Citation: *EC v Canada Employment Insurance Commission*, 2024 SST 1532

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	E. C.
Representative:	Josianne Drouin
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (654578) dated April 8, 2024 (issued by Service Canada)

Tribunal member:	Paul Dusome
Type of hearing:	Videoconference
Hearing date:	June 14, 2024
Hearing participants:	Appellant Appellant's representative
Decision date:	July 5, 2024
File number:	GE-24-1510

Decision

[1] The appeal is dismissed with a modification of the date of the allocation from the one week starting June 11, 2023, to the one week starting June 25, 2023.

Overview

[2] The Appellant got $2,500.00 from her current employer. The Commission decided that the money is “earnings” under the law because it is a bonus. It categorized the money as an event or signing bonus.

[3] The law says that all earnings have to be allocated to certain weeks. What week’s earnings are allocated to depends on why you received the earnings.[1]

[4] The Commission decided that the $2,500.00 had to be allocated to the week the collective agreement authorizing the bonus was signed, June 11, 2023. The Commission did not spread the payment over more than that one week. The Commission made the allocation under section 36(19)(b) of the EI Regulations.

[5] The Appellant disagrees with the Commission. She does dispute that the $2,500.00 is earnings for EI purposes. If it is earnings, she says that the money should have been allocated under section 36(4) of the EI Regulations because it was retroactive compensation for the performance of duties after the expiry of a previous collective agreement, and before the signing of a new collective agreement. It was not an event or signing bonus. So, it should have been allocated to a previous period before she was receiving EI benefits.

Matter I have to consider first

I will accept the documents sent in after the hearing

[6] At the end of the hearing, the Appellant’s representative presented a detailed summary of the evidence and her closing argument. I asked that she submit the written document she had prepared for this purpose after the hearing. This was to ensure that I

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

did have a complete copy of the closing statement, rather than relying exclusively on my own notes. The representative provided the copy to the Tribunal that day. The Tribunal forwarded the copy to the Commission for its file.

Issues

[7] 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?

[8] Yes, the $2,500.00 that the Appellant received is earnings. Here are my reasons for deciding that the money is earnings.

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

[10] **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]

[11] **Employment** is any work that you did or will do under any kind of service or work agreement.[4]

[12] However, the Appellant and the Commission disagree over the true nature of the payment, and the reason for the payment. The Commission says that the payment is a signing bonus. The Appellant says that the payment is a retroactive increase in wages or salary and therefore not earnings due to an exemption.[5] In the alternative, if the

[2] See section 35(2) of the EI Regulations.
[3] See section 35(1) of the EI Regulations.
[4] See section 35(1) of the EI Regulations.
[5] See section 35(7)(d) of the EI Regulations.

payment is earnings, the Appellant put forward three different allocation rules that could apply.

[13] The $2,500.00 was a one-time payment payable under a collective agreement negotiated between the employer and the union representing some of its employees. The Appellant was a member of that union. That is the reason that the employer paid the $2,500.00 to the Appellant.

[14] The Appellant was on maternity leave starting February 3, 2023. The expected date for returning to work was August 5, 2024. Her employment had not ended.

[15] The previous collective agreement expired on June 22, 2022. The tentative agreement to replace it was signed on May 16, 2023. The final collective agreement was signed on June 29, 2023. The Commission incorrectly used the signing date of June 16, 2023, from a collective agreement with a different union than the one representing the Appellant.

[16] The employer paid the Appellant the $2,500.00 due under the new collective agreement on November 8, 2023. She reported this payment to the Commission the next day. The Commission treated the payment as a signing bonus, allocated it to the week of June 11, 2023, and assessed an overpayment of EI benefits in the amount of $390.00.

– **Was the $2,500.00 payment exempt under section 35(7)(d) of the EI Regulations?**

[17] Section 35(7)(d) removes from earnings amounts that are “retroactive increases in wages or salary”. If the $2,500.00 payment is exempted as earnings, there would be no amount to allocate, and no basis for assessing an overpayment. I find that the payment is not exempt.

[18] To see if an exemption does apply, I must determine the true nature of the earnings.[6] The Commission has recognized in a document on its policies and practices

[6] See *Budhai v Canada (Attorney General)*, 2002 FCA 167.

that the relevant documents need to be reviewed to find out what the parties intended to do.[7] I have to look at the facts and language of each case to find the dominant reason why the earnings were paid.

[19] The Appellant relies on her testimony and on language in the tentative agreement in support of her claim that the $2,500.00 is a retroactive increase in wages or salary (GD7-2 and GD5-6). The employer is to provide the one-time lump-sum payment of $2,500.00 on the signing of the collective agreement. That one-time allowance is "for the performance of regular duties and responsibilities associated with their position." That language does not identify any period during which the regular duties were or will be performed.

[20] The problem for the Appellant with this argument is another clause in the tentative agreement (GD5-5, paragraph 7). That clause states, "Unless otherwise expressly stipulated, the parties agree that changes to the EC collective agreement will not result in any retroactive payment or adjustment. They will form part of the implementation, on a prospective basis, of the new collective agreement once signed."

[21] On the evidence before me, there is no express stipulation in the tentative collective agreement to make the $2,500.00 a retroactive payment. A review of the final collective agreement will confirm this. Appendix A in the final agreement sets out the increases in the annual rates of pay of eight categories of employees in the EC group, from June 22, 2021, to June 22, 2025 (GD5-87 and 88). It does not include any reference to the $2,500.00 payment in Annex A in the tentative agreement. Changes in the rates of pay for 2022 and 2023 will be paid as retroactive lump sums (GD5-89). Because there are eight categories of employees with different rates of pay, the retroactive amounts will vary depending on the particular employee's category. The $2,500.00 payment is the same for all employees, so it cannot be a retroactive payment for past services under Annex A. Those past services are being compensated by the retroactive payment based on retroactive increases to the rates of pay. In the absence of any reference to the $2,500.00 payment in Appendix A of the final agreement, there

[7] *Digest of Benefit Entitlement Principles*, 5.2.

is no express stipulation that that amount is for a past period or is to be paid retroactively.

[22] That means that the $2,500.00 is prospective only, and not retroactive. The exemption from earnings in section 35(7)(d) does not apply in this case.

[23] The Appellant relied on another Tribunal General Division decision to support her position that the $2,500.00 is a retroactive payment.[8] That decision involved the same tentative agreement between employer and union as is involved in this appeal. That decision predates the signing of the tentative and final agreements in this case. That decision finds that the payment is related to the performance of regular duties and responsibilities under a past collective agreement. That finding is not consistent with the facts in this case. In that decision, there is no reference to the tentative agreement clause cited in the previous paragraph that changes to the collective agreement will not result in any retroactive payment unless expressly stipulated. That is understandable because the tentative agreement had not been signed when the decision was made. In this case, that clause and the absence of evidence of any express stipulation to make the $2,500.00 payment retroactive, in either the tentative or the final agreement, mean that the payment in this appeal is not retroactive. So, the other Tribunal decision does not help the Appellant in this appeal.

[24] The $2,500.00 payment is properly classified as earnings under section 35(2) of the EI Regulations, as it is part of “the income of a claimant arising out of any employment...”

– **The nature of and reason for the $2,500.00 payment**

[25] The Appellant is a member of the EC (Economics and Social Science Services) group in the Canadian Association of Professional Employees (CAPE). CAPE is the union bargaining with the employer on behalf of the employees, including the Appellant.

[8] See *AC v Canada Employment Insurance Commission,* file GE-24-535, April 12, 2024.

[26] The previous collective agreement between CAPE and the employer expired in June 2022. The employees did not go on strike. They continued working under the previous agreement until a tentative agreement was reached on May 16, 2023. The tentative agreement was ratified on June 29, 2023.

[27] The language of the tentative agreement does not refer to the $2,500.00 as a signing bonus. The language does refer to it as being for the performance of duties. The chief negotiator for the employer confirmed both points in an email. The first point is also confirmed by the fact that the employees were not on strike. There was therefore no need for a signing bonus to encourage them to return to work. The chief negotiator also stated that a signing bonus would not by definition be pensionable. That is consistent with the legislation dealing with pensions for the public service. The amount of a pension (annuity) is based on years of service and annual salary. Salary is defined as the basic pay for the performance of regular duties of a position, but not including allowances, special remuneration, payment for overtime or other compensation or as a gratuity.[9] A signing bonus is not part of regular pay for performance of regular duties and is excluded in the list of items not included in salary. So, the pensionable status of the $2,500.00 payment confirms that it is not a signing bonus.

[28] The one-time allowance of $2,500.00 is “for the performance of regular duties and responsibilities associated with their position.” It is not a signing bonus.

[29] Having determined in this and the previous subheading that the status of the $2,500.00 payment as earnings is not for a retroactive period, I have to deal with the allocation of that payment to the proper period of time.

Did the Commission allocate the earnings correctly?

[30] The law says that earnings have to be allocated to certain weeks. What week’s earnings are allocated to depend on why you received the earnings.[10]

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[9] See sections 3(1) and 11(1)(a) of the *Public Service Superannuation Act.*
[10] See section 36 of the EI Regulations.

[31] The Commission said that the $2,500.00 was a signing bonus, so it was properly allocated under section 36(19)(a) to the week that the collective agreement was signed, namely June 11, 2023. In fact, the proper date for the signing of the collective agreement covering the Appellant was June 29, 2023. The June 11, 2023, date referred to a different collective agreement with a different union representing employees.

[32] The Appellant disagrees. She says that the $2,500.00 was a one-time payment related to the performance of regular duties in the past. That amount should be allocated under section 36(4) or alternatively under section 36(5) or 36(19)(a).

[33] The law deals with a number of different situations in which earnings have been paid to a claimant. If none of the other situations set out in section 36 of the EI Regulations apply, then the allocation rule of subsection 36(19) applies. That is the section the Commission relies on in this appeal.

[34] In order to determine which subsection of section 36 applies, it is necessary to determine the true nature of the earnings, and the reason why those earnings were paid. I have already done that above, finding that the $2,500.00 was not a signing bonus, but was payment for the performance of regular duties at an unspecified time, which was not in the past.

[35] Some additional terms in the tentative agreement are relevant to determining the proper allocation of the $2,500.00 payment. The employer will provide this one-time lump-sum payment “on the date of signing of the collective agreement…Payment will be issued according to implementation timelines as per Appendix J…” (GD5-6).

[36] Appendix J deals with payments for prospective and retroactive amounts payable to employees (GD5-22, tentative agreement, and GD5-99, final agreement). The Appendix states, “The prospective elements of compensation increases (such as prospective salary rate changes and other compensation elements such as premiums, allowances, changes to overtime rates) will be implemented within one hundred and eighty (180) days after signature of this agreement where there is no need for manual

intervention." Retroactive payments are subject to the same 180 days and no manual intervention conditions.

[37] The employer and the union signed the final collective agreement on June 29, 2023 (GD5-40 to 101).

[38] Since the final agreement does not deal with the $2,500.00 payment, and the tentative agreement does not say what period of time that payment is for, I can only conclude that the relevant period of time is the date the amount is payable. That date could be the signing of the tentative or the final agreement, or the date of actual payment.

[39] I find that the $2,500.00 is properly allocated under section 36(5) of the EI Regulations (not section 36(4)) for the following reasons.

– **Section 36(4)**

[40] This section applies to situations in which the employee is under a contract of employment for the performance of services and there has been performance of services by that employee. If both conditions are met, the allocation is to the period during which the employee performed services.

[41] The difficulty in this case is that while the Appellant was under a contract of employment to perform services, she did not perform any services for the employer while she was on maternity and parental leave. That leave began on February 3, 2023, and is scheduled to end on August 5, 2024. However, she did perform services for the employer prior to the start of the maternity leave, so the section might apply.

[42] The section does not apply for the following reasons. The employer and the union agreed to the $2,500.00 payment in the tentative agreement, signed on May 16, 2023, and effective June 22, 2022 (GD5-3). The employer and union signed the final collective agreement on June 29, 2023. The employer paid the $2,500.00 to the Appellant on November 8, 2023. The tentative agreement stated, "Unless otherwise expressly stipulated, the parties agree that changes to the EC collective agreement will

not result in any retroactive payment or adjustment. They will form part of the implementation, on a prospective basis, of the new collective agreement once signed." The $2,500.00 payment was not expressly stipulated to be retroactive to a date earlier than the signing of the tentative agreement, May 16, 2023. That means that the Appellant's services performed prior to the signing of the tentative agreement are not services performed by the Appellant for the purposes of section 36(4). That is true despite the tentative agreement being effective June 22, 2022, because of the language in the clause in that agreement quoted in this paragraph.

[43] So, the relevant events in assessing whether this section applies occurred while the Appellant was on maternity/parental leave. And because she was not performing services for the employer during that leave, the second condition for section 36(4) is not met. So, section 36(4) cannot apply to this situation.

– **Section 36(5)**

[44] This section applies to situations in which the employee is under a contract of employment without the performance of services, or in which the employer pays the employee to return to or begin to work. In both of those situations, earnings paid by the employer are allocated to the period for which they are payable.

[45] The $2,500.00 payment does not fall under the second condition, paying the employee to return to or begin work. That is because the payment is made to all the employees in the EC group, most of whom worked through the negotiation of the new collective agreement. They were not on strike. For those, like the Appellant, who were on temporary leave, such as maternity/parental leave, there was no requirement attached to the $2,500.00 payment that they return to work in order to receive the payment.

[46] The first condition, being under a contract of employment without the performance of services, does apply to the Appellant. She was under a continuing contract to perform services for the employer, and she was on a temporary maternity/parental leave during which she did not perform services for the employer.

[47] The $2,500.00 has to be allocated to the period for which it is payable. The tentative agreement terms do not specify a period the payment is intended to cover, with a start and end date. The terms state that the employer will provide the $2,500.00 to employees on the date of the signing of the collective agreement. The terms do not specify whether the date of signing refers to the tentative or the final agreement. The terms continue that payment will be issued according to timelines in Appendix J. The change in language from "provide" to "payment" creates a further ambiguity as to when the money will be payable.

[48] In this case, that ambiguity does not change the result. That is because all of the dates generated from the different times that the money might be payable fall within the time that the Appellant was on maternity/parental leave. Section 36(5) has no express wording to authorize spreading the payment to a period before or after the actual date of the payment.[11] The only language that might permit that is the statement, "shall be allocated to the period for which they are payable." In this case, there is no evidence that the $2,500.00 payment was for a defined period, or what that period was. So, what remains are the four potential dates on which the money could be payable. Those are the signing of the tentative or final agreement, within 180 days after signing the final agreement or the date of actual payment.

[49] The different dates on which the money could be payable are these. If it is the signing of the tentative agreement date, that is May 16, 2023. If it is the signing of the final agreement date, that is June 29, 2023. If it is the timelines in Appendix J (GD5-22, tentative agreement, and GD5-99, final agreement), the date is "within one hundred and eighty (180) days after signature of this agreement where there is no need for manual intervention." So, the money would be payable within the 180-day period, either from May 16, 2023, or June 29, 2023, or the date of actual payment, November 8, 2023. The 180 days from June 29, 2023, ends on December 22, 2023, well before the end of the

[11] Compare section 36(8) of the EI Regulations. It deals with vacation pay that is paid or payable to an employee continuing in employment. The section provides for the allocation of the vacation pay to a number of weeks, whether it is paid for a specific period, or in any other case. Section 36(5) has no equivalent specific rules to allocating the earnings to a specific period.

Appellant's maternity/parental leave on August 5, 2024. The employer made the payment of the $2,500.00 to the Appellant on November 8, 2023.

[50] I find that the $2,500.00 was payable on the date of signing the final agreement. That was June 29, 2023. The reason for setting this date is simple. That was the date on which the employer committed itself to paying the $2,500.00 and the retroactive pay increases within 180 days. That was the date on which the commitment to pay was firmed up. The actual date of payment was to happen within a set period after the commitment on June 29, 2023.

[51] The date to which the Commission allocated the $2,500.00 was the week of June 11, 2023. That date is incorrect. The Commission, in a conversation with the Appellant on November 9, 2023, recorded the new contract as being ratified in June 2023. The Commission based the June 11th date on a different collective agreement with a different union, ratified on June 16, 2023. The Commission did not respond to the Appellant's information in her request for reconsideration that her collective agreement was signed on June 29, 2023. So, the week starting June 25, 2023, is the correct week for the allocation.

[52] Having found that section 36(5) of the EI Regulations applies, it is unnecessary to deal with allocation under section 36(19). That is because section 36(19) only applies if no other subsections of section 36 apply to the circumstances.

Conclusion

[53] The appeal is dismissed, with a minor modification.

[54] The Appellant received $2,500.00 in earnings. These entire earnings are allocated to the week starting Sunday, June 25, 2023.

Paul Dusome

Member, General Division – Employment Insurance Section