[TRANSLATION]

Citation: *G. A. v. Canada Employment Insurance Commission*, 2014 SSTGDEI 59

Appeal No.: GE-14-573

BETWEEN:

**G. A.**

Appellant
Claimant

and

**Canada Employment Insurance Commission**

Respondent

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# SOCIAL SECURITY TRIBUNAL DECISION
## General Division – Employment Insurance

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| SOCIAL SECURITY TRIBUNAL MEMBER: | Charline Bourque |
| HEARING DATE: | June 3, 2014 |
| TYPE OF HEARING: | Videoconference |
| DECISION: | Appeal allowed |

## PERSONS IN ATTENDANCE

[1] G. A., the claimant, participated in the hearing via videoconference. He was represented by François-Alexandre Gagné, lawyer.

## DECISION

[2] The Tribunal determines that the amount of $4,500 was compensation for relinquishing the right to reinstatement and that it did not constitute earnings and did not need to be allocated pursuant to sections 35 and 36 of the *Employment Insurance Regulations* (the "Regulations"). The amount of $500 received for job search costs was not part of this case.

## INTRODUCTION

[3] The claimant made a claim for Employment Insurance benefits, effective August 26, 2012. On October 17, 2013, an out-of-court agreement was reached between the employer and the claimant following the filing of a complaint for dismissal not made for good and sufficient cause under section 124 of *An Act Respecting Labour Standards.* On November 28, 2013, the Canada Employment Insurance Commission (the "Commission") determined that, following the receipt of $6,103.00 as vacation pay, pay in lieu of notice and retiring allowance, the amount was considered income and would be deducted from the benefits received from August 19, 2012, to December 1, 2012. On January 28, 2014, following the reconsideration of its decision, the Commission maintained the November 28, 2013, decision concerning the earnings received. The claimant filed an appeal with the Social Security Tribunal (the "Tribunal") on February 5, 2014.

## TYPE OF HEARING

[4] This appeal was heard by videoconference for the reasons set out in the May 2, 2014, notice of hearing. The hearing via videoconference was held on June 3, 2014.

## ISSUES

[5] The issues are as follows:

a) Do the amounts received constitute earnings under subsection 35(2) of the Regulations?

b) Were the earnings allocated in accordance with section 36 of the Regulations?

## APPLICABLE LAW

[6] Subsection 35(1) of the Regulations states:

> The definitions in this subsection apply in this section.
>
> "employment" means
>
> (*a*) any employment, whether insurable, not insurable or excluded employment, under any express or implied contract of service or other contract of employment:
>
> > (i) whether or not services are or will be provided by a claimant to any other person, and
> >
> > (ii) whether or not income received by the claimant is from a person other than the person to whom services are or will be provided;
>
> (*b*) any self-employment, whether on the claimant's own account or in partnership or co-adventure; and
>
> (*c*) the tenure of an office as defined in subsection 2(1) of the *Canada Pension Plan*. (*emploi*)
>
> "income" means 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. (*revenu*)

[7] Subsection 35(2) of the Regulations states:

> Subject to the other provisions of this section, the earnings to be taken into account for the purpose of determining whether an interruption of earnings under setion 14 has occurred and the amount to be deducted from benefits payable under section 19, subsection 21(3), 22(5) or 23(3) of the Act, and to be taken into account for the purposes of sections 45 and 46, are the entire income of a claimant arising out of any employment, including
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> (*a*) amounts payable to a claimant in respect of wages, benefits or other remuneration from the proceeds realized from the property of a bankrupt employer;
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> (*b*) workers' compensation payments received or to be received by a claimant, other than a lump sum or pension paid in full and final settlement of a claim made for workers' compensation payments;
>
> (*c*) payments a claimant has received or, on application, is entitled to receive under
>
> (i) a group wage-loss indemnity plan,
>
> (ii) a paid sick, maternity or adoption leave plan,
>
> (iii) a leave plan providing payment in respect of the care or support of a family member referred to in subsection 23(1) of the Act, or
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> (*d*) notwithstanding paragraph (7)(*b*) but subject to subsection (3), the payments a claimant has received or, on application, is entitled to receive from a motor vehicle accident insurance plan provided under a provincial law in respect of the actual or presumed loss of income from employment due to injury, if the benefits paid or payable under the Act are not taken into account in determining the amount that the claimant receives or is entitled to receive from the plan;
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> (*e*) 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; and
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> (*f*) where the benefits paid or payable under the Act are not taken into account in determining the amount that a claimant receives or is entitled to receive pursuant to a

provincial law in respect of an actual or presumed loss of income from employment, the indemnity payments the claimant has received or, on application, is entitled to receive pursuant to that provincial law by reason of the fact that the claimant has ceased to work for the reason that continuation of work entailed physical dangers for

(i) the claimant,

(ii) the claimant's unborn child, or

(iii) the child the claimant is breast-feeding.

[8] Subsection 35(7) of the Regulations establishes that:

That portion of the income of a claimant that is derived from any of the following sources does not constitute earnings for the purposes referred to in subsection (2):

(*a*) disability pension or a lump sum or pension paid in full and final settlement of a claim made for workers' compensation payments;

(*b*) payments under a sickness or disability wage-loss indemnity plan that is not a group plan;

(*c*) relief grants in cash or in kind;

(*d*) retroactive increases in wages or salary;

(*e*) the moneys referred to in paragraph (2)(*e*), if the number of hours of insurable employment required by section 7 or 7.1 of the Act for the establishment of their benefit period was accumulated after the date on which those moneys became payable and during the period in respect of which they received those moneys; and

(*f*) employment income excluded as income pursuant to subsection 6(16) of the *Income Tax Act*.

[9] Subsection 36(1) of the Regulations states: “Subject to subsection (2), the earnings of a claimant as determined under section 35 shall be allocated to weeks in the manner described in this section and, for the purposes referred to in subsection 35(2), shall be the earnings of the claimant for those weeks.”

[10] Subsection 36(9) states: “Subject to subsections (10) to (11), all earnings paid or payable to a claimant by reason of a lay-off or separation from 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.”

[11] Lastly, subsection 36(10) states: “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 the total.”

**EVIDENCE**

[12] On October 17, 2013, counsel Tougas, the claimant’s representative, submitted to the Commission an out-of-court agreement reached between the claimant and his employer, the École supérieure de ballet du Québec (the “ESBQ”), and signed on October 16, 2013.

[13] The agreement acknowledges that, following the claimant’s dismissal, [translation] “the ESBQ undertakes to pay Mr. G. A., as compensation for relinquishing the right to reinstatement, a net amount of $500 as a reimbursement of expenses related to his job search and a gross amount of $4,500 (net amount of $3,555) as a retiring allowance, within ten (10) days following provision of the Employment Insurance decision to the ESBQ” (GD3-17).

[14] Paragraph 4 of the agreement further establishes that Mr. G. A. undertakes [translation] “to submit a declaration of out-of-court settlement of his complaint for dismissal not made for good and sufficient cause filed with the Commission des relations du travail” (GD3-18).

[15] On November 18, 2013, the Commission indicated to the claimant that, following the receipt of $6,103.00 as vacation pay, pay in lieu of notice and retiring allowance from the ESBQ, the amounts were considered income and would be deducted from the benefits received from August 19, 2012, to December 1, 2012.

[16] On March 21, 2014, counsel Gagné forwarded to the Tribunal an addendum to the agreement signed on October 16, 2013, by the claimant and his former employer, ESBQ, in order to clarify the parties’ willingness when they signed the agreement. The agreement was signed by the ESBQ.

[17] On April 8, 2014, the Commission forwarded supplementary submissions to the Tribunal, in which it stated that, following review of the new document [Addendum #1], [translation] “the Commission would not object to the earnings being considered compensation for relinquishing the right to reinstatement, and therefore not applicable, if a copy signed by both parties (employer and claimant) is provided to demonstrate that the agreement in the addendum is confirmed by both parties” (GD7-1).

[18] On April 16, 2014, a copy of Addendum #1 signed by both parties was submitted to the Tribunal.

**SUBMISSIONS OF THE PARTIES**

[19] The claimant submitted the following:

(a) The intention of the parties was that, as compensation for relinquishing the right to reinstatement, the employer undertook to pay the amount of $4,500, in addition to $500 for job search costs.

(b) The awkwardly qualified “retiring allowance” was included solely to indicate the applicable tax rate.

(c) A complaint was filed with the Commission des normes du travail under section 124, and the remedies included reinstatement. Since the employer was opposed to this, the parties negotiated the relinquishment of the right to reinstatement. In addition, the amount of $4,500 was not accepted as income, but rather as compensation for relinquishing the right to reinstatement.

[20] Following the claimant’s submission of new documents that were not taken into account by the Commission at the time it made his submissions, the Respondent changed its position on this case. Therefore, after these documents were submitted, the Respondent maintained the following:

(a) Addendum #1 confirms that the claimant filed a complaint for dismissal not made for good and sufficient cause under section 124 of *An Act Respecting Labour Standards*.

(b) The parties confirm that they discussed reinstatement and that the employer was not willing to reinstate Mr. G. A.

(c) There is a relinquishment and a permanent severance of the employment relationship.

(d) The term “retiring allowance” was used strictly to establish the applicable tax rate. The amount of $4,500 $ was not paid in exchange for work completed and did not arise out of employment pursuant to sections 35 and 36 of the Regulations.

(e) The Commission would not object to the earnings being considered compensation for relinquishing the right to reinstatement, and therefore not applicable, if a copy signed by parties (employer and employer) were provided.

**ANALYSIS**

[21] The only issue before the Tribunal is to decide the nature of the amount of $4,500 received by the claimant with a view to determining whether it should be allocated under section 35 of the Regulations. The other amounts received are not at issue in this appeal.

[22] The claimant submits that the amount received was compensation for relinquishing the right to be reinstated in his employment as assistant superintendant for the ESBQ.

[23] In *Meechan,* the Federal Court of Appeal established the conditions under which an amount paid following a termination of employment may be considered compensation for relinquishing the right to reinstatement. First, this right must exist under a federal law, a provincial law, a contract or a collective agreement. Second, the employee must have requested a reinstatement, and the settlement agreement must demonstrate that the amount was paid as compensation for relinquishing the right to reinstatement (*Meechan v. Canada (Attorney General)*, 2003 FCA 368).

[24] The claimant was dismissed on August 20, 2012. He stated that he filed a complaint under section 124 of *An Act Respecting Labour Standards* for dismissal not made for good and sufficient cause on September 12, 2012.

[25] The claimant's representative indicated that section 128 of this Act specifically states that, where the Commission des relations de travail considers that the employee has been dismissed without good and sufficient cause, the Commission may order the employer to reinstate the employee.

[26] Moreover, the claimant stated that, at the first out-of-court settlement meeting, the employer offered to reinstate him in his position, however, by adjusting his hours of work. At the second out-of-court settlement meeting, the employer allegedly told the claimant that it had found another person to replace him.

[27] Lastly, after the complaint for dismissal not made for good and sufficient cause was filed, the claimant and the ESBQ reached an agreement that was submitted to the Commission.

[28] Although the Tribunal is not the judge of the *Loi sur les normes du travail,* it is of the opinion that sections 124 and 128 establish the right to reinstatement in the event of a dismissal without good and sufficient cause. Clearly, the Commission des relations de travail made no ruling, but the fact that an out-of-court agreement was reached supports the fact that the complaint was well-founded and that the employer and the employee sought to reach an agreement before having to appear before Commission, even though the final ruling may have been in favour of the employer.

[29] The decision in *Cantin* established that, "In federal law, the right to reinstatement is an employee's right to resume his or her position following a wrongful dismissal, if the employee is granted reinstatement" (*Canada (Attorney General) v. Cantin*, 2008 FCA 192).

[30] The Tribunal is also of the opinion that the claimant demonstrated that discussions regarding the right to reinstatement were held. Moreover, this fact is supported by paragraph 4 of the agreement, which states that, following the agreement, the claimant undertakes "to submit a declaration of out-of-court settlement of his complaint for dismissal not made for good and sufficient cause filed with the Commission des relations du travail."

[31] Consequently, the Tribunal is satisfied that the claimant's right to reinstatement exists and that the claimant requested that he be reinstated in his employment. In doing so, the Tribunal is satisfied that the claimant meets the first two conditions under which an amount paid following a termination of employment may be considered compensation for relinquishing the right to reinstatement, according to *Meechan.*

[32] The third condition established in *Meechan* under which an amount may be considered compensation for relinquishing the right to reinstatement is that it must be established that the amount was paid as compensation for relinquishing the right to reinstatement.

[33] In *Warren*, the Court stated that, unless the payment can be characterized as compensation for relinquishment of the right to reinstatement, it may be allocated under the provisions of the Act and Regulations (*Canada (Attorney General) v. Warren*, 2012 FCA 74).

[34] The Commission initially determined that [translation] "the Commission had no choice other than to find that the true nature of the $4,500.00 is a retiring allowance as specified in the out-of-court settlement reached between the employer and the claimant, not before the Normes du travail" (GD4-4).

[35] The agreement to which the Commission referred states at paragraph 2(a) that, [translation] "the ESBQ undertakes to pay Mr. G. A., as compensation for relinquishing the right to reinstatement, a net amount of $500 as a reimbursement of expenses related to his job search and a gross amount of $4,500 (net amount of $3,555) as a retiring allowance, within ten (10) days following provision of the Employment Insurance decision to the ESBQ" (GD3-17).

[36] Consequently, the same paragraph states that the amount paid as compensation for relinquishing the right to reinstatement corresponds to $4,500 as a retiring allowance. The Commission contacted counsel Gagné, who noted that the expression "retiring allowance" was used for tax purposes strictly in relation to the *Income Tax Act*.

[37] Nevertheless, the Commission based its decision on the expression used, namely, "retiring allowance," without considering the decision to relinquish the right to reinstatement.

[38] The claimant submitted Addendum #1, signed by both parties. The addendum notes that discussions regarding the employee's reinstatement were held, that the term "retiring allowance" was used strictly for the purpose of establishing the applicable tax rate and that the amount of $4,500 was paid following the employer's refusal to reinstate the claimant in his position and because he relinquished his right to reinstatement.

[39] After it received the addendum signed by the employer and the employee, the Commission modified its position and indicated that it would not object to the earnings being considered compensation in lieu of reinstatement. The Tribunal agrees with the Commission's position in this regard, given that the claimant demonstrated that the amount received was paid because he relinquished the right to reinstatement.

[40] The Tribunal has already established that the claimant demonstrated that there was a right to reinstatement, that discussions regarding reinstatement were held and that the amount of $4,500 was paid as compensation for relinquishing the right to reinstatement. Consequently, pursuant to section 35 of the Regulations, the Tribunal is of the opinion that the amount received does not constitute earnings and that it therefore need not be allocated.

**CONCLUSION**

[41] The appeal is allowed.

*Charline Bourque*
Member, General Division

DATE OF REASONS: June 17, 2014