



[TRANSLATION]

Citation: *AA v Canada Employment Insurance Commission*, 2023 SST 135

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant: A. A.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (495615) dated July 9, 2022 (issued by Service Canada)

Tribunal member: Normand Morin

Type of hearing: Teleconference

Hearing date: December 8, 2022

Hearing participant: Appellant

Decision date: January 13, 2023

File number: GE-22-2374

Decision

[1] The appeal is dismissed.

[2] I find that the \$6,070.00 the Appellant received from X (employer) as wages and severance pay constitutes earnings.¹ This means that this amount has to be allocated or deducted from his Employment Insurance (EI) benefits.² The Canada Employment Insurance Commission (Commission) allocated these earnings to the correct weeks of the Appellant's EI benefit period.³

[3] I find that the Commission is justified in asking the Appellant to repay an amount he was overpaid in benefits (overpayment).⁴

Overview

[4] From September 17, 2018, to October 15, 2019, inclusive, the Appellant worked as an IT programmer analyst for the employer and stopped working there because of a shortage of work.⁵

[5] On October 3, 2019, the Appellant made an initial claim for EI benefits (regular benefits).⁶ A benefit period was established effective September 29, 2019.⁷

[6] In its arguments, the Commission explains that the Appellant applied for benefits on October 3, 2019, saying that there had been a shortage of work since then. The Commission says that a Record of Employment was filed in the Appellant's file⁸ and that September 30, 2019, was accepted as his last day of work. This explains why his benefit period was established effective September 29, 2019. The Commission says that a second Record of Employment was issued by the Appellant's employer showing

¹ See section 35 of the *Employment Insurance Regulations* (Regulations).

² See section 36 of the Regulations.

³ See section 36 of the Regulations.

⁴ See sections 43, 44, and 52 of the *Employment Insurance Act* (Act).

⁵ See GD3-3 to GD3-14, GD3-17, and GD3-18.

⁶ See GD3-3 to GD3-14.

⁷ See GD4-1 and GD8-1.

⁸ See the Record of Employment issued on September 26, 2019—GD3-15 and GD3-16.

that his last day of work was October 15, 2019.⁹ It says that, following an investigation, it found that the separation from employment occurred on October 15, 2019. The Commission says that postdating the start of the Appellant's benefit period to October 15, 2019, would have no impact on the calculations made.¹⁰

[7] On May 9, 2022, the Commission told the Appellant that it had allocated his earnings (his salary and severance pay from his employer) for the following weeks: September 29, 2019, to October 5, 2019 (\$1,231.00), October 6 to 12, 2019 (\$1,231.00), and October 13 to 19, 2019 (\$3,608.00). It told him that he would receive a notice of debt and that he would have to pay back the benefits he was not entitled to.¹¹

[8] On July 9, 2022, after a request for reconsideration, the Commission told him that it was upholding its May 9, 2022, decision.¹²

[9] The Appellant explains that he received the amount that the Commission allocated. He argues that he should not have to pay back the amount the Commission says he owes for benefits he was overpaid (overpayment). The Appellant argues that this is the way it should be because he did not get benefits for the number of weeks he could have gotten benefits.

[10] On July 18, 2022, the Appellant challenged the Commission's reconsideration decision. That decision is being appealed to the Tribunal.

⁹ See the Record of Employment issued on November 5, 2019—GD3-17 and GD3-18.

¹⁰ See GD8-1.

¹¹ See GD3-28 and GD3-29.

¹² See GD3-38.

Issues

[11] I have to decide whether the \$6,070.00 that the Appellant received from his employer is earnings¹³ and, if so, whether the allocation of those earnings was correct.¹⁴

To do this, I must answer the following questions:

- Is the money that the Appellant received from his employer earnings?
- If so, did the Commission allocate the earnings correctly?

[12] I also have to decide whether the Commission is justified in asking the Appellant to repay the amount he was overpaid in benefits.¹⁵

Analysis

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

[14] Earnings are the claimant's entire income, meaning the entire income arising out of any employment.¹⁶ An amount received will not be considered earnings if it falls within the exceptions set out in the Regulations¹⁷ or if it does not arise out of employment.

[15] Income can be anything that a person has received or will receive from an employer or another person. It is not necessarily money, but that is often the case.¹⁸ Employment is any work that a person has done or will do under a contract of employment or service.¹⁹

¹³ See section 35 of the Regulations.

¹⁴ See section 36 of the Regulations.

¹⁵ See sections 43, 44, and 52 of the Act.

¹⁶ See section 35 of the Regulations.

¹⁷ See section 35(7) of the Regulations.

¹⁸ See section 35(1) of the Regulations.

¹⁹ See section 35(1) of the Regulations.

[16] The Act says that all earnings have to be allocated.²⁰ The weeks to which earnings are allocated depend on why the person received the earnings.²¹

[17] The Claimant has to show that the money he received or is entitled to is not earnings. He has to prove this on a balance of probabilities. This means that he has to prove that it is more likely than not that the money in question is not earnings.

Issue 1: Is the money the Appellant received from his employer earnings?

[18] I find that the \$6,070.00 the Appellant received from his employer is earnings.²² This is money that was paid to him in return for the work he did. It represents income that was owed to him after he worked for the employer.

[19] The Federal Court of Appeal (Court) has established that a sum of money will be considered earnings if it is earned by a worker as a result of their work or in return for their work if there is a “sufficient connection” between the claimant’s employment and the sum received.²³

[20] The Court says that severance pay is earnings.²⁴

[21] The evidence on file shows that the Appellant received a total of \$6,070.00 from his employer.²⁵ That amount includes the following amounts:

- \$1,231.00 (\$1,231.29): earnings (week of September 29, 2019, to October 5, 2019)
- \$1,231.00 (\$1,230.93): earnings (week of October 6 to 12, 2019)
- \$989.00 (\$988.89): earnings (week of October 13 to 19, 2019)

²⁰ See section 36 of the Regulations.

²¹ See section 36 of the Regulations.

²² See section 35 of the Regulations.

²³ See the Court’s decision in *Roch*, 2003 FCA 356.

²⁴ See the Court’s decision in *Blais*, 2011 FCA 320.

²⁵ See GD3-17 to GD3-22.

- \$2,619.00 (\$2,618.90): vacation pay paid on October 15, 2019²⁶

[22] The four amounts in question total \$6,070.00 (\$1,231.00 + \$1,231.00 + \$989.00 + \$2,619.00 = \$6,070.00). This is the amount of money that the Commission considers to be income and that was deducted from the benefits paid to the Appellant for the following weeks: September 29, 2019, to October 5, 2019 (\$1,231.00), October 6 to 12, 2019 (\$1,231.00), and October 13 to 19, 2019 (\$989.00 + \$2,619.00 = \$3,608.00).²⁷

[23] The Appellant agrees that he received the amount of money in question.²⁸

[24] I find that this money is earnings because it is part of the entire income arising out of his employment, as set out in the Regulations.²⁹

[25] This money is related to the job the Appellant had with the employer in return for the work he performed there.

[26] In addition, this money is not covered by the exceptions set out in the Regulations that would allow it to not be considered earnings.³⁰

Issue 2: Did the Commission allocate the earnings correctly?

[27] I find that the \$6,070.00 the Appellant received from his employer was correctly allocated in accordance with the provisions of the Regulations, since this money is earnings.³¹

[28] The Act says that earnings have to be allocated to certain weeks. The weeks to which earnings are allocated depend on why the person received the earnings.

²⁶ See GD3-21 and GD3-22. These amounts have been rounded to the nearest dollar, as required by section 6(2) of the Act and section 36(20) of the Regulations.

²⁷ See GD3-28 and GD3-29.

²⁸ See GD3-26 and GD3-27.

²⁹ See section 35(2) of the Regulations.

³⁰ See section 35(7) of the Regulations.

³¹ See section 36(9) of the Regulations.

[29] 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.³²

[30] 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.³³

[31] The Court tells us that the amounts that you get for being separated from your job and that are earning within the meaning of section 35 of the Regulations have to be allocated in accordance with section 36(9) of the Regulations.³⁴

[32] 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.³⁵

[33] The Appellant has not made any arguments about the Commission's allocation of the earnings he received from his employer. His arguments focus on showing that he should not have to pay back the amount the Commission says he owes for benefits he was overpaid (overpayment)., since he should be entitled to receive benefits for more weeks than he received them.

[34] Concerning the Record of Employment the employer issued on November 5, 2019, indicating that his last day of work was October 15, 2019,³⁶ the Appellant explains that, if he applied for benefits on October 3, 2019, it is because he had stopped working when he applied.

[35] The Commission, on the other hand, gives the following explanations:

- a) The employer issued an initial Record of Employment (Record of Employment issued on September 26, 2019). It showed that the Appellant's last day of

³² See section 36(9) of the Regulations.

³³ The Court established this principle in *Boone et al*, 2002 FCA 257.

³⁴ See the Court's decisions in *Boucher Dancause*, 2010 FCA 270; and *Cantin*, 2008 FCA 192.

³⁵ See the Court's decision in *McLaughlin*, 2009 FCA 365.

³⁶ See GD3-17 and GD3-18.

paid work was September 30, 2019.³⁷ The Appellant applied for benefits on October 3, 2019, indicating that he had stopped working on October 3, 2019 (last day worked).³⁸ This explains why the benefit period was established effective September 29, 2019.³⁹

- b) Following an investigation, the Commission decided that October 15, 2019, was when the Appellant stopped working.⁴⁰ The employer issued a second Record of Employment indicating that the Appellant's last day of work was October 15, 2019.⁴¹
- c) Postdating the start of the Appellant's benefit period to October 15, 2019, would have no impact on the calculation for allocating his earnings.⁴²
- d) The Appellant's earnings were allocated starting the week beginning September 29, 2019, based on his normal weekly earnings of \$1,250.00.⁴³

[36] I find that the \$6,070.00 should be allocated in accordance with the provisions of section 36(9) of the Regulations, since that money is earnings that were paid to the Appellant because of his lay-off or separation from employment.⁴⁴

[37] That section says that the Appellant's earnings have to be allocated to a number of weeks that begins with the week of separation, regardless of the period for which they are purported to be paid or payable.⁴⁵

³⁷ See GD3-15, GD3-16, and GD8-1.

³⁸ See GD3-6 and GD8-1.

³⁹ See GD8-1.

⁴⁰ See GD8-1.

⁴¹ See GD3-17, GD3-18, and GD8-1.

⁴² See GD8-1.

⁴³ See GD4-2 and GD8-1.

⁴⁴ See section 36(9) of the Regulations.

⁴⁵ See section 36(9) of the Regulations.

[38] I accept the Commission's explanation that it allocated the Appellant's earnings starting the week beginning September 29, 2019, even though he stopped working on October 15, 2019, given that there is no impact on the calculation it made in this way.

[39] I note that, during his testimony, the Appellant said that he had stopped working when he applied for benefits on October 3, 2019.

[40] I find that, in these circumstances, the Commission correctly determined when the allocation of the Appellant's earnings was established—that is, effective the week beginning September 29, 2019—based on the provisions of the Regulations.

[41] In summary, I find that the \$6,070.00 the Appellant received was allocated to the correct weeks of his benefit period.⁴⁶

Paying back the overpayment of benefits

[42] I find that the Commission is justified in asking the Appellant to repay the amount he was overpaid in benefits.⁴⁷

[43] If a person received EI benefits to which they were not entitled or because they were disqualified from receiving those benefits, they must repay those benefits or the resulting excess amount.⁴⁸

[44] The Commission has 36 months to reconsider any claim for benefits paid or payable to a claimant, including the EI ERB, and that period is 72 months if the Commission is of the opinion that a false or misleading statement or representation has been made in connection with a claim.⁴⁹

⁴⁶ See section 36(9) of the Regulations.

⁴⁷ See sections 43, 44, and 52 of the Act.

⁴⁸ See sections 43 and 44 of the Act.

⁴⁹ See section 52 of the Act.

[45] The Appellant argues that he should not have to pay back the amount the Commission is asking him to repay for benefits he was overpaid, since he did not receive benefits for all the weeks he was entitled to.⁵⁰

[46] He says that he received 31 weeks of benefits, when he was entitled to 36 weeks.⁵¹

[47] The Appellant argues that he was unable to complete his claimant reports after the week ending June 13, 2020, because of a technical problem; otherwise, he would have continued to complete them.⁵²

[48] He explains that he made an antedate request⁵³ to the Commission to receive benefits for the missing weeks.⁵⁴

[49] Despite the Appellant's disagreement that he has to pay back the amount he owes for benefits he was overpaid, the fact is that he has to pay back that amount. It represents an overpayment that must be paid back.

[50] The Court tells us that the amount of an overpayment specified in a notice of debt becomes repayable on the date of notification of the overpayment and that a person who receives an overpayment of benefits is to return the amount of overpayment without delay.⁵⁵

[51] The Appellant's situation cannot exempt him from his obligation to pay back the overpayment amount he owes for benefits he was overpaid.

⁵⁰ See GD3-30.

⁵¹ See GD2-7, GD2-14, GD2-15, GD3-30, GD3-35, and GD3-36.

⁵² See GD10-1.

⁵³ Antedating a claim for EI benefits allows a late claim for benefits to be considered as having been made on an earlier day than the day it was actually made.

⁵⁴ See GD10-1.

⁵⁵ See the Court's decision in *Braga*, 2009 FCA 167. See also sections 43, 44, and 52 of the Act.

[52] Even though the Appellant argues that he is entitled to 36 weeks of benefits when he only received 31 weeks, I cannot rule on this specific issue because it is not the issue at hand. The same is true of the Appellant's request to the Commission for an antedate.

[53] I note that the Commission's initial decision of May 9, 2022, concerns the allocation of the Appellant's earnings and the request that he pay back the benefits he was not entitled to.⁵⁶

[54] I note that the Commission's July 9, 2022, reconsideration decision says that the Commission upholds the May 9, 2022, reconsideration decision against the Appellant.⁵⁷

[55] It was the reconsideration decision that was appealed to the Tribunal. So, I must make a decision on that issue. The issues about how many weeks of benefits the Appellant can receive benefits and his antedate request to the Commission are not addressed in this decision.

[56] On this point, I also note that, as a Tribunal member, I cannot decide an issue that is not before me. The Tribunal can hear only appeals of reconsideration decisions that the Commission makes.⁵⁸

[57] I find that the Commission is justified in asking the Appellant to pay back the overpayment. It is up to the Commission to consider how he should pay back the amount of money it says he owes.

Conclusion

[58] I find that the \$6,070.00 the employer paid the Appellant is earnings. These earnings must be allocated or deducted from the Appellant's benefits. The Commission correctly allocated these earnings.

⁵⁶ See GD3-28 and GD3-29.

⁵⁷ See GD3-38.

⁵⁸ See section 113 of the Act.

[59] The Commission is justified in asking the Appellant to repay the amount he was overpaid in benefits.

[60] This means that the appeal is dismissed.

Normand Morin
Member, General Division – Employment Insurance Section