Citation: *AC v Canada Employment Insurance Commission*, 2024 SST 1262

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	A. C.
Representative:	Philippe Chretien
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (637751) dated January 8, 2024 (issued by Service Canada)

Tribunal member:	Lilian Klein
Type of hearing:	Videoconference
Hearing date:	March 28, 2024
Hearing participants:	Appellant's Representative
Decision date:	April 12, 2024
CORRIGENDUM DATE	**May 2, 2024**
File number:	GE-24-535

Decision

[1] I'm **allowing** this appeal. I agree with the Appellant. My decision explains why.

[2] I find that the true nature of the employer's payment to the Appellant on November 8, 2023, was for services performed before she began her maternity leave and claimed Employment Insurance (EI). These are earnings from employment that must be allocated.

[3] But the Canada Employment Insurance Commission (Commission) incorrectly identified this money as a signing bonus and allocated it to a week during the Appellant's EI claim. This created an overpayment.

[4] The Commission should correct the way that it allocated the Appellant's lump sum payment, as described below. This will remove the overpayment.

Overview

[5] The Appellant is a permanent employee of the Government of Canada. She's represented by the Canadian Association of Professional Employees (CAPE).

[6] The Appellant began a claim for EI maternity and parental benefits on November 27, 2022. In the last month of her year-long claim, her employer paid her $2,500. She reported this money to the Commission, which decided that it was a "signing bonus" for ratifying a Collective Agreement. It allocated this money as earnings to a week during her EI claim.

[7] This way of allocating the Appellant's money created an overpayment. She also stands to lose the "top-up" that the employer pays for each week she gets EI.

[8] The Appellant argues that this money was paid under a contract of employment for the performance of services. So, it should be allocated to the period when she performed these services. She says the negotiators' language shows that this was their true intention and the "dominant" reason for the payment.

[9] All earnings must be allocated, but it's the **reason** for the payment that dictates how to allocate them. So, I must decide the nature of the earnings to determine whether the Commission allocated them correctly.

The issues I Must decide

[10] Does the lump sum that the Appellant received while on maternity leave count as **earnings**? If so, what was the **nature** of these earnings?

[11] Did the Commission **allocate** the Appellant's earnings correctly?

Analysis

Is the money that the Appellant received earnings?

[12] Yes. The $2,500 lump sum payment is earnings. That's because the law says the entire income you get from any employment is earnings.[1]

[13] The law defines both "income" and "employment." **Income** is anything you got or will get from an employer or any other person. It doesn't have to be money, but it often is. **Employment** is any work you did or will do under any kind of service or work agreement.[2]

[14] If EI claimants want to argue that money they got while receiving EI is **not** earnings, they must show it's **more likely than not** that it was something else. [3]

[15] All money from employment is allocated as earnings unless it falls within an exception in section 35(7) of the *Employment Insurance Regulations* (EI Regulations).

[16] To see if an exemption applies, I must first determine the "true nature" of the earnings.[4] Elsewhere, the Commission recognizes the need to review all relevant documents to discover what the parties intended to do.[5] This means looking at the facts and language of each case to find the "dominant" reason why earnings were paid.

What was the true nature of the payment? Why was it paid?

[17] I first considered whether the Appellant's lump sum was a retroactive pay increase. The Commission hasn't made this argument, but the Appellant asked me to

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[1] Section 35 of the *Employment Insurance Regulations* (EI Regulations) explains what counts as earnings.
[2] See section 35(1) of the EI Regulations explains these two definitions.
[3] *See Braga v General of Canada et al*, 2009 FCA 167.
[4] See *Budhai v Canada (Attorney General)*, 2002 FCA 298. The facts in *Budhai* are not identical to those in this case, but key principles are still relevant. See *also D.D. et al. v Canada Employment Insurance Commission*, 2019 SST 619.
[5] *Digest of Benefit Entitlement Principles*, 5.2. The *Digest* set out the Commission's policies and practices.

consider it. If the money were retroactive pay, it would be exempt from allocation under section 35(7)(d) of the EI Regulations. So, the allocation method wouldn't be an issue.

[18] But I find, on a balance of probabilities, that the money was **not** a retroactive pay increase.

[19] Before making this finding, I noted that the payment was in the same Annex of the Tentative Agreement as provisions on retroactive pay increases. So, I considered whether the payment might "derive" from those pay increases.[6] But I find that I can't draw this conclusion from the available evidence. So, I've given more weight to the following factors.

[20] First, the Tentative Agreement didn't call the money a retroactive pay increase or link it to any percentage increase. If it had been linked to the percentage increases in Annex A, the amount would surely be different for employees at different pay points.[7]

[21] Second, the head of the negotiating team has confirmed that it had **not** intended the payment to be for a retroactive pay increase.[8] It could have used that language but didn't.

[22] Third, the money was only paid to CAPE members who remained employed and were part of the bargaining unit when the new Collective Agreement was signed. If the money had been a retroactive pay increase, ex-employees would have received it too.

[23] So, I agree with the Commission that this money isn't exempt from allocation as a retroactive pay increase would have been. But I don't agree with it classifying the money as earnings under section 35(2)(a) of the EI Regulations. That section deals with "wages, benefits or other renumeration" related to the sale of a bankrupt employer's property.

[24] I find that the money is earnings under section 35(1)(a) of the EI Regulations since it was paid for work performed under a contract of employment.

[25] Even though this money is earnings under section 35(1)(a) of the EI Regulations, **how** it's allocated depends on **why** it was paid. So, that's what will dictate how the Appellant's payment should be allocated under section 36 of the EI Regulations.

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[6] See *D.D. et al. v Canada Employment Insurance Commission*, 2019 SST 619.
[7] I'm not suggesting that a linkage is required to the number of hours an employee had worked.
[8] See GD12-4.

Was the money a signing bonus?

[26] No. I considered that the payment was part of an agreement yet to be ratified, but I still find it more likely than not that this money was **not** intended to be a signing bonus.

[27] **The Commission says** the money was a signing bonus.[9] It announced that the payment was "an incentive to promote ratification on the collective agreement" dated June 16, 2023. It said payment was "specifically conditional to the signing of that agreement."[10]

[28] The Commission has little more to say on **why** it made this finding. It hasn't commented on the multiple documents that the Appellant submitted after she filed her appeal.[11] It didn't attend the hearing to respond to her arguments. And it's been silent on a key Federal Court of Appeal (FCA) decision that is relevant to this appeal.[12] FCA decisions are binding, so they should be considered.

[29] **The Appellant says** the payment was for performance of duties before she went on maternity leave. It wasn't a signing bonus. I've summarized her arguments as follows:

- The Commission relied on the generalization that lump sums are paid to incentivize employees to sign a new agreement. Some government workers were on strike, but not those in her bargaining unit. So, there'd have been no need to incentivize her to return to work through a signing bonus.
- The Commission issued a blanket *Interpretation Bulletin* for all government employees who'd received a lump sum. It didn't consider that the language in collective agreements and ratification dates differed between bargaining units. The June 16, 2023, ratification date that it cites is for PSAC, not for her.[13]
- CAPE's Tentative Agreement explicitly says this payment to employees is for the performance of regular duties and responsibilities associated with their positions. The head of the negotiating team has confirmed this.

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[9] See GD04 for the submission that the Commission prepared for this appeal.
[10] See GD02-41 to GD02-42 for the Commission's interpretation of this payment. The Appellant submitted this.
[11] See GD05, GD06, GD07, GD-08, GD10, GD-12, GD-13 and GD14.
[12] See *Budhai v Canada (Attorney General)*, 2002 FCA 298.
[13] PSAC is the acronym for the Public Service Alliance of Canada. CAPE is a different bargaining unit.

- A signing bonus would discriminate against CAPE members on sick leave or maternity leave who'd lose EI and top-up benefits due to this payment.

My findings

[30] I agree with the Appellant that the lump sum was paid to employees "for the performance of regular duties and responsibilities associated with their position."[14]

[31] I've summarized my reasons for agreeing with the Appellant as follows:

- Although Annex A of the Tentative Agreement deals primarily with pay increases, the one-time payment is listed as a separate, named item.
- The Tentative Agreement specifies that this payment is for the "performance of regular duties and responsibilities."[15] It's more likely than not that the words "signing bonus" would have appeared if this had been the intention.
- ~~CPAC~~ **[CAPE]** members weren't on strike, so I agree there'd have been no need to incentivize them to return to work through a signing bonus.
- I doubt negotiators would have agreed to a discriminatory measure that cost employees on sickness or maternity leave their EI or "top-up" benefits.
- The one-time payment was pensionable, while a signing bonus is not.
- The Commission hasn't provided any evidence to contradict the Chief Negotiator's confirmation that the money wasn't a signing bonus.

[32] I find the combination of these arguments compelling. I've given most weight to the last two points. That's because of the credentials of the Chief Negotiator, as noted below.[16] So, I can presume that his words accurately reflect the government's intention as to the "true nature" of the lump sum payment. As well, this payment was pensionable, which wouldn't apply to a signing bonus. The Commission hasn't responded to that argument.

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[14] See GD02-16 for Annex A of the Tentative Agreement with CAPE.
[15] See Annex A on page GD02(16).
[16] He's the Executive Director, Employee Relations and Total Compensation, Strategic Compensation Management, Office of the Chief Human Resources Officer at the Treasury Board of Canada Secretariat.

[33] So, I find that the "dominant" reason for the money was payment related to the performance of regular duties and responsibilities under a **past** Collective Agreement. It wasn't a signing bonus to incentivize ratification of CAPE's **new** Collective Agreement, which was due to come into effect on June 22, 2023.[17]

Did the Commission allocate the lump sum correctly?

[34] No. The law says all earnings must be allocated, but **how** they're allocated depends on **why** you receive them.[18] The Commission misidentified the reason.

[35] The allocation of earnings is important. When earnings are allocated to weeks in your benefit period, this can reduce, or even cancel, the benefits payable for those weeks.[19] The law says you must repay any EI benefits that you were overpaid.[20]

[36] The Commission says the Appellant's lump sum should be allocated as "a type of event bonus, triggered by the signing of a collective agreement."[21] So, it allocated the money under section 36(19)(b) of the EI Regulations to the week of June 11, 2023. It based this date on ratification of a Collective Agreement on June 16, 2023. On this basis, it's asked the Appellant to repay EI benefits she received for that week.

[37] But the law says when money is paid under an employment contract for the performance of services, it should be allocated to when the services were performed.[22]

[38] So, the Commission should **not** have allocated the Appellant's lump sum to a week when she was on maternity leave and receiving EI. This money should be allocated as earnings to a period when she'd been performing her regular services and responsibilities. That was **before** she left on maternity leave.

[39] The next question the Appellant asked is whether the money should be allocated under section 36(4) or section 36(19)(a) of the EI Regulations.

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[17] I make no comment on payments in the Collective Agreement ratified by a different union on June 16, 2023.
[18] See section 36 of the EI Regulations.
[19] See section 35(2) of the EI Regulations and *McLaughlin v Attorney General of Canada,* 2009 FCA 365.
[20] See sections 43 and 44 of the *Employment Insurance Act* (EI Act).
[21] The Commission applied the policies in its *Digest of Benefit Entitlement Principles,* section 5.14.3.1.
[22] See *Budhai v Canada (Attorney General)*, 2002 FCA 298.

Which allocation section applies?

[40] I find that the Appellant's lump sum should be allocated under section 36(4) of the EI Regulations since it was money paid for services under a contract of employment.

[41] The Commission allocated the money under section 36(19)(b) of the EI Regulations, which allocates a signing bonus to the date of a "transaction." As noted above, the transaction was ratification of a Collective Agreement on June 16, 2023. But the agreement ratified on June 16, 2023, was with another bargaining unit. So, it's not relevant here.

[42] The Appellant says the Commission shouldn't have allocated the payment to any transaction date during her EI claim. She's asked me to decide whether her money should be allocated instead under section 36(4) or section 36(19)(b) of the EI Regulations.

[43] Section 36(4) of the EI Regulations can apply to an agreement to pay an additional amount for services that a person has already performed under another agreement.[23] I've already found that the Appellant's employer paid her a lump sum for the performance of regular services and responsibilities under a past agreement.

[44] So, the money should be allocated under section 36(4) of the EI Regulations to the period before her maternity leave began when she was still performing her regular duties.

[45] It's not necessary for me to consider allocating the money under section 36(19)(a) of the EI Regulations since section 36(4) already applies.[24]

Conclusion

[46] The employer's lump sum payment to the Appellant during her maternity leave is earnings under section 35(1)(a) of the EI Regulations. The Commission allocated this money incorrectly. It should be reallocated under section 36(4) of the EI Regulations. That's why I'm allowing the appeal.

Lilian Klein

Member, General Division – Employment Insurance Section

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[23] See *Ostonal v Canada (Unemployment Insurance Commission)* (1991), 139 NR 75 (FCA), as cited in *D.D. et al. v Canada Employment Insurance Commission*, 2019 SST.

[24] Allocation under section 36(19)(a) of the EI Regulations is only for when subsections (1) to (18) don't apply.