



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *KW v Canada Employment Insurance Commission*, 2021 SST 381

Tribunal File Number: GE-19-1090

BETWEEN:

K. W.

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: March 17, 2021

DATE OF DECISION: March 26, 2021

DECISION

[1] The appeal is dismissed.

[2] K W. (the Claimant) worked and received earnings from his employer while receiving Employment Insurance (EI) benefits.

[3] The Commission has correctly allocated the earnings to the Claimant's EI benefits. This means the Claimant received \$877 of EI benefits which he was not entitled to receive. The Claimant must repay those EI benefits.

OVERVIEW

[4] The Claimant is a casual substitute teacher. In June 2016 he applied for and established a claim for EI benefits. A pilot project was ongoing during his benefit period. The pilot project allowed claimants to work while receiving EI benefits and choose the formula the Commission would use to deduct their earnings from all their EI benefits. The Claimant returned to work on September 7, 2016, and continued to receive EI benefits. The Commission found out the Claimant did not report all of his earnings correctly. It notified the Claimant that because the correct amount of earnings had not been allocated to (deducted from) his EI benefits he had been paid EI benefits that he should not have received. The Commission told the Claimant that he had to pay back those EI benefits, which is called an overpayment.

[5] The Claimant disagrees with the Commission's decision. He says that the Commission has provided three different amounts for the overpayment and has not explained its calculations. He says that the Commission has delayed responding to his requests for information, his Access to Information Request and that it should apply section 46.01 of the *Employment Insurance Act* to his circumstances and not require any repayment.

PRELIMINARY MATTERS

The hearing was adjourned

[6] The hearing was originally scheduled to be held by teleconference on April 24, 2019. On April 17, 2019, the Claimant requested an adjournment because he had not received information

from Service Canada in response to an Access to Information request. In the interests of natural justice, I granted the adjournment to allow the Claimant time to obtain the documents. The hearing remained adjourned until March 17, 2021, at which time the hearing was held.

A pre-hearing conference was held

[7] A pre-hearing conference was held by teleconference on April 24, 2019, to discuss procedure in light of the Claimant's Access to Information Request to the Commission. At the pre-hearing conference, the Claimant explained that he had filed the access request on the same day he filed his appeal with the Tribunal (February 27, 2019). He had not yet received a response to his request. I instructed the Claimant to provide an update to the Tribunal by June 3, 2019, on whether his access request had been completed or additional time would be required.

Access to Information Request

[8] The Claimant's access to information request was not completed at the time of the hearing on March 17, 2021. He provided updates to the Tribunal on June 3, 2019, July 3, 2019, and August 29, 2019. At the hearing, the Claimant asked to submit a document relating to the access request. The document was an email, dated March 12, 2021, from a person who is investigating his complaint that Service Canada had not responded to his Access to Information request. I asked how the email would be relevant to the issue I was required to decide, which is whether the money the Claimant received was earnings, and if it was, did the Commission allocate the earnings correctly. The Claimant replied that the document was relevant to the issue because he has been denied information from Service Canada to prepare a proper defence to the overpayment.

[9] At the end of the hearing, I instructed the Claimant on to how to submit the document. The Claimant was instructed to submit the document by March 19, 2021. The Tribunal received the document on March 18, 2021.¹

[10] I have read the document and do not find it to be relevant to the issue I am required to decide. To determine relevance requires that I consider the content of the document and whether

¹ This document is numbered GD22.

it will inform my decision. The Claimant is appealing the allocation of his earnings. The document relates to his pursuit of an Access to Information request made to Service Canada.² The information in the document relates to the Claimant's complaint against the Commission for failing to respond to an Access to Information request. It does not provide any information about the issue under appeal. As a result, I will not consider the document in reaching my decision.

[11] In reaching my decision on relevance, I have also considered the Claimant's argument that the document is relevant because it shows that he was not able to properly prepare a defence against the overpayment. I do not agree that the Claimant required fulfillment of the Access to Information request to properly prepare a defence against the overpayment. In my opinion, the Commission has complied with the *Social Security Regulations* and the Claimant had all the relevant evidence necessary to properly prepare a defence. My reasons for my opinion follow.

[12] The *Social Security Regulations* require that the Commission must, within 7 business days after it receives a copy of an appeal, file with the Tribunal documents in the Commission's possession that are relevant to the decision being appealed.³ At page GD3-77, the appeal file contains a record of the earnings, which the Claimant testified that he does not dispute. The appeal file contains a table at page GD3-80 which shows for each of the 9 weeks the Claimant had earnings: the amount of EI benefits the Claimant received, the earnings he received, the amount of earnings allocated, and the resulting overpayment and underpayment. That same table has the note "(2)" explaining how the Commission calculated the amount by which benefits are reduced by earnings. In other words, the note explains the how the Commission calculated the amount of the earnings that were allocated to the Claimant's EI benefits. The entire GD3 document was e-mailed to the Claimant on April 5, 2019, and again on March 4, 2021.

[13] At page GD20-4, the Commission provided a second calculation of the allocation amounts at my request. I asked the Commission to calculate the allocation of earnings had the Claimant made an election on the treatment of his earnings while on claim and participating in

² The Claimant's access request was for "All Service Canada information with respect to Employment Insurance benefit for 2016. All correspondence (telephone transcripts), emails, earnings calculations and overpayment, etc.). All relevant Freedom of Information and Protection of Privacy related to Service Canada and Integrity Services. This is for appeal purposes." See page GD11-2 of the appeal file

³ *Social Security Tribunal Regulations*, section 30(b). The Commission is also required to file at the same time a copy of the request for reconsideration, a copy of the decision being appealed, and the submissions, if any of the Commission. (see *Social Security Tribunal Regulations* sections 30(a)(c) and (d); and, GD3 and GD4).

the pilot project. The Commission provided a table showing each of the 9 weeks the Claimant had earnings, the amount of EI benefits the Claimant received, the earnings he received, the amount of earnings allocated, and the resulting overpayments and underpayment. Above the table are two notes: Benefit Rate = \$300 a week. Maximum allowable earnings = 40% of \$300 = \$120 a week. In other words, where a claimant earned less than \$120 a week, no deduction was made from the EI benefits. Where a claimant earned more than \$120 a week, the earnings above that amount were deducted dollar for dollar from the EI benefits to the maximum amount of those benefits. The GD20 document was e-mailed to the Claimant on February 12, 2021, e-mailed again on February 15, 2021, with a correction to the cover letter, and, again e-mailed on March 4, 2021.

[14] The hearing was held on March 17, 2021. The Claimant had the reconsideration file and the Commission's first submissions from April 5, 2019. He was sent by email the legislation governing the Pilot Project (GD6) on April 5, 2019. These documents contained the Commission's calculations of the overpayment, the legislation that it relied upon to make those calculations and the Commission's submission as to why it believed that it had correctly determined the money the Claimant received to be earnings and that the earnings were correctly allocated. He had the second calculation as of February 12, 2021. In my view, the Claimant had the necessary information to prepare a proper defence and, further, he had that information sufficiently ahead of the hearing to allow time for his preparations.

The hearing was held by teleconference

[15] At the start of the hearing on March 17, 2021, the Claimant questioned why he was not given an in-person hearing. I replied that he had not asked for an in-person hearing for this appeal. He then said that he could not hear me on his speakerphone. I asked if the Claimant had a hearing impairment. He said he did not. I explained that sometimes domestic speaker phones do not allow for two people to talk at the same time and both be heard. I suggested that we both wait for the other person to stop speaking before starting to speak. The hearing then proceeded.

[16] At the end of the hearing when I asked the Claimant if he was satisfied that he had enough time to present his case, the Claimant replied that he was not happy that he did not get an in-person hearing. But, he said that was beside the point. He said "as far as today went it was

reasonable.” He said he did not get any hard copy documents by courier, he only got his documents by email. He said he was not working in an office; he was working in a bedroom in a house full of people who were restricted due to the pandemic.

[17] The Tribunal usually tries to respect claimants’ requests for form of hearing. Even so, the law says it is up to me to make the final decision about the form of hearing.⁴

[18] I decided to hold this hearing by teleconference because the Claimant did not make any request on the form of hearing. When he filed his appeal with the Tribunal in February 2019 he did not use the Tribunal’s Notice of Appeal form that asks for the Claimant’s preference on the form of hearing. The hearing was initially scheduled to be heard by teleconference on April 24, 2019. The Claimant did not object to that method of proceeding.

[19] The Claimant participated in the pre-hearing conference on April 24, 2019, by teleconference. He did not object to the pre-hearing conference being held by teleconference. Given the lack of any preference for type hearing being expressed by the Claimant and the lack of objection by the Claimant to the prior teleconference, I chose to hold the March 17, 2021, hearing by teleconference.

[20] After the Claimant said he was not happy that he did not get an in-person hearing, I asked the Claimant if there was any change in the circumstances or information related to the issue under appeal. He replied no. This tells me that the Claimant was able to participate in the hearing.

[21] I then asked the Claimant again about his ability to hear. He replied that the hearing (meaning his ability to hear me) issue was subjective but that he did not have a hearing impairment. From this, I concluded there was no health reason that prevented the Claimant from participating in the hearing.

[22] The Claimant said that he got the notice of hearing on March 3, 2021, and the hearing was March 17, 2021. He did not think there was enough time to contact the Tribunal to ask for a change in the form of hearing. I noted that the Claimant could have telephoned or emailed the

⁴ *Social Security Regulations*, section 21

Tribunal and it was his choice not to. The Claimant did appear before me by teleconference and the hearing was conducted by teleconference at the scheduled time on the scheduled date.

[23] The Claimant complained that when the Tribunal called his house only "Private Name" appeared. He and other members of the household do not answer calls showing Private Number because that is what telemarketers use. He says that the Private Number adds to the confusion. He said he did not know the Tribunal was calling him until he actually made contact with the Tribunal on March 9, 2021.

[24] I noted to the Claimant that the Tribunal staff left voice mail messages at the telephone number provided by the Claimant on March 4, 2021, and March 5, 2021, asking him to call the Tribunal and asking if he received the documents sent by email or if he wanted a hard copy. The Claimant replied that was not his answering machine. Nonetheless, I noted to the Claimant that when Tribunal staff spoke to his wife on March 9, 2021, at the same telephone number he provided and where messages had been left, that his wife asked the staff member to call back in two hours. The staff member did call back later that day and spoke to the Claimant at the same telephone number he provided. The Claimant told the staff member that he wanted a hard copy of the documents. The Claimant also said that he received a voice mail message from the Tribunal on March 11, 2021, about the hearing asking if he had any questions. Because he did not have any questions he did not call back. I note that the message of March 11, 2021, was left at the same telephone number as the messages were left for the Claimant on March 4, 2021, and March 5, 2021.

[25] The Claimant said that he did not have time to prepare and he did not receive the documents by hard copy. I noted to the Claimant that all the documents were emailed to him on March 4, 2021. The emails have not been returned as undeliverable. During the hearing, the claimant was able to look at each page that I asked him to look at. He also referred me to a page (GD15-1) in support of his argument. This tells me that the lack of hard copy of the appeal file did not prevent the Claimant from participating in the hearing.

[26] The law says that I have to proceed as quickly as the circumstances and the considerations of fairness and natural justice permit.⁵

[27] The Tribunal is not holding in-person hearings because of the COVID-19 pandemic. It is difficult to foresee when the Tribunal will be able to start holding in-person hearings again.

[28] This appeal has been in abeyance since April 2019. The Claimant had presented his evidence and argument and I had completed my questions when the Claimant said he was not happy that he did not get an in-person hearing. I do not think it would be fair to the other party, the Commission, to reschedule this hearing to a later date to allow for a change in format and to hold, what in effect would be a rehearing on the issue.

[29] There has been no change in the information or circumstances related to the issue under appeal. The Claimant was not prevented from presenting his case, through evidence and argument, at the hearing. He had an electronic copy of the appeal file, emailed to him from April 5, 2019, onward and emailed to him again on March 4, 2021. He was able to, and did, refer to documents in the appeal file. There was no medical reason preventing his participation in the hearing. He was able to hear me and I was able to hear him. This tells me that my decision hold the hearing by teleconference met my obligation under the law to proceed as quickly as the circumstances and the considerations of fairness and natural justice permit.

My jurisdiction is limited

[30] The Claimant is appealing the allocation of earnings while working on claim. Because he was eligible to participate in a Pilot Project at the time he had the option of making an election between two methods as to how he wanted those earnings allocated. I asked the Commission whether I had jurisdiction to decide on matters related to the election. The Commission quoted section 77.991(7) of the *Employment Insurance Regulations*: A decision of the Commission in respect of any matter related to an election, including failure to make an election, is not subject to a reconsideration under section 112 of the [*Employment Insurance*] Act.

⁵ *Social Security Tribunal Regulations*, section 3(1)

[31] My authority to determine issues under appeal is provided for in Section 113 of the *Employment Insurance Act*, which states that a party, who is dissatisfied with a decision of the Commission that was made under section 112 of the Act, may appeal that decision to the Tribunal. The Court has confirmed that the issue the Tribunal must determine under appeal is the decision the Commission made under section 112.⁶ In this case, the law says that any decision made by the Commission on any matter related to an election of the method of allocation under the pilot project is not subject to section 112. Therefore, in the absence of a decision made under section 112, I have no authority to make any decisions regarding a claimant's election of the method used to allocate earnings.

ISSUES

[32] I have decide if the money that the Claimant received is earnings as defined by the *Employment Insurance Act*.

[33] If I decide the money is earnings, I also have to decide if the Commission allocated the earnings correctly.

ANALYSIS

[34] The law says that earnings are the entire income of a claimant arising out of any employment.⁷

[35] The law defines both "employment" and "income." "Employment" includes any employment under any kind of contract of service or employment.⁸ "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.⁹

⁶ *Hamilton v. Canada (Attorney General)*, A-175-87. The law requires me to apply principles used by the Courts when they interpret the *Employment Insurance Act*. I refer to this and other cases that explain the *Employment Insurance Act* in this decision.

⁷ *Employment Insurance Regulations*, section 35(2)

⁸ *Employment Insurance Regulations*, section 35(1)

⁹ *Employment Insurance Regulations*, section 35(1)

The money the Claimant received is earnings

[36] The Record of Employment (ROE) in the appeal files shows that the Claimant worked as a substitute teacher for a school board from September 7, 2016, to June 27, 2017.¹⁰ The Claimant does not dispute that he earned the amounts for the nine weeks as listed by the Commission in its decision letter to him dated November 29, 2018.¹¹ The Claimant testified that he was paid the amounts by the school board for work he performed as a substitute teacher. This evidence tells me that the money the Claimant received arose from his employment. As a result, I find that the \$3,510.00 the Claimant received is earnings and must be allocated to his EI benefits.¹²

Pilot Project No. 20

[37] The Claimant established a claim for EI benefits on June 12, 2016. The benefit period began on that date and ended on June 10, 2017.

[38] Pilot Project No. 20, in effect from August 7, 2016, to August 11, 2018, applied to his claim.¹³

[39] Pilot Project No. 20 amended section 19 of the *Employment Insurance Act* to provide for deducting a claimant's earnings from their EI benefits when they worked while on claim.

[40] **The amendment method** provided that earnings be deducted from the EI benefits payable to any claimant at the rate of 50% of those earnings, until the earnings were greater than 90% of the claimant's weekly insurable earnings used to calculate the benefit rate.¹⁴ Earnings that were more than 90% of the Claimant's weekly insurable earnings were deducted from the EI benefits at 100%, in other words dollar for dollar.¹⁵

[41] One purpose of Pilot Project No. 20 was to test which of two methods of calculating the amount of earnings to be deducted was more effective in encouraging claimants to work more

¹⁰ The Record of Employment is at page GD3-10 of the appeal file

¹¹ This letter is at page GD3-77 of the appeal file.

¹² \$3,510 is the total of the amounts in each of 9 weeks listed by the Commission in the letter at page GD3-77.

¹³ *Employment Insurance Regulations*, section 77.99(2)

¹⁴ The benefit rate is the dollar amount of the weekly EI benefits a claimant is entitled to receive

¹⁵ *Employment Insurance Regulations*, section 77.99(3)

while receiving EI benefits.¹⁶ The first method was the amendment as described in paragraph 40 above. I call the first method the “amendment method.” The second method was used in a prior pilot project. I call the second method the “alternative method” and describe it in paragraph 42 below.

[42] **The alternative method:** A claimant was allowed to have weekly earnings to a maximum of \$75 if the rate of weekly EI benefits was less than \$188 or to a maximum of 40% of the claimant’s rate of weekly benefits, if the rate of weekly benefits was greater than \$188.¹⁷ This meant that any earnings above the maximum amounts would be deducted from a claimant’s EI benefits.

[43] Under Pilot Project No. 20 claimants were allowed to make an election of how they wished to have their earnings while on claim allocated to their EI benefits for all weeks of unemployment in their benefit claim. The Claimant did not make an election. The Commission says the Claimant may now advise the Commission of his election. The Commission says if he does make an election he is required to show good cause for the delay in making his election.¹⁸

[44] The Claimant’s employer issued an ROE on June 26, 2018, for the period September 7, 2016, to June 27, 2017. The amounts that were reported on the ROE did not match the amounts the Claimant reported on his claim reports for some weeks during the benefit period. The Commission asked the school board to confirm the weekly amounts paid to the Claimant during the benefit period. The Claimant was asked to explain the difference in the amounts that he reported and the amounts his employer reported.

[45] As noted above the Claimant does not dispute the amounts of earnings in the 9 weeks listed in the letter issued to him by the Commission on November 29, 2018. The Claimant testified that he both worked and received EI benefits during those weeks.

[46] The Commission allocated the earnings according to the amendment method as provided for by section 77.99(3) of the *Employment Insurance Regulations* and sent a notice of debt that

¹⁶ *Employment Insurance Regulations*, section 77.991(1)

¹⁷ *Employment Insurance Regulations*, section 77.94(3)

¹⁸ The Commission made this submission at page GD20-3 of the appeal file.

said the Claimant had an overpayment due to earnings other than declared. The overpayment was calculated as \$994.00¹⁹

The Commission's submission

[47] The Commission submitted that the money the Claimant received from his employer was earnings because the payment was made to compensate the Claimant for work he performed. The Commission says it correctly allocated the money to the weeks in which the services were performed in accordance with section 36(4) of the *Employment Insurance Regulations*.

The Claimant's submission

[48] The Claimant submitted that the issue was not the earnings. He has always agreed that he had earnings in the weeks listed on the Commission's letter of November 29, 2018.²⁰ The issue is the three different amounts he has been told that he owes at three different times. He was told one figure was "eight hundred something," another figure was "nine hundred something" and, another figure was "thirteen hundred something." He said this tells him the Commission does not know what it is doing.

[49] The Claimant said there was zero clarification until what he was given at the hearing. He did not know what number was owed until he was told at the hearing that he owed \$877. He said he has been given three different numbers, so how is he supposed to agree to three different calculations? The Claimant asked, now the amount had been clarified by me, why couldn't the Commission have done that, why did he have to go to the Tribunal, why did this have to take four years, couldn't the Commission have just worked with him, why was the Commission so unreasonable, why did it deny him access to information. The Claimant said that he understood that his questions are not the legal test but that is why he was at the hearing.

[50] The Claimant referred to GD15-1. This is an email from Claimant initially sent to the Tribunal on 13.08.2019 and again on 2019-08-29. The subject line is: status update GE-19-1090. The Claimant said this email creates the whole purpose why this has taken so long. He said he knows that this is not the legal test. He said on the date of the email, August 13, 2019, it had

¹⁹ Page GD3-79

²⁰ Page GD3-77

been six months since his initial request to Service Canada under the *Access to Information Act*. The Claimant said the request remains unresolved because the Commission would not comply. As a result, the Claimant said, he feels that the Commission has placed unreasonable expectations and is acting in bad faith.

[51] The Claimant submitted that since his initial application for benefits was on June 16, 2016, that the overpayment should be dismissed under section 46.01 of the *Employment Insurance Act*. The Claimant quoted section 46.01 as follows:

46.01 No amount is payable under section 45, or deductible under subsection 46(1), as a repayment of an overpayment of benefits if more than 36 months have elapsed since the lay-off or separation from the employment in relation to which the earnings are paid or payable and, in the opinion of the Commission, the administrative costs of determining the repayment would likely equal or exceed the amount of the repayment.

[52] The Claimant submitted it is now month 57 since he requested reconsideration. He said that section 46.01 applies to his circumstances. The Claimant noted that the legislation has since been amended and there is no time limit. He noted that the 36-month limitation was in effect at the time he was laid off. The Claimant said that he was laid off and believes that section 46.01 applies to him.

[53] Following my questions to the Claimant, I asked the Claimant if there was anything else he wished to tell me about why he disagreed with the Commission's decision. The Claimant replied that it was not that he disagreed with the Commission's decisions. He disagreed with their tactics and how they conducted themselves, it was beneath reproach.

Section 46.01 does not apply

[54] I do not agree with the Claimant's submission that section 46.01 applies to his circumstances.

[55] First, section 46.01 speaks to the recovery of benefits paid to a claimant where "more than 36 months have elapsed since the lay-off or separation from the employment in relation to which the earnings are paid or payable." For this section to apply, a claimant would need first to

have been laid off or separated from his employment and, second, to have received earnings in relation to that former employment. The Claimant was laid off from his employment and established an EI claim effective on June 12, 2016. He returned to work on September 7, 2016, and worked while on claim. The weeks of earnings the Claimant received are relation to his employment after September 7, 2016, and not in relation to his employment prior to his layoff in June 2016. As a result, I find that section 46.01 of the *Employment Insurance Act* is not applicable to the Claimant's circumstances.

[56] Second, Section 46.01 says that "no amount is payable under section 45 or deductible under subsection 46(1)."

[57] Section 45 says, in part,

If a claimant receives benefits for a benefit period and, under a labour arbitration award or court judgement, 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 a 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.

[58] In the Claimant's case, he was working while receiving EI benefits. He received earnings for the weeks he worked. Those are the earnings the Commission allocated. It is not a case of receiving earnings "subsequent" to receiving benefits in a benefit period. As a result, I find that section 45 does not apply to the Claimant's circumstances.

[59] Subsection 46(1) speaks to the requirement that an employer or other person who pays a claimant earnings for a period while a claimant is receiving EI benefits, to repay an amount equal to the EI benefits. As that is not what has happened in this case and the Commission is not seeking repayment of benefits from the Claimant's employer or other person, I find that subsection 46(1) does not apply to the Claimant's circumstances.

The Commission correctly allocated the Claimant's earnings

[60] I find the Commission correctly allocated the earnings the Claimant received while he was working on claim.

[61] An overpayment of benefits occurs when a claimant receives EI benefits that he or she is not entitled to receive. The Commission allocated the Claimant's earnings to the weeks in which the earnings were paid or became payable. As a result, I find the Commission correctly allocated the Claimant's earnings to the correct weeks in accordance with section 36(4) of the *Employment Insurance Regulations*.

The Commission used the correct method to calculate the allocation amounts

[62] The Claimant disputes the amounts the Commission calculated that he was overpaid in EI benefits in each of the nine weeks.

[63] The Commission's calculations are in tabular form at page GD3-80 of the appeal file. I note that the Commission used the amendment method as described in paragraph 40 above.

[64] As noted above, Pilot Project No. 20 applied to the Claimant's claim for EI benefits.

[65] As noted above, Pilot Project No. 20 amended section 19 of the *Employment Insurance Act* to provide for deducting a claimant's earnings from their EI benefits when they worked while on claim. The amendment required that earnings be deducted at the rate of 50% for every dollar earned to a maximum of 90% of the weekly insurable earnings used to establish the EI benefit rate and 100% of every dollar above that rate.

[66] To allocate earnings according to the alternative method where earnings above a set dollar amount of EI benefits would be deducted from EI benefits, required that the Claimant make an election to have his earnings allocated using the alternative method.²¹ Although the Commission now says that the Claimant may now make an election, provided he can show good cause for the delay in making the election, the evidence is that no election was made at the time the Claimant was working on claim or when the benefit period ended. As a result, in the absence

²¹ The alternative method is described in paragraph 42 of this decision

of an election, the Commission was required to allocate the earnings in accordance with the amended method as set out at section 77.99(3) of the *Employment Insurance Regulations*. The appeal filed shows the Commission used the amended method to determine the amounts to be allocated. Accordingly, I find that the calculation method the Commission used to determine the amount of earnings to be allocated is correct and is in accordance with the *Employment Insurance Regulations*.

The Commission correctly calculated the overpayment amount

[67] I further find that the Commission's calculation of the overpayment of \$877 is also correct. The reasons for my findings are below.

[68] The Claimant's weekly benefit rate was \$300. The benefit rate was 55% of his weekly insurable earnings.²² This means the Claimant's weekly insurable earnings used to calculate his rate of EI benefits was \$545.²³

[69] Thus the Claimant's earnings, while working on claim, would be deducted from the EI benefits he received at the rate of 50% for each dollar earned up to \$491 and at the rate of 100% for each dollar earned over \$491.²⁴

[70] If a claimant receives earnings while receiving EI benefits without any deduction of earnings made from the EI benefits, the claimant has received EI benefits which he was not entitled to receive.

[71] For the week beginning September 14, 2016, the Claimant received EI benefits in the amount of \$300. The Claimant reported zero earnings but he actually had earnings of \$569 of which \$324 should have been allocated. The \$324 is equal to 50% of the earnings up to \$491 (.5 x \$491 = \$246) plus 100% of the earnings over \$491 (1.00 x (\$569 - \$491) = \$78).²⁵ Because the allocation amount of \$324 is more than the \$300 in EI benefits, the Claimant should not have

²² *Employment Insurance Act*, section 14(1).

²³ $\$300 \div .55 = \545.45

²⁴ $\$545 \times .90 = \490.50 . Section 36(2) of the *Employment Insurance Regulations* says that for the purposes of allocation, a fraction a dollar that is equal to a greater than one half shall be taken as a dollar and a fraction that is less than one half shall be disregarded.

²⁵ $\$246 + \$78 = \$324$

received any EI benefits in this week. This means the Claimant has an overpayment of \$300 for the week beginning September 16, 2016.

[72] For the week beginning October 9, 2016, the Claimant received EI benefits in the amount of \$300. The Claimant reported zero earnings but he actually had earnings of \$221 of which \$111 should have been allocated. The \$111 is equal to 50% of the earnings up to \$491 (.5 x \$221 = \$111). Because the allocation amount of \$111 was not deducted from the \$300 in EI benefits, the Claimant received more EI benefits than he was entitled to receive. The overpayment is the difference between what the Claimant should have received in EI benefits once the allocation is made and what the Claimant did receive in EI benefits. The Claimant should have received \$189 in EI benefits. He received \$300. This means the Claimant has an overpayment of \$111 for the week beginning October 9, 2016.²⁶

[73] For the week beginning October 23, 2016, the Claimant received EI benefits in the amount of \$300. The Claimant reported zero earnings but he actually had earnings of \$493 of which \$248 should have been allocated. The \$248 is equal to 50% of the earnings up to \$491 (.5 x \$491 = \$246) plus 100% of the earnings over \$491 (1.00 x (\$493-\$491) = \$2).²⁷ Because the allocation amount of \$248 was not deducted from the \$300 in EI benefits the Claimant received more EI benefits than he was entitled to receive. The overpayment is the difference between what the Claimant should have received in EI benefits once the allocation is made and what the Claimant did receive in EI benefits. The Claimant should have received \$52 in EI benefits. He received \$300. This means the Claimant has an overpayment \$248 for the week beginning October 23, 2016.²⁸

[74] For the week beginning October 30, 2016, the Claimant received EI benefits in the amount of \$79. The Claimant reported that he had \$442 in earnings but he actually had earnings of \$443. The initial allocation was \$221 (.5 x \$442 = \$221). The allocation should have been \$222 (.5 x \$443 = \$222). Because the allocation amount of \$221 instead of \$222 was deducted from the \$300 in EI benefits, the Claimant received more EI benefits than he was entitled to receive. The overpayment is the difference between what the Claimant should have received in

²⁶ \$300 - \$189 = \$111

²⁷ \$246 + \$2 = \$248

²⁸ \$300 - \$52 = \$248

EI benefits once the allocation is made and what the Claimant did receive in EI benefits. The Claimant should have received \$78 in EI benefits. He received \$79. This means the Claimant has an overpayment \$1 for the week beginning October 30, 2016.²⁹

[75] For the week beginning November 13, 2016, the Claimant received EI benefits in the amount of \$79. The Claimant reported that he had \$442 in earnings but he actually had earnings of \$443. The initial allocation was \$221 ($.5 \times \$442 = \221). The allocation should have been \$222 ($.5 \times \$443 = \222). Because the allocation amount of \$221 instead of \$222 was deducted from the \$300 in EI benefits, the Claimant received more EI benefits than he was entitled to receive. The overpayment is the difference between what the Claimant should have received in EI benefits once the allocation is made and what the Claimant did receive in EI benefits. The Claimant should have received \$78 in EI benefits. He received \$79. This means the Claimant has an overpayment \$1 for the week beginning November 13, 2016.³⁰

[76] For the week beginning November 27, 2016, the Claimant received EI benefits in the amount of \$300. The Claimant reported zero earnings but he actually had earnings of \$221 of which \$111 should have been allocated. The \$111 is equal to 50% of the earnings up to \$491 ($.5 \times \$221 = \111). Because the allocation amount of \$111 was not deducted from the \$300 in EI benefits, the Claimant received more EI benefits than he was entitled to receive. The overpayment is the difference between what the Claimant should have received in EI benefits once the allocation is made and what the Claimant did receive in EI benefits. The Claimant should have received \$189 in EI benefits. He received \$300. This means the Claimant has an overpayment \$111 for the week beginning November 27, 2016.³¹

[77] For the week beginning December 11, 2016, the Claimant received EI benefits in the amount of \$300. The Claimant reported zero earnings but he actually had earnings of \$443 of which \$222 should have been allocated. The \$222 is equal to 50% of the earnings up to \$491 ($.5 \times \$443 = \222). Because the allocation amount of \$222 was not deducted from the \$300 in EI benefits, the Claimant received more EI benefits than he was entitled to receive. The overpayment is the difference between what the Claimant should have received in EI benefits

²⁹ $\$79 - \$78 = \$1$

³⁰ $\$79 - \$78 = \$1$

³¹ $\$300 - \$189 = \$111$

once the allocation is made and what the Claimant did receive in EI benefits. The Claimant should have received \$78 in EI benefits. He received \$300. This means the Claimant has an overpayment \$222 for the week beginning December 11, 2016.³²

[78] The overpayments in EI benefits for the seven weeks when no allocation was made or an incorrect amount was allocated total \$994.

[79] There are two weeks where the Claimant reported more earnings than he actually received. This meant that an underpayment was created because the Claimant did not receive the correct amount of EI benefits during those weeks, he actually received less benefits than he was entitled to receive. These two weeks are in paragraphs 80 and 81 below.

[80] For the week of November 20, 2016, the Claimant reported that he made \$442.00. Allocating \$221 ($.5 \times \$442 = \221) to the Claimant's weekly EI benefits of \$300 resulted in him receiving \$79 of EI benefits. In fact, the Claimant actually earned \$221 in this week. This means the Claimant should have received \$189 of EI benefits. ($\$300 - (50\% \text{ of } \$221) = \$189$). Because the Claimant did receive \$79 of EI benefits in this week the net underpayment is \$110 ($\$189 - \$79 = \110) for the week of November 20, 2016.

[81] For the week of December 18, 2016, the Claimant reported that he made \$470. Allocating \$235 ($.5 \times \$470 = \235) to the Claimant's weekly EI benefits of \$300 resulted in him receiving \$65 of EI benefits. In fact, the Claimant earned \$456 in this week. This means the Claimant should have received \$72 of EI benefits. ($\$300 - (50\% \text{ of } \$456) = \$72$). Because the Claimant did receive \$65 of EI benefits in that week the net underpayment is \$7 ($\$72 - \$65 = \7).

[82] The Commission submitted that the underpayment of \$117 ($\$110 + \$7 = \117) was used to reduce the total overpayment of \$994 for a net total overpayment of \$877 ($\$994 - \$117 = \877). I agree that the Commission has correctly calculated the net overpayment. This means the Claimant received \$877 in EI benefits that he was not entitled to receive.

³² $\$300 - \$78 = \$222$

The Claimant must repay the overpayment

[83] Section 43 of the *Employment Insurance Act* says that a claimant is liable to repay an amount paid by the Commission to him as benefits to which he was not entitled.³³ The law also states that all amounts payable under section 43 of the *Employment Insurance Act* are debts to the Crown, and are recoverable in the Federal Court or any other court of competent jurisdiction or in any other manner provided by the *Employment Insurance Act*.³⁴

[84] The *Employment Insurance Act* also states that no amount due under section 47 may be recovered more than 72 months after the day on which the liability arose.³⁵

[85] The date on which the liability arose, however, is not the date when the benefits were paid, which in the Claimant's case was 2016. The Federal Court of Appeal has confirmed that the date on which the Commission notifies the Claimant of the amount to be re-paid determines the starting point of the prescription period for recovery of the debt.³⁶ Thus, the 72-month limitation period begins on December 1, 2018, which is the date which the Commission notified the Claimant of the overpayment.³⁷

[86] The delay in recovery is, as discussed above, allowed by legislation and the Commission is within its rights to request the overpayment be repaid, for the period the Claimant was in receipt of both regular EI benefits and unreported earnings.

Other matters ~ the alternative method of allocation

[87] I asked the Commission to calculate the allocation amounts had the Claimant elected to have his earnings treated using the alternative method. As noted above, the alternative method deducts earnings above certain dollar amounts depending upon the amount of a claimant's EI benefits. Amounts above those certain dollar amounts are deducted dollar for dollar from EI benefits.

³³ *Employment Insurance Act*, section 43(b)

³⁴ *Employment Insurance Act*, section 47(1)

³⁵ *Employment Insurance Act*, section 47(3)

³⁶ *Brière v. Canada (Employment and Immigration Commission)*, [1989] 3 FC 88, at para 66

³⁷ The letter advising the Claimant that an overpayment occurred is at page GD3-77. The notice of debt issued to the Claimant is at page GD3-79.

[88] The Commission calculated that the net overpayment of EI benefits, had the Claimant elected to have his earnings allocated according to the alternative method, would be \$1,205. In the Claimant's case with weekly EI benefits of \$300 earnings above 40% of the rate of his weekly benefits are deductible from his EI benefits. This means all earnings above \$120 would be deducted from the Claimant's EI benefits.³⁸

[89] The amount of overpayment is greater using the alternative method because a larger amount of earnings is allocated under the alternative method than is allocated under the amendment method.

[90] For example, in the week beginning October 23, 2016, the overpayment amount calculated using the amendment method was \$248.³⁹ Using the alternative method for the same week, the overpayment amount would be \$300. Paragraph 91 below explains the alternative method calculation for the week of October 23, 2016.

[91] For the week beginning October 23, 2016, the Claimant reported zero earnings but he actually had earnings of \$493. Using the alternative method, any earnings above \$120 ($\$300 \times .40 = \120) are deducted from the Claimant's EI benefits. The amount to be allocated (deducted) is \$373 ($\$493 - \$120 = \373). Because the allocation amount is more than the \$300 of EI benefits the Claimant received, he should not have received any benefits in this week. This means, using the alternative method, the Claimant would have had an overpayment of \$300 for the week beginning October 23, 2016.

[92] I have reviewed the Commission's calculations using the alternative method for the remaining eight weeks.⁴⁰ I find that, had the Claimant elected the alternative method, the net overpayment would have been \$1,205 and, further, the net overpayment amount of \$1,205 is correctly calculated.⁴¹

³⁸ 40% of \$300 EI benefits = \$120 maximum earnings permitted.

³⁹ See paragraph 73 of this decision and page GD3-80

⁴⁰ These calculations are at page GD20-4

⁴¹ The gross overpayment was correctly calculated as \$1,325. There is only one week, using the alternative method, when there would have been an underpayment of \$120. Applying the underpayment of \$120 to the overpayment of \$1,325, results in a net overpayment of \$1, 205.

Other matters ~ the Claimant may make an election

[93] Nothing in my decision prevents the Claimant from contacting the Commission to make an election asking that the alternative method be used to calculate the allocation of his earnings. As noted above, the Commission has said the Claimant may now make the election provided he can show good cause for the delay in making his election. As well, as noted above, the Tribunal will not have any jurisdiction to decide any matters related to the Claimant's election should he decide to make one.

CONCLUSION

[94] The appeal is dismissed.

[95] The Claimant received EI benefits in the amount of \$877 which he was not entitled to receive.

[96] The Claimant must repay the EI benefits he was not entitled to receive.

Raelene R. Thomas

Member, General Division - Employment Insurance Section

HEARD ON:	March 17, 2021
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	K. W., Appellant