



Citation: *CJ v Canada Employment Insurance Commission*, 2023 SST 2044

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

Decision

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

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (601241) dated August 4, 2023
(issued by Service Canada)

Tribunal member: Ambrosia Varaschin
Type of hearing: **IN WRITING**
Decision date: November 16, 2023
File number: GE-23-2348

Decision

[1] The appeal is dismissed.

[2] The money the Appellant received from her employer was paid to her for work she performed; this makes it earnings. Earnings must be allocated (in other words, assigned). The Canada Employment Insurance Commission (Commission) allocated those earnings to the correct weeks.

[3] There were errors calculating the Appellant's weekly benefit rate because of a miscommunication with her employer and an incorrect ROE. The Commission contacted the employer and corrected the benefit rate properly.

[4] Finally, I cannot write off the Appellant's overpayment. While I sympathize with her situation, I do not have the power to write off an overpayment.

Overview

[5] The Appellant established a claim for EI benefits on February 5, 2023. Based on her ROE at the time of her application, she had 1617 insurable hours and her best 22 weeks of pay totalled \$17,015.98. That meant her weekly benefit rate was \$425.

[6] The law says that all earnings have to be allocated to certain weeks. What weeks earnings are allocated to depends on why you received the earnings.¹ On March 13, 2023, the Appellant told the Commission that she had received money from her separation of employment.

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

[7] Based on the information the employer gave the Commission, her best 22 weeks of pay increased to \$17,765.98, which increased her weekly benefit rate to \$444. The Commission calculated her the normal weekly earnings as 736.33 and allocated the \$750 in severance pay and the \$750 pay in lieu of notice as follows:

- February 5, 2023: \$736.00
- February 12, 2023: \$736.00
- February 19, 2023: \$27.00

[8] This allocation resulted in an overpayment of \$858.00. This means the Commission is asking the Appellant to pay back benefits she received during those three weeks in February, minus the additional money she should have been paid every week.

[9] On reconsideration, the Commission contacted the employer and found that the severance pay was added to Pay Period 1 twice, in error. That meant that her best 22 weeks dropped to \$17,436.00, and her benefit rate would be reduced to \$436, creating a weekly overpayment of \$8.

[10] The Commission also corrected the allocation of the Appellant's severance and pay in lieu of notice. The Commission revised the allocation to:

- February 5, 2023: \$750.00
- February 12, 2023: \$300.00

[11] This allocation reduced the overpayment to \$168.00.

[12] The Appellant says she shouldn't need to repay money when it was the Commission's clerical errors that created an overpayment.

Issues

[13] 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?

[14] Yes, the \$1,500.00 that the Appellant received is earnings. Here are my reasons for deciding that the money is earnings.

[15] The law says that earnings are the entire income that you get from any employment.² The law defines both “income” and “employment.”

[16] **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.³ Case law says that severance pay is earnings.⁴

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

[18] The Appellant's former employer gave the Appellant \$750.00 pay in lieu of notice (in other words, pay she would have earned if she worked the week(s) she was legally entitled to) and \$750.00 severance.

[19] I find that the pay in lieu of notice is earnings according to Section 35(2) of the EI Regulations.

[20] I find that the severance pay is earnings according to Section 36(9) of the EI Regulations.

Did the Commission allocate the earnings correctly?

[21] 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.⁶

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

³ See section 35(1) of the EI Regulations.

⁴ See *Blais v Canada (Attorney General)*, 2011 FCA 320.

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

⁶ See section 36 of the EI Regulations.

[22] The Appellant's earnings are in lieu of notice and severance pay. The Appellant's employer gave the Appellant those earnings because the Appellant was laid off.

[23] The law says that the earnings you get for being separated from your job have to be allocated starting the week you were laid off. It doesn't matter when you actually receive those earnings. The earnings have to be allocated starting the week your lay-off starts, even if you didn't get those earnings at that time.⁷

[24] I find that the Appellant was laid off starting the week of January 29, 2023. I find this because her last day worked was January 31, 2023, which was a Tuesday.

[25] The amount of money to be allocated starting that week is \$450. This is because \$750 is the Appellant's normal weekly earnings, and she earned \$300 that week. The parties don't dispute this amount, and I accept it as fact.

[26] This means that \$750 is allocated to the week of February 5, 2023, and the remaining \$300 is allocated to the week of February 12, 2023.

[27] So, the Commission allocated the earnings correctly.

Is the weekly benefit rate correct?

[28] A claimant may receive up to 55% of their weekly insurable earnings as a regular EI benefit, up to a weekly maximum. The benefit rate is calculated using the average of the best (highest) weeks of insurable earnings during the qualifying period. The number weeks counted varies from 14 to 22 based the unemployment rate in effect at the beginning of the benefit period.⁸

[29] In this case, the Appellant's qualifying period was from February 6, 2022, to February 4, 2023. She lives in the Toronto region, and the rate of unemployment at the start of her benefit period was 6%. So, the number of best weeks required for the calculation of her weekly benefit rate is 22.

⁷ See section 36(9) of the EI Regulations.

⁸ See section 14 of the EI Act.

[30] I find that the Appellant's total earnings for \$17,436.00 because her pay in lieu of notice is insurable earnings, but the severance pay is not.

[31] \$17,436.00 divided by 22 weeks results in weekly insurable earnings of \$792.54.

[32] I find that the Appellant's weekly benefit rate is \$436 because that is the rounded total of 55% of \$792.54.

Does the Appellant need to repay the overpayment?

[33] The Appellant argues that the Commission is to blame for the errors on her file, so she is not liable for the overpayment. The Supreme Court of Canada has maintained that the Commission and its representatives have no power to amend the law, and that therefore the interpretations or information they may give do not have the force of the law. That means that clerical errors don't create an entitlement to benefits that doesn't exist in the legislation.⁹

[34] So, I can't remove an overpayment of benefits if the Appellant isn't eligible to receive those benefits. Therefore, the Appellant is required to repay the overpayment because the *Act* says she must.¹⁰

[35] I do not have the authority to write off an overpayment, but the Appellant can request that the Commission consider writing off her debt.¹¹

Conclusion

[36] The appeal is dismissed. The Commission calculated the weekly benefit rate and allocated the Appellant's earnings correctly.

Ambrosia Varaschin
Member, General Division – Employment Insurance Section

⁹ See *Canada (AG) v. Shaw* 2002 FCA 325, and *Granger v. CEIC* (1986), 69 N.R. 212 (FCA).

¹⁰ See section 43 of the *Employment Insurance Act*.

¹¹ See section 112.1 of the *Employment Insurance Act*.