[TRANSLATION]

Citation: *F. I. v. Canada Employment Insurance Commission*, 2013 SSTGDEI 5

Appeal No.: GE-13-918

BETWEEN:

F. I.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance

SOCIAL SECURITY TRIBUNAL MEMBER:	Normand Morin
HEARING DATE:	November 26, 2013
TYPE OF HEARING:	Teleconference
DECISION:	Appeal allowed

PERSONS IN ATTENDANCE

[1] The Appellant, F. I., participated in the telephone hearing (teleconference) held on November 26, 2013.

DECISION

[2] The Social Security Tribunal (the Tribunal) finds that the appeal of the Employment Insurance Commission (the Commission) decision to allocate the Appellant's earnings has merit under sections 35 and 36 of the *Employment Insurance Regulations* (the Regulations).

INTRODUCTION

[3] On September 10, 2013, the Appellant appealed to the Employment Insurance Section of the Tribunal's General Division the Commission's decision dated August 27, 2013 (Exhibit GD2-1A), to uphold the decision initially rendered on July 25, 2013, regarding the allocation of the amount received from the employer, Brinks Canada Ltd. (Exhibit GD3-16), under an agreement between the said employer and the Appellant.

TYPE OF HEARING

[4] The hearing was held by teleconference for the reasons set out in the notice of hearing dated November 12, 2013 (Exhibits GD1-1 and GD1-2).

ISSUE

[5] The Tribunal must determine whether the appeal of the Commission's decision regarding the allocation of the Appellant's earnings has merit under sections 35 and 36 of the Regulations.

APPLICABLE LAW

[6] The provisions relating to allocating earnings are set out in sections 35 and 36 of the Regulations.

[7] The Federal Court of Appeal (the Court) clearly established the conditions according to which an amount paid following a separation from employment may be considered as having being paid to compensate for the right to reinstatement. First, the right to reinstatement must exist under federal or provincial legislation, a contract, or a collective agreement. Second, the claimant must have requested to be reinstated and the settlement agreement must show that the amount represents compensation for the relinquishment of the right to reinstatement (***Canada (AG) v. Nicole Meechan*, A-140-03**).

[8] In the matter of ***Nicole Meechan*** **(2003 FCA 368 – A-140-03**), Justice J. Edgar Saxton of the Court stated:

> ". . . there seems to have been little evidence, if any, that the award could represent anything else. In particular, there does not seem to be evidence before the Board of Referees to the effect that the damages represented loss of earnings.
>
> This Court in ***Canada v. Plasse*** [2000] F.C.J. 1671 at paragraph 18, decided that a payment received for renunciation of a right to reinstatement does not constitute earnings under the ***Employment Insurance Regulations***. The Board referred to this most recent relevant law and applied it correctly. We would observe that the Umpire did not refer to this law.
>
> It is therefore our view that the Umpire erred in allowing the appeal from the Board of Referees.
>
> We would therefore allow the Applicant's application, set aside the decision of the Umpire, and issue a declaration that the damages awarded to the Applicant by

> the Arbitration Board did not constitute earnings and therefore were not subject to allocation pursuant to the ***Employment Insurance Act***."

[9] In the ***Robert Plasse*** **(A-693-99**) decision, Justice Robert Décary of the Court stated as follows:

> "If a settlement encompasses both an acceptation of lost wages and a renunciation of a right to reinstatement granted by the appropriate authority, only the former constitutes "earnings" and only the value attributable to the former is allocated pursuant to section 57 of the Regulations. It would of course be open to the Commission in any given case to make sure that a purported settlement is not a mere sham to circumvent the unemployment insurance scheme by disguising compensation for lost wages as something else."

[10] The Court stated that the right to reinstatement is an employee's right to resume his or her position following a wrongful dismissal. Unless a payment can be characterized as compensation for relinquishment of the right to reinstatement, it must be allocated under the provisions of the Regulations (***Canada (AG) v. Warren*****, 2012 FCA 74**).

[11] In the ***Yvan Bourgeois*** **(2004 FCA 117 – A-289-03)** decision, Justice Marc Noël of the Court stated:

> "It was incumbent upon the applicant to establish that all or part of the sums received as a result of his dismissal amounted to something other than earnings within the meaning of the Act (*Attorney General of Canada v. Mary Radigan*), [2001] 267 N.R. 129 (FCA)."

[12] In the ***Michael Bielich*** **(2005 FCA 363 – A-53-05)** decision, in which the Commission's appeal was dismissed, Justice J. D. Denis Pelletier of the Court stated:

> "The Board of Referees heard the claimant and found his explanation credible. Given the evidence before it, it concluded that the release did not represent the agreement between the parties and accepted that the entire settlement amount was attributable to the respondent's renunciation of his right to reinstatement."

[13] The issue of whether an amount paid as part of a settlement constitutes "earnings" is a question of mixed fact and law (***Dunn*, A-231-95; *Chartier*, 2010 FCA 150**).

EVIDENCE

[14] The evidence in the file is as follows:

(a) On October 3, 2011, the Appellant filed an initial claim for benefits effective July 31, 2011. The Appellant stated that he worked for employer Brinks Canada Ltd. until May 6, 2011, inclusively. The Appellant explained that he would not resume work for this employer because of his dismissal (Exhibits GD3-2 to GD3-10);

(b) A Record of Employment dated October 18, 2011, states that the Appellant worked for employer Brinks Canada Ltd. from April 26, 2010 to August 2, 2011, and that the reason for separation from this employer was "Other" (Code K – Other) (Exhibit GD3-11);

(c) An agreement titled [translation] "Transaction and Receipt", which was reached between employer Brinks Canada Ltd. and the Appellant, sets out the conditions for the Appellant's separation from employment following an adjudication decision rendered in this file by the adjudicator, counsel Jacques Bélanger, on September 13, 2012 (Exhibits GD3-12 and GD3-13);

(d) On July 22, 2013, the Appellant stated that he had filed a complaint as a result of his dismissal during the time that he was on sick leave (Exhibit GD3-14);

(e) On July 23, 2013, the Commission stated in a report that the $40,000.00 received by the Appellant is [translation] "applicable". A comment indicates [translation] "grievance settlement / amount applicable" (Exhibit GD3-15);

(f) On July 25, 2013, the Commission informed the Appellant that it had allocated the $40,000.00 received from Brinks Canada Ltd. for renouncing the right to reinstatement. The Commission explained that this amount was considered earnings and that it would be deducted from the Appellant's benefits from July 31, 2011 to April 28, 2012, and that an amount of $156.00 would be deducted from his benefits for the week of April 29, 2012 (Exhibit GD3-16);

(g) On July 25, 2013, the Commission informed employer Brinks Canada Ltd. that the Appellant had received a $17,965.00 overpayment of Employment Insurance benefits. The Commission asked the employer to deduct this amount from any amounts owing to the Appellant and to send it to the Commission (Exhibit GD3-17);

(h) On August 5, 2013, the Appellant filed a Request for Reconsideration of an Employment Insurance (EI) Decision. The Appellant attached to his request a copy of the Commission's letter dated July 25, 2013 (Exhibit GD3-17) (Exhibit GD3-18 to GD3-20);

(i) On August 27, 2013, the Appellant stated that he was informed of the Commission's decision regarding his situation and that his counsel recommended that he appeal this decision (Exhibit GD3-21);

(j) On August 27, 2013, the Commission informed the Appellant that it was upholding the decision rendered on July 19, 2013, to allocate the amount received from employer Brinks Canada Ltd. (Exhibits GD2-1A);

(k) On September 10, 2013, the Appellant filed a Request for Reconsideration of an Employment Insurance (EI) Decision. The Appellant attached a copy of the following documents to his request:

- Adjudication decision rendered on September 13, 2012, by counsel Jacques Bélanger, arbitrator, in the F. I. and Brinks Canada Ltd. case (File number YM2707-9123) (Exhibits GD2-6 to GD2-38);
- Letter from the Commission dated July 25, 2013 (Exhibit GD3-17 – GD3-19) (Exhibit GD2-39) (Exhibits GD2-1 to GD2-39);

(l) In a notice of hearing dated November 12, 2013, the Tribunal informed the Appellant that the date of his hearing was scheduled for November 26, 2013 (Exhibits GD1-1 and GD1-2).

[15] The evidence presented at the hearing is as follows:

(a) The Appellant reviewed the key elements in the docket;
(b) He stated that a counsel guided him throughout the process undertaken with employer Brinks Canada Ltd., and that this counsel advised him to appeal the Commission's decision;
(c) He explained that, at the start of the process undertaken with the Commission, he sent the Commission a copy of the adjudication decision rendered on September 13, 2012, by the adjudicator, counsel Jacques Bélanger (Exhibits GD2-6 to GD2-38);
(d) He stated that he informed a representative of the Commission that if the $40,000.00 was considered earnings, he could consequently become eligible for a new benefit period using new dates;
(e) He explained that, after his benefit period, he returned to school for a period of 14 weeks, during which time he did not receive any income. He explained that, even if a new benefit period had been established in his case, while he was pursuing his studies, after the end of his previous benefit period, he would have been considered not available for work at that time because of his return to school;
(f) He explained that the $40,000.00 is an overall amount that was not itemized in the agreement that was reached;
(g) He stated that he accepted this amount, noting, in particular, that employer Brinks Canada Ltd. wanted to get his new employer involved in the case. The Appellant stated that he did not want his new employer to be involved in this case. He stated that he was forced to sign the papers;
(h) He explained that, although he obtained $40,000.00, in the end, he did not gain anything or lose anything, and that he had waged a [translation] "useless battle". He explained that after paying his counsel fees and after repaying Service Canada,

he was left [translation] "penniless".

(i) He recalled that he had previously worked for a competitor of employer Brinks Canada Ltd. He indicated that he accepted an offer from employer Brinks Canada Ltd. because the conditions were better than those he had with his former employer;

(j) He stated that he now has a new job with a [translation] "lifetime guarantee".

SUBMISSIONS OF THE PARTIES

[16] The Appellant made the following observations and submissions:

(a) He stressed the content of the adjudication decision rendered by the adjudicator, counsel Jacques Bélanger, on September 13, 2012;

(b) He explained that he accepted an offer to renounce his right to reinstatement in exchange for $40,000.00 (Exhibit GD3-14);

(c) The Appellant stated that the $40,000.00 from employer Brinks Canada Ltd. does not represent [translation] "wage benefits, but rather a mutual monetary agreement for not returning to work" (Exhibits GD3-18 and GD2-4);

(d) He stated that he intended to resume his employment because he liked the job;

(e) He stated that he wanted to be reinstated into his duties, but that it was his employer who did not want this to happen;

(f) He emphasized the fact that, if he had returned to work for employer Brinks Canada Ltd., he would not have needed to return to school.

[17] The Commission made the following observations and submissions:

(a) The Commission pointed out that [translation] "amounts received from an employer are considered earnings and must therefore be allocated, unless they fall under the exceptions set out in subsection 35(7) of the Regulations or do not arise from employment" (Exhibit GD4-2);

(b) The Commission explained that [translation] "amounts paid by an employer by

reason of a lay-off or separation from an employment shall be allocated under subsection 36(9) of the Regulations" (Exhibit GD4-2);

(c) The Commission determined that the amounts received by the Appellant [translation] "for renouncing his right to be reinstated constituted earnings under subsection 35(2) of the Regulations" (Exhibit GD4-2);

(d) The Commission explained that [translation] "a payment was issued to the claimant in light of his refusal to return to work" (Exhibit GD4-3);

(e) The Commission stated that [translation] "a payment was made in light of the claimant's separation from employment" (Exhibit GD4-3);

(f) The Commission explained that it allocated the $40,000.00 received by the Appellant in accordance with the provisions set out in subsection 36(9) of the Regulations (Exhibit GD4-3).

ANALYSIS

[18] Section 35 of the Regulations defines "income" as "any pecuniary or non-pecuniary income that is or will be received by a claimant from an employer or any other person, including a trustee in bankruptcy." This section also sets out which income is considered earnings.

[19] Once this is established, section 36 of the Regulations sets out how the "Allocation of Earnings for Benefit Purposes" is conducted over specific weeks.

[20] Thus, amounts received from an employer are considered earnings and must be allocated, unless they fall under the exceptions set out in subsection 35(7) of the Regulations, or do not arise from any employment.

1. AMOUNT RECEIVED UNDER THE AGREEMENT BETWEEN THE APPELLANT AND THE EMPLOYER

[21] The Appellant worked for employer Brinks Canada Ltd. until his dismissal on September 26, 2011 (Exhibits GD2-6 to GD2-38, and Exhibit GD3-12).

[22] The evidence in the docket shows, first, that the Appellant received an grand total of $40,000.00 under an agreement between him and employer Brinks Canada Ltd. (Exhibits GD3-12 and GD3-13), in accordance with an adjudication decision rendered on September 13, 2013 (Exhibits GD2-6 to GD2-38).

[23] The Tribunal is of the opinion that, in this case, the Commission's submissions were a complete abstraction of the content of the adjudication decision rendered by arbitrator Jacques Bélanger (Exhibits GD2-6 to GD2-38).

[24] The content of this document highlights the causes and all the circumstances preceding the Appellant's dismissal, while emphasizing the fact that the Appellant's right to reinstatement existed under federal or provincial legislation, a contract, or a collective agreement.

[25] This document shows specifically that the Appellant had a [translation] "right to reinstatement", that he tried to exercise it and that he renounced it in exchange for monetary compensation (***Canada (AG) v. Nicole Meechan*, A-140-03**).

[26] In his decision, the adjudicator demonstrated the existence of this right when he concluded that [translation]: "The employer did not show just and sufficient cause for dismissing the complainant. For these reasons, the complaint under section 240 of the *Canada Labour Code* is allowed, the dismissal is cancelled and the complainant's rights are reinstated." (Exhibit GD2-37).

[27] This decision also states as follows: [translation] " . . .ORDER the reinstatement of F. I. within thirty (30) days of the receipt of this decision with all his rights and privileges; ORDER the employer to pay him, as compensation for wages and benefits that he would have earned had he not been dismissed, with interest at the legal rate minus any wages and/or

earnings in lieu, earned during the time between his dismissal and his return to work; . . .” (Exhibit GD2-37).

[28] At the hearing, the Appellant also clearly showed that he wanted to be reinstated into his position at the employer’s business, stating that he had a job that he liked but that it was his employer that did not want him to be reinstated.

[29] The Appellant also emphasized the fact that, if he had been reintegrated into his duties, he would not have had to commit to a 14-week training process, at his own cost, when his benefit period ended.

[30] The evidence in the file also shows that the employer took part in a process to have the Appellant return to work, but that, in the end, this process proved to be unsuccessful.

[31] In the adjudication decision that was rendered, the arbitrator stated that the Appellant [translation] “. . . had always been very clear that he wanted to return to work, but he claimed that this depended on his doctor and that he could not make the decision.” (Exhibit GD2-17).

[32] In this document, the adjudicator also concluded that the Appellant:

> [translation]
> “. . . never refused to accept a gradual return to work. He was completely in agreement with resuming his duties as soon as his health permitted, and he would have obtained a confirmation from his doctor in this regard, as it appears in particular in the evidence filed under Exhibits E-15(A) and P-18. . . In addition, the complainant liked his job, as it appears in particular in the evidence filed under Exhibits E-22 and P-1 B. He stated in these documents that he had always had the firm intention of returning to work, but that his current condition, that is, the condition stated in the numerous medical documents sent to the employer, did not allow him to agree to the employer’s request. However, he was not renouncing his employment.”

(Exhibits GD2-34 and GD2-35)

[33] In this context, the Tribunal does not accept the Commission's submissions that [translation] "a payment was issued to the claimant in light of his refusal to return to work" (Exhibit GD4-3).

[34] The Appellant's undisputed testimony and the evidence presented indicate otherwise.

[35] The agreement signed by the Appellant and the employer under the decision rendered by adjudicator Jacques Bélanger also confirms that the $40,000.00 was paid to the Appellant for renouncing his right to reinstatement (Exhibits GD3-12 and GD3-13).

[36] This agreement specifies, in particular, that:

> [translation]
> "WHEREAS the Employee filed a complaint under section 240 of the *Canada Labour Code*; WHEREAS the adjudicator, counsel Jacques Bélanger, rendered a decision on September 13, 2012, allowing the Employee's complaint; WHEREAS the Employee renounced his right to reinstatement; . . . The employer agrees to pay the total gross lump sum of FOURTY THOUSAND DOLLARS ($40,000), minus the usual tax deductions. . ."

(Exhibit GD3-12)

[37] The Appellant also recalled that the $40,000.00 from employer Brinks Canada Ltd. did not represent [translation] "wage benefits, but rather a mutual monetary agreement for not returning to work" (Exhibits GD3-18 and GD2-4).

[38] In this regard, the Commission stated in the decision initially rendered on July 25, 2013, that the Appellant received $40,000.00 [translation] "to renounce the

reinstatement from Brinks Canada Ltd." (Exhibit GD3-16) and recalled this element in its submissions (Exhibit GD4-2).

[39] According to the Tribunal, the $40,000.00 paid to the Appellant can be qualified as compensation for renouncing the right to reinstatement and cannot be allocated under the provisions of the Regulations (***Canada (AG) v. Warren*, 2012 FCA 74**).

[40] The Appellant chose to renounce his right to reinstatement in exchange for $40,000.00. This amount does not constitute "earnings" within the meaning of section 35 of the Regulations (***Meechan*, 2003 FCA 368**; ***Plasse*, A-693-99**).

2. ALLOCATION OF THE AMOUNT RECEIVED

[41] The Tribunal finds that, overall, the amount paid to the Appellant under the agreement with his employer cannot be allocated under the provisions set out in section 36 of the Regulations because it cannot be qualified as "earnings" within the meaning of section 35 of the Regulations.

[42] Referring to the case law mentioned earlier, the Tribunal finds that the allocation of the total amount of $40,000.00 paid to the Appellant was not conducted in accordance with the provisions set out in sections 35 and 36 of the Regulations.

[43] The Tribunal finds that the appeal on this issue has merit.

CONCLUSION

[44] The appeal is allowed.

Normand Morin

Member, General Division

DATE OF REASONS: December 4, 2013