[TRANSLATION]

Citation: *JL v Canada Employment Insurance Commission*, 2021 SST 584

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	J. L.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (417556) dated April 28, 2021 (issued by Service Canada)

Tribunal member:	Normand Morin
Type of hearing:	Teleconference
Hearing date:	August 26, 2021
Hearing participant:	Appellant
Decision date:	September 29, 2021
File number:	GE-21-1009

Decision

[1] The appeal is allowed in part. I find that the Appellant received earnings as a result of an agreement with his former employer, X. But, the amount of earnings is lower than what the Canada Employment Insurance Commission (Commission) decided, so only part of the $335,719 the Appellant received as a result of that agreement is earnings.[1] That part of the amount is what should be allocated (assigned) or deducted from the Appellant's Employment Insurance (EI) benefits.[2]

Overview

[2] From January 1, 2010, to November 19, 2013, inclusive,[3] the Appellant worked as City Manager for X and stopped working after being let go.

[3] On September 30, 2015, the Appellant made an initial claim for EI benefits (sickness benefits or special benefits).[4] A benefit period was established effective April 5, 2015.[5]

[4] On January 19, 2021, the Commission explained to him that he had received $335,719 as severance pay, specifically $293,723 in lost wages, $29,496 in lieu of a flexible allowance, and $12,500 in lieu of a lump sum travel allowance, under a settlement agreement with the employer (X). It informed him that the $335,719, before deductions, was considered income and that it would be allocated to his benefits from November 19, 2013, to December 17, 2016. The Commission also informed him that it did not consider the amounts he had received as accrued interest, for the relinquishment of reinstatement, as reimbursement for professional dues, for legal fees, and for moral damages to be earnings for EI purposes. It explained that it would not

---

[1] See section 35 of the *Employment Insurance Regulations* (Regulations).
[2] See section 36 of the Regulations.
[3] Although the amended or replaced Record of Employment dated February 18, 2014, indicates that the Appellant worked from January 1, 2010, to January 11, 2013, the agreement he entered into with his former employer on September 25, 2020, says that his employment ended on November 19, 2013—GD3-13, GD3-14, GD3-18, and GD8-5.
[4] See GD3-3 to GD3-10.
[5] See GD4-1.

deduct those amounts from his benefits. The Commission also specified that, following that decision, he would receive a notice of debt indicating the assessed overpayment.[6]

[5] On April 28, 2021, after a request for reconsideration, the Commission told the Appellant that it was upholding the February 24, 2021, decision.[7] It explained to him that its decision involved his claim for benefits starting April 5, 2015, and that the $5,240 overpayment related to that claim corresponded to the sickness benefits he had received from January 17, 2016, to March 26, 2016.[8]

[6] The Appellant explains that he received money under an agreement he entered into with his former employer on September 25, 2020. He says that only some of the money is earnings—the amount representing payment for wages lost since his dismissal. The Appellant also says that this amount should be allocated to the period for which it was paid to him under the agreement, that is, for wages lost between January 1, 2016, and December 31, 2019, not from November 19, 2013, when he was let go. In his opinion, in allocating this amount from the date of his dismissal, the Commission exceeded its jurisdiction by failing to respect the terms of the agreement with the employer. He also argues that the Tribunal would exceed its jurisdiction if, in its decision, it found that his earnings should be allocated from the date of his dismissal. On June 16, 2021, the Appellant challenged the Commissions' reconsideration decision. That decision is now being appealed to the Tribunal.

---

[6] See GD3-31, GD3-32, and GD3-41.
[7] The initial decision in the Appellant's case is dated January 19, 2021—GD3-31, GD3-32, GD3-41, GD3-44, and GD3-45.
[8] See GD3-44 and GD3-45. In its arguments, the Commission also says that its decision concerns only the benefit period starting April 5, 2015, even though the earnings involved were also the subject of another decision for the Appellant's benefit period starting December 1, 2013—GD4-1.

Issues

[7] I have to decide whether the $335,719 set out in the agreement between the Appellant and his former employer is earnings,[9] and, if so, whether these earnings were allocated correctly.[10]

[8] To decide this, I have to answer the following questions:

- Is the money that the Appellant received as a result of his agreement with his former employer earnings?
- If the money is earnings, did the Commission allocate the earnings correctly?

Analysis

[9] Section 35 of the *Employment Insurance Regulations* (Regulations) defines what constitutes income and employment and specifies what types of income must be considered earnings, while section 36 states how earnings must be allocated or deducted from a claimant's EI benefits.

[10] Earnings are the entire income of a claimant arising out of any employment.[11] An amount received will not be considered earnings if it falls within the exceptions set out in the Regulations[12] or does not arise out of employment.

[11] The *Employment Insurance Act* (Act) defines both "income" and "employment." Income can be anything that you got or will get from an employer or any other person. It does not have to be money, but it often is.[13] Employment is any work that you did or will do under any kind of service or work agreement.[14]

---

[9] See section 35 of the Regulations.
[10] See section 36 of the Regulations.
[11] See section 35 of the Regulations.
[12] See section 35(7) of the Regulations.
[13] See section 35(1) of the Regulations.
[14] See section 35(1) of the Regulations.

[12] The Act says that all earnings have to be allocated to certain weeks.[15] What weeks earnings are allocated to depends on why you received the earnings.[16]

[13] The claimant has to prove that the money they received or are entitled to is not earnings. The claimant has to prove this on a balance of probabilities. This means that they have to show that it is more likely than not that the money is not earnings.

Issue 1: Is the money that the Appellant received as a result of his agreement with his former employer earnings?

[14] I find that part of the $335,719 is earnings—that is, an amount of $323,219 that the Appellant received as a result of the agreement he entered into with his former employer on September 25, 2020[17]—is earnings.[18] That amount is consideration for work the Appellant did. The amount is income he was owed after working for the employer.

[15] The Federal Court of Appeal (Court) has held that money will be considered earnings if an employee earns it as a result of their work, or in return for their work, or if there is a "sufficient connection" between the claimant's employment and the amount received.[19]

[16] The Court says that severance pay is earnings.[20]

---

[15] See section 36 of the Regulations.
[16] See section 36 of the Regulations.
[17] Agreement between the Appellant and the employer, entitled [translation] "Settlement and Release" (Administrative Labour Tribunal – Province of Quebec – District of Richelieu-Salaberry – Case: CM-2013-6270, CM-2014-1460, CM-2020-0990, CM-2020-3160 – CNESST [Quebec's labour standards commission]: 620067416, 620086932, 620087552). The Appellant and the employer signed this agreement on September 25, 2020—GD3-18 to GD3-23 and GD8-5 to GD8-10.
[18] See section 35 of the Regulations.
[19] The Federal Court of appeal (Court) established this principle in *Roch*, 2003 FCA 356.
[20] See *Blais*, 2011 FCA 320.

[17] The evidence on file indicates that the Appellant entered into an agreement with his former employer on September 25, 2020, in relation to his dismissal on November 19, 2013.[21] This agreement involves paying the Appellant a total of $632,881.27.[22] Of that amount, $335,719 was considered income by the Commission.[23] The Commission deducted that amount from the benefits the Appellant had received from November 19, 2013, to December 17, 2016, for his benefit period starting April 5, 2015.[24] The $335,719 is made up of the following amounts:

- $293,723 as payment for wages lost since the dismissal. This amount is broken down for wages lost between January 1, 2016, and December 31, 2019.
- $29,496 as payment for the loss of the flexible allowance set out in the Appellant's work agreement.
- $12,500 as payment for the loss of the lump sum travel allowance set out in the Appellant's work agreement.[25]

[18] The evidence on file also indicates that the Administrative Labour Tribunal (ALT) ratified the September 25, 2020, agreement in a May 3, 2021, decision ordering the parties to comply with it.[26]

[19] The Appellant indicates that he has received all the amounts of money set out in the September 25, 2020, agreement.

---

[21] See the document entitled [translation] "Settlement and Release"—GD3-18 to GD3-23 and GD8-5 to GD8-10.
[22] See the document entitled [translation] "Settlement and Release"—GD3-18 to GD3-23 and GD8-5 to GD8-10.
[23] See GD3-31, GD3-32, GD3-41, GD3-44, and GD3-45.
[24] See GD3-31, GD3-32, GD3-41, GD3-44, and GD3-45.
[25] See the document entitled [translation] "Settlement and Release"—GD3-18 to GD3-23 and GD8-5 to GD8-10.
[26] See the Administrative Labour Tribunal (ALT) decision (Labour Relations Division – Region: Montréal – File: 992980-71-1312 (CM-2013-6270) and 994795-71-1402 (CM-2014-1460) –CNESST file: 62-00-67416) dated May 3, 2011—GD8-3 and GD8-4.

[20] He acknowledges that the $293,723 he received as payment for wages lost since his dismissal is earnings.

[21] The Appellant says that the $29,496 he received as payment for the loss of the flexible allowance set out in his work agreement, and the $12,500 received as payment for the loss of the lump sum travel allowance also set out in his work agreement, are not earnings. He indicates that these amounts involved expenses incurred during the period of his dismissal, from 2013 to 2019.[27]

[22] The Appellant argues that the $29,496 payment he received for the loss of his flexible allowance is an amount of money he was paid back for health care expenses incurred for him and his family members. He explains that this allowance is an amount he was entitled to as compensation for the choice the employer made to change the group insurance plan he had access to as a management employee. The Appellant specifies that, to receive this amount, he had to provide supporting documentation (for example, eligible health care expenses). He says that this was [translation] "compensation" for an amount of money he had previously spent. The Appellant stresses that he did not [translation] "make money" with this amount.

[23] The Appellant argues that the $12,500 payment he received for the loss of the lump sum travel allowance is also [translation] "compensation" for travel expenses incurred during the period from 2013 to 2019 is not earnings either [*sic*]. He says he had to provide supporting documentation (for example, travel, parking, and vehicle maintenance costs) to be able to get that amount. The Appellant stresses that this is an amount of money he had to spend.

[24] The Appellant argues that these two payments, like other amounts that were part of the agreement he entered into with the employer on September 25, 2020 (for

[27] In its arguments, the Commission indicates that the Appellant was not employed by X between November 20, 2013, and May 24, 2019, because he was let go on May 19, 2013, and was reinstated on May 25, 2019. (See GD3-18 and GD4-5). The Commission also mentions that, according to the Records of Employment on file, the Appellant then stopped working on August 27, 2019—GD4-5.

example, amount paid as reimbursement for extrajudicial fees, amount paid as moral damages), were not considered income for tax purposes.

[25] The Commission, in turn, says that the money the Appellant received as payment for wages lost since his dismissal is earnings, since the employer paid it to him to compensate him for lost wages, and it is related to his job.[28]

[26] It also says that the payment the Appellant received for the loss of the flexible allowance set out in his work agreement is earnings because this allowance is a benefit related to his job in addition to his wages.[29]

[27] Additionally, the Commission says that the payment the Appellant received for the loss of the lump sum travel allowance set out in his work agreement is a monetary benefit, if he did not incur such expenses, or if they were not directly job-related.[30] It explains that amounts received as reimbursement for job-related expenses are not a gain or a benefit if the employee actually incurred such expenses to perform their job.[31] The Commission argues that, since the Appellant has not shown that the payment for the loss of the lump sum travel allowance is reimbursement for expenses that were actually incurred, it considers that this money was meant to compensate him for the loss of a monetary benefit related to his job, and that it is earnings.[32]

[28] The Commission argues that the amounts in question (payment for wages lost since the Appellant's dismissal, payment for the loss of the flexible allowance set out in his work agreement, and payment for the loss of the lump sum travel allowance set out in his work agreement) were paid to the Appellant for the period from November 19, 2013, to December 31, 2019.[33]

---

[28] See GD4-4.
[29] See GD4-4 and GD4-5.
[30] See GD4-5.
[31] See GD4-5.
[32] See GD4-5
[33] See GD4-5.

[29] The Commission indicates that the Appellant was not employed by X between November 20, 2013, and May 24, 2019, because he was let go on November 19, 2013, and was reinstated on May 25, 2019, according to the terms of the September 25, 2020, agreement.[34] It explains that, according to the Records of Employment in his file, the Appellant then stopped working on August 27, 2019.[35] According to the Commission, the payment the Appellant received for the loss of the lump sum travel allowance could not have been made to him as reimbursement for expenses related to the performance of his job for the periods from November 20, 2013, to May 24, 2019, and from August 28, 2019, to December 31, 2019, because he did not work for the employer during those periods.[36] The Commission argues that the Appellant has not shown that he incurred expenses to perform his job between May 25, 2019, and August 27, 2019.[37] It points out that it is up to the Appellant to prove that the payments he received were not meant to compensate for the loss of wages and other job-related benefits.[38]

[30] According to the Commission, the Appellant has not shown that the payments he received for the loss of wages, of the flexible allowance, and of the lump sum travel allowance were made to him for a reason other than to compensate for the monetary losses resulting from being separated from his job.[39]

[31] In this case, I find that only the $293,723 and the $29,496 that the Appellant received are earnings, which amounts to a total of $323,219 ($293,723 + $29,496 = $323,219).

[32] I accept that the $323,219 is part of the Appellant's entire income arising out of his employment, as set out in the Regulations.[40] This money is related to the job the Appellant had with X.

---

[34] See the document entitled [translation] "Settlement and Release"—GD3-18 to GD3-23 and GD8-5 to GD8-10.
[35] See GD4-5.
[36] See GD4-5.
[37] See GD4-5.
[38] See GD4-5.
[39] See GD4-5 and GD4-6.
[40] See section 35(2) of the Regulations.

[33] I do not accept the Appellant's argument that the $29,496 he received as payment for the loss of his flexible allowance, because it is an expense that he initially incurred to pay for health care and that he was later reimbursed for [*sic*]. I find that it is an amount that represents a benefit related to the Appellant's job.

[34] I find that this amount ($29,496) is a payment that is part of the Appellant's entire income arising out of any employment, which includes the income he received or, on application, was entitled to receive under a group wage-loss indemnity plan.[41] Although this payment may be an amount the Appellant was entitled to as compensation for the employer's decision to change the group insurance plan he had access to, the fact is that he was able to take advantage of it as a management employee just like other employees in positions of that nature. It is not a payment under a wage-loss indemnity plan that is not a group plan.[42] This payment is part of a benefit that is related to a group of persons who are all employed by the same employer—in this case, management employees—and financed in whole or in part by that employer.[43]

[35] I find that the $12,500 payment the Appellant received for the loss of his lump sum travel allowance is not earnings under the Regulations.

[36] I accept the Appellant's argument that this payment should not be considered earnings because it represents expenses related to his job that he initially incurred and that he was later reimbursed for. I am of the view that, in this case, the amount in question is not a gain or a benefit.

[37] The Court tells us that it is up to the claimant to establish that all or part of the amounts received as a result of their dismissal amounts to something other than earnings within the meaning of the Act.[44]

---

[41] See section 35(2)(c) of the Regulations.
[42] See section 35(7)(b) of the Regulations.
[43] See section 35(8) of the Regulations.
[44] The Court established this principle in *Bourgeois*, 2004 FCA 117.

[38] The Court also tells us that a settlement payment made in respect of an action for wrongful dismissal is “income arising out of .... employment” unless the claimant can demonstrate that due to “special circumstances” some portion of it should be regarded as compensation for some other expense or loss.[45]

[39] I find that the Appellant has shown that the $12,500 representing the payment he received for the loss of his lump sum travel allowance is not compensation for the loss of his wages.

[40] I point out that the September 25, 2020, agreement includes specific amounts for the wages the Appellant lost as a result of his dismissal.[46] I find that the Appellant has shown, based on this agreement, that the $12,500 payment he received was not meant to compensate for his loss of wages or other benefits related to his job, since this payment is not part of the amounts intended for this purpose.

[41] I also accept the Appellant’s explanation that the amount of that payment was established based on supporting documentation he had provided to be reimbursed for travel expenses incurred during the period from 2013 to 2019, when he was not working for the employer and he had brought an action against it to challenge his dismissal. I find that it is more likely than not that the amount of $12,500 was established based on the supporting documentation the Appellant had provided in that regard. There is also every indication that the Appellant spent the amounts in question to perform his job.

[42] So, I do not accept the Commission’s argument that the payment the Appellant received for the loss of his lump sum travel allowance could not have been made to him as reimbursement for expenses related to the performance of his job for the periods from November 20, 2013, to May 24, 2019, and from August 28, 2019, to December 31, 2019, because he did not work for the employer during those periods and that, in addition, he has not shown that he incurred expenses to perform his job between those

[45] See the Court’s decision in *Radigan*, A-567-99.
[46] See the document entitled [translation] “Settlement and Release”—GD3-18 to GD3-23 and GD8-5 to GD8-10.

two periods, from May 25, 2019, to August 27, 2019.[47] I point out that, in its arguments, the Commission mentions that the money the Appellant received was paid for the entire period from November 19, 2013, to December 31, 2019, referring to the September 25, 2020, agreement,[48] which includes the period he did not work.

[43] The Appellant also argues that the money he received as payment for the loss of his flexible allowance and for the loss of his lump sum travel allowance was not considered income from a tax perspective. On this point, I find that this situation does not change the fact that the amount corresponding to the payment for the loss of his flexible allowance is, in this case, earnings within the meaning of the Act.

[44] I find that the $323,219 ($293,723 + $29,496 = $323,219) the Appellant received does not fall within the exceptions set out in the Regulations that would make it possible not to consider it earnings.[49]

Issue 2: Did the Commission allocate the earnings correctly?

[45] I find that the $323,219 ($293,723 + $29,496 = $323,219) the Appellant received as a result of the agreement he entered into with his former employer on September 25, 2020, was correctly allocated in accordance with the provisions of sections 36(9) and 36(10) of the Regulations because this money is earnings.

[46] Since I have found that the $12,500 representing the payment the Appellant received for the loss of his lump sum travel allowance is not earnings, the Commission should, however, make changes to its calculations to take this situation into account. So, the allocation should be made with the $323,219, not with the $335,719, as the Commission initially determined.

[47] The Act says that earnings have to be allocated to certain weeks. What weeks earnings are allocated to depends on why you received the earnings.

---

[47] See GD4-5.
[48] See GD3-25 and GD4-5.
[49] See section 35(7) of the Regulations.

[48] The Regulations say that earnings paid or payable to a claimant by reason of a lay-off or separation from an employment have to be allocated to a number of weeks that begins with the week of the lay-off or separation.[50]

[49] The Court has held that money that is earnings under section 35 of the Regulations has to be allocated under section 36 of the Regulations.[51]

[50] The Court tells us that amounts that you get for being separated from your job and that are earnings within the meaning of section 35 of the Regulations have to be allocated in accordance with section 36(9) of the Regulations.[52]

[51] The Court also tells us that the entire income of a claimant arising out of any employment has to be taken into account in calculating the amount to be deducted from benefits.[53]

[52] The Appellant says that only the $293,723 he received as payment for wages lost since his dismissal should be allocated. He feels that the $29,496 he received as payment for the loss of the flexible allowance set out in his work agreement and the $12,500 he received as payment for the loss of the lump sum travel allowance are not earnings and should not, in his opinion, be allocated.

[53] The Appellant also says that the $293,723 should be allocated from January 1, 2016, to December 31, 2019, because that is the money he received as payment for wages lost for that specific period, according to the terms of the September 25, 2020, agreement.[54]

---

[50] See section 36(9) of the Regulations.
[51] The Court established this principle in *Boone et al*, 2002 FCA 257.
[52] The Court established this principle in the following decisions: *Boucher Dancause*, 2010 FCA 270; and *Cantin*, 2008 FCA 192.
[53] The Court established this principle in *McLaughlin*, 2009 FCA 365.
[54] See the document entitled [translation] “Settlement and Release”—GD3-18 to GD3-23 and GD8-5 to GD8-10.

[54] The Appellant argues that the Commission is trying to imply that there is a retroactive effect to 2013 in allocating the money he received as a result of the September 25, 2020, agreement.

[55] The Appellant says that the Commission exceeded its jurisdiction in allocating the amount he had received as payment for lost wages from the date of his dismissal, November 19, 2013—beyond the period that the ALT established in the September 25, 2020, agreement.[55]

[56] The Appellant argues that the Commission exceeded its jurisdiction because it did not take into account the terms of the September 25, 2020, agreement, which states that the payment he received for lost wages was spread over the period between January 1, 2016, and December 31, 2019.[56]

[57] The Appellant argues that the ALT ratified this agreement in a May 3, 2021, decision ordering the parties to comply with it.[57]

[58] In the Appellant's opinion, the ALT's May 3, 2021, decision is similar to an order from the Superior Court of Québec (Superior Court). He argues that federal entities are covered by orders from the Superior Court.

[59] The Appellant says that the ALT is the appropriate authority to decide a case like the one that resulted in the September 25, 2020, agreement. He argues that several provisions of the *Act to Establish the ALT* prove it.[58]

[60] According to the Appellant, the ALT's decision in his case also applies to EI.

---

[55] See GD2-4.
[56] See GD2-4.
[57] See the ALT's May 3, 2021, decision ratifying the agreement evidenced and signed on September 25, 2020, and ordering the parties to comply with it—GD8-3 and GD8-4.
[58] See sections 9 and 19 of the *Act to Establish the ALT*—GD8-11 to GD8-51.

[61] The Appellant says that, if EI (the Commission) or the Tribunal had the ability not to respect the terms of the September 25, 2020, agreement, which includes the breakdown included in the agreement concerning the payment he received for lost wages, this would be contrary to section 51 of the *Act to Establish the ALT*. He notes that this section provides the following details:

> The [ALT]'s decision is final and without appeal, and the persons concerned must comply with it immediately.
>
> The decision is enforceable according to the terms and conditions it sets out, provided the parties have received a copy of it or have been otherwise advised of it.
>
> The forced execution of a decision begins by the decision being filed with the office of the Superior Court ….[59]

[62] According to the Appellant, there is a conflict of jurisdiction because the ALT, which is a tribunal of competent jurisdiction in labour relations matters, chose to allocate or break down the amount of money in question over the period established in the September 25, 2020, agreement.

[63] He argues that, if the Tribunal (Social Security Tribunal) made a decision that did not result in a breakdown like the one included the September 25, 2020, agreement, this would conflict with the exclusive provincial jurisdiction in this area of labour relations.

[64] The Appellant indicates that he would recognize the Commission's interpretation if the ALT's decision in his case had stated that he was to be paid an overall amount, without further clarification or distinction. He points out that, in the September 25, 2020, agreement and in its May 3, 2021, decision, the ALT instead gives a detailed description of the breakdown of the payment he received for lost wages.[60]

---

[59] See section 51 of the *Act to Establish the ALT*—GD8-22.
[60] See the document entitled [translation] "Settlement and Release"—GD3-18 to GD3-23 and GD8-5 to GD8-10. See also the ALT's May 3, 2021, decision—GD8-3 and GD8-4.

[65] The Appellant says that the information one of his counsel—a lawyer with the Commission des normes, de l'équité, de la santé et de la sécurité au travail [Quebec's labour standards commission] (CNESST)—gave the Commission to show that he had declined payment for wages lost before January 1, 2016 (2013 to 2015) is not admissible as evidence,[61] since it comes from a conciliation session that predated the September 25, 2020, agreement. On this point, the Appellant explains that section 22 of the *Act to Establish the ALT* indicates the following: "Nothing said or written in the course of a conciliation session may be admitted as evidence without the parties' consent."[62] The Appellant says that he did not decline any wages for 2013, 2014, or 2015. In his opinion, the Commission cannot rely on this information or make such a finding. The Appellant points out that this was not the counsel who led the negotiations that resulted in the September 25, 2020, agreement.

[66] The Appellant explains that he was on disability during the period from 2013 to 2016. He says that he received EI benefits during that period. The Appellant points out that the September 25, 2020, agreement takes into account the fact that he was on disability during the period from 2013 to 2016 and does not specify that he was awarded an amount of money for the entire period from 2013 to 2019.

[67] The Appellant says that the Commission's decision in his case is inapplicable because he was on extended disability leave during the period covered by that decision.[63]

[68] The Appellant also says that the benefits he is being asked to repay relate to 2015.[64]

---

[61] See GD3-25 and GD3-26.
[62] See section 22 of the *Act to Establish the ALT*—GD8-18.
[63] See GD3-38.
[64] See GD2-4.

[69] Additionally, the Appellant argues that, for his tax returns, the amounts set out in the September 25, 2020, agreement that were considered income from a tax perspective were broken down over the 2016 to 2020 tax years.

[70] The Commission, in turn, argues that, even though the September 25, 2020, agreement shows a breakdown of the payment for wages lost between January 1, 2016, and December 31, 2019, the amounts of money it considered cannot be allocated to that period. The Commission says that, according to the provisions of the Regulations,[65] these amounts should be allocated from the week of separation, based on normal weekly earnings, taking into account the other amounts paid because of the separation.[66]

[71] The Commission explains that, before the September 25, 2020, agreement was signed, the Appellant stopped working for X twice: on November 19, 2013, as the agreement indicates,[67] and on August 27, 2019.[68]

[72] The Commission says that, to allocate the Appellant's earnings, it determined that the separation from employment that resulted in the payments he received is the one that took place on November 19, 2013, because it is the only separation mentioned in the September 25, 2020, agreement,[69] and because the payments in question were made for a period that started before August 27, 2019.[70]

[73] The Commission explains that it assessed the Appellant's normal weekly earnings [at] $2,767 based on information on the amended or replaced Record of Employment[71] that the employer issued on February 18, 2014.[72] It points out that the Appellant has not disputed that allocation rate.[73]

---

[65] See sections 36(9) and 36(10) of the Regulations.
[66] See GD4-6.
[67] See GD3-18 and GD3-25.
[68] See GD4-6.
[69] See GD3-18.
[70] See GD4-6.
[71] Record of Employment no. W31903547—GD3-13 and GD3-14.
[72] See GD3-13 and GD3-14.
[73] See GD4-6.

[74] The Commission says that the total applicable amount of earnings—$335,719—was allocated from the Appellant's separation from his job on November 19, 2013, at $2,767 per week until the amount was exhausted on December 17, 2016.[74]

[75] The Commission explains that, since the Appellant received benefits for the period from January 17, 2016, to March 26, 2016, and since earnings stemming from the September 25, 2020, settlement agreement were paid to him for the same period, it calculated the excess benefits he had received, in accordance with section 45 of the Act.[75] It says that the $2,767 allocation rate exceeds the $952 limit above which benefits are no longer payable to the Appellant.[76] The Commission specifies that this situation explains why the Appellant is not entitled to any benefits during the allocation [period] and that he has to repay the benefits he received.[77]

[76] Concerning the Appellant's allegation that the decision in his case is inapplicable because he was claiming sickness benefits (special benefits) for the period in question,[78] the Commission says that sections 19(1) and 19(2) of the Act describe how earnings are deducted from EI benefits.[79] It specifies that the version of section 21(3) of the Act that was in force when the Appellant's claim for benefits was established stated that earnings received during a benefit period for sickness benefits were deducted dollar for dollar from the benefits.[80] The Commission says that, as a result, it was appropriate to deduct the earnings that were paid to the Appellant under the September 25, 2020, agreement from the sickness benefits he had received.[81]

[77] The Commission argues that, although the Appellant says the wage compensation specifically relates to the years 2016 to 2020, while the EI benefits he is being asked to repay relate to 2015, the amounts paid as compensation for wages lost

---

[74] See GD3-31 and GD4-6.
[75] See GD4-7.
[76] See GD4-7.
[77] See GD3-36 and GD4-7.
[78] See GD3-38.
[79] See GD4-7.
[80] See GD4-7.
[81] See GD4-7.

as a result of the dismissal have to be allocated to consecutive weeks from the week of separation.[82] It points out that sections 36(9) and 36(10) of the Regulations state that this is how the allocation should be made, even if the amounts are purported to have been paid for a period other than the one immediately following the separation.[83] The Commission says that, even though the September 25, 2020, agreement indicates that the payment for lost wages was made for the period from January 1, 2016, to December 31, 2019, it cannot take it into account and has to allocate the amount from the separation from employment on November 19, 2013.[84] In its opinion, since the allocation [period] was until December 17, 2016, it is appropriate to ask the Appellant to pay back the excess benefits he received between January 17, 2016, and March 26, 2016.[85]

[78] Regarding the Appellant's argument that the ALT ratified the September 25, 2020, agreement in June 2021 [*sic*] [May 3, 2021] and that its decision in his case constitutes an excess of jurisdiction, the Commission argues that the ALT has the power, within its jurisdiction, to ratify an agreement, if it is in compliance with the law.[86] In its opinion, the ALT does not have jurisdiction to make decisions under the Act or Regulations.[87] The Commission says that, as a result, the decision it made in the Appellant's case is not bound by the ALT's decision.[88]

[79] The Commission says it has the power to determine earnings for EI benefit purposes and the allocation of those earnings.[89]

---

[82] See GD4-7.
[83] See GD4-7.
[84] See GD4-7.
[85] See GD4-7 and GD4-8.
[86] See GD4-8.
[87] See GD4-8.
[88] See GD4-8.
[89] See section 54(s) of the *Employment Insurance Act* (Act)—GD4-8.

[80] It says that, as a result, it had the power to decide that the money the Appellant had received as payment for the loss of wages, of the flexible allowance, and of the lump sum travel allowance was earnings and to allocate it.[90]

[81] I find that the $323,219 ($293,723 + $29,496 = $323,219) should be allocated in accordance with the provisions of sections 36(9) and 36(10) of the Regulations because this money is earnings that were paid to him by reason of a lay-off or separation from an employment.

[82] Under these sections, the Appellant's earnings have to be allocated to a number of weeks that begins with the week of the separation, regardless of the period for which the earnings are purported to have been paid or payable.[91]

[83] In this case, I find that the Appellant was separated from his job on November 19, 2013. I find this because the September 25, 2020, agreement indicates that the Appellant's employment ended on November 19, 2013.[92]

[84] I find that, according to the provisions of the Regulations, the Commission correctly determined when the Appellant's earnings [*sic*] had to be made, that is, from the Appellant's separation from his job on November 19, 2013.

[85] I do not accept the Appellant's argument that the Commission exceeded its jurisdiction because it allocated his earnings from that date. According to the Appellant, the Commission's excess of jurisdiction is due to the fact that, in its allocation, it did not take into account the terms of the September 25, 2020, agreement establishing a breakdown or staggering of the payment he received for wages lost during the period between January 1, 2016, and December 31, 2019, or the ALT's May 3, 2021, decision ratifying that agreement.

---

[90] See sections 35(2)(a), 36(9), and 36(10) of the Regulations—GD4-8.
[91] See sections 36(9) and 36(10) of the Regulations.
[92] See the document entitled [translation] "Settlement and Release"—GD3-18 to GD3-23 and GD8-5 to GD8-10.

[86] In my view, the Commission has jurisdiction to make decisions according to the provisions of the Act and Regulations, which includes the power to determine a claimant's earnings and to allocate them to establish their entitlement to receive benefits. I point out that the Commission has such a power under the Act. Section 54(s) of the Act says the following:

> The Commission may, with the approval of the Governor in Council, make regulations:
>
> […]
>
> **(s)** defining and determining earnings for benefit purposes, determining the amount of those earnings and providing for the allocation of those earnings to weeks or other periods ….[93]

[87] In addition, sections 36(9) and 36(10) of the Regulations specify the weeks to which the Commission allocates a claimant's income following a lay-off or separation from an employment based on the claimant's weekly earnings.[94]

[88] The Appellant also argues that, in addition to the Commission, the Tribunal cannot make a decision that would conflict with the terms of the September 25, 2020, agreement regarding the breakdown or staggering period for the payment he received for lost wages.

[89] On this point, I note that the *Department of Employment and Social Development Act* (DESD Act) says that the Tribunal may decide any question of law or fact that is necessary for the disposition of any application made under the DESD Act, which includes questions related to the *Employment Insurance Act*.[95]

[90] I find that the Appellant's earnings were not allocated contrary to the terms of the September 25, 2020, agreement. I find that the Commission's decision did not have the

---

[93] See section 54(s) of the Act.
[94] See sections 36(9) and 36(10) of the Regulations.
[95] See sections 64 and 66 of the *Department of Employment and Social Development Act*.

effect of changing the terms of that agreement. The Appellant was able to receive the payments set out in it.

[91] I do not accept the Appellant's argument that the decision in his case is inapplicable because he was on extended disability leave during the period covered by that decision,[96] or his argument that the benefits he is being asked to repay relate to 2015.[97]

[92] Although the Appellant was on disability leave and received sickness benefits (special benefits), this situation does not change the fact that his earnings have to be allocated.

[93] Even though the Appellant's benefit period started on April 5, 2015, before the period for which he received a payment for lost wages, since that payment was staggered or broken down over the period between January 1, 2016, and December 31, 2019, according to the terms of the September 25, 2020, agreement, the fact is that benefits were paid to him for part of that period.[98]

[94] More specifically, regarding that benefit period, the Appellant received sickness benefits (special benefits) for the period from January 17, 2016, to March 26, 2016,[99] and [the period for] the Commission's allocation was until December 17, 2016.[100] So, the Appellant found himself receiving both benefits and his payment for wages lost for the same period.

[95] I point out that the overpayment amount the Commission is asking the Appellant to repay specifically concerns benefits that were paid to him from January 17, 2016, to March 26, 2016.[101]

---

[96] See GD3-38.
[97] See GD2-4.
[98] See GD3-44, GD3-45, and GD4-7.
[99] See GD3-44, GD3-45, and GD4-7.
[100] See GD4-7 and GD4-8.
[101] See GD3-44 and GD3-45.

[96] In summary, I find that the Commission correctly allocated the earnings of $323,219 that were paid to the Appellant, specifically, $293,723 as payment for wages lost since his dismissal and $29,496 as payment for the loss of the flexible allowance set out in his work agreement ($293,723 + $29,496 = $323,219).[102]

[97] However, since I have found that the $12,500 the Appellant received as payment for the loss of the lump sum travel allowance is not earnings, this amount should not be allocated and, as a result, should not be part of the calculation that led to the allocation. So, it is up to the Commission to make a new calculation taking this change into account.

Conclusion

[98] I find that part of the $335,719 the Appellant received from his former employer under an agreement reached on September 25, 2020, is earnings, specifically, an amount of $323,219. This amount should be allocated or deducted from the Appellant's benefits.

[99] This means that the appeal is allowed in part.

Normand Morin

Member, General Division – Employment Insurance Section

[102] See sections 36(9) and 36(10) of the Regulations.