[TRANSLATION]

Citation: *I. B. v. Canada Employment Insurance Commission*, 2015 SSTGDEI 187

Date: November 6, 2015

File number: GE-15-2079

GENERAL DIVISION – Employment Insurance Section

Between:

I. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

Decision by: Charline Bourque, Member, General Division – Employment Insurance Section

Hearing by teleconference on October 20, 2015

REASONS AND DECISION

PERSONS IN ATTENDANCE

The claimant, I. B., was present at the hearing by teleconference.

INTRODUCTION

[1] The Appellant filed a claim for employment insurance benefits effective July 6, 2014. On April 23, 2015, the Canada Employment Insurance Commission ("the Commission") informed the claimant that it had reviewed the new Record of Employment(s) received from BPR Inc. and that they did not alter the weekly benefit rate or the number of weeks of regular benefits to which the claimant was entitled pursuant to her claim effective July 6, 2014. The Commission stated that the claimant had received wages of $3,980 in lieu of notice and that that amount, before deductions, was considered income and would be allocated for benefit purposes to the period from July 6 to August 2, 2014. An amount of $467.00 would be allocated for benefit purposes to the week of August 3, 2014. The Commission added that the claimant had received $2,832.00 in vacation pay from that employer. That amount, before deductions, was considered income and would be allocated to the period from January 4 to 24, 2015. An amount of $22.00 would be allocated to the week of January 25, 2015. An overpayment of $2.277.00 was established.

[2] On June 16, 2015, in response to the claimant's request for reconsideration, the Commission informed her that the decision communicated on April 23, 2015 concerning her earnings–pay in lieu of notice had been replaced. An amount of $3,968.00 received as pay in lieu of notice would be allocated to the period from July 6 to August 2, 2014 and an amount of $282.00 would be allocated to the week of August 3, 2014. As a result of the change to that allocation, the overpayment was reduced by $185. The claimant appealed that decision to the Social Security Tribunal ("the Tribunal") on June 25, 2015.

[3] This appeal was heard by the teleconference form of hearing for the following reasons:

a) The complexity of the issue or issues;

b) The fact that credibility does not appear to be a determinative issue;

c) The fact that the Appellant will be the only party in attendance;

d) The information in the file, including the need for additional information;

e) This method of proceeding respects the requirement under the Social Security Tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

ISSUE

[4] Beginning with what date must the amounts received as severance pay be allocated under section 36 of the *Employment Insurance Regulations* ("the Regulations")?

THE LAW

[5] An "employment" is defined in paragraph 35(1)(*a*) of the Regulations as follows:

> *(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;

[6] Subsection 35(2) of the Regulations provides that the earnings to be taken into account are defined as "the entire income of a claimant arising out of any employment."

[7] Subsections 36(9) and (10) of the Regulations provide as follows:

> (9) 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.
>
> (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 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.

EVIDENCE

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

a) Record of Employment W33841752, issued July 7, 2014, indicates that the last day for which paid was July 7, 2014 due to a shortage of work/end of season or contract.

b) ROE W37080194 amending ROE W33841752, issued on January 12, 2015, indicates the last day for which paid was July 7, 2014 due to a lack of work/end of season or contract. The comments indicate a "Temporary lay-off July 7, 2014. Final lay-off January 5, 2015. Pay January 16, 2015 notice + vacation + banked hours." Vacation pay of $2,831.98 was paid. Wages in lieu of notice of $3968.40 and accumulated over time of $66.14 were also paid.

c) A letter from Tetra Tech dated January 5, 2015 stating, "Due to a shortage of work, we regret we must terminate your employment on January 5, 2015." The letter also indicates that group insurance coverage with Great-West Life was to terminate on January 5, 2015 (GD3-20/21).

[9] The evidence adduced at the hearing by the Appellant's testimony is as follows:

a) The claimant was temporarily laid off on July 7, 2014. The claimant indicated that she was permanently laid off on January 5, 2015. She said she continued to be part of her employer's group insurance plan until she was permanently laid off on January 5, 2015. She did not have a pension.

PARTIES' ARGUMENTS

[10] The Appellant made the following arguments:

a) On July 7, 2014, the claimant was temporarily laid off for a period of six months. She did not receive her vacation pay or severance pay because her employer had promised to call her back as soon as there was work. She received EI benefits from July 7 to October 21, 2014, on which date she started a contract with another employer. On January 5, 2015, her lay-off became permanent and her employer paid her vacation pay and four weeks' severance pay at that time;

b) The claimant said that she disputed the allocation of her severance pay to July 7, 2014, indicating that the allocation should have been made to when she received that pay on January 16, 2015.

c) She said it was absurd to claim an amount from her when she received the severance pay at a time when she was not receiving EI benefits.

[11] The Respondent argued as follows:

a) Amounts received from an employer are considered earnings and must therefore be allocated unless they fall within the exceptions set out in subsection 35(7) of the Regulations or do not arise out of employment;

b) 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. It is the reason for the payment, not its date, that determines when it must be allocated;

c) Relying on the facts in the file, the Commission determined that the amounts the claimant received in lieu of notice constituted earnings under subsection 35(2) of the Regulations. A payment was made to the claimant as a result of her lay-off on July 7, 2014. Consequently, in accordance with subsection 36(9), the amount paid in lieu of notice was allocated based on the claimant's usual weekly earnings starting July 6, 2014 (page GD3-14);

d) The first allocation (page GD3-14) was made considering her last week's salary at $245.55, as indicated in the ROE (page GD3-12). However, during the administrative review, the officer discovered that her last week's salary had in fact been $62.00

because the amount indicated in the ROE was for the period from June 27 to July 7, 2014. The correction was made and the claimant was informed of the new allocation establishing a reduction in her overpayment (page GD3-28);

e) Consequently, the Commission confirmed that the allocation of the pay in lieu of notice was allocated to the correct period, from July 6 to August 9, 2014, because it had been paid as a result of her work stoppage on July 7, 2014.

ANALYSIS

[12] Subsection 35(2) of the Regulations provides that income arising from any employment, whether wages, benefits or other remuneration, must be taken into account unless it falls within one of the exceptions set forth in subsection 35(7) of the Regulations.

[13] In *McLaughlin*, the Federal Court of Appeal stated the principle that "the entire income of a claimant arising out of any employment" is to be taken into account in calculating the amount to be deducted from benefits (*McLaughlin v. Canada (Attorney General)*, 2009 FCA 365).

[14] The Federal Court of Appeal also confirmed the principle that any sums that constitute earnings under section 35 of the Regulations must be allocated under section 36 of the Regulations (*Boone et al v. Canada (Attorney General)*, 2002 FCA 257).

[15] The claimant does not dispute that she received earnings as severance pay from her employer. She disputes the date to which the allocation of the earnings was made. Consequently, the Tribunal is satisfied that, as the nature of the amounts is not at issue and that those amounts were severance pay received upon a permanent lay-off, they constitute earnings within the meaning of section 35 of the Regulations. The Tribunal must therefore determine whether and when those earnings must be allocated.

[16] Subsection 36(9) provides 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.

[17] The Tribunal notes that the ROE issued on July 7, 2014 indicates that the last day of work was July 7, 2014. The amended ROE issued on January 12, 2015 then states that the lay-off on July 7, 2014 was temporary whereas that of January 5, 2015 was permanent (GD3-13).

[18] The Tribunal also notes that the letter from the employer dated January 5, 2015 confirms that the employment was terminated that same day. It further indicates that the claimant would be paid for four weeks in lieu of notice. Lastly, the letter states that group insurance coverage would end at midnight on January 5, 2015 (GD3-20/21).

[19] The Tribunal takes into consideration that the claimant said she was still covered by the group insurance plan following her temporary lay-off from July 2014 to January 2015.

[20] The Tribunal also takes into consideration that the Commission determined that a "payment was made to the claimant as a result of her work stoppage on July 7, 2014. In accordance with subsection 36(9), the pay in lieu of notice was allocated based on the claimant's usual weekly earnings starting July 6, 2014." (GD4-3)

[21] In *Savarie*, the Federal Court of Appeal held as follows:

> In my opinion, a payment is made "by reason of" the separation from employment within the meaning of this provision when it becomes due and payable at the time of termination of employment, when it is, so to speak, "triggered" by the expiration of the period of employment, when the obligation it is intended to fulfil was simply a potentiality throughout the duration of the employment, designed to crystallize, becoming liquid and payable, when, and only when, the employment ended. The idea is to cover any part of the earnings that becomes due and payable at the time of termination of the contract of employment and the commencement of unemployment. For if an employee's savings, the monies that are already his, should not bar him from receiving benefits under the Unemployment Insurance Act, in return it would seem but normal that the earnings to which he is entitled at the time of his departure should be taken into consideration before he is eligible to receive those benefits. Accordingly, my construction of the expression "by reason of", like that of many umpires, corresponds to the manifest intention of Parliament and is consistent with the *Kinkead* decision, which the umpire claims to rely on but at the cost of altering its meaning. (*Canada (Attorney General) v. Savarie*, FCA, A-704-95)

[22] Furthermore, CUB 73115 states:

> That reasoning is equally applicable to the case at bar. The claimant received the monies in question as a result of her final separation from employment in September of 2008 and, in accordance with Regulation 36(9), all of the monies should have been allocated to the weeks following that separation. The monies are not in any way connected with the claimant's temporary lay-off in July of 2008 and no portion of them therefore, should be retroactively allocated to the weeks following that lay-off. There is no legislative mandate for allocating monies paid upon separation to a period following a prior lay-off.

[23] Considering the evidence and the arguments presented by the parties, the Tribunal is of the view that the claimant's employment relationship with her employer was not severed until January 5, 2015. The claimant was still covered by the group insurance plan and believed that she would be called back to work. The employer notified the claimant by letter of her permanent lay-off on that date. The Tribunal is of the view that the amounts owed to the claimant, whether it be a vacation pay or her severance pay, did not become payable until that final termination of employment. Following the temporary lay-off, the employer did not contemplate paying those amounts to the claimant as it intended to call its employee back to work.

[24] The Tribunal is thus of the view that the Commission erred in distinguishing the amounts received as severance from those received as vacation pay. The two amounts were paid as a result of the claimant's dismissal and must therefore be allocated under subsection 36(9) of the Regulations over a number of weeks starting with the week of the dismissal or separation from employment such that the total earnings received by her from that employment in each consecutive week, except for the last, are equal to her usual weekly earnings from that employment.

[25] The Tribunal is of the view that this dismissal occurred on January 5, 2015 since those amounts were neither owed or payable before that date as the employer anticipated a return to work.

CONCLUSION

[26] Thus, considering the evidence and the arguments presented by the parties, the Tribunal is of the view that, in accordance with subsection 36(9) of the Regulations, the earnings must be allocated starting on January 4, 2015, the week of the dismissal.

[27] The appeal is allowed.

Charline Bourque
Member, General Division — Employment Insurance Section