



Citation: *CC v Canada Employment Insurance Commission*, 2024 SST 1682

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant: C. C.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (650534) dated March 9, 2024
(issued by Service Canada)

Tribunal member: Raelene R. Thomas

Type of hearing: Teleconference

Hearing date: May 7, 2024

Hearing participant: Appellant

Decision date: June 3, 2024

File number: GE-24-1304

Decision

[1] The appeal is allowed. I agree with the Appellant.¹

[2] The commissions paid to the Appellant are earnings and must be allocated. The commissions arise from the performance of services, the sale of goods to customers, and are to be allocated to the week when the sale of goods occurred.

[3] This means the Appellant's commissions are not to be deducted from the Appellant's EI benefits.

Overview

[4] The Appellant worked for a national retail chain. Part of her earnings came from commissions that were paid when the goods she sold were delivered to the customer.

[5] The Appellant stopped working on October 12, 2023 and was receiving employment insurance (EI) maternity and parental benefits when her employer paid her commissions. The commissions she was paid related to sales she made before she stopped working.

[6] The Commission says this money the Appellant received from her employer is earnings and must be allocated to (deducted from) her EI benefits.

[7] The Appellant does not agree. The Appellant argues she made all the sales leading to the commissions while she was working. The only reason the commission is paid out later is due to her employer's policy of not having sufficient stock or a regular delivery schedule. Despite the customer paying in full for the goods when she sells them it is the employer's policy that commissions are only paid when the goods are delivered to the customer.

¹ A person who applies for employment insurance (EI) benefits is called a "claimant." A person who appeals a decision of the Canada Employment Insurance Commission (Commission) is called an "Appellant."

Matter considered first

[8] The Commission's initial decision was made on January 19, 2024. It referred to \$1,106.33 of commissions the Appellant received from November 3, 2023 to December 1, 2023. The Appellant requested reconsideration of that decision.² And, on March 9, 2024, the Commission maintained its original decision about the \$1,106.33 of earnings.

[9] The appeal file shows the Appellant received additional commissions totaling \$282.08 from December 15, 2023 to February 9, 2024.³ The appeal file does not contain a decision from the Commission regarding these additional commissions. Nor is there a request for reconsideration of the allocation of these amounts or a reconsideration decision.

[10] I explained to the Appellant that my jurisdiction, in other words my ability to make a ruling on an appeal, comes only after the Commission makes a decision on reconsideration that the Appellant then chooses to appeal.⁴ My jurisdiction is limited to reviewing the reconsideration decisions the Commission has actually made.

[11] In this case, the Commission has only reconsidered its decision to allocate the commissions totaling \$1,106.33 the Appellant received from November 3, 2023 to December 1, 2023. So, I will issue a decision on that issue only.

[12] The Commission is reminded that it must communicate an initial decision about the reasons for the allocation of the additional commissions totaling \$282.08 paid to the Appellant from December 15, 2023 to February 9, 2024. A notice of debt is not sufficient to communicate its allocation decision.

[13] Nothing in my decision prevents the Appellant from seeking reconsideration of the Commission's decision on the additional commissions. She may also appeal that reconsideration decision to this Tribunal if she wishes.

² The reconsideration request was received by the Commission on February 12, 2024.

³ These were reported to the Commission by the Appellant on March 8, 2024.

⁴ See section 113 of the *Employment Insurance Act* (EI Act).

Issue

[14] I have to decide the following issues:

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

Analysis

Are the commissions the Appellant received earnings?

[15] Yes, the commissions the Appellant received are earnings. Here are my reasons for this finding.

[16] The law says earnings are the entire income you get from any employment.⁵ The law defines both “income” and “employment.”

[17] **Income** can be anything you got or will get from an employer or any other person. It doesn’t have to be money, but it often is.⁶

[18] **Employment** is any work that you did or will do under any kind of service or work agreement.⁷

[19] The Appellant testified she receives commissions on the goods she sells. Customers pay for the item they have purchased at the time of the sale. If a customer purchases an item that they can carry out of the store at the time of the sale, she will receive the commission right away. If an item is too large for carry out it will be delivered shortly after the sale is made, pending delivery schedule and available space on the truck. Or, if the item is not in stock, it is delivered when it becomes available. A customer can ask for a refund prior to delivery but cannot stall delivery in either case. The Appellant receives the commission only after an item is delivered.

⁵ See section 35(2) of the EI Regulations.

⁶ See section 35(1) of the EI Regulations.

⁷ See section 35(1) of the EI Regulations.

[20] I find the commissions totaling \$1,106.33 the Appellant received from November 3, 2023 to December 1, 2023 are earnings. She was paid the money because she sold goods for her employer. The money arose from her employment. This means the commissions are earnings within the meaning of the EI Act.

Did the Commission allocate the earnings correctly?

[21] No, the Commission did not allocate the earnings correctly. The reasons for my finding follow.

[22] The Commission wrote the Appellant on January 19, 2024, to say it was allocating the commissions to the EI benefits the Appellant received from October 22, 2023 to November 25, 2023.

[23] The appeal file shows the Appellant received the following commissions:

Date Received	Amount	EI benefit week beginning ⁸
November 3, 2023	\$677.66	October 29, 2023
November 17, 2023	\$228.39	November 12, 2023
December 1, 2023	\$677.66	November 26, 2023

[24] The Commission says in the Appellant's case her right to the commission earnings arose when the transaction of selling the goods was completed. It says the Appellant's employment agreement deems the transaction is completed when the goods are delivered to the customer. The Commission says the Appellant's right to the commission earnings did not become actionable until the goods were delivered to the

⁸ Section 2 of the EI Act says a "week" is the seven-day period beginning on Sunday.

Appellant. So, it says the commissions should be allocated in accordance with section 36(6.2) of the EI Regulations.

[25] The Appellant testified her earnings are all commission based. Employees are paid an hourly wage for each hour worked. If your commissions fall below the hourly amount you were paid, you still get your hourly pay, but you have a negative balance for that bi-weekly period. The negative balance is removed when, in a future bi-weekly pay period, you have commissions that are greater than the hourly pay you received for that period. The commission in the future bi-weekly pay period is clawed back to make up for the negative hourly balance in a prior bi-weekly period.

[26] The Appellant says the commissions should be allocated to the period when she performed the work that led to her commissions and not when those commissions are paid. In her view, the work that leads to her commissions is when she makes the sale of the goods. And, she argues, that is when the earnings should be allocated. The Appellant testified she is paid her commissions only when the goods are either taken from the store at the time of the sale or when the goods are delivered to the customer. She argued she does not have any control over when goods are delivered.

[27] The EI Regulations have four provisions for the allocation of commissions.

[28] Section 36(6) says earnings of a claimant that come from participation in profits or commissions that arise from the **performance of services** shall be allocated to weeks in which the services are performed.

[29] Section 36(6.1) has a further two ways to deal with the earnings that come from participation in profits or commissions that arise from a **transaction**.

[30] If the earnings are more than the maximum weekly insurable earnings, the allocation is made to the weeks in which the work that gave rise to the transaction was

performed or if no work was performed the allocation is to the week in which the transaction occurred.⁹

[31] Or, if the earnings are less than or equal to the maximum weekly insurable earnings, the allocation is made to the week of the transaction, unless the claimant can show that the work that gave rise to the transaction occurred in more than one week, the allocation is made to the weeks in which the earnings were earned.¹⁰

[32] Finally, section 36(6.2) says earnings of a claimant that come from participation in profits or commissions that **do not arise** from the performance of services, or a transaction shall be allocated equally to each week falling within the period in which the earnings were earned.

[33] The Commission says it chose section 36(6.2) as the method of allocation because the transaction was deemed complete when the goods were delivered to the customer.

[34] I do not think the Appellant's commissions can be allocated under section 36(6.2) for two reasons. First, this section applies to earnings from commissions **do not arise** from the performance of services or a transaction. Second, in my view the "transaction" the legislation is referring to is the transaction between the Appellant and her employer and not between the employer and one of its customers.

[35] Further, the Commission bases its allocation method on when the Appellant's right to the commission earnings becomes actionable. And, it says the right of action only arises when the goods are delivered to the customer. I note the right of action to earnings is not a consideration for determining the weeks in which allocation of earnings must occur. The legislation relies on whether the earnings arise from the performance

⁹ See section 36(6.1)(a) of the EI Regulations. I am paraphrasing the law for this decision. The maximum yearly insurable earnings are set each year. In 2023 the maximum yearly insurable earnings was \$61,500 so the maximum weekly insurable earnings were \$1,183.

¹⁰ See section 36(6.1)(b) of the EI Regulations. I am paraphrasing the law for this decision.

of services or from a transaction to determine the week in which the allocation of those earnings should occur.

[36] The legislation makes a clear distinction on how earnings can arise. Earnings can arise from the performance of services or from a transaction. Earnings cannot arise from both.

[37] Although I am not bound by Canada Umpire Benefit decisions (CUBs) I can be persuaded by the reasoning in a CUB if the circumstances are similar or analogous to the that of the issue before me.¹¹

[38] The matter of paying commissions long after the work has been performed was considered in CUB 23067. In that appeal, the claimant worked selling advertising for a magazine. She was paid a regular salary and commissions. The commissions were paid irregularly. On March 4, 1990 the claimant started to receive EI benefits. Her claim was based on an ROE that only reported her regular salary. The claimant's employer then issued an amended ROE showing two commission payments it issued. In February 1990 she was paid commission on sales she made in November and December 1989 for advertising in the January/ February 1990 issue of the magazine. In March 1990 she was paid commission for sales she made in January and February 1990 for the March/April 1990 issue of the magazine.

[39] At issue before the Board of Referees (BOR) was in which year should the claimant's commission earnings be allocated. The year of allocation would increase her insurable earnings and the weekly amount of EI benefits she could receive. The Commission decided the commissions should be allocated to the year in which they were paid, that is, only to 1990. The BOR decided the commissions should be allocated to the years in which the services were performed, that is, to both 1989 and 1990. The Commission appealed this decision to the Umpire.

¹¹ CUB decisions are decisions of the Umpire, the final level of appeal in the former Unemployment Insurance administrative appeal scheme. The first level of appeal was the Board of Referees. Board of Referee and CUB decisions are not binding but may be persuasive.

[40] The Umpire found the claimant's commissions should be allocated to the year in which the work was performed to earn those commissions. In reaching that finding the Umpire relied on then section 58(6) of the EI Regulations which said "The earnings of a claimant ... whose earnings are ... on the basis of commission, shall be allocated to the week in which the services that gave rise to those earnings are performed ..." The Umpire found that even though the commissions were only paid to the claimant in February 1990, the claimant was entitled to them in 1989 because she had done the work for those commissions in November / December 1989.¹² The same held true for the commissions paid for work done in January and February 1990 for which she received commission in March 1990. Those earnings were allocated to 1990.

[41] I note the Appellant's circumstances are not the same as the real estate agent who must wait until the sale is finalized to receive their commission. There is often a delay between when an agreement to purchase a house is made, possession of that house by the buyer takes place and money changes hands. An agent may perform some services on the day the buyer takes possession of the house from the seller. But it is only when the buyer takes possession of the house that the sale is complete, and the buyer pays the seller for the house. At that point, the funds are available to pay the agent their commission. By contrast, in the Appellant's case the goods are paid for at the time of the sale and the funds are available to pay her the commission from that point. Further, the Appellant does not perform any services related to the delivery of the goods to the customer on the day of the delivery.

[42] I think the Appellant's circumstances are similar to those of the claimant in CUB 23067 and I am relying on that CUB in reaching my decision. In both the CUB and this appeal before me, the timing of the payment of the commission was dictated by the employer. In both the CUB and the appeal before me, commissions were earned on the basis of sales made and those sales were made long before the commission was paid.

[43] In my view, the Appellant's commissions should be allocated to the week in which the Appellant made the sale to the customer. She earned the commissions due

¹² CUB 23067

to her performance of services when making the sale. The sale is made in the store. The commission is paid by the customer at the time the sale is made. That sale arises from the Appellant's performance of duties.

[44] The commission becomes payable to the Appellant when the sale is made and is, in effect, held in trust by the employer until the delivery takes place. The employer holds on to the commission because the customer has the right to cancel the sale any time prior to delivery. That is the employer's practice. I am not bound by its practices. It could equally pay the commission to the Appellant during the week of the sale and then later recover the commission if the customer cancels the delivery of goods, thereby cancelling the sale. Holding the commission back pending delivery of the goods to the customer does not mean when the commission is finally paid to the Appellant that the payment of the money is by way of transaction. It is the reason for the payment and not the timing of the payment that is determinative of the issue before me.

[45] Having determined the Appellant's commissions are earnings that arise from the performance of services, I find the commissions should be allocated to the week in which those services were performed.¹³ In the Appellant's case that is the week in which the sale was made to the customer and the customer paid for the goods.

[46] This means the Appellant's commissions are not to be deducted from the Appellant's EI benefits.

Other matters

[47] As with CUB 23067, my decision means the Appellant's insurable earnings should increase. It is not within my jurisdiction to determine whether that increase in insurable earnings will change the amount of the Appellant's weekly EI benefit. The Commission is encouraged to make that determination as soon as possible after receiving my decision and to advise the Appellant.

¹³ See section 36(6) of the EI Regulations

Conclusion

[48] The commissions the Appellant received are earnings and must be allocated. The commissions arise from the Appellant's performance of services and should be allocated to the week in which she made the sale of goods to the customer. This means the Appellant does not have to repay any EI benefits.

[49] The appeal is allowed.

Raelene R. Thomas
Member, General Division – Employment Insurance Section