how earnings must be allocated.

### **Does the amount of money paid to the Appellant as vacation pay constitute earnings?**

[7] Under section 35 of the Regulations, earnings are the entire income of a claimant arising from employment. An amount received will not be considered earnings if it falls under the exceptions set out in section 35(7) of the Regulations or is not from employment.

[8] The Tribunal finds that the \$833.70 paid to the Appellant as vacation pay constitutes earnings under section 35 of the Regulations because this amount is income that was owed to her after she worked for the employer.

[9] For an amount to be considered earnings, the income must be linked to employment. According to the Federal Court of Appeal (Court), the amounts will be considered earnings if they are earned by a worker by labour or given in return for work, or if there is a “sufficient connection” between the claimant’s employment and the amount received (*Roch*, 2003 FCA 356).

[10] I must establish the true nature of the amounts and consider the facts, based not only on the way in which the parties qualify those amounts. The onus of proof is on the claimant to prove that the amounts received constitute something other than earnings.

[11] 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 section 36(9) of the Regulations (*Boucher Dancause*, 2010 FCA 270; *Cantin*, 2008 FCA 192).

[12] The altered or replaced Record of Employment issued by the employer on June 13, 2017, indicates that \$833.70 representing vacation pay was paid to the Appellant because she had stopped working (GD3-18 and GD3-19). This document specifies that the Appellant was on sick leave from May 10, 2017, to June 4, 2017, and that her resignation was effective as of June 5, 2017 (GD3-18 and GD3-19).

[13] The Appellant stated that she received \$833.70 from her employer.

[14] This amount constitutes earnings because it represents vacation pay paid to the Appellant. This vacation pay is part of the Appellant's entire income arising out of her employment, as section 35(2) of the Regulations indicates.

[15] Furthermore, this amount does not fall under the exceptions set out in section 35(7) of the Regulations, which would enable it to not be considered earnings.

[16] In this case, the amount of money the Appellant received is connected with the employment she held with the employer (*Roch*, 2003 FCA 356).

#### **How should these earnings be allocated?**

[17] Amounts paid because of a separation from employment and that constitute earnings within the meaning of section 35 of the Regulations must be allocated according to section 36(9) of the Regulations (*Boucher Dancause*, 2010 FCA 270; *Cantin*, 2008 FCA 192).

[18] Section 36(9) of the Regulations specifies that earnings paid or payable to a claimant by reason of a lay-off or separation from an employment are to be allocated to a number of weeks that begins with the week of the lay-off or separation.

[19] To calculate the amount to deduct from benefits, the Tribunal must consider the entire income of a claimant arising out of any employment (*McLaughlin*, 2009 FCA 365).

[20] The Tribunal considers that the \$833.70 must be allocated under section 36(9) of the Regulations because it is earnings paid to the Appellant because of the separation from her employment.

[21] The Tribunal notes that the Appellant's separation from employment occurred on June 5, 2017. The evidence on file indicates that the Appellant resigned from her employment with the employer as of June 5, 2017 (GD3-18, GD3-19, and GD3-26).

[22] In this case, the Appellant's earnings must be allocated to a number of weeks that begins with the week of the separation under section 36(9) of the Regulations, that is a number of weeks beginning on June 4, 2017, because the Appellant's employment ended on June 5, 2017.

[23] The Tribunal considers that the \$833.70 that the Appellant received as vacation pay was correctly allocated under section 36(9) of the Regulations (*Boucher Dancause*, 2010 FCA 270; *Cantin*, 2008 FCA 192; *McLaughlin*, 2009 FCA 365).

**Do the overpaid benefits need to be reimbursed?**

[24] Yes. The overpaid benefits the Appellant received must be reimbursed under sections 43 and 44 of the Act.

[25] Sections 43 and 44 of the Act stipulate provisions that if a person has received Employment Insurance benefits to which they were not entitled or because they were disqualified from receiving those benefits, they must repay those benefits or the excess amount (*Braga*, 2009 FCA 167).

[26] Section 52 of the Act provides that the Commission has 36 months to reconsider a claim about benefits paid or payable to a claimant and that the Commission has 72 months if it believes that a false or misleading statement or representation has been made in connection with a claim.

[27] The Court also established that a claimant who receives a sum to which they are not entitled, even after the Commission's error, is not excused from having to repay it (*Lanuzo*, 2005 FCA 324).

[28] The Appellant argued that she should not have to pay the amount the Commission is asking her to repay because it admitted that it made an error when she declared her vacation pay (GD2-2).

[29] The Appellant said that she finds it unfair and improper that she is being asked to repay \$515.00 as an overpayment, several months after the Commission paid her benefits (GD2-2).

[30] The Appellant argued that this situation resulted in her budget being unbalanced and that she did not have the means to repay the amount the Commission is claiming. The Appellant stressed that it was the Commission's error and that she learned much too late that she had been paid excess benefits.

[31] The Commission acknowledges that it did not allocate the vacation pay when paying benefits to the Appellant. It explained that, under section 52(1) of the Act, it reconsidered the Appellant's file and gave its decision on November 3, 2017, five months after it had paid the benefits (GD4-3).

[32] The Commission also indicated that it had explained to the Appellant that there had been an error during the coding of her June 23, 2017, statement and that, when this error was discovered, the allocation of the vacation pay was applied, which caused the overpayment (GD3-25 and GD3-26).

[33] Despite the Appellant's opinion that she should not have to repay the overpayment amount that she is being asked to repay because the Commission made the error in her file and she was informed of this situation late, the fact remains that she was paid excess benefits.

[34] The Appellant's situation cannot exempt her from her obligation to reimburse the amount of the overpayment that she is being asked to repay for benefits to which she is not entitled (*Braga*, 2009 FCA 167; *Lanuzo*, 2005 FCA 324).

[35] The Tribunal considers that the Commission invoked its right, under section 52 of the Act, to reconsider the Appellant's claim for benefits within the time allotted to do so.

[36] The Tribunal also considers that the Commission demonstrated that it had correctly calculated the overpayment amount, in accordance with the provisions under section 36(9) of the Regulations, even though it acknowledged that it had made an error when processing the Appellant's file.

[37] The Commissions presented several tables (for example, a document titled "Certificat d'attestation – Écran en texte intégral – Paiements" [Attestation Certificate – Full Text Screen – Payments] and "Explication de trop-payé" [Overpayment Explanation], describing payments made to the Appellant during the period from the week starting on June 5, 2016, to the week ending on December 2, 2017. The tables also showed the deductions from the benefits and the amount of the resulting overpayment (GD3-27 to GD3-30).

[38] The Tribunal considers that the Commission had just cause to claim the amount of the overpayment paid to the Appellant under sections 43 and 44 of the Act (*Braga*, 2009 FCA 167; *Lanuzo*, 2005 FCA 324).

## **CONCLUSION**

[39] The Tribunal finds that the amount of \$833.70 paid to the Appellant as vacation pay constitutes earnings under section 35(2) of the Regulations and must be allocated under section 36(9) of the Regulations as of the week of the termination of employment, that is the week beginning on June 4, 2017, because the Appellant's employment ended on June 5, 2017.

[40] The Tribunal considers that the amount representing the overpayment of benefits paid to the Appellant and that the Commission has asked her to repay must be reimbursed under sections 43 and 44 of the Act.

[41] The appeal is dismissed.

Normand Morin  
Member, General Division – Employment Insurance Section

HEARD ON:	September 5, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCE:	I. H., Appellant



## ANNEX

### THE LAW

#### *Employment Insurance Act*

**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.

**44** A person who has received or obtained a benefit payment to which the person is disentitled, or a benefit payment in excess of the amount to which the person is entitled, shall without delay return the amount, the excess amount or the special warrant for payment of the amount, as the case may be.

**52 (1)** Despite section 111, but subject to subsection (5), the Commission may reconsider a claim for benefits within 36 months after the benefits have been paid or would have been payable.

(2) If the Commission decides that a person has received money by way of benefits for which the person was not qualified or to which the person was not entitled, or has not received money for which the person was qualified and to which the person was entitled, the Commission must calculate the amount of the money and notify the claimant of its decision.

(3) If the Commission decides that a person has received money by way of benefits for which the person was not qualified or to which the person was not entitled,

- (a) the amount calculated is repayable under section 43; and
- (b) the day that the Commission notifies the person of the amount is, for the purposes of subsection 47(3), the day on which the liability arises.

(4) If the Commission decides that a person was qualified and entitled to receive money by way of benefits, and the money was not paid, the amount calculated is payable to the claimant.

(5) If, in the opinion of the Commission, a false or misleading statement or representation has been made in connection with a claim, the Commission has 72 months within which to reconsider the claim.

### ***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 \$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:

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

where

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

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

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

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

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

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

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

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

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