

Citation: *A. G. v. Canada Employment Insurance Commission*, 2015 SSTGDEI 18

Appeal #: GE-14-4074

BETWEEN:

**A. G.**

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: Takis Pappas

HEARING DATE: January 19, 2015

TYPE OF HEARING: Teleconference

DECISION: Appeal Dismissed

## **PERSONS IN ATTENDANCE**

The Appellant, Ms. A. G., did not attend the teleconference hearing. The Tribunal waited 15 minutes past the appointed time and then proceeded with deliberations. The Tribunal sent the Notice of Appeal to the Appellant on November 19, 2014 (GD1). The Appellant received and signed for, the Notice of Hearing, on December 19, 2014.

## **DECISION**

[1] The Tribunal finds that the severance the Appellant received constitutes earnings within the meaning of section 35(2) and that those earnings must be allocated, pursuant to section 36(9) from February 12, 2012 to March 11, 2012.

## **INTRODUCTION**

[2] An initial claim for Employment Insurance benefits was established effective February 5, 2012.

[3] The Respondent determined that money the Appellant received as severance pay constituted earnings according to subsection 35(2) of the *Regulations* (the Regulations). According to subsection 36(9), the Respondent allocated these earnings from February 12, 2012 to March 11, 2012.

[4] The Appellant appealed that decision to the Board of Referees. The Board of Referees dismissed the Appellant's appeal.

[5] The Appellant appealed this decision to the Social Security Tribunal's Appeal Division.

[6] On November 5, 2014, the Tribunal's Appeal division allowed the appeal and referred the matter to the General Division of the Social Security Tribunal.

## **FORM OF HEARING**

[7] The Tribunal decided to hold the hearing by way of teleconference for the reasons stated in the Notice of Hearing dated November 19, 2014.

## **ISSUE**

[8] An allocation of earnings pursuant to sections 35 and 36 of the Regulations.

## **THE LAW**

[9] Sections 35 and 36 of the Regulations discuss the determination of what constitutes earnings and how those earnings should be allocated for the purpose of Employment Insurance benefits. Sections 35(1), 35(2), 36(9) and 36(10) state as follows:

35(1) 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

“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.

35.(2) 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 section 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 of the Act, are the entire income of a claimant arising out of any employment, including

(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;

36.(9) Subject to subsections (10) and (11), all earnings paid or payable to a claimant by reason of a lay-off or separation from an employment shall, regardless of the nature of the earnings or 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.

36.(10) 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 nature of the subsequent earnings or the period in respect of which they are purported to be paid or payable, a revised allocation shall be made in accordance with subsection (9) on the basis of that total.

36.(11) 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.

[10] Subsection 13 of the Act states:

A claimant is not entitled to be paid benefits in a benefit period until, after the beginning of the benefit period, the claimant has served a two week waiting period that begins with a week of unemployment for which benefits would otherwise be payable.

[11] Subsections 19(1) & (2) of the Act:

(1) If a claimant has earnings during their waiting period, an amount not exceeding those earnings shall, as prescribed, be deducted from the benefits payable for the first three weeks for which benefits are otherwise payable.

(2) Subject to subsections (3) and (4), if the claimant has earnings during any other week of unemployment, there shall be deducted from benefits payable in that week the amount, if any, of the earnings that exceeds

(a) \$50, if the claimant's rate of weekly benefits is less than \$200; or

(b) 25% of the claimant's rate of weekly benefits, if that rate is \$200 or more.

[12] Subsection 43 of the Act:

A claimant is liable to repay an amount paid by the Commission to the claimant as benefits

(a) for any period for which the claimant is disqualified; or

(b) to which the claimant is not entitled.

[13] Subsection 44 of the Act:

A person who has received or obtained a benefit payment to which the person is disentitled, or a benefit payment in excess of the amount to which the person is entitled, shall without delay return the amount, the excess amount or the special warrant for payment of the amount, as the case may be.

[14] Subsection 52 of the Act:

(1) Notwithstanding section 120, but subject to subsection (5), the Commission may reconsider a claim for benefits within 36 months after the benefits have been paid or would have been payable.

(2) If the Commission decides that a person

(a) has received money by way of benefits for which the person was not qualified or to which the person was not entitled, or

(b) has not received money for which the person was qualified and to which the person was entitled, the Commission shall calculate the amount of the money and notify the claimant of its decision and the decision is subject to appeal under section 114.

(3) If the Commission decides that a person has received money by way of benefits for which the person was not qualified or to which the person was not entitled,

(a) the amount calculated is repayable under section 43; and

(b) the day that the Commission notifies the person of the amount is, for the purposes of subsection 47(3), the day on which the liability arises.

(4) If the Commission decides that a person was qualified and entitled to receive money by way of benefits, and the money was not paid, the amount calculated is payable to the claimant.

(5) If, in the opinion of the Commission, a false or misleading statement or representation has been made in connection with a claim, the Commission has 72 months within which to reconsider the claim.

## **EVIDENCE**

[15] An initial claim for Employment Insurance benefits was established effective February 5, 2012.

[16] The claimant's last day of work was February 6, 2012. After her separation from employment the Appellant was not issued separation money, although the record indicated that she was entitled to severance money. The Respondent contacted the employer who verified the Appellant was offered a severance package, but as of that time, the Appellant had not signed off on that agreement.

[17] Because there was no money paid upon separation, the Appellant was allowed to serve her waiting period in the weeks of February 5 to 18, 2012, following which she was paid regular Employment Insurance benefits at a rate of 485.00 per week.

[18] The employer then issued an amended record of employment. This record was identical to the original, except it now showed severance money of 4,844.31 paid to the Appellant.

[19] The Respondent determined that money the Appellant received as severance pay constituted earnings according to subsection 35(2) of the Regulations. According to subsection 36(9), the Respondent allocated these earnings from February 12, 2012 to March 11, 2012. This decision has resulted in an overpayment of 2187.00.

[20] In Exhibit GD2-84, the Respondent gives a detailed explanation of how the allocation was calculated.

[21] The Appellant's main argument is that the compensation she received should not be considered to constitute a "severance" within the general understanding of the term, but rather some form of compensation for what she had been made to endure at her place of employment.

[22] The Respondent stated that, in this case, there is no documentation to show that the money paid to the Appellant represents anything other than the "severance" as indicated by the employer.

## **SUBMISSIONS**

[23] The Appellant submitted that:

- a) The money she had received from her employer was compensation from an agreed settlement related to injustices she had suffered while employed.

[24] The Respondent submitted that:

- a) Sums received from an employer are presumed earnings and must therefore be allocated unless the amount falls within an exception in subsection 35(7) of the Regulations or does not arise from employment.
- b) The Appellant received 4,844.31 in severance money.
- c) The earnings paid to the Appellant by her employer by reason of the separation from employment must be allocated forward from the Appellant's last day worked pursuant to Regulation 36(9).

## **ANALYSIS**

[25] When a question arises as to whether certain amounts should result in, for example, repayment of benefits, two questions need to be asked:

- a) Are the amounts in question earnings and if so,
- b) To which weeks are the earnings to be allocated?



[26] Sections 35 and 36 of the Regulations discuss the determination of what constitutes earnings and how those earnings should be allocated for the purpose of Employment Insurance benefits.

[27] In the case at bar, the uncontested evidence indicates that the Appellant received money from her employer and this money was paid to the Appellant as severance pay. The Respondent maintains that this money constitutes earnings according subsection 35(2) of the Regulations because the payment was made to compensate the Appellant for her loss of employment. In accordance with Regulation 36(9) the Respondent allocated these earnings to the period from February 12, 2012 to March 11, 2012.

[28] The Appellant does not dispute that she received the payment. What she contests is that the payment is not severance but rather compensation that came from a settlement related to injustices she had suffered while employed.

[29] The Tribunal considered the Appellant's submission and the Respondent's statement that there is no documentation to show the money paid to the Appellant is anything other than "severance" as indicated by the employer.

[30] In this case the Tribunal prefers the submission of the Respondent. There is no evidence before the Tribunal to indicate or confirm that the money the Appellant received from her employer was a settlement to compensate her to injustices she had suffered. The Tribunal finds that the money the Appellant received was severance.

[31] In *Blais* 2011 FCA 320 the Court affirms a long line of case law that severance pay equals earnings. Paragraph 12 of this decision states that, "section 35 of the Regulations, identifies what constitutes earnings for benefit purposes. For this application, it is sufficient to know that the case law is consistent in stating that severance pay (CUB 178052, 17564, 13063, 20753) and vacation pay (*Scully v. Canada (Commission of Employment and Immigration)*, [1989] F.C.J. No. 965, 107 N.R. 142) are earnings that disentitle the claimant concerned from receiving benefits".

[32] In *Canada (AG) v. Tremblay*, A-106-96, the Federal Court of Appeal confirmed that it is the reason for the payment that determines the date to which it should be allocated.

[33] The Tribunal finds, given the evidence submitted, that the severance the Appellant received constitutes earnings within the meaning of section 35(2) and that those earnings must be allocated, pursuant to section 36(9) from February 12, 2012 to March 11, 2012.

## **CONCLUSION**

[34] The appeal is dismissed.

*Takis Pappas*

Member, General Division

DATED: January 31, 2015