[TRANSLATION]

Citation: *A. D. v. Canada Employment Insurance Commission,* 2014 SSTGDEI 17

Appeal No: GE-13-2095

BETWEEN:

A. D.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division –Employment Insurance

SOCIAL SECURITY TRIBUNAL MEMBER:	Aline Rouleau
HEARING DATE:	January 31, 2014
TYPE OF HEARING:	Teleconference
DECISION:	Appeal dismissed with recommendations

PERSONS IN ATTENDANCE

Only counsel Cynthia Tessier from the firm Marceau Avocats Inc., the Appellant's representative, participated in the hearing held on January 31, 2014.

DECISION

[1] The Tribunal determines that the amounts paid by the employer to the Appellant between January 23 and June 30, 2013, constitute earnings and that these earnings were correctly allocated pursuant to sections 35 and 36 of the *Employment Insurance Regulations* (the Regulations). However, the Tribunal recommends that the Commission write off the amount of the overpayment made to the Appellant. If the Commission refuses to do so, the Tribunal recommends that the Appellant appeal from this decision to the Federal Court of Appeal so that it can make a ruling.

TYPE OF HEARING

[2] The hearing was held by teleconference for the reasons given in the notice of hearing dated January 14, 2014.

ISSUE

[3] Was the allocation of earnings carried out in compliance with sections 35 and 36 of the Regulations?

INTRODUCTION – STATEMENT OF FACTS

[4] An initial benefit period took effect on December 2, 2012 (GD3-2 to GD3-13).

[5] The appellant stopped working on December 3, 2012, because of a dismissal (GD3-14). Due to the circumstances of the termination of employment, a disqualification was not imposed in this case, and benefits were paid as of January 15, 2013.

[6] On February 14, 2013, the Appellant informed the Commission that an agreement had been reached with the employer (GD3-15), and a copy of the agreement signed on January 23, 2013, was provided (GD3-16 and GD3-17).

[7] On February 21, 2013, the Commission informed the Appellant that an amount of $10,196 had to be allocated pursuant to sections 35 and 36 of the Regulations and that his benefits would be affected (GD3-18 and GD3-19). An overpayment was established at $5,104, and a notification of debt was sent to the Appellant (GD3-21) on September 14, 2013.

[8] On February 21, 2013, the Commission informed the employer that, pursuant to section 46 of the *Employment Insurance Act* (the Act), it would have to deduct $928 from the amount payable to the Appellant, representing the established overpayment (GD3-20).

[9] The Appellant submitted an application for reconsideration of the Commission's decision (GD3-24 to GD3-30).

[10] After reconsideration, the Commission maintained its decision (GD3-32), thus the present appeal to the Tribunal (GD2-1 to GD2-10, and GD2A-1 to GD2A-13).

APPLICABLE LAW

[11] Section 35 of the Regulations defines what constitutes income, and section 36 of the same Regulations indicates how a claimant's earnings should be allocated, namely, during which week these amounts were taken into account as earnings. Amounts received from an employer constitute earnings and must be allocated unless they come under one of the exceptions provided.

[12] Subsection 36(9) of the Regulations reads as follows:

> Subject to subsections (10) to (11), all earnings paid or payable to a claimant by reason of a lay-off or separation from an employment shall, regardless of the period in respect of which the earnings are purported to be

paid or payable, be allocated to a number of weeks that begins with the week of the lay-off or separation in such a manner that the total earnings of the claimant from that employment are, in each consecutive week except the last, equal to the claimant's normal weekly earnings from that employment.

[13] Subsection 36(10) of the Regulations reads as follows:

Subject to subsection (11), where earnings are paid or payable to a claimant by reason of a lay-off or separation from an employment subsequent to an allocation under subsection (9) in respect of that lay-off or separation, the subsequent earnings shall be added to the earnings that were allocated and, regardless of the period in respect of which the subsequent earnings are purported to be paid or payable, a revised allocation shall be made in accordance with subsection (9) on the basis of that total.

[14] Subsection 36(11) of the Regulations reads as follows:

Where earnings are paid or payable in respect of an employment pursuant to a labour arbitration award or the judgment of a tribunal, or as a settlement of an issue that might otherwise have been determined by a labour arbitration award or the judgment of a tribunal, and the earnings are awarded in respect of specific weeks as a result of a finding or admission that disciplinary action was warranted, the earnings shall be allocated to a number of consecutive weeks, beginning with the first week in respect of which the earnings are awarded, in such a manner that the total earnings of the claimant from that employment are, in each week except the last week, equal to the claimant's normal weekly earnings from that employment.

[15] Subsection 56(1) of the Regulations reads as follows:

A penalty owing under section 38, 39 or 65.1 of the Act or an amount payable under section 43, 45, 46, 46.1 or 65 of the Act, or the interest accrued on the penalty or amount, may be written off by the Commission if

(*a*) the total of the penalties and amounts, including the interest accrued on those penalties and amounts, owing by the debtor to Her Majesty under any program administered by the Department of Employment and Social Development does not exceed $100, a benefit period is not currently running in respect of the debtor and the debtor is not currently making regular payments on a repayment plan;

(*b*) the debtor is deceased;

(*c*) the debtor is a discharged bankrupt;

(*d*) the debtor is an undischarged bankrupt in respect of whom the final dividend has been paid and the trustee has been discharged;

(*e*) the overpayment does not arise from an error made by the debtor or as a result of a false or misleading declaration or representation made by the debtor, whether the debtor knew it to be false or misleading or not, but arises from

(i) a retrospective decision or ruling made under Part IV of the Act, or

(ii) a retrospective decision made under Part I or IV of the Act in relation to benefits paid under section 25 of the Act; or

(*f*) the Commission considers that, having regard to all the circumstances,

(i) the penalty or amount, or the interest accrued on it, is uncollectable,

(ii) the repayment of the penalty or amount, or the interest accrued on it, would result in undue hardship to the debtor, or

(iii) the administrative costs of collecting the penalty or amount, or the interest accrued on it, would likely equal or exceed the penalty, amount or interest to be collected.

[16] Subsection 56(2) of the Regulations stipulates that the Commission may write off "the portion of an amount owing under section 47 … of the Act in respect of

benefits received more than 12 months before the Commission notifies the debtor of the overpayment … if (*a*) the overpayment does not arise from an error made by the debtor or as a result of a false or misleading declaration …; and (*b*) the overpayment arises as a result of … (ii) retrospective control procedures or a retrospective review initiated by the Commission."

EVIDENCE

[17] The evidence in the docket is as follows:

(a) The agreement reached between the employer and the Appellant involves the settlement of a grievance and is presented in the docket as Exhibits GD3-16 and GD3-17. According to this agreement, the employer decided to dismiss the Appellant as of June 30, 2013. From December 3, 2012, to June 30, 2013, the Appellant was considered to be on authorized leave without pay. From January 23, 2013, (date the agreement was signed) to June 20, 2013, the Appellant received a total amount of $10,196 paid in equal amounts of $463 every two weeks, from which the mandatory employment-related costs and tax liabilities were deducted. In return, the Appellant agreed not to file a grievance concerning the disciplinary measure imposed following the described incident, and the grievance filed on December 6, 2012, was considered settled and withdrawn.

(b) The Appellant was informed (GD3-18 and GD3-19) on February 21, 2013, by the Commission that the amounts payable by the employer would be used to repay the overpayment of Employment Insurance benefits. The overpayment was established at $5,104 (GD3-21).

(c) The employer was informed on February 21, 2013 (GD3-20) that it had to deduct an amount of $928 from the amounts payable to the Appellant and send this amount to the Commission pursuant to section 46 of the Act.

(d) The Commission stated in its arguments (GD4-2) that the amount that should have been recovered from the employer was $5,104, not $928, and that this error was the result of a transactional error (input of allocation dates). This error was found and corrected in September 2013. The amount of $928 received from the employer was applied to the overpayment on October 2, 2013, which left an overpayment of $4,174 to be repaid by the Appellant (GD3-34).

(e) The Appellant is of the view that he does not have to repay the overpayment amount (GD2-3). The Commission refuses to write off the overpayment (GD4-4).

[18] The evidence submitted at the hearing by the Appellant's representative is as follows:

(a) The Appellant's situation was the result of a grievance settlement, and the Commission recognizes that the Appellant stopped working on December 3, 2012.

(b) The fact that the Appellant was considered to be on authorized leave until June 30, 2013, and the payment of the settlement amount was spread out until that date is a legal fiction intended to enable the Appellant to have his retirement pension.

SUBMISSIONS OF THE PARTIES

[19] The Appellant stated the following:

(a) When he contacted the Commission (GD3-22), he was informed that the employer was going to repay the overpayment to the Commission.

(b) He did not intend to repay the overpayment because the error was made by the Commission, he discussed the situation with his Member of Parliament and he should not be held responsible for this error.

(c) The grievance settlement was misinterpreted because the amounts paid were initially allocated so that there was no overpayment, which he was not informed of until six months later.

(d) In the settlement agreement reached, the statement [translation] "WHEREAS the employee recognizes his errors and confirms that he will no longer come back to work for Rolls Royce Canada" must be interpreted as a relinquishment by the Appellant of his right to reinstatement, although it could have been formulated more clearly; in return for this relinquishment, he accepted an amount of money.

(e) The case law of the Federal Court of Appeal in *Meechan v. Canada (AG)*, 2003 FCA 368, and *Canada (AG) v. Plasse*, A-693-99, supports the Appellant's position. The facts of each case are similar, and the Court ruled that the amount received should not be considered earnings that must be allocated.

(f) The Appellant asked the Tribunal to correct the decision of the Commission, which misinterpreted the settlement agreement between him and the employer.

[20] The Commission (Respondent) argued the following:

(a) The Commission referred to paragraph 35(2)(*e*) of the Regulations to determine that the amount of $10,196 paid by the employer constituted earnings that must be allocated. This paragraph stipulates that the moneys paid or payable to a claimant on a periodic basis or in a lump sum on account of or in lieu of a pension constitute earnings that must be allocated.

(b) The agreement between the parties confirms that the amount of $10,196 was paid between January and June 2013, in equal amounts every two weeks, at the same time that the Appellant would normally have received

his pay. He was still considered an employee on authorized leave during this time.

(c) The Commission referred to subsection 36(5) of the Regulations, which stipulates that earnings that are payable to a claimant under a contract of employment without the performance of services shall be allocated to the period for which they are payable. In the Appellant's case, for the period from January 20 to June 22, 2013, this represents a weekly amount of $463.

(d) During this period, the Appellant received 22 weeks of regular benefits at a rate of $485. On applying the amount of earnings in each week, the benefit amount payable is reduced to $253 per week. The overpayment of $232 X 22 weeks is $5,104.

(e) The Commission assessed the possibility of writing off the overpayment pursuant to subsection 56(2) of the Regulations. Any amount received more than 12 months before the Commission notifies the debtor of the overpayment may be written off. In this case, a write-off is not possible because the benefits were received within the 12-month period preceding notification of the error.

(f) Only the Commission has the jurisdiction to write off an overpayment. The Social Security Tribunal is not able to rule on this issue. The Federal Court has jurisdiction to hear an appeal on this type of issue.

(g) The Commission submits that the case law supports its decision: *Claveau et al.*, T-1268-07; *Villeneuve*, A-191-05; *Canada (AG) v. Boucher Dancause*, 2010 FCA 270; *Canada (AG) v. Cantin*, 2008 FCA 192; *Canada (AG) v. Radigan*, A-567-99; and *Bourgeois v. Canada (AG)* 2004, FCA 117.

ANALYSIS

[21] Although the type of payment received by the Appellant is not expressly set out in the applicable Employment Insurance legislation and regulations, the Federal Court

of Appeal has repeatedly held that and has established the conditions under which an amount paid upon separation from an employment can be considered as having been paid to compensate for relinquishing the right to be reinstated in employment.

[22] The right to reinstatement is the right of an employee to resume his or her work following an unjust dismissal. Unless a payment can be classified as compensation for relinquishing the right to reinstatement, it must be allocated according to the provisions of the Regulations [*Canada (AG) v. Warren*, 2012 FCA 74].

[23] To begin with, the right to reinstatement must exist under federal law, a provincial law, a contract or a collective agreement. A settlement agreement reached between an employer and a claimant must show that an amount was paid as compensation for relinquishing the right to reinstatement [*Canada (AG) v. Nicole Meechan*, 2003 FCA 368 or A-140-03].

[24] The onus is on the claimant to prove that the amounts received do not constitute earnings within the meaning of the Act, and the Tribunal must ensure that an amount received for loss of income is not disguised as something else [*Plasse*, A-693-99 (decision rendered October 5, 2000)]. The claimant must demonstrate that there were special circumstances establishing that the amount was received for a reason other than the loss of income [*Meechan v. Canada (AG)* 2003 FCA 368].

[25] The term “licenciement” in the French version of subsections 36(9) and 36(10) refers to a lay-off. The expression “separation from an employment” (“cessation de son emploi” in French) refers to the termination of the employment relationship. If an employment relationship remains and an amount is paid as severance following the termination of the employment relationship, this amount constitutes earnings within the meaning of the Act. Amounts paid by reason of a lay-off or separation from an employment constitute earnings within the meaning of section 35 of the Regulations and must be allocated according to subsection 36(9) of the Regulations [*Canada (AG) v. Boucher Dancause*, 2010 CAF 270; *Canada (AG) v. Cantin*, 2008 CAF 192 or A-392-07, dated May 27, 2008].

[26] Based on these teachings of the Federal Court of Appeal, in the case of the present Appellant, the wording of the settlement agreement casts doubt on whether the right to reinstatement existed or whether the dismissal was unjust. It indicates that the board of investigation ruled out the possibility of an error committed in good faith, and the Appellant admitted his errors.

[27] Until June 30, 2013, the Appellant was considered by the employer to be an absent employee. This was a condition of the settlement agreement. On December 3, 2012, the right to reinstatement did not arise and was not negotiable. The agreement reached on January 23, 2013, relates to a disciplinary measure, and the Appellant agreed not to file a grievance concerning this disciplinary measure. With regard to grievance 12-44, which is mentioned in the agreement, it appears to be an additional one, and there is no evidence to indicate that it was related to the lay-off on December 3, 2012. The termination of the employment relationship occurred on June 30, 2013, even though the Appellant stopped coming to work on December 3, 2012. A Record of Employment issued by an employer may signify that there was a lay-off without a termination of the employment relationship. It happens quite often. If severance is paid for a lay-off, it constitutes earnings within the meaning of the Regulations.

[28] There was a link between the Appellant's employment and the amounts received. According to the agreement: [translation] "This amount will be paid every two weeks…by direct deposit at the same time that the employee would normally receive his pay." The Appellant did not demonstrate that there were special circumstances establishing that the amounts were received for a reason other than the loss of income. It was stated only that the amount received constituted compensation in exchange for the poorly written relinquishment of the right to reinstatement.

[29] The $10,196 received by Mr. D. was paid to him as severance following the termination of his employment relationship. There was a sufficient link between the employment and the amount received for it to be considered earnings within the meaning of section 35 of the Regulations. The Tribunal concludes that the amounts

paid by the employer to the Appellant between January 23 and June 30, 2013, constitute earnings and that these earnings were correctly allocated pursuant to section 35 and subsection 36(5) of the Regulations.

[30] With regard to the Commission's discretion to write off the overpayment, the Tribunal must point out the following.

[31] Pursuant to subsection 56(1) of the Regulations, the amounts payable by the Appellant are owed pursuant to section 45 of the Act. The overpayment is not the result of the Appellant's error or a false or misleading statement made by him, but arises from the Commission's retrospective decision to recover this amount from the Appellant because of its error in recovering the amount from the employer pursuant to section 46 of the Act. The wording of subsection 56(1) does not indicate [translation] "subject to subsection (2)." Consequently, subsection 56(1) can be applied independently of subsection 56(2), which addresses overpayments received more than 12 months before the Commission gave notice of the overpayment. The Commission is not justified in ignoring the existence of subsection 56(1) of the Regulations and limiting its decision to the fact that the overpayment was made less than 12 months before it notified the Appellant of the overpayment.

[32] The case law concerning the Commission's exercise of its discretion to write off an overpayment is evolving. The Commission claims that only the Federal Court has the authority to rule on this matter. However, in *Bernatchez v. Canada (AG)*, 2013 FC 111, the Federal Court addressed this jurisdiction, in the words of Justice de Montigny, who stated:

> At the hearing, I raised this issue on my own initiative, and I invited the parties to make representations on this point in light of the concurring reasons of Justice Stratas of the Federal Court of Appeal in *Steel v Canada (Attorney General)*, 2011 FCA 153, 418 NR 327. In that case, Justice Stratas was of the view that since the *Employment Insurance Act* came into force, SC 1996, c 23 [EIA], "a claimant or other person" and not simply a "claimant", as was the case previously, may appeal a decision of

> the Commission to the Board of Referees then to the Umpire (see subsection 114(1) and section 115 of the EIA). It follows that, even in write-off cases, a decision by the Commission may be appealed to the Board of Referees, the Umpire and then the Federal Court of Appeal, in accordance with section 118 of the EIA.

[33] Justice de Montigny wrote: "That being said, Justice Stratas' reasoning appears unassailable to me." And he added: "…Justice Stratas' comments in *Steel* do not formally bind this Court until such time as the Court of Appeal adopts Justice Stratas' opinion and explicitly disregards the numerous decisions it has issued (before and after the statutory amendment enacted in 1996) to the effect that a decision by the Commission refusing to write off an overpayment cannot be appealed to the Board of Referees: see …".

[34] The Tribunal finds that the Commission should take into account this most recent case law and recommends that it write off, under subsection 56(1), the amount of the overpayment made to the Appellant. If the Commission refuses to do so, the Tribunal recommends that the Appellant appeal from this decision to the Federal Court of Appeal so that it can make a ruling.

CONCLUSION

[35] The appeal is dismissed with recommendations

Member, General Division

DATE OF REASONS: March 28, 2014