



Citation: *SB v Canada Employment Insurance Commission*, 2021 SST 660

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

Decision

Appellant: S. B.
Representative: Jesse Valkenier

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (417865) dated March 30, 2021
(issued by Service Canada)

Tribunal member: Charlotte McQuade

Type of hearing: Teleconference
Hearing date: May 28, 2021 and June 10, 2021
Hearing participants: Appellant
Appellant's representative

Decision date: June 22, 2021
File number: GE-21-730

Decision

[1] The appeal is allowed.

[2] S. B. (the "Claimant") settled a claim for wrongful dismissal against his employer for \$5000.00. The Canada Employment Insurance Commission (the "Commission") says that payment is earnings and allocated it to the Claimant's claim, resulting in an overpayment. The Commission did not reconsider the claim within the allowed time to do so its decision that the settlement money is earnings and the allocation of those earnings resulting in an overpayment is invalid.

Overview

[3] The Claimant was terminated from his employment on November 24, 2017. The employer paid him three weeks pay in lieu of notice of \$1,578.37. That sum was allocated to his EI claim from November 26, 2017. The Claimant began receiving EI benefits from December 31, 2017. The Claimant started a legal action against his employer and settled the claim for \$8000.00 less \$3000.00 in legal fees on May 25, 2018. The Claimant told the Commission about his settlement on August 14, 2018. In 2019 the Commission asked the Claimant to provide a copy of the settlement agreement, which he did on July 2, 2019. On February 3, 2021 the Commission wrote to the Claimant saying that following his voluntary disclosure about his earnings, the Commission had concluded that the Claimant had made a false representation because he had only declared some of the settlement monies he received from his employer. The Commission then allocated the adjusted earnings from the week of December 10, 2017 to the week of January 28, 2018 at a rate of \$684.00 per week. The Claimant requested a reconsideration of that decision.

[4] Upon reconsideration, on March 30, 2021, the Commission changed its allocation. The Commission said in its reconsideration decision that it had started the allocation from the incorrect start date and also used the incorrect average weekly earnings to allocate the earnings. It noted that the corrections would result in a change to the overpayment. No specifics concerning about the corrected start date or corrected

average weekly earnings was provided. The new overpayment was provided. The Claimant appealed this decision to the Tribunal.

[5] In its submission to the Tribunal, the Commission clarified its position. The Commission says that it had decided that the initial termination pay of \$1,578.37 and \$5000 of the settlement monies (\$8,000.00 minus legal fees of \$3,000.00) were “earnings” under the law because these payments were made to compensate the claimant for lost wages.

[6] The law says that all earnings have to be allocated to certain weeks. What weeks earnings are allocated to depends on why you received the earnings.¹

[7] The Commission allocated the earnings of \$6578.00 (\$1578.37 termination pay+ \$5000.00 settlement monies) from November 26, 2017 to February 3, 2018 at the Claimant’s normal weekly earnings of \$630.00, with a balance of \$220.00 allocated to the week starting February 4, 2018. The Commission says the week of November 26, 2017 is the week the Claimant was separated from his employment. The Commission said that being separated from his job is why the Claimant received the earnings. The allocation of the earnings caused an overpayment of \$2872.00.

[8] The Claimant agrees that the pay in lieu of notice of \$1578.37 is earnings and is to be allocated at his normal weekly earnings from the week of separation. However, he disagrees with the Commission that any part of the \$5000.00 settlement monies is earnings. The Claimant says that \$684.02 represents reimbursement for out of pocket health expenses he incurred. He says the balance of the \$5000.00 represents general damages to compensate him for the improper manner in which he was terminated. The Claimant also maintains that even if any of the settlement monies are considered earnings to be allocated, his employer held back \$1756.00 of that sum to repay the Commission for EI benefits he had received. So he says that amount should be deducted off any overpayment.

¹ See section 36 of the *Employment Insurance Regulations* (EI Regulations).

[9] The Claimant also disputes the fact the Commission is reconsidering the claim now, when it had the information before it necessary to reconsider the claim in 2019. The Claimants says he disclosed the amounts of the settlement to the Commission.

Matters I have to consider first

The Claimant's Representative provided testimony

[10] The Claimant's representative wanted to provide evidence regarding the terms of the settlement because the Claimant was not present during the settlement negotiations. Although typically a representative would not provide evidence, because the Claimant's representative had relevant evidence to provide, I permitted him to provide testimony.

Clarification from Commission

[11] At the initial hearing of this matter on May 28, 2021, it became apparent that the further clarification was required concerning the Commission's overpayment calculation. So, the hearing was adjourned to seek that clarification. The hearing was reconvened on June 10, 2021.

No post-hearing documentation from Claimant

[12] The Claimant's represented testified that he and the employer's counsel had gone back and forth over the phone and by email about how to characterize the terms of the final settlement. He testified as to the content of some of those emails. I did not have those emails before me. I asked the Claimant's representative if he would like time to submit any of that email documentation to the Tribunal. The Claimant's representative said he would look through the emails and submit any documentation he wished to rely on by 7 p.m. on June 10, 2021. However, as of the date of this decision, no post-hearing documentation was provided.

Issues

[13] I have to decide the following issues:

- a) Is the Commission within the time allowed to reconsider the claim?
- b) If so, is the money that the Claimant received earnings?
- c) If the money is earnings, did the Commission allocate the earnings correctly?
- d) Is the overpayment correctly calculated?

Analysis

Is the Commission within the time allowed to reconsider the claim?

[14] No. I find it is not. The Commission has not shown it has a reasonable basis for concluding a false statement or misleading statement or representation was made in connection with the Claimant's claim so it cannot extend the reconsideration period past 36 months.

[15] There are time limits the Commission must follow to reconsider a claim. The Commission may reconsider a claim for benefits within 36 months after the benefits have been paid or would have been payable.² The Commission has 36-months to establish that there is an overpayment and proceed to recover it.³

[16] That time limit can be extended to 72 months if, in the Commission's opinion, a claimant has made a false or misleading statement or representation.⁴ In that situation, the Commission must calculate the amount of overpayment and notify the claimant of its decision within the 72 months. The Commission must also advise the claimant why it considered the claimant's statement to be false.⁵

[17] Even if the false or misleading statement was made innocently, the Commission can still reconsider a claim within 72 months. It is enough that the Commission has a

² See subsection 52(1) of the *Employment Insurance Act* (Act).

³ *Canada (Attorney General) v Laforest*, A-607-87

⁴ See subsection 52(5) of the Act.

⁵ *Canada (Attorney General) v Langelier*, 2002 FCA 157.

reasonable basis for its opinion that a false or misleading statement was made. The intention of the person making the representation does not matter.⁶

[18] The Commission must prove it has a reasonable basis for its opinion that a Claimant made a false or misleading statement or representation.

[19] The Commission provided a payment schedule showing the Claimant was paid EI benefits from December 31, 2017 until June 23, 2018. The Commission's allocation covers the period from November 26, 2017 to the week of February 4 to 10, 2017. So, I find the Commission had 36 months from February 10, 2017 which is February 10, 2020 to reconsider the Claimant's claim, unless the Commission had a reasonable basis for its opinion that a Claimant made a false or misleading statement or representation.

[20] I find the Commission has not proven that it has a reasonable basis for its opinion that the Claimant made a false or misleading statement or representation.

[21] An initial claim for work-sharing employment insurance benefits was established by the Claimant on April 2, 2017. On November 27, 2017, the Claimant requested that his claim be converted to regular employment insurance benefits. He advised that his last day of work was November 24, 2017 and he would be getting three weeks of pay in lieu of notice upon separation. He also explained he would be filing a wrongful dismissal law suit and the reasons for that.⁷

[22] On December 8, 2017, the Commission contacted the Claimant and he confirmed the separation payment amounted to \$1578.37. The Claimant also confirmed his earnings in the last week of separation.⁸ This information was also noted on an amended Record of Employment (ROE) dated December 12, 2017.⁹

[23] Based on this information, the Commission wrote to the Claimant on December 27, 2020 advising that his claim would be renewed from November 26, 2017. The letter

⁶ *Canada (Attorney General) v. Dussault*, 2003 FCA 372.

⁷ GD3-12 to GD3-14.

⁸ GD3-12.

⁹ GD3-18.

provided that the Claimant had received \$1,578.37 in severance pay from his employer which was considered earnings and would be applied against his claim from November 26, 2017 to December 9, 2017, with a balance of \$142.00 to be applied against his benefits for the week beginning December 10, 2017.¹⁰

[24] On August 14, 2018 the Claimant contacted the Commission to advise that on June 1, 2018 he had received a settlement from his lawsuit against his employer. The Commission's notes provide that the Claimant advised that he had received vacation pay plus severance in the gross amount of \$2340.00. He also advised that the employer had withheld four weeks of what he had received from EI from the monies that were owed to him. He said total amount was \$4107.98 but he only received \$2339.99.¹¹ The Claimant testified that he contacted the Commission to report his settlement money. He said the Commission did not contact him about this money.

[25] Following that disclosure, the Commission contacted the employer on March 3, 2019 to obtain details of the settlement. The employer advised the Commission on that the settlement was \$8,000 (gross) with the following breakdown:¹²

- \$3,000 for legal fees
- \$684.02 for health expense reimbursement
- \$2,559.98 to the claimant and \$1756.00 to the employer held in trust pending EI overpayment.

[26] The Commission then sent a request for information to the Claimant, asking for a copy of the settlement agreement so it could determine if the additional monies would affect the Claimant's claim. There is no date on this request but the Commission requested the return of the information by May 3, 2019.¹³

¹⁰ GD3-20.

¹¹ GD3-22.

¹² GD3-26.

¹³ GD3-27.

[27] The Claimant sent back the form dated May 2, 2019 to the Commission.¹⁴ He confirmed the breakdown of the settlement as explained by the employer and provided a copy of the email dated May 25, 2018 between his representative and the employer's counsel confirming the terms of the settlement.¹⁵ He also provided a copy of the final release signed by the parties on May 25, 2018.¹⁶ The Claimant also provided pay stubs showing a payment of \$2399.99 and a payment of \$684.02.¹⁷

[28] On February 3, 2021 the Commission sent the Claimant a letter advising the Claimant that following his voluntary disclosure of information about his earnings, they had concluded that he made a false representation. He was also advised that a notice of debt would be sent to him for repayment of benefits that he should not have received. However, the letter does not say what the false representation is that the Claimant has said to have made.¹⁸

[29] The Commission then sent the Claimant a decision letter on February 3, 2021 that said, according to their records, the Claimant had only declared some of his earnings received as settlement monies from his employer. The letter provided that the Commission had adjusted the allocation of the earning based on the new information provided. It noted the allocation as follows:

[30] Week beginning:	Your earnings are:	Instead of:
December 10, 2017	\$684.00	\$142.00
December 17, 2017	\$684.00	\$0.00
December 24, 2017	\$684.00	\$0.00
December 31, 2017	\$684.00	\$0.00

¹⁴ GD3-27.

¹⁵ GD3-29.

¹⁶ GD3-31.

¹⁷ GD3-30.

¹⁸ GD3-34.

January 7, 2018	\$684.00	\$0.00
January 14, 2018	\$684.00	\$0.00
January 21, 2018	\$684.00	\$0.00
January 28, 2018	\$354.00	\$0.00

[31] Upon reconsideration, on March 30, 2021, the Commission advised the Claimant that the Commission had changed its allocation. The Commission said in its reconsideration decision that it had made errors in the initial decision as the allocation was from the incorrect start date and the incorrect average weekly earnings was used. It noted that the corrections would result in a change to the overpayment. However, no details were provided as to what the correct start date was or what the average weekly earnings should have been. As well no detail was given as to how the changes would impact the overpayment amount.

[32] The Commission provided no submissions as to why it was able to reconsider the Claimant's claim beyond the 36 month period.

[33] I fail to see how the Commission has shown a reasonable basis for its conclusion that the Claimant had made a false representation. The weeks in question the Commission identifies as the Claimant having reported no earnings was an accurate representation at the time the Claimant made those representations. The Claimant did not reach the settlement with his employer until May 25, 2018 so he could hardly have declared settlement monies in the weeks from December 10, 2017 to January 28, 2018. The Claimants benefits were paid based on the information he was in possession of at the time he did his reports. When the Claimant had new information, being the settlement, he voluntarily disclosed the terms of settlement to the Commission and provided all settlement documents upon request.

[34] I see no indication that any benefits were paid to the Claimant based on any false or misleading statements or representations made by the Claimant. New information is not the same thing as a false or misleading statement or representation being made in

connection with a claim. The information provided by the Claimant was correct at the time he made it. A false statement, while it does not have to be intentional, does have to be at least incorrect at the time it is made.

[35] The Commission has not suggested the employer provided false or misleading statements or representations.

[36] Since the Commission has not provided a reasonable basis for its conclusion that any false or misleading statements or representations were made in connection with the claim, I find the Commission only had 36 months until February 10, 2020 to reconsider the claim. The Commission reconsidered the claim on February 3, 2021, outside the 36 month period. So, I find the Commission improperly reconsidered the claim.

[37] My finding in this regard does not impact the Commission's decision of December 27, 2020 that the initial separation payment of \$1578.37 was earnings and those earnings were to be allocated from November 26, 2017 to December 9, 2017 with a balance of \$142.00 allocated to the week beginning December 10, 2017. The Claimant does not dispute that that payment is earnings or the allocation of those earnings. That decision was made by the Commission in the appropriate time period.

[38] Since I have decided the Commission is not within the time allowed to reconsider the claim with respect to the settlement monies from the lawsuit, it is not necessary for me to go on to consider whether those monies are earnings or whether they have been allocated properly. However, for the sake of completeness, I have addressed those issues as well.

Is the money that the Claimant received earnings?

[39] The Commission says the initial pay in lieu of notice of \$1578.37, the \$684.02 for health expenses reimbursement, as well the \$2559.98 payment to the Claimant and the \$1756.00 held by the employer in trust to reimburse the Commission for EI benefits paid to the Claimant are all earnings. The Commission says the Claimant's earnings amount to \$6578.00 (\$5000.00 + \$1578.37) The Commission say that the payments were made

to the Claimant to compensate the claimant for lost wages. The Commission further submits that these payments were made by reason of the Claimant's separation from employment.

[40] As above, the Claimant does not dispute that the \$1578.37 pay in lieu of notice is earnings or the allocation of those earnings as decided by the Commission on December 27, 2017.¹⁹

[41] The Claimant does, however, dispute the other payments are earnings. The Claimant says the \$684.02 was to reimburse him for out of pocket health care expenses he had to pay for himself so this is not earnings. The Claimant says the \$2559.98 payment and the \$1756.00 held in trust were not earnings because they were in the nature of general damages to compensate him for the manner in which he was terminated. He says even if the \$1756.00 were earnings, it was never paid to him. It was held back by the employer to reimburse the Commission for EI benefits he had received.

[42] The law says that earnings are the entire income that you get from any employment.²⁰ The law defines both "income" and "employment."

[43] **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.²¹ Case law says that severance pay is earnings.²²

[44] **Employment** is any work that you did or will do under any kind of service or work agreement.²³

¹⁹ GD3-20.

²⁰ See section 35(2) of the EI Regulations.

²¹ See section 35(1) of the EI Regulations.

²² See *Blais v Canada (Attorney General)*, 2011 FCA 320.

²³ See section 35(1) of the EI Regulations.

[45] Sums received from an employer are presumed earnings and must therefore be allocated to a period on the claim unless the amount falls within an exception allowed by law²⁴ or does not arise from employment.

[46] If an individual claims that the amounts received from his or her employer or former employer were paid out for reasons other than the loss of revenue arising from employment, in the case of a settlement or agreement based upon a lawsuit, a complaint or a claim because of a dismissal, it is up to the individual to demonstrate that due to "special circumstances" some portion of it should be regarded as compensation for some other expense or loss other than the loss of revenue arising from employment.

²⁵

[47] "Special circumstances" could potentially include settlement monies paid to address injury to one's health or reputation or to address one's legal fees, or for the relinquishment of a right to reinstatement, or potentially damages relating to breach of a Human Rights code

[48] The Claimant has to prove that the money is **not** earnings. The Claimant has to prove this on a balance of probabilities. This means that he has to show that it is more likely than not that the money isn't earnings.

[49] A letter dated December 4, 2017 from the employer to the Claimant is on file. It provides that the Claimant will receive three weeks existing pay as a goodwill gesture in the gross amount of \$1578.37. It also provides that effective November 24, 2017 the Claimant's benefit coverage was terminated.²⁶

[50] The Claimant told the Commission he was terminated on November 24, 2017. He said the termination letter said that he didn't follow the procedures and that he didn't communicate with his staff. He explained he was filing a wrongful dismissal lawsuit. The Claimant said he started with the employer on December 28, 2014 but had been with the company since day one "temping". The Claimant explained that in September

²⁴ See subsection 35(7) of the EI Regulations.

²⁵ See *Canada (A.G.) v. Radigan*, A-567-99; *Bourgeois v. Canada (A.G.)*, 2004 FCA 117.

²⁶ GD3-40.

of 2017, a new general manager was hired and he had been having problems with her since she came. He said he filed a report with human resources and since then she had been using bullying tactics. He says he was let go because he stood up to her. The Claimant related that his employer even told some of his “guys” before he knew that he was going to be let go and to have no contact with him in and out of work. The Claimant explained he had no warnings and when he was terminated, there were people that were not even part of human resources in the meeting including a buyer and an accountant. ²⁷

[51] The Claimant phoned the Commission on August 14, 2018 to report monies received in a settlement of his wrongful dismissal lawsuit. The notes provide that he advised the Commission he had received \$2340.00 on June 1, 2018 in vacation pay plus remaining severance. He said the total payment was \$4107.98 but his employer held back 4 weeks of what he was receiving from EI from the monies owed to him. ²⁸

[52] The employer told the Commission that the settlement was \$8,000 (gross) with the following breakdown: \$3,000 for legal fees, \$684.02 for health expense reimbursement, \$2,559.98 to the Claimant and \$1756.00 to the employer held in trust pending EI overpayment. The employer said that it was not specified in the agreement was the \$2559.98 and the \$1756.00 payments were for. ²⁹ The employer said the \$684.02 was a pay in lieu of benefits payment.

[53] An email dated May 25, 2018 confirms the parties are settling the matter on the following basis: A settlement of \$8,000 to be paid as follows: \$3,000 – legal fee reimbursement; \$684.02 - health expense reimbursement. \$1756.00 – EI withholdings pending EI overpayment Statement [employer’s name] will pay the overpayment amount directly to Service Canada and any balance will be sent to the Claimant, \$3559.98 less 10% source deductions – payment to the Plaintiff. ³⁰

²⁷ GD3-13

²⁸ GD3-22.

²⁹ GD3-26.

³⁰ GD3-29.

[54] A Release Agreement dated May 25, 2018 is also on file.³¹ It notes the payment of \$8000.00 less statutory deductions, is to be paid in accordance with the May 25, 2018 email and is over and above the amount originally paid on termination. In exchange for the payment, the agreement says that the Claimant releases the employer from any and all actions, claims arising directly or indirectly from his employment or termination. He specifically release any claims for wrongful dismissal including all non-salary benefits, vacation pay, and any and all expenses incurred in respect of employment and any claims which he may have had in Small Claims Court file (file number noted). He acknowledges receipt of all monies owed pursuant to the Ontario Employment Standards Act including termination pay, holiday pay, vacation pay and overtime pay.

[55] The Release also provides that the Claimant agrees to save harmless and indemnify the employer against any claims under the Income Tax Act and in respect of any charges related to the EI Commission which may be found to be payable by the employer. It is acknowledged that the employer must repay the EI Commission any monies that the Claimant received on account of EI benefits and the reimbursement will be paid from the proceeds of any monies paid to him. The Claimant agrees to provide any evidence of EI received following his termination so the required amounts may be withheld.

[56] The Claimant testified that he does not recall telling the Commission that the \$2340.00 he received on June 1, 2018 was for vacation pay plus remaining severance.³² He says he is not sure where that came from. He says he was not owed any vacation pay and did not receive any vacation pay.

[57] The Claimant testified that the \$684.02 was paid to him because the employer was supposed to maintain his benefits coverage for three weeks after termination but they did not do so. He says he spent this money on prescriptions. He had to submit

³¹ GD3-32.

³² GD3-22.

receipts to the employer. He says this sum was to reimburse him for his out of pocket health expenses.

[58] The Claimant testified that the balance of monies (\$2559.98 and the \$1756.00 held in trust) were not for severance pay or vacation pay. He says he had already received three weeks severance pay upon termination. The Claimant testified that he understood that these monies were for wrongful termination. He says he felt the termination was a personal attack on him and his character and his work habits and nothing to do with job performance. The Claimant explained they had filed a claim in court for more money for the wrongful dismissal and they came to this agreement and the claim was withdrawn.

[59] The Claimant testified about his termination. He says he was on his way home from work and was asked to return for a meeting with General Manager. He walked into a room with six people. Some were from accounting and payroll. He had papers shoved at him and was told they were letting him go and told him he had to sign some papers. The papers said he was being fired for insubordination and lack of professionalism. The Claimant says the reason he was fired was because the day before he was terminated, he had filed a complaint against the General Manager for calling him a liar and a few other things. The Claimant said they had been butting heads since she started in September. She had asked him to get things organized in the warehouse by December 7, 2017 but then let him go a week on November 24, 2017. The Claimant says he feels the settlement monies were paid to him because the termination was a personal attack on him and not so much for wrongful dismissal. He says he felt depressed and slighted due to the reason he was terminated and the way he was terminated.

[60] The Claimant's representative testified that the settlement was not for lost wages but for the employer's attack on the Claimant. He said when the Claimant approached, him, they discussed his options. They discussed that he had been terminated but more how he had been terminated. He suggested if the Claimant wanted to pursue a wrongful dismissal claim, he would need a lawyer because of the amount of money he would be seeking in that type of a claim. The Claimant's representative says, as a paralegal, he

could not represent the Claimant in such a claim. The representative said given the Claimant had worked more than three years, any such settlement would have exceeded \$8000.00.

[61] The Claimant's representative testified they had filed a claim in Small Claims Court for \$25,000.00. He says he does not have a copy of the claim as it is in storage. However, he recalls that they claimed general damages, pain and suffering and for defamation of character. He says there was no claim for pay in lieu of notice as the employer has already paid three weeks severance upon separation.

[62] The Claimant's representative testified he and the employer's counsel went back and forth through phone and email for four months before settling the matter. The Claimant's representative denies that any portion of the final amount settled on of \$8000.00 represented pay in lieu of notice or severance. The Claimant's representative testified that the \$8000.00 agreed upon was in the category of general or special damages because the Claimant's character was attacked and he was terminated in front of people who had no business being there. He said the sum was to compensate him for the manner in which he had been fired.

[63] I asked the Claimant's representative why the settlement for the payments of \$2449.98 and the \$1756.00 made no reference to general damages but rather appeared to represent an agreement they were earnings, given the statutory deductions from the \$2559.98 and the fact the \$1756.00 was held in trust as an EI repayment.

[64] The Claimant's representative testified that he and the employer's counsel were not in agreement about how to word the settlement. He testified that he had sent the employer's counsel an email on May 17, 2018 suggesting there were a few ways to characterize some of the settlement funds. In the email, he told the employer's counsel that the damages were primarily general damages and reimbursement of legal costs. He told the employer's counsel that some can be allocated as general damages. He said, if a legitimate basis for doing so, general damages not taxable and no not impact EI benefits. The Claimant's representative says he went on to reference human rights being breached by which he meant the manner of firing in front of a group of people. He

says the email went on to say, that the other common allocation is reimbursement of legal fees. He said with respect to remaining income, when paid in as a lump sum it can be treated as a retiring allowance pursuant to the Income Tax Act and tax withholding rates will be lower than amount usually applied to paycheques and usual deductions such as EI and CPP don't apply. He said that we have to ensure client receives the \$7000.00 or they will proceed with small claim's court claim. He suggested in the email that the wording on full and final release needs to be changed. He also stated in the email that he had contacted CRA and if it was employment income, tax source deductions need to be made but this is not employment income.

[65] The Claimant's representative said the employer's counsel did not want to agree to general damages as they did not want to admit to any wrongdoing. He said the employer's counsel sent him back an email on May 17, 2018 saying that the employer would not pay punitive damages. The lawyer said in the email that those damages could only be awarded by a court. The lawyer pointed out that the only settlement that would avoid tax obligations were human rights obligations and damages for pain and suffering which were not applicable here. The lawyer said that the Claimant had not suffered any pain and suffering beyond what everyone else suffers when terminated. He said you have to pay taxes unless you meet those two exceptions. He said even if you had "pled" pain and suffering, the employer would not pay general damages as there was no intent to cause pain and suffering. The lawyer noted that the employer simply let an employee go they no longer wanted.

[66] The Claimant's representative said the employer's counsel said either they settled on these terms or they would go to trial. The Claimant's representative said the Claimant needed the money so he accepted the employer's counsel's terms. It was either agree to those terms or have a lengthy court battle.

Health Expense Reimbursement

[67] I find that the \$684.02 health expense reimbursement is earnings.

[68] The Claimant says this should not be considered as earnings as it was reimbursement of out of pocket medication expenses.

[69] The employer told the Commission that this sum represented a pay in lieu of benefits payment.³³

[70] The Commission submits that this amount is an employment related benefit.

[71] I accept the Claimant's testimony that this sum represented reimbursement of an out of pocket expense for medication. However, I find this sum still amounts to earnings. This sum does not fall within an exception allowed by law.³⁴The payment arises from the Claimant's employment. The health plan is a benefit arising from his employment. It is part of the entire compensation package the Claimant receives from employment. There is a "sufficient connection" between the Claimant's employment and the sum received. In that regard, but for that benefit, the Claimant would have had to pay those medication expenses on his own. So, I find that even though the Claimant was being reimbursed for expenses, the reason he was reimbursed was because he was being compensated for the loss of an employment related benefit. So, I find this amount is earnings.

Payment of \$2559.98 and \$1756.00 held in trust by employer to repay Commission EI benefits paid

[72] I am not satisfied that, due to special circumstances the above-noted sums represent compensation for some other expense or loss other than the loss of revenue arising from employment.

[73] The components of the settlement must be considered against the evidence specific to each case.³⁵ In that regard, I must consider the entirety of the evidence in determining whether these amounts represent earnings.

³³ GD3-33.

³⁴ See subsection 35(7) of the EI Regulations.

³⁵ See *Attorney General of Canada v. Dunn*, A-231-95.

[74] While the terms of the settlement do not define specifically what these payments are for, the fact statutory deductions are taken of the \$2559.98 and the \$1756.00 was held back to repay EI benefits paid to the Claimant suggest these payments were “earnings”. Typically general damages do not have statutory deductions. An agreement to pay back EI out of the \$1756.00 is a tacit acknowledgment that the \$1756.00 represents earnings.

[75] The Release agreement is ambiguous. It is broadly drafted to release any and all claims against the employer including those in the small claim’s court proceeding filed. Both earnings related claims and non-earnings related claims are potentially released. So, this document does not help resolve the issue one way or another.

[76] The Claimant’s testimony is that, with the exception of the medical expense reimbursement, the balance of the \$5000.00 was to compensate him for the manner in which he was terminated. However, I have some trouble with his testimony. It is not clear why, if that was what the money was for, this was never mentioned to the Commission. Rather, there is a notation that the Claimant told the Commission the monies were for vacation pay and remaining severance.³⁶ The Claimant says he does not recall saying this. However, even if he did not say that, he did not tell the Commission that the payments represented compensation for the manner in which he was terminated.

[77] The Claimant’s representative says he recalls that a claim was filed for general damages, pain and suffering and defamation of character. He says there was no claim for pay in lieu of notice as the employer has already paid the three weeks severance upon separation and the Claimant would have had to hire a lawyer to advance such a claim. The statement of claim was not filed in evidence. The Claimant’s representative testified about an email of May 17, 2018 to the employer’s counsel in which he suggested some portion of the settlement be considered general damages. However, the email also says, “with respect to remaining income, when paid in as a lump sum it can be treated as a retiring allowance pursuant to the Income Tax Act and tax

³⁶ GD3-22.

withholding rates will be lower than amount usually applied to paycheques and usual deductions such as EI and CPP don't apply". The fact there is a reference to other income that the Claimant's representative proposes be termed a "retiring allowance" suggests the compensation being settled on included more than just damages relating to the manner of termination. It suggests there was some earnings related compensation also included in the settlement monies.

[78] I accept that the Claimant was distressed about why and how he was fired. I also accept that part of the Claimant's claim was for damages relating to the manner in which he was terminated. However, given the Claimant's representative was testifying from memory about the what the claim contained and given length of time involved, along with the Claimant's representative's suggestion to the employer's counsel that part of the settlement be considered a "retiring allowance", I am not satisfied, that the only claims made related to the manner of dismissal and did not include any claim for earnings related compensation such as additional pay in lieu of notice or severance. Indeed, the email the Claimant read from the employer's counsel of May 17, 2018 suggest that there was no claim "pled" for pain and suffering in the small claims court lawsuit. I am also not satisfied that the settlement funds were only to compensate for the manner of termination.

[79] The Claimant's representative's testified that there was disagreement between himself and the employer's counsel about how the settlement should be characterized. He referred to an email in which the employer's counsel says that the employer did not agree to pay general damages as it did not agree that the Claimant had suffered any damages beyond those associated with any firing and that there was no intent to cause pain and suffering by the employer. The Claimant's representative says the Claimant accepted the employer's terms as he was in financial need and the other alternative was proceeding.

[80] Even though the parties wanted to characterize the settlement in different ways, ultimately they did agree to the terms set out in the email of May 18, 2018. As above, those terms suggest that the amounts in question were earnings, given the statutory

deductions and EI holdback. I place less weight on the characterization after the fact by the Claimant and his representative as to what this settlement was meant to compensate for than the actual terms of the settlement. In that regard, I note there was no mention to the Commission that the settlement payments were compensation for the manner of firing until the hearing and no documentation has been provided to support that position. The email documentation referred to by the Claimant's representative in his testimony is ambiguous and suggests only that there was a disagreement between the parties as to how to characterize the settlement. It also suggests that the compensation agreed to included both earnings and non-earnings related compensation.

[81] I accept that some portion of the two payments in question represents compensation for the manner in which the Claimant was terminated. However, there is no evidence as to what that component might be. I cannot simply speculate what portion of those payments was compensation for the manner in which the Claimant was terminated and what was earnings related compensation. I am aware of no authority that allows me to simply estimate an amount. So, I find the Claimant has not established that the sums of \$2559.98 and \$1756.00 held in trust represented compensation for some other expense or loss other than the loss of revenue arising from employment. I find therefore that these payments represent a loss of revenue arising from employment.

[82] Had the Commission reconsidered the claim on time, I would agree that the total earnings to be allocated amount to \$5000.00. This represents the sum of \$2559.98 paid to the Claimant, the \$1756.00 held back to repay the EI benefits received and the \$684.02 health expense reimbursement.

[83] The Claimant argues that since he did not receive the \$1756.00 held back by the employer to reimburse the Commission for the EI payments he received, that amount cannot be considered earnings. I disagree. The \$1756.00 represents monies payable to the Claimant, as part of the \$8000.00 agreed to. Whether the monies were paid directly to the Claimant so he could reimburse the Commission or the monies were held

back so the employer could reimburse the Commission on his behalf, this does not change the nature of the payment. Earnings can include sums not actually received when they are to be paid to a third party at the Claimant's request or agreement.

Did the Commission allocate the earnings correctly?

[84] The law says that earnings have to be allocated to certain weeks. What weeks earnings are allocated to depend on why you received the earnings.³⁷

[85] The Claimant's earnings are to compensate him for loss of revenue arising from employment. The Claimant's employer gave the Claimant those earnings because the Claimant was separated from his job.

[86] The law says that the earnings you get for being separated from your job have to be allocated starting the week you were separated from your job. It doesn't matter when you actually receive those earnings. The earnings have to be allocated starting the week your separation starts, even if you didn't get those earnings at that time.³⁸ If separation monies have already been allocated to a claim and subsequent to that allocation, additional monies are paid or payable to a Claimant by reason of separation, those subsequent earnings are to be added to the earnings that have already been allocated and a revised allocation of the total separation monies is to be done from the week of separation. The allocation is done in such a manner that the total earnings from that employment are, in each consecutive week except the last, equal to the Claimant's normal weekly earnings from that employment.³⁹

[87] The Claimant and the Commission agree the Claimant was terminated on November 24, 2017. The Commission says the week of separation is the week of November 26, 2017. The Claimant does not dispute this. I find that the Claimant was separated from his job starting the week of November 26, 2017.

³⁷ See section 36 of the EI Regulations.

³⁸ See section 36(9) of the EI Regulations.

³⁹ See subsection 36(10) of the EI Regulations.

[88] The Claimant received separation monies of \$1578.37 upon termination. He subsequently had earnings paid or payable to him from the settlement of his wrongful dismissal claim in the amount of \$5000.00. So, the total earnings to be allocated are \$6578.00.

[89] The Commission says the Claimant's normal weekly earnings is \$630.00. The Commission made this determination based on an average of the Claimant's earnings.⁴⁰The parties don't dispute this amount, and I accept it as fact. This means that starting the week of November 26, 2017, \$630.00 should be allocated to each week. If there is any amount of earnings that is left over, it should be allocated to the last week.

[90] As above, however, the Commission is out of time to reconsider the claim. So, even though I agree with that the \$5000.00 is earnings and I agree with the Commission's allocation, the sum cannot be allocated to the Claimant's claim as the Commission is out of time to reconsider the claim.

Is the overpayment correctly calculated?

[91] Yes. However, I find this overpayment cannot be assessed against the Claimant because the Commission is out of time to reconsider the claim.

[92] The Commission provided its overpayment calculation. The overpayment arising from the allocation amounts to \$2872.00. On the initial hearing date, the Claimant disputed that he had received benefits for the week of December 31, 2017 and January 7, 2018. The hearing was adjourned and I sought clarification from the Commission on that issue. The Commission provided a payment schedule. The Claimant testified at the reconvened hearing that he no longer disputed that he received those payments.

[93] I have reviewed the overpayment calculation and find it to be correct. If the Commission had reconsidered the claim on time, I would have found the overpayment

⁴⁰ GD6-3.

to have been properly assessed against the Claimant. This is because the overpayment arises from the allocation of earnings that are paid or payable to him.

[94] The Claimant says the overpayment amount should be reduced by the sum held back by the employer to reimburse the Commission for EI benefits paid to him. The Commission confirmed that it has not received any payment from the employer. The Commission says it is the Claimant's responsibility to provide his employer with a copy of the notice of debt to the employer in order for the employer to release the funds withheld.

[95] The objection the Claimant raises really is about who should repay the overpayment, not whether the overpayment has been validly assessed against him. Section 46 of the EI Act requires the employer to submit the amount of benefits withheld as repayment of an overpayment of benefits. The Claimant is only liable to repay those benefits if the employer breaches this obligation.⁴¹ However, this does not mean the overpayment should not be assessed against the Claimant to begin with. Absent that, it would be unclear how much the employer was required to remit and whether the Claimant owed any balance after that remittance.

[96] The terms of the settlement require that the employer be provided with an overpayment statement so it can reimburse the Commission.⁴² It appears that has not been done yet. Indeed if the employer breached its obligation to repay, after having been provided the overpayment statement, and the Commission pursued the Claimant for the sum held back, the Claimant might then have some legal resolution available to him. However, I find it is premature and beyond my jurisdiction to delve into that issue on this appeal. The question before me is whether the overpayment is correct in amount and validly created against the Claimant.

⁴¹ See section 45 of the EI Act and *Lauzon v. C.E.I.C.* (1998), 231 N.R. 111 (Fed. C.A.)

⁴² GD3-29.

[97] Had the Commission reconsidered the claim in the appropriate time, I would agree that the overpayment amount is correct and was validly assessed against the Claimant.

[98] However, since the Commission did not act within the allowable time to reconsider the claim and assess an overpayment against the Claimant, the overpayment cannot be assessed against him.

Conclusion

[99] The appeal is allowed.

[100] Because the Commission did not reconsider the claim within the allowed time to do so, its decision that the \$5000.00 settlement money is earnings and the allocation of those earnings resulting in an overpayment is not valid.

Charlotte McQuade
Member, General Division – Employment Insurance Section