



[TRANSLATION]

Citation: *SB v Canada Employment Insurance Commission*, 2023 SST 523

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant: S. B.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (533712) dated October 18, 2022 (issued by Service Canada)

Tribunal member: Normand Morin

Type of hearing: Videoconference

Hearing date: March 14, 2023

Hearing participant: Appellant

Decision date: May 5, 2023

File number: GE-22-3641

Decision

[1] The appeal is dismissed.

[2] I find that the Canada Employment Insurance Commission (Commission) was justified in deducting the amount of money the Appellant received from the employer X (employer) as wage-loss indemnity payments from her EI benefits.¹

[3] This money is earnings.² This means that this amount has to be allocated or deducted from her benefits.³ The Commission made this allocation correctly.⁴

[4] I find that the Commission is justified in asking the Appellant to pay back an amount she owes in overpaid benefits (overpayment).⁵

Overview

[5] From April 26, 2021, to October 25, 2021, inclusive, the Appellant worked as an agent for the employer X and stopped working for that employer because of an illness or injury⁶.

[6] On November 3, 2021, she made a renewal claim for Employment Insurance (EI) benefits (sickness benefits – special benefits).⁷ Her claim for benefits was renewed on October 24, 2021.⁸

[7] On June 25, 2022, a notice of debt was sent to the Appellant.⁹

¹ See section 19(2) of the *Employment Insurance Act* (the Act).

² See section 35 of the *Employment Insurance Regulations* (Regulations).

³ See section 36 of the Regulations.

⁴ See section 36 of the Regulations.

⁵ See sections 43, 44, 47, and 52 of the Act.

⁶ See GD3-3 to GD3-18.

⁷ See GD3-3 to GD3-16.

⁸ See GD3-1 and GD4-1.

⁹ See the document entitled “*Notice of Debt / Notice of Debt*” issued by *Employment and Social Development Canada*, dated June 25, 2022—GD3-22 and GD3-23.

[8] On October 18, 2022, after a reconsideration request, the Commission told her that it was upholding the June 21, 2022,¹⁰ decision about the allocation of her wage-loss indemnity payments.¹¹

[9] The Appellant says that she received money in wage-loss indemnity payments from the employer X for the two weeks from November 7 to November 20, 2021, and EI benefits for each of the two weeks in question. She says that she contacted the Commission twice to find out whether she could receive benefits for those two weeks while her employer was also paying her wage-loss indemnity payments. The Appellant says that the Commission told her that, even if she received wage-loss indemnity payments, she was entitled to receive benefits and would not have to pay them back. She argues that the Commission made an error in her file because it is asking her to repay the benefits she was paid for those weeks, even though it had told her that she would not have to. The Appellant argues that she should not have to pay back the amount the Commission says she owes in overpaid benefits (overpayment). She argues that she can't afford to pay back the amount in question and asks that her debt be written off. On October 26, 2022, the Appellant challenged the Commission's reconsideration decision. That decision is being appealed to the Tribunal.

Issues

[10] I have to decide whether the Commission was justified in deducting the amount of money the Appellant received from her employer as wage-loss indemnity payments from the EI benefits she was paid.¹² To do this, I have to answer the following questions:

- Is the money the Appellant received from her employer as wage-loss indemnity payments earnings?

¹⁰ In its arguments, the Commission says that the October 18, 2022, notice of decision contains a clerical error. It says that this document indicates that the initial decision was communicated to the Appellant on June 21, 2022, while that decision was communicated to her on June 25, 2022—GD4-2.

¹¹ See GD2-21 and GD3-31.

¹² See section 19(2) of the Act; and sections 35 and 36 of the Regulations.

- If so, did the Commission allocate the earnings correctly?

[11] I also have to decide whether the Commission is justified in asking the Appellant to pay back the amount she was overpaid in benefits.¹³

Analysis

[12] The Act says that when a claimant receives earnings during a week of unemployment, an amount equal to the total of the following amounts is deducted from the benefits payable to the claimant:

- 50% of the earnings up to 90% of the claimant's weekly insurable earnings
- 100% of the earnings that are greater than 90% of the claimant's weekly insurable earnings¹⁴

[13] The Act also says that when benefits are payable to a claimant for a week of unemployment because of illness, injury, or quarantine (for example, special benefits), any allowances, money, or other benefits payable to the claimant for that week are deducted from those benefits. This applies under a plan covering employees working for an employer which had its premium rate reduced in accordance with regulations made under section 69(1) of the Act.¹⁵

[14] 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 are to be allocated or deducted from a claimant's EI benefits.

[15] Earnings are the claimant's entire income, meaning the entire income arising out of any employment.¹⁶

¹³ See sections 43, 44, 47 and 52 of the Act.

¹⁴ See section 19(2) of the Act.

¹⁵ See section 21(3) of the Act.

¹⁶ See section 35 of the Regulations.

[16] This income includes, but isn't limited to, payments that the claimant has received or, on application, is entitled to receive under a group wage-loss indemnity plan or a paid sick, maternity, or adoption leave plan.¹⁷

[17] An amount received won't be considered earnings if it falls within the exceptions set out in the Regulations¹⁸ or if it isn't from employment.

[18] The Act defines both "income" and "employment." Income can be anything that a person has received or will receive from an employer or another person. It isn't necessarily money, but that is often the case.¹⁹ Employment is any work that a person has done or will do under a contract of employment or service.²⁰

[19] The Act says that all earnings have to be allocated.²¹ The weeks to which earnings are allocated depend on why the person received the earnings.²²

[20] The Claimant has to show that the money she received or is entitled to isn't earnings. She has to prove this on a balance of probabilities. This means that she has to prove that it is more likely than not that the money in question isn't earnings.

Issue 1: Is the money the Appellant received from her employer as wage-loss indemnity payments earnings?

[21] I find that the money the Appellant received from her employer as wage-loss indemnity payments for the two weeks from November 7 to November 20, 2021, is earnings.²³

[22] 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

¹⁷ See sections 35(2)(c)(i) and 35(2)(c)(ii).

¹⁸ See section 35(7) of the Regulations.

¹⁹ See section 35(1) of the Regulations.

²⁰ See section 35(1) of the Regulations.

²¹ See section 36 of the Regulations.

²² See section 36 of the Regulations.

²³ See section 35 of the Regulations.

their work if there is a “sufficient connection” between the claimant’s employment and the sum received.²⁴

[23] In her application for benefits from November 3, 2021, the Appellant states that she is covered by a sickness wage-loss indemnity plan with her employer (paid sick leave or wage-loss insurance) and that she received, or was entitled to receive, payments under a group wage-loss indemnity plan as of November 4, 2021.²⁵

[24] The evidence on file indicates that the Appellant received a total of \$1,268 from her employer as wage-loss indemnity payments for the two weeks starting November 7 and November 14, 2021, which is \$634 per week.²⁶

[25] The evidence on file also indicates that the Appellant received benefits (sickness benefits) totalling \$512 for these two weeks, or \$256 per week.²⁷

[26] The Appellant agrees that she received the amounts of money in question (wage-loss indemnity payments and benefits).²⁸

[27] She hasn’t made any arguments to show that the wage-loss indemnity payments from her employer should not be considered earnings. Her arguments focus on the amount of money the Commission is asking her to repay for benefits she was overpaid (overpayment), following the correction to her file.

[28] I find that the money in question is earnings because it is part of the entire income from her employment, as set out in the Regulations.²⁹

[29] This amount is related to the Appellant’s employment with the employer.

²⁴ See the Court’s decision in *Roch*, 2003 FCA 356.

²⁵ See GD3-7 to GD3-9.

²⁶ See GD3-21 and GD3-32.

²⁷ See GD3-21 and GD3-32.

²⁸ See GD2-7, GD2-14, GD2-19, GD2-22, GD3-8, GD3-9, GD3-21, GD3-25, GD3-27, and GD3-30.

²⁹ See section 35(2) of the Regulations.

[30] Also, this amount doesn't fall under the exceptions set out in the Regulations that would allow for it not to be considered earnings.³⁰

Issue 2: Did the Commission allocate the earnings correctly?

[31] I find that the total of \$1,268 that the Appellant received from her employer as wage-loss indemnity payments for the two weeks from November 7 to November 20, 2021, was correctly allocated in accordance with the provisions of the Regulations, since this amount is earnings.³¹

[32] The Regulations say that earnings have to be allocated to certain weeks. The weeks to which earnings are allocated depend on why the person received the earnings.

[33] The Regulations say that payments under a group sickness or disability wage-loss plan are earnings that must be allocated to the weeks for which those earnings are paid or payable.³²

[34] 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

[35] 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.³⁴

[36] The Appellant hasn't made any arguments about the Commission's allocation of the earnings she received from her employer as wage-loss indemnity payments.

³⁰ See section 35(7) of the Regulations.

³¹ See section 36(12) of the Regulations.

³² See section 36(12)(b) of the Regulations.

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

³⁴ The Court established this principle in *McLaughlin*, 2009 FCA 365.

[37] The Commission argues the following:

- a) The Act says that, when a claimant applies for sickness or maternity benefits and is also entitled to paid sick leave or wage-loss indemnity payments from an employer who obtained a reduction in their EI premium rate under the “Premium Reduction Program” (PRP), the amount of those payments is deducted at 100% for each week in which they are payable.³⁵
- b) The employer X obtained a reduction in its EI premium rate under the PRP.³⁶ This reduction means that 100% of the total amount of the wage-loss indemnity payments the Appellant received must be deducted from her sickness benefits for the weeks from November 7 to November 20, 2021.³⁷
- c) As a result, the earnings from these indemnity payments were deducted from the Appellant’s benefits in accordance with the provisions of the Act.³⁸
- d) Indemnity payments that a claimant receives or to which they are entitled are allocated to the period for which the amounts are paid or payable.³⁹
- e) Short-term disability benefits under a group plan are considered income under section 35(2)(c)(i) of the Regulations. They must be allocated in accordance with the provisions of section 36(12)(b) of the Regulations.⁴⁰

[38] I find that the amount of \$1,268 should be allocated in accordance with the provisions of section 36(12) of the Regulations, since this amount is a wage-loss payment.⁴¹

³⁵ See sections 19(2), 21(3), and 22(5) of the Act. See also GD4-3.

³⁶ See GD3-24.

³⁷ See GD4-3.

³⁸ See sections 19(2), 21(3), and 22(5) of the Act. See also GD3-32 and GD4-3.

³⁹ See GD4-4.

⁴⁰ See the Court’s decision in *Mercer*, 2012 FCA 37. See also GD4-5.

⁴¹ See section 36(12) of the Regulations.

[39] This section says that the payment must be allocated to the weeks for which it is paid or payable.⁴²

[40] I find that the Commission correctly determined the weeks for which the Appellant's earnings had to be allocated—the weeks that began on November 7 and 14, 2021, based on the provisions of the Regulations.⁴³

[41] In summary, I find that the earnings of \$1,268 paid to the Appellant as a wage-loss indemnity payments were correctly allocated by the Commission.⁴⁴

Repayment of benefit overpayment

[42] I find that the Commission is justified in asking the Appellant to repay the amount she was overpaid in benefits.⁴⁵

[43] If a person received EI benefits to which they weren't entitled or because they were disqualified from receiving those benefits, they must repay those benefits or the resulting excess amount.⁴⁶

[44] The Commission has 36 months to reconsider any claim for benefits paid or payable to a claimant. 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.⁴⁷

[45] The Commission may write off an amount owing under specific conditions.⁴⁸ Write-off means cancelling or waiving a debt or an amount owing (for example, an overpayment).

⁴² See section 36(12) of the Regulations.

⁴³ See section 36(12) of the Regulations.

⁴⁴ See section 36(12) of the Regulations.

⁴⁵ See sections 43, 44, 47 and 52 of the Act.

⁴⁶ See sections 43 and 44 of the Act.

⁴⁷ See section 52 of the Act.

⁴⁸ See section 56 of the Regulations.

[46] The Appellant's testimony and statements indicate the following:

- a) When she received benefits for the weeks from November 7 to 20, 2021, she contacted the Commission twice (November 12 and 30, 2021) to find out whether she was entitled to receive benefits and also to find out whether she would have to pay them back, since she had received wage-loss indemnity payments from her employer. The Commission told her that she was entitled to the benefits in question and told her that she would not have to pay them back.⁴⁹
- b) She points out that she was honest in her dealings with the Commission, that she did her due diligence, and that she always gave it the right information about her file.⁵⁰
- c) The Commission made an error in her file. The Commission didn't consider the information she provided. It is up to the Commission (government) to take responsibility for this error, since it gave her incorrect information twice. She would have repaid the amount she was overpaid in benefits when the error occurred. But, almost a year passed before the Commission told her about that error.⁵¹
- d) So, she disagrees with paying back the money that the Commission says she owes in overpaid benefits. She is no longer able to repay the amount in question. She is asking that her debt be written off.⁵²

⁴⁹ See GD2-7, GD2-14, GD2-19, GD2-22, GD3-19, GD3-21, GD3-25, GD3-27, and GD3-29.

⁵⁰ See GD2-7, GD2-14, GD2-19, GD2-22, GD3-19, GD3-21, GD3-25, GD3-27, and GD3-29.

⁵¹ See GD2-7, GD2-14, GD2-19, GD2-22, GD3-25, GD3-27, and GD3-29.

⁵² See GD2-7, GD2-14, GD2-19, GD2-22, GD3-25, GD3-27, and GD3-29.

[47] The Commission gives the following explanations:

- a) The evidence shows that the Appellant was entitled to indemnity payments from the employer X's wage-loss indemnity plan for the period from November 7 to November 20, 2021.⁵³
- b) Since this employer is registered for the PRP, 100% of the wage-loss indemnity payments the Appellant received had to be deducted from her benefits.⁵⁴
- c) In November 2021, when the Appellant completed her claimant reports, 50% of her wage-loss indemnity payments was deducted from her sickness benefits. This allowed her to receive \$256 in benefits for each week starting November 7 and 14, 2021.⁵⁵
- d) On June 1, 2022, the Commission corrected the employer's deduction code to show that the employer was registered for the PRP. This correction resulted in 100% of wage-loss indemnity payments being deducted from the Appellant's benefits. This created an overpayment of \$512 for the two weeks in question.⁵⁶
- e) The Commission doesn't dispute the Appellant's good faith or statements about the information she gave it. But, the Appellant was told that she may have to repay benefits if she received wage-loss indemnity payments. So, despite the delay in her file being processed, she had a reasonable expectation that it would eventually be reconsidered.⁵⁷

⁵³ See GD2-7, GD2-14, GD3-30, and GD4-3.

⁵⁴ See GD4-2.

⁵⁵ See GD4-1 and 2.

⁵⁶ See GD3-32, GD4-1, and GD4-2.

⁵⁷ See GD3-19, GD3-21, GD4-4, and GD4-5.

- f) In her renewal claim for sickness benefits, the Appellant indicated that her employer had a group wage-loss indemnity plan. So, she had to expect the payments to be deducted from her benefits.⁵⁸
- g) The correction to the Appellant's file was made within the time limit set for doing so.⁵⁹
- h) Court decisions say that the Commission providing incorrect information to a claimant can't relieve the claimant from the operation of the Act.⁶⁰
- i) The Commission says that it is sympathetic to the fact that the Appellant has to pay back the amount of money it says she owes in overpaid benefits. It is possible for the Appellant to reach an agreement with the Canada Revenue Agency (CRA) to spread out the repayment of the overpayment based on her financial situation. A claimant is required to repay benefits they were overpaid.⁶¹

[48] I find that the Commission exercised its right to ask the Appellant to repay the amount she was overpaid in benefits.⁶²

[49] Despite the Appellant disagreeing that she has to pay back the amount of money the Commission says she owes in overpaid benefits, the fact is that she has to repay it. It is an overpayment that must be repaid.

[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

⁵⁸ See GD3-8, GD3-9, GD3-19, GD3-21, and GD4-4.

⁵⁹ See section 52(1) of the Act. See also GD4-4.

⁶⁰ See the Court's decisions in *Lanuzo*, 2005 FCA 324; and *Shaw*, 2002 FCA 325. See also GD4-3 and GD4-4.

⁶¹ See GD4-4.

⁶² See section 52 of the Act.

person who receives an overpayment of benefits is to return the amount of overpayment without delay.⁶³

[51] The Court also tells us that, even if a Commission representative provides incorrect information to a claimant, that situation doesn't exempt the claimant from the requirements of the Act.⁶⁴

[52] Although the Appellant is asking that the debt she was overpaid in benefits be written off, I note that the Tribunal doesn't have jurisdiction to decide on writing off an overpayment.⁶⁵ That authority rests with the Commission.

[53] I find that the Appellant's situation can't exempt her from her obligation to pay back the amount of money she was overpaid in benefits.

[54] Even though several months passed before the Commission told the Appellant of the decision, that situation doesn't change the fact that she was overpaid benefits.

[55] But, I am of the view that the Commission should have acted quickly to tell the Appellant of its decision.

[56] 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 she should repay the amount of money she was overpaid in benefits.

Conclusion

[57] I find that the \$1,268 the employer paid the Appellant as wage-loss indemnity payments is earnings. Those earnings have to be allocated or deducted from the

⁶³ This principle was established or reiterated by the Court in *Faullem*, 2022 FCA 29; and *Braga*, 2009 FCA 167. See also sections 43, 44, 47 and 52 of the Act.

⁶⁴ This principle was established or reiterated by the Court in *Lanuzo*, 2005 FCA 324; and *Shaw*, 2002 FCA 325.

⁶⁵ This principle was established or reiterated by the Court in *Villeneuve*, 2005 FCA 440; *Filiatrault A-874-97*; *Romero A-815-96*; and *Gagnon A-676-96*.

Appellant's benefits. The Commission correctly allocated those earnings to the weeks from November 7 to November 20, 2021.

[58] The Commission is justified in asking the Appellant to pay back the amount of money she was overpaid.

[59] This means that the appeal is dismissed.

Normand Morin
Member, General Division – Employment Insurance Section