



Citation: *SN v Canada Employment Insurance Commission*, 2021 SST 378

**Social Security Tribunal of Canada  
General Division – Employment Insurance Section**

**Decision**

**Appellant:** S. N.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission  
reconsideration decision (424339) dated June 1, 2021  
(issued by Service Canada)

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**Tribunal member:** Amanda Pezzutto

**Type of hearing:** Teleconference

**Hearing date:** July 22, 2021

**Hearing participant:** Appellant

**Decision date:** July 29, 2021

**File number:** GE-21-1006

## Decision

[1] S. N. is the Claimant. The Canada Employment Insurance Commission (CEIC) made decisions about his Employment Insurance (EI) benefits. He is appealing these decisions to the Social Security Tribunal (Tribunal).

[2] I am allowing the Claimant's appeal in part. The sales commission is earnings. I find that he performed work to earn the commission. But I find that he only worked in the weeks beginning November 29, 2020, January 17, 2021, and January 24, 2021. The CEIC should allocate his earnings equally to those three weeks.

## Overview

[3] The Claimant was collecting EI benefits. At the same time, he was working as a real estate agent. He received a commission for selling a home and reported income of \$5433 to the CEIC. The CEIC decided that the commission was earnings.

[4] The law says that the CEIC has to assign all earnings to certain weeks. The law calls this **allocating** earnings. The weeks of allocation depends on the reason why you received the earnings.<sup>1</sup>

[5] The CEIC decided to allocate the Claimant's earnings equally to each week between December 5, 2020 and February 27, 2021. This is because the Claimant listed the property for sale in the week of December 5 and closed the sale in the week ending February 27. The CEIC argues that the Claimant worked to earn the sales commission in each of these weeks.

[6] The Claimant agrees that the money is earnings. But he disagrees with how the CEIC allocated the earnings. He says the CEIC should allocate the earnings just to the week of January 24, 2021. He says he earned his commission in this week because his client accepted an offer in this week. He says he barely performed any work in any of the other weeks.

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<sup>1</sup> See section 36 of the *Employment Insurance Regulations* (EI Regulations).

## Issues

[7] I have to look at several questions to decide this appeal:

1. Is the sales commission earnings?
2. If it is earnings, which section of the law describes how to allocate the earnings?
3. Did the Claimant perform any work to earn the commission? If he did perform work, when did he work?
4. How should the CEIC allocate the earnings?

## Analysis

[8] When you receive money at the same time you receive employment insurance benefits, the CEIC must decide whether the sum of money is earnings. Any income arising from employment is earnings.<sup>2</sup>

[9] The law defines both “income” and “employment.”

[10] **Income** can be anything that you got or will get from an employer or any other person. It doesn't have to be money, but it often is.<sup>3</sup>

[11] **Employment** is any work that you did or will do under any kind of service or work agreement.<sup>4</sup>

[12] If the CEIC decides that a sum of money is earnings, then the CEIC must allocate the money to the proper weeks. The reason for the payment determines the weeks of allocation.<sup>5</sup>

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<sup>2</sup> See section 35(2) of the EI Regulations

<sup>3</sup> See section 35(1) of the EI Regulations.

<sup>4</sup> See section 35(1) of the EI Regulations.

<sup>5</sup> See section 36 of the EI Regulations.

**Issue 1: Is the sales commission earnings?**

[13] The CEIC says the sales commission is earnings. The CEIC says the money is income arising from employment.

[14] At the hearing, the Claimant said he agreed. He agrees that the sales commission is earnings.

[15] Both parties agree that the commission is earnings. Nothing in the appeal file makes me doubt that the money is income arising from employment. I accept that the \$5433 the Claimant received as a sales commission is earnings.

**Issue 2: Which section of the law describes how to allocate the earnings?**

[16] I find section 36(6.1)(a) of the *Employment Insurance Regulations* describes how to allocate the earnings. This section of the law says the CEIC has to allocate the earnings to the weeks the Claimant worked, if he did any work to earn the earnings.

[17] Both the Claimant and the CEIC agree that the earnings is a commission from a real estate sale. They disagree about how the law applies to these kinds of earnings.

[18] The Claimant argues that the CEIC should allocate the earnings to the week of the transaction. He says his client accepted the offer on January 24, 2021 and so the CEIC should allocate the earnings to that week only.

[19] The CEIC says that the Claimant performed work to earn the commission from the date he listed the property for sale until the sale closed. The CEIC wants to allocate the earnings equally from December 5, 2020 until February 27, 2021.

[20] At the hearing, the Claimant said he represented a client who was selling a home. When the home sold, the Claimant became entitled to the commission. He says this means that the earnings arose from a transaction – the sale of the home.

[21] The CEIC agrees that the earnings arose from the transaction.

[22] I agree with both parties. I find that the transaction – the sale of the home – led to the Claimant earning the commission. He wouldn't have received the commission if he didn't complete the transaction.

[23] Only one part of the *Employment Insurance Regulations* talks about how to allocate a commission that arises from a transaction:

**36(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.

[24] What does this mean? It means that the law gives us two different ways of allocating a commission. If the commission is greater than the maximum weekly insurable earnings, then the CEIC has to use paragraph (a). If the commission is lower than the maximum weekly insurable earnings, then the CEIC has to use paragraph (b).

[25] The law tells us how to calculate the maximum weekly insurable earnings. First, I have to look at the **maximum yearly insurable earnings**. I divide this number by 52 to come up with a weekly amount.

[26] The CEIC says I should use this calculation:

$\$56,300$  (maximum yearly insurable earnings)  $\div$  52 =  $\$1083$  (rounded to the nearest dollar)

[27] The Claimant hasn't given me any reason to doubt the CEIC's calculation, and so I agree with the CEIC. I will use this calculation to decide which part of the law applies to the Claimant's earnings.

[28] If the Claimant's earnings are greater than  $\$1083$ , then the first paragraph, paragraph (a), applies to his earnings. If his earnings are less than  $\$1083$ , the second paragraph, paragraph (b), applies.

[29] The Claimant's earnings were  $\$5433$ . This is greater than  $\$1083$ , and so the first paragraph, paragraph (a), applies to his earnings.

[30] Paragraph (a) says the CEIC has to allocate the Claimant's earnings to the weeks he worked to earn the earnings. If he didn't do any work to earn the earnings, then the CEIC has to allocate his earnings to the week of the transaction.

[31] So now, this means I have to decide if the Claimant did any work to earn his commission. If he did perform work, which weeks did he work?

### **Issue 3: Did the Claimant perform any work to earn the commission? If he did perform work, when did he work?**

[32] I find that the Claimant performed work to earn his commission. I find that he worked in the weeks beginning November 29, 2020, January 17, 2021, and January 24, 2021.

[33] The CEIC argues that the Claimant worked to earn his commission from the day he listed the property for sale on December 5, 2020 until he closed the sale on February 27, 2021.

[34] The Claimant disagrees. He says he barely performed any work at all. He says the CEIC should allocate the earnings to the week of January 24, 2021 because this was the week of the transaction.

[35] At the hearing, I asked the Claimant to describe his role. I asked him to explain what he did for his client from the day started working with them until the day they handed the property over to the new owners.

[36] The Claimant described his duties:

- The week of November 29 to December 5, 2020: He viewed the property. He took pictures. He prepared the contract and had the sellers review and sign it. He prepared the listing and uploaded the listing to the real estate system. He said this all took about two or three hours.
- The week of January 17 to 23, 2021: He showed the property to the prospective buyers. He said this took two or three hours.
- The week of January 24 to January 30, 2021: The buyers made an offer. The offer went back and forth between the two parties. This took two or three hours. The buyers hired a home inspector and the Claimant was present as the inspector viewed the property. The inspection took one hour.

[37] The Claimant said he didn't have any other duties related to the listing and sale of the property.

[38] I believe the Claimant's description of his activities. I believe that he did very little work to sell the home. But I find that the activities he described are all work. He dealt with his clients. He prepared a contract and prepared the listing. He helped the prospective buyers view the property. He helped his clients with the offer process. He helped the prospective buyers complete the home inspection. Even if this isn't very much work, I find that it still counts as work. If the Claimant didn't do any of these things, he wouldn't have helped his clients sell the property and he wouldn't have received his commission.

[39] The law only allows me to allocate the earnings to the week of the transaction if the Claimant didn't perform any work to earn the earnings. But I find that he did perform

work. This means that I must allocate his earnings proportionally to each of the weeks he worked.

[40] I believe the Claimant's description of the time he spent working each week. He said he spent about the same amount of time working in each week.

[41] So, I find that the Claimant performed the work that gave rise to his earnings in the weeks beginning November 29, 2020, January 17, 2021, and January 24, 2021. I find that he spent an equal amount of time working in each of these three weeks.

#### **Issue 4: How should the CEIC allocate the earnings?**

[42] The law says the CEIC must allocate the Claimant's earnings equally to each week he performed the work. I find that the Claimant worked an equal amount in each of the three weeks he worked. So, I find that the CEIC should allocate the Claimant's earnings equally to each week.

[43] \$5433 divided by three is \$1811. So, I find the CEIC should allocate the Claimant's earnings like this:

- Week beginning November 29, 2020: \$1811;
- Week beginning January 17, 2021: \$1811;
- Week beginning January 24, 2021: \$1811.

#### **Conclusion**

[44] I am allowing the Claimant's appeal in part. The real estate sales commission is earnings. I find that the Claimant only worked for three weeks. The CEIC should allocate the earnings equally to each of the three weeks the Claimant worked.

Amanda Pezzutto  
Member, General Division – Employment Insurance Section