



Citation: *AB v Canada Employment Insurance Commission*, 2024 SST 720

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

## Decision

**Appellant:** A. B.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (0) dated March 28, 2024 (issued by Service Canada)

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**Tribunal member:** Gary Conrad

**Type of hearing:** Teleconference

**Hearing date:** June 10, 2024

**Hearing participant:** Appellant

**Decision date:** June 24, 2024

**File number:** GE-24-1332

## Decision

[1] The appeal is allowed in part.

[2] The Canada Employment Insurance Commission's (Commission) decision of May 29, 2023, to go back and change the original allocation of the \$3,625.19, in earnings the Appellant received, was not done judicially.

[3] In making the decision the Commission should have made, I have determined the Commission should not have gone back and changed their original decision of how the \$3,625.19, in earnings was allocated.

[4] This means the May 29, 2023, decision is rescinded and the original decision on the allocation dated January 24, 2023, is restored, as the Appellant wanted.

[5] In regard to the second amount received by the Appellant (\$3,644.25) This amount is earnings. It is earnings received by the Appellant as wages under an employment contract for the performance of services and the Commission correctly allocated it week by week over the period when the Appellant performed the services.

## Overview

[6] The Appellant received \$3,625.19 from her employer. She called the Commission in January 2023 and reported this money. The Commission decided that the money is "earnings" and allocated it only to the week the Appellant received the payment.

[7] In March 2023 the Appellant called the Commission again and reported that she would be receiving another payment from her employer of \$3,644.25.

[8] The Commission employee she spoke to at that time did not immediately make a decision on how this money should be allocated, but did decide that the previous allocation in January 2023 should be reviewed.

[9] After talking to the Appellant and her employer, the Commission made two decisions. First, they decided that they were going to change the original allocation of

\$3,625.19. Instead of it being allocated all to the week the payment was received, it would be allocated week-by-week over the whole period the Appellant was under contract.

[10] Second, they decided the amount the Appellant received (\$3,644.25) was earnings, and needed to be allocated over the entire period of time the Appellant did the work that resulted in being paid the \$3,644.25.

[11] The Appellant disputes these decisions.

[12] She says that the original allocation of \$3,625.19 should not have been changed and the second allocation \$3,644.25 should have been done as the original allocation of \$3,625.19; all allocated to the week she received the payment.

## **Matter I have to consider first**

### **Post-hearing documents**

[13] The Appellant sent in post-hearing documents which I accepted and considered in making my decision as it was documentation I specifically asked for at the hearing.

### **Issues**

[14] Did the Commission make a previous initial decision(s)?

[15] Can the Commission go back and review a previous decision(s)?

[16] If so, did they act judicially when they did?

[17] Is the money the Appellant received earnings?

[18] If so, did the Commission correctly allocate the earnings?

## Analysis

### Did the Commission make a previous initial decision(s)?

[19] Yes, the Commission did make a previous initial decision, but only in regard to the \$3,625.19 the Appellant reported on January 24, 2023.

[20] The Appellant argues that the Commission had already made a decision that the money she received from her employer was a commission. She says they then decided to change this decision which is unfair.

[21] The Commission agrees they made an initial decision on January 24, 2023, to allocate the money the Appellant received in the amount of \$3,625.19 as a commission.<sup>1</sup>

[22] They say they amended and replaced that decision with a new one on May 29, 2023.<sup>2</sup>

[23] I accept the Commission made a previous decision on January 24, 2023, to allocate the money the Appellant received in the amount of \$3,625.19 and then later went back and changed it, as the Commission agrees they did so.

[24] I further find that no previous decision was made on allocating the \$3,644.25 the Appellant received; the May 29, 2023, decision<sup>3</sup> was the only initial decision made on that issue. I find as such for the following reasons:

[25] On January 24, 2023, the Appellant called the Commission and informed them of money she had received from an employer.

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<sup>1</sup> RGD03-2

<sup>2</sup> RGD03-2

<sup>3</sup> GD03-31

[26] The notes of the conversation with the Commission state that a decision was made, which resulted in an overpayment, and that the decision and the right to request reconsideration was communicated to the Appellant.<sup>4</sup>

[27] In contrast, the initial call on March 30, 2023, regarding the amount the Appellant received of \$3,644.25 does not say a decision was made, or that the Appellant was notified of any overpayment or reconsideration rights.<sup>5</sup>

[28] Further, after the March 30, 2023, phone call there were continued calls by the Commission to the Appellant and her employer in May 2023 for more information on her work and the money she was paid. This shows me that until the decision letter of May 29, 2023, was sent out, no decision had been made on the Appellant's \$3,644.25.

[29] So, in summary, the Commission made an initial decision on January 24, 2023, on the allocation of the \$3,625.19 the Appellant received. They went back and changed this decision and issued a new one on May 29, 2023.

[30] In contrast, the May 29, 2023, decision allocating the Appellant's \$3,644.25 was the only initial decision made on that amount. The Commission did not go back and change a previous decision.

### **Can the Commission review their initial January 24, 2023, decision?**

[31] The Appellant argues that the Commission changing the decision they had already made about how to allocate the \$3,625.19 she received from her employer is unfair.

[32] While the Appellant may not want them to, I find the Commission can go back and review their January 24, 2023, initial decision as the law allows them to reconsider a claim, for any reason, within 36 months of when benefits were paid and the Commission is well within that time frame.<sup>6</sup> There is far less than 36 months between

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<sup>4</sup> GD03-22

<sup>5</sup> GD03-25

<sup>6</sup> Section 52 of the EI Act.

January 21, 2023, the week of benefits impacted by the initial decision and May 29, 2023, when the review was completed and the initial decision was changed.

### **Did the Commission act judicially?**

[33] While the Commission can go back and review a claim for any reason. They must do so judicially.

[34] For their decision to have been made “judicially” the decision maker (here, the Commission) cannot have acted in bad faith or for an improper purpose or motive, took into account an irrelevant factor or ignored a relevant factor, or acted in a discriminatory manner. Any discretionary decision that is not made “judicially” should be set aside.<sup>7</sup>

[35] I find the Commission did not act judicially because they failed to take into account a relevant factor.

[36] I find the Commission failed to take into account their own policy regarding reviewing a claim. I find this factor is relevant because if they had considered their own policy on reviewing a claim, they would have seen that an allocation is not something they would review just because a different agent of the Commission thinks it should be allocated differently.

[37] The Commission’s Digest of Benefit Entitlement Principles (Digest) section 17.3.3 Reconsideration Policy states that a review will only be performed if:

- benefits have been underpaid
- benefits were paid contrary to the structure of the EIA
- benefits were paid as a result of a false or misleading statement

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<sup>7</sup> *Canada (Attorney General) v Purcell*, 1 FCR 644

- the claimant ought to have known there was no entitlement to the benefits received<sup>8</sup>

[38] The Commission has never argued, nor is there any evidence, that benefits were underpaid to the Appellant. The Commission has never argued a false or misleading statement was made, neither have they ever argued the Appellant ought to have known she was not entitled to benefits.

[39] This would leave a review because benefits were paid contrary to the structure of the Act, except the Digest states an allocation of earnings decision is not considered contrary to the structure of the *Employment Insurance Act*.<sup>9</sup>

[40] So, since the Commission did not make their decision judicially, as they failed to consider a relevant factor, I will give the decision the Commission should have given.<sup>10</sup>

### **Decision the Commission should have given**

[41] In making the decision the Commission should have made, I find they should not have gone back and reviewed their decision on allocating the \$3,625.19 the Appellant received from her employer.

[42] While not binding on me I find the direction in the Commission's Digest regarding reviewing a claim to be instructive. Based on the information in the Digest there is nothing to warrant a decision to review the previous decision allocating the \$3,625.19 the Appellant received from her employer.

[43] I further find, that even ignoring the Digest, the allocation of the \$3,625.19 should not have been reviewed simply because a different employee of the Commission would have done the allocation in a different manner.

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<sup>8</sup> [https://www.canada.ca/en/employment-social-development/programs/ei/ei-list/reports/digest/chapter-17/reconsideration.html#a17\\_3\\_3](https://www.canada.ca/en/employment-social-development/programs/ei/ei-list/reports/digest/chapter-17/reconsideration.html#a17_3_3)

<sup>9</sup> [https://www.canada.ca/en/employment-social-development/programs/ei/ei-list/reports/digest/chapter-17/reconsideration.html#a17\\_3\\_3](https://www.canada.ca/en/employment-social-development/programs/ei/ei-list/reports/digest/chapter-17/reconsideration.html#a17_3_3) Scroll down to 17.3.3.2 Contrary to the structure of the act

<sup>10</sup> I can do this pursuant to section 54(1) of the *Department of Employment and Social Development Act*.

[44] Finality is an important part of any administrative decision. At some point a decision has to stick so that a claimant can move on and deal with the result of said decision. Claimants should not have to worry that a decision will be changed simply because another employee disagrees with it.

[45] In the Appellant's case, the concept of finality in an administrative decision far outweighs any disagreement another employee may have with how the initial allocation was done.

### **Summary**

[46] So, in summary, while the Appellant may not like it, the Commission can go back and review their initial January 24, 2023, decision which allocated the Appellant's \$3,625.19 she received from her employer.

[47] However, I find the Commission did not make their decision to go back and review their initial allocation of the Appellant's money judicially as they failed to consider a relevant factor.

[48] In making the decision the Commission should have made I find that the January 24, 2023, decision should not have been reviewed.

[49] This means the new decision made on May 29, 2023,<sup>11</sup> to alter the allocation of the \$3,625.19 is rescinded, and the original decision of January 24, 2023,<sup>12</sup> is reinstated.

[50] While the original decision has been reinstated for the Appellant's \$3,625.19, there is still the matter of the decision allocating the \$3,644.25 the Appellant received. This is what I will turn to next.

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<sup>11</sup> GD03-29

<sup>12</sup> GD03-22



## Is the money the Appellant received earnings?

[51] Yes, the \$3,644.25 that the Appellant received is earnings. Here are my reasons for deciding that the money is earnings.

[52] The law says that earnings are the entire income that the Appellant gets from any employment.<sup>13</sup> The law defines both “income” and “employment.”

[53] **Income** can be anything the Appellant got or will get from an employer or any other person. It doesn't have to be money, but it often is.<sup>14</sup>

[54] **Employment** is any work the Appellant did or will do under any kind of service or work agreement.<sup>15</sup>

[55] I find the \$3,644.25 is earnings because is it income directly rising from the Appellant's employment. If she had not been employed by the university, she would not have received the money. This makes it earnings.

## Did the Commission allocate the earnings correctly?

[56] The law says that earnings have to be allocated to certain weeks. What weeks earnings are allocated to depends on why the Appellant received the earnings.<sup>16</sup>

[57] Why the Appellant received the earnings is the entire crux of the appeal.

[58] The Appellant argues that the payment she received from the University (her employer) is a commission. She says her situation is like someone who asks for a painter to make a work and then pays them the agreed upon amount when the painting is done.

[59] Unfortunately for the Appellant, I don't agree that her pay from the University is a commission. I find the Appellant is mixing words in her argument. While someone may

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<sup>13</sup> See section 35(2) of the EI Regulations.

<sup>14</sup> See section 35(1) of the EI Regulations.

<sup>15</sup> See section 35(1) of the EI Regulations.

<sup>16</sup> See section 36 of the EI Regulations.

“commission” a painter to make a painting, that does not mean the painter is paid by commission.

[60] A more accurate version of being paid by commission is a salesman, such as a car salesman or a realtor. These people are paid a percentage of the product they sell, or a set price for the products they sell.

[61] The painter is getting whatever the full value is that they set for their painting. Someone paid by commission is getting a partial value based on the item(s) they sell.

[62] The painter analogy further fails for the Appellant as the painter is not an employee of the person who asks them to create a painting.

[63] That is not the case for the Appellant, she is employed by the University as she agrees she has a contract for a period of time and a positional title with the University. She says the contract she sent me<sup>17</sup> is analogous to the one she signed that resulted in the payment of \$3,644.25. In the contract she sent me it says she will be appointed to a position of lecturer, as part-time academic staff.<sup>18</sup>

[64] The contract says her duties would involve teaching a course, and grading exams and test and assignments. She is also included in the bargaining unit, and it says her salary is set based on the collective agreement. Again, the painter analogy fails. A painter asked to make a certain painting for someone decides how much they will be paid. They decide what a painting is worth, or how much their time is worth to create a painting. For the Appellant, her pay is set by her employer.

[65] Further, this amount is stated to be a salary for the period of her employment contract. It is not said to be a one-time payment for the creation of a set product, but rather, an amount to compensate her for the work she does during the period of the contract.<sup>19</sup>

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<sup>17</sup> RGD04-3

<sup>18</sup> RGD04-3

<sup>19</sup> RGD04-3

[66] I note the Appellant has said that the Commission should have contacted the program director L.G.<sup>20</sup> instead of some “random administrative person for the entire school of nursing” to discuss her work at the University.<sup>21</sup>

[67] For the Appellant’s information, I would point out that the Commission did contact L.G. This person told the Commission that the Appellant was a sessional employee who is hired and paid on contract with the University; a contract which would cover the semester of the course the Appellant was hired to work on.<sup>22</sup>

[68] L.G. said that there were expectations for deliverables from the Appellant and these would be on a weekly or biweekly basis depending on the course; the Appellant was assisting the course professor.<sup>23</sup>

[69] L.G. also said, and the Appellant agreed in her testimony, that there was a strike during one of the Appellant’s contracts and as the Appellant was a part of the union, she was not able to work or be paid during the period of the strike.<sup>24</sup>

[70] So, base on the evidence and testimony I find the following:

- The Appellant was performing work under a contract of service with her employer.
- She was not working independently of her employer as when there was a strike, she was unable to work or be paid.
- She was being paid an amount as a salary by her employer to compensate her for the work she does in the period of the contract.

[71] According to the law earnings paid to the Appellant under a contract of employment for the performance of services shall be allocated to the period in which the

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<sup>20</sup> GD02-11

<sup>21</sup> GD02-11

<sup>22</sup> GD03-45

<sup>23</sup> GD03-45

<sup>24</sup> GD03-45

services were performed, which is what the Commission did, so they allocated her earnings correctly.

## Final Point

[72] One final thing I would point out, just for the Appellant's information, while I have found that her earnings should not be allocated as a commission, even if that was done, it would still not give her the result she wants.

[73] The law states that earnings from commission that arise from the performance of services would be allocated to the weeks those services were performed. This would result in the Appellant's earnings being allocated to multiple weeks.<sup>25</sup>

[74] The section of the law that the Appellant quoted in her notice of appeal referencing commissions would also not help her.<sup>26</sup> That section states that if earnings are commissions that arise from a transaction, if the amount of the earnings is greater than the maximum yearly insurable earnings divided by 52, then the earnings would be allocated to the weeks in which the work that gave rise to the transaction occurred.

[75] In the Appellant's case she did perform work for her employer over multiple weeks and the maximum insurable earnings for 2023 is \$61,500.<sup>27</sup> Dividing that by 52 equals \$1,182.69 and her earnings of \$3,644.25 is far higher than that, so the earnings would still be allocated to multiple weeks, not just a single week as she desires.

## Conclusion

[76] The appeal is allowed in part.

[77] The Commission's decision to change the original allocation of the \$3,625.19 in earnings the Appellant received was not done judicially.

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<sup>25</sup> Section 36(6) of the EI Regulations.

<sup>26</sup> She references 36(6.2)(a) of the EI Regulations, see GD02-11.

<sup>27</sup> <https://www.canada.ca/en/revenue-agency/services/tax/businesses/topics/payroll/payroll-deductions-contributions/employment-insurance-ei/ei-premium-rates-maximums.html>

[78] In making the decision the Commission should have made, I have determined the Commission should not have gone back and changed their original decision of how the \$3,625.19, in earnings was allocated.

[79] This means the May 29, 2023, decision is rescinded and the original decision on the allocation dated January 24, 2023, is restored.

[80] In regard to the second amount received by the Appellant (\$3,644.25) This amount is earnings and was paid to the Appellant as wages under an employment contract for the performance of services.

[81] The Commission correctly allocated it week by week over the period when the Appellant performed the services she was paid for.

Gary Conrad  
Member, General Division – Employment Insurance Section