



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *SC v Canada Employment Insurance Commission*, 2020 SST 1212

Tribunal File Number: GE-20-2281

BETWEEN:

S. C.

Appellant / Claimant

and

Canada Employment Insurance Commission

Respondent / Commission

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Raelene R. Thomas

HEARD ON: December 10, 2020

DATE OF DECISION: December 16, 2020

Decision

[1] The appeal is allowed in part.

[2] The executor fee the Claimant received is earnings and must be allocated to (deducted from) the Claimant's employment insurance (EI) benefits.

[3] However, the Commission has incorrectly allocated the earnings. The earnings are to be allocated in the amount of \$28.00 per week to the period from January 11, 2015 to April 4, 2015.

Overview

[4] The Claimant's step-father passed away on January 14, 2015. The Claimant was named executor of his estate. The Claimant received an executor fee of \$2,719.80 on November 18, 2016. The fee was calculated as a percentage of the worth of the estate. The Claimant was receiving EI benefits from the week beginning January 15, 2015 to the end of the week beginning March 29, 2015. The Commission decided that the executor fee was earnings. It allocated the earnings to the Claimant's EI benefits by calculating an hourly rate. They did this by dividing the total fee he received by the number of hours the Claimant said he spent performing his duties. The Claimant disagrees that the executor fee was received due to employment, as he was not paid an hourly wage but a fee for the services he performed. The Claimant also says the amount received was so insignificant that it should not be deducted from his EI benefits.

Issues

[5] I have to decide whether the \$2,719.80 executor fee the Claimant received is earnings, as defined by the *Employment Insurance Act*. If I decide the executor fee is earnings, I then have to decide if the Commission allocated the amount correctly.

Analysis

[6] The law says that earnings are the entire income of a claimant arising out of any employment.¹ The law defines both “employment” and “income.” “Employment” includes any employment under any kind of contract of service or employment.² “Income” includes any income that a claimant did or will get from an employer or any other person, whether it is in the form of money or something else.³

Did the Claimant receive earnings?

[7] Yes, the \$2,719.80 the Claimant received for acting as an executor is earnings. My reasons for deciding this are below.

[8] The Federal Court of Appeal has decided that an executor fee is earnings from “employment” as defined by the *Employment Insurance Regulations*.⁴ The *Employment Insurance Regulations* say that “employment” includes the tenure of an office as described in subsection 2(1) of the *Canada Pension Plan*.⁵ The *Canada Pension Plan* defines an “office” as meaning, “the position of an individual entitling him to a fixed or ascertainable stipend or remuneration.”⁶ I am required to apply decisions of the Courts. Therefore, I find that the executor fee paid to the Claimant is earnings arising from employment within the meaning of the *Employment Insurance Regulations*. The sum does not fall within the exception in section 35(7) of the *Employment Insurance Regulations* and there is a clear connection between the services the Claimant performed as an executor and the executor fee he received.

[9] The Claimant testified that he was named the executor for his step-father’s estate in his step-father’s will. He engaged a lawyer to help settle the estate. The lawyer suggested that he register a business so that the estate could pay him an executor fee. He did this and on November 18, 2016, he received a cheque for \$2,719.80, from the estate as compensation for acting as executor for the estate. The estate also issued a T-4 slip reporting the amount as

¹ *Employment Insurance Regulations*, section 35(2). This is how I refer to the legislation that applies to this appeal.

² *Employment Insurance Regulations*, section 35(1)

³ *Employment Insurance Regulations*, section 35(1)

⁴ *Employment Insurance Regulations*, section 35(1)(c)

⁵ *Employment Insurance Regulations*, section 35(1)(c)

⁶ *Canada Pension Plan*, section 2(1)

income in 2016 tax year. This evidence tells me that the Claimant was engaged in employment when he performed the duties of executor because he held an office that entitled him to an ascertainable amount of money. The evidence also tells me that the Claimant received income, in the form of a fee based on a percentage of the estate's value, for the performance of those duties. As a result, I find that the executor fee is earnings within the meaning of the *Employment Insurance Regulations*.

Did the Commission allocate the earnings correctly?

[10] The law says that earnings have to be allocated to certain weeks. What weeks the earnings are allocated to depend on why the earnings were paid.⁷

[11] The Claimant received earnings when he acted as executor for his step-father's estate. In accepting and performing that duty the Claimant was under a contract of employment. As a result, I find that the earnings were paid to the Claimant for services performed under a contract of employment.

[12] The *Employment Insurance Regulations* require that earnings payable to a Claimant under a contract of employment for the performance of services be allocated to the period in which the services were performed.⁸ I find the period in which the services were performed is from January 14, 2015, to November 22, 2016. My reasons for deciding this are below.

[13] The appeal file shows that the Commission asked the Claimant to provide a detailed accounting of the time he spent to settle the estate. The Claimant submitted two documents showing various activities, meetings and time spent in settling the estate. At the hearing, the Claimant testified that the information he submitted was not complete because it was based only on emails that he had to support the times reported. He said that he spent more time talking to the beneficiaries and trying to locate them as well. The Claimant could not recall when the Canada Revenue Agency (CRA) issued the clearance for his step-father's estate. He estimated that the CRA clearance was issued shortly before the cheques were issued to the beneficiaries in November 2016. He said that there were a few small tasks after November 2016, such as the

⁷ *Employment Insurance Regulations*, section 36

⁸ *Employment Insurance Regulations*, section 36(4)

final wind up of amounts held in trust by the lawyer, but the bulk of the tasks were complete by the time he received the fee.

[14] The Claimant argues that the Commission's approach of calculating an hourly rate to determine how much of the fee to allocate while he was receiving EI benefits is not correct. He says that he was not paid an hourly wage for performing the executor duties. He was paid a percentage of the value of the estate. The fee was not dependent on the number of hours he spent settling the estate. He would have spent time settling the estate while not receiving EI benefits. He could not say how the executor fee was calculated, but did know that it was based on a percentage of the value of the estate. There was no specific provision in the will on the amount to be paid to the executor. He said that the lawyer would have calculated the executor fee based on whatever minimums the government would have allowed. The Claimant also argued, in the alternative, that if the executor fee is considered earnings it should be allocated in its entirety to the week in which it was received.

[15] I do not agree with the Claimant's argument that the full amount of the executor fee should be allocated to the week in which he received it. The *Employment Insurance Regulations* do allow for the allocation of lump sums amounts to one week of EI benefits where the earnings arise as a result of a transaction and no other method of allocation is specified. In this case, however, I have found that the earnings were paid for performance of services over a period of time. As a result, the earnings cannot be considered to have arisen from a transaction and the Claimant's argument must fail.

[16] I agree with the Claimant that the Commission's use of an hourly rate to determine the amount to allocate is incorrect. The Claimant was paid a fee for performing the duties of the executor once those duties were largely complete. The fee was based on the value of the estate and not on the hours of work performed in any given week. The law says that earnings paid for the performance of services must be allocated to the period in which services are performed.⁹ In order to apportion the remuneration paid under a contract of service in the course of which some services were not always rendered, it is necessary to have regard to the period for which the remuneration was payable rather than the dates on which the employee performed his or her

⁹ *Employment Insurance Regulations*, section 36(4)

duties.¹⁰ As a result, I find that the correct period for allocation of the executor fee began on the day the Claimant's step-father passed away, when the Claimant accepted the executor appointment, to the date that the disbursements from the estate to the beneficiaries occurred. Accordingly, I find that the period during which the services were performed by the Claimant is from January 14, 2015, to November 22, 2016.¹¹

[17] The law says that allocation of earnings is made on a weekly basis.¹² As a result, I find the weekly amount to be allocated is calculated by dividing the executor fee by the number of days in the period and multiplying the result by 7 days. As found above the period is from January 14, 2015, to November 22, 2016. There are 679 days in that period. Thus, \$2,719.80 / 679 days x 7 days = \$28.03. Allocations are made in whole dollars with amounts less than 50 cents disregarded¹³ so the weekly allocation amount is \$28.00.

Conclusion

[18] The appeal is allowed in part. The money received by the Claimant for services performed as an executor is earnings. The weekly earnings of \$28.00 are to be allocated to each week the Claimant's EI weekly benefits from January 11, 2015 to April 4, 2015.

Raelene R. Thomas

Member, General Division - Employment Insurance Section

HEARD ON:	December 10, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	S. C., Appellant

¹⁰ *Sylvain*, A-769-90 FCA. This is how I refer to the court cases containing principles the law requires me to apply to the circumstances of this appeal.

¹¹ See page GD3-62 in appeal file

¹² *Employment Insurance Regulations*, section 36(1)

¹³ *Employment Insurance Regulations*, section 36(20)