



Citation: *NN v Canada Employment Insurance Commission*, 2024 SST 224

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant: N. N.
Representative: P. N.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (619304) dated October 25, 2023
(issued by Service Canada)

Tribunal member: Bret Edwards

Type of hearing: Teleconference

Hearing date: January 3, 2024

Hearing participant: Appellant's representative

Decision date: January 5, 2024

File number: GE-23-3205

Decision

[1] The appeal is dismissed.

[2] The Appellant received earnings. And the Canada Employment Insurance Commission (Commission) allocated (in other words, assigned) those earnings to the right weeks.

[3] The Appellant's earnings still have to be allocated even if an error was made when that money was given to her. This means she can't be paid back the money she has already returned to the Commission.

Overview

[4] The Appellant got \$2249.00 from her former employer. The Commission decided the money is "earnings" under the law because it was paid to compensate her for the loss of her earnings while she was on sick leave.

[5] 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

[6] The Commission allocated the earnings starting the week of June 10, 2018 at an amount of \$173.00 per week. The Commission says this is the first week that is tied to the money she received.

[7] The Appellant agrees with the Commission that the money she received is earnings. But she says it shouldn't be allocated because her employer paid her the money incorrectly and she only realized this later. She says she's a victim of her employer's mistake and the money she already paid back to the Commission should now be returned to her because she did nothing wrong.

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

Matter I have to consider first

The Appellant wasn't at the hearing

[8] The Appellant wasn't at the hearing. A hearing can go ahead without the Appellant if the Appellant got the notice of hearing.² I think that the Appellant got the notice of hearing because her representative (who was at the hearing) said she did. Her representative also said she wanted the hearing to go ahead even though she wasn't there.

[9] So, the hearing took place when it was scheduled, but without the Appellant.

Issues

[10] I have to decide the following two issues:

- a) Is the money that the Appellant received earnings?
- b) If the money is earnings, did the Commission allocate the earnings correctly?

Analysis

Is the money that the Appellant received earnings?

[11] Yes, the \$2249.00 that the Appellant received is earnings. Here are my reasons.

[12] The law says that earnings are the entire income that you get from any employment.³ The law defines both "income" and "employment."

[13] **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.⁴

[14] **Employment** is any work that you did or will do under any kind of service or work agreement.⁵

² Section 58 of the *Social Security Tribunal Rules of Procedure* sets out this rule.

³ See section 35(2) of the EI Regulations.

⁴ See section 35(1) of the EI Regulations.

⁵ See section 35(1) of the EI Regulations.

[15] The Appellant's former employer gave the Appellant \$2249.00. The Commission decided that this money was money to compensate the Appellant for the loss of her earnings while she was on sick leave. So, it said the money is earnings under the law.⁶

[16] The Appellant's former employer told the Commission⁷:

- They paid the Appellant money to top up her EI benefits while she was on sick leave.
- They weren't registered for supplemental unemployment benefits or a premium reduction program, but since the Appellant was a long-term employee and was sick, they wanted to compensate her for the difference of her normal weekly earnings even though that wasn't their policy.
- They therefore paid the Appellant 45% of her normal weekly earnings to top up the EI benefits she was receiving, for a total of \$173.00 per week from the week of June 17, 2018 to the week of September 9, 2018.

[17] The Appellant agrees that the money is earnings. Her representative confirmed at the hearing that she isn't disputing this.⁸

[18] I find the money the Appellant received is earnings.

[19] I find the evidence clearly shows the Appellant's former employer paid her money to supplement her normal earnings while she was on sick leave. Her former employer says they did this and the Appellant doesn't dispute it. And in my view, this money was directly related to the Appellant's employment since it was paid to her to offset the income that she lost from not being able to work while she was sick.

⁶ GD4-2 to GD4-3.

⁷ GD3-25, GD3-26.

⁸ See hearing recording.

[20] I also find the total amount of earnings the Appellant received is \$2249.00. This is because she received \$173.00 per week for 13 weeks (from the week of June 17, 2018 to the week of September 9, 2018)⁹, which equals \$2249.00.

[21] Since the \$2249.00 is earnings, it will be allocated to the Appellant's claim.

Did the Commission allocate the earnings correctly?

[22] I find the Commission allocated the earnings correctly. The earnings should be allocated starting the week of June 17, 2018, which was the first week the Appellant's former employer said the money they paid her was for.

[23] 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.¹⁰

[24] The Appellant's earnings are money the Appellant was paid to compensate her for the loss of earnings while she was on sick leave.

[25] As discussed above, the Appellant's former employer told the Commission they paid the Appellant \$173.00 per week from the week of June 17, 2018 to the week of September 9, 2018 to top up the EI benefits she was receiving while she was on sick leave, even though they weren't registered for supplemental unemployment benefits or a premium reduction program.

[26] The Appellant says¹¹:

- Even though she doesn't dispute the money that she received is earnings, she feels it should be hers to keep, meaning it shouldn't be allocated.
- She's the victim of her former employer's mistake and shouldn't be penalized for it by having to pay back some of the benefits she received.
- She had to stop working in May 2018 because of illness.

⁹ GD3-32.

¹⁰ See section 36 of the EI Regulations.

¹¹ GD2-5, GD2-12, GD3-20 to GD3-23, GD3-27 to GD3-28, hearing recording.

- At that time, her husband (who is also her representative) met with her former employer. She was too ill to attend the meeting. Her former employer assured her husband that they would compensate her for the difference between her earnings at the time and what she would get in EI benefits.
- It seems her former employer had access to information from Service Canada about her entitlement to EI even before she submitted her claim. She's uncertain whether this was legal.
- She didn't speak to her former employer again until she was ready to return to work in November 2018. They also didn't contact her during the time she was sick.
- She returned to work in November 2018 and her former employer provided her with eight pay stubs, including checks dated from June 11, 2018 to September 30, 2018, in the customary payment format they used. Her husband deposited these checks into her bank account on November 22, 2018. This occurred after her EI benefits had already stopped since she was no longer eligible.
- She later realized her employer had made an error in paying her this money and that it was a mismanagement of their business finances.
- Despite not being fully aware of the situation, she decided to pay back some of the money she owed in May 2022 after getting a debt notice from Service Canada because getting these notices made her uncomfortable.
- The money she paid back in May 2022 should now be returned to her because her former employer made a mistake in giving her the top up money the way they did. She didn't know at the time that they had to be registered to do this and only later learned they weren't registered. And since her former employer gave her that money, she has the right to take it, not the Commission.
- The Commission is also responsible for her former employer's mistake because it's their responsibility to notify employers that they need to register to distribute top up money to employees.

[27] I acknowledge the Appellant feels the top up money from her former employer shouldn't affect the benefits she was paid and therefore shouldn't be allocated because her former employer didn't follow the rules when they decided to give her that money.

[28] And I acknowledge the Appellant also feels the top up money from her former employer shouldn't affect the benefits she was paid and therefore shouldn't be allocated because the Commission should have notified her former employer that they had to register to provide top up money to employees.

[29] Unfortunately, I find those arguments aren't relevant here.

[30] The Federal Court of Appeal (Court of Appeal) has said an appellant isn't exempt from the allocation process even if the Commission provides wrong information.¹² And the law doesn't give me the power to award the Appellant any compensation even if a Commission agent made a mistake.

[31] In other words, this means the Appellant's earnings still have to be allocated despite Commission errors.

[32] A decision from the Canadian Umpire Benefit (CUB), which is the predecessor to the Tribunal, also says that an appellant isn't exempt from the allocation process even if an employer makes an error.¹³

[33] Unlike decisions from the Court of Appeal, I'm not bound by CUB decisions. This means I don't have to automatically follow them, but I can choose to do that if I agree with their findings.

[34] In this case, I agree with the findings in the CUB decision. In my view, it follows the same thought process as the Court of Appeal in concluding that an appellant can't

¹² In *Canada (Attorney General) v Shaw*, 2002 FCA 325, the Federal Court of Appeal explains that misinformation from the Commission does not give an appellant relief from the provisions of the *Employment Insurance Act*. Similarly, in *Granger v Canada Employment Insurance Commission*, A-684-85, the Federal Court of Appeal explains that Commission agents don't have the power to amend the law. An individual Commission agent cannot promise to pay benefits in a way that is contrary to the law.

¹³ See CUB 16825.

get relief from the allocation rules even if errors were committed that they weren't aware of or that were beyond their control.

[35] As a result, I will follow the CUB decision here. This means the Appellant's earnings still have to be allocated despite her former employer's errors.

[36] I acknowledge the Appellant may see the allocation rules as unfair. But I have to apply the law the way it's written and can't interpret it in a way that's contrary to its plain meaning.¹⁴ And I can't make an exception for the Appellant, no matter how difficult or compelling her circumstances may be.¹⁵

[37] In other words, I have to apply the law as it is, and the law says the Appellant's earnings need to be allocated to the applicable weeks, as discussed above.

[38] And when I look at the evidence, I find the Appellant's earnings have been allocated correctly.

[39] The Appellant's former employer says that she was paid \$173.00 weekly from the week starting June 17, 2018 to the week starting September 9, 2018, through a series of cheques given to her when she returned to work in November 2018.¹⁶ And the Appellant doesn't dispute that she received these cheques for this period of time.¹⁷ I find this means the Appellant's earnings should be allocated starting the week of June 17, 2018 because this is when her former employer says the first cheque was dated.

[40] I therefore find the Commission allocated the Appellant's earnings correctly. This means that starting the week of June 17, 2018, \$173.00 is allocated to each week. If there is any amount of earnings that is left over, it will be allocated to the last week.

[41] This also means the Appellant can't be paid back the money she has returned to the Commission. This is because the money she received from her former employer is

¹⁴ See *Canada (Attorney General) v Knee*, 2011 FCA 301.

¹⁵ See *Pannu v Canada (Attorney General)*, 2004 FCA 90.

¹⁶ GD3-25.

¹⁷ GD2-5, GD3-20 to GD3-21.

earnings and needs to be allocated as the law requires, which means she was paid more benefits than she was entitled to.

[42] The Appellant says she already paid back the money the Commission told her she owes (she says it was \$1961.87) due to the allocation of her earnings.¹⁸ But I note the Commission says the Appellant still owes \$1819.00.¹⁹

[43] As a result, I would ask the Commission to promptly reach out to the Appellant to clarify what the money she has already paid back was specifically for²⁰ and how much she still owes due to the allocation of her earnings.

Conclusion

[44] The appeal is dismissed.

[45] The Appellant received \$2249.00 in earnings. These earnings are allocated starting the week of June 17, 2018 at \$173.00 per week. Any amount left over is allocated to the last week.

Bret Edwards

Member, General Division – Employment Insurance Section

¹⁸ GD2-5.

¹⁹ GD3-32.

²⁰ I note the Commission also initially decided to impose a penalty on the Appellant for not reporting her earnings, only to reverse this decision upon reconsideration. See GD3-27 to GD3-29. Because of this, I think it's at least possible that there could be some confusion around the money the Appellant has already paid back due to the penalty the Commission initially imposed on her.