Citation: ***J. A. M. v. Canada Employment Insurance Commission*****, 2015 SSTAD 1437**

Date: December 14, 2015

File number: AD-13-777

APPEAL DIVISION

Between:

J. A. M.

Appellant

and

Canada Employment Insurance Commission

Respondent

Decision by: Shu-Tai Cheng, Member, Appeal Division

Heard by Videoconference on September 9, 2015

REASONS AND DECISION

PERSONS IN ATTENDANCE

Appellant	J. A. M.
Representative for the Appellant	Ulf Kristiansen
Representative for the Respondent	Louise Laviolette

INTRODUCTION

[1] On February 13, 2013, the Board of Referees (Board) dismissed the claimant's appeal on an allocation of earnings pursuant to the *Employment Insurance Regulations* (Regulations). The claimant had received an amount from the wind up of a health and welfare plan (HWP). The Canada Employment Insurance Commission (Commission) had determined that this amount was a retiring allowance and constituted earnings, while the claimant asserted that this amount did not constitute earnings.

[2] An application for leave to appeal the Board decision was filed with the Appeal Division of the Tribunal on May 7, 2013 and leave to appeal was granted on May 13, 2015.

[3] This appeal proceeded by videoconference for the following reasons:

a) The complexity of the issue(s) under appeal;

b) The fact that the appellant or other parties are represented;

c) The availability of videoconference in the area where the appellant resides; and

d) The requirements under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

[4] The Appellant is one of seven claimants whose appeals were heard together on September 9, 2015.

ISSUE

[5] The Appeal Division of the Tribunal must decide whether it should dismiss the appeal, give the decision that the Board should have given, refer the case to the General Division for reconsideration or confirm, rescind or vary the decision of the Board.

[6] The parties agree that the question to be answered is: Whether the amount received by the Appellant from the wind up of the HWP constitutes earnings under the Regulations.

THE LAW

[7] According to subsection 58(1) of the *Department of Employment and Social Development Act* (DESD Act) the only grounds of appeal are that:

a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or

c) the General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

[8] For our purposes, the decision of the Board is considered to be a decision of the General Division.

[9] Leave to appeal was granted on the basis that the Appellant had set out reasons which fall into the enumerated grounds of appeal and that at least one of the reasons had a reasonable chance of success, specifically, under paragraphs 58(1)(b) and (c) of the DESD Act.

[10] Section 59(1) of the DESD Act sets out the powers of the Appeal Division.

[11] The relevant portions of section 35 of the Regulations are (emphasis mine):

DETERMINATION OF EARNINGS FOR BENEFIT PURPOSES

35 (1) The definitions in this subsection apply in this section.

"employment"

"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"

"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*)

"pension"

"pension" means a retirement pension

(a) arising out of employment or out of service in any armed forces or in a police force;

(b) under the Canada Pension Plan; or

(c) under a provincial pension plan. (pension)

"self-employed person"

"self-employed person" has the same meaning as in subsection 30(5). (*travailleur indépendant*)

(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), 152.03(3) or 152.04(4) or section 152.18 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;

(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 of a child or children referred to in subsection 23(1) or 152.05(1) of the Act,

(iv) a leave plan providing payment in respect of the care or support of a family member referred to in subsection 23.1(2) or 152.06(1) of the Act, or

(v) a leave plan providing payment in respect of the care or support of a critically ill child;

…

(7) 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

(i) in the case of a self-employed person, the moneys became payable before the beginning of the period referred to in section 152.08 of the Act, and

(ii) in the case of other claimants, 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*.

(8) For the purposes of paragraphs (2)(*c*) and (7)(*b*), a sickness or disability wage-loss indemnity plan is not a group plan if it is a plan that

(a) is not related to a group of persons who are all employed by the same employer;

(b) is not financed in whole or in part by an employer;

(c) is voluntarily purchased by the person participating in the plan;

(d) is completely portable;

(e) provides constant benefits while permitting deductions for income from other sources, where applicable; and

(f) has rates of premium that do not depend on the experience of a group referred to in paragraph (*a*).

SUBMISSIONS

[12] The Appellant submitted that the Board erred in law and erred in fact and law in that:

a) It improperly characterized the monies paid out to the employees from the HWP after the closure of their employer JS McMillan Fisheries ("fish plant" or "plant");

b) These monies constituted the employees returning money to themselves;

c) It was not a payment under a wage-loss indemnity plan, as described in subsections 35(7) and (8) of the Regulations;

d) These monies did not constitute earnings, as the Board concluded; and

e) The receipt of this sum should not have resulted in disentitlement and an overpayment.

[13] The Appellant did not make submissions on the applicable standard of review. The Respondent submitted that the applicable standard of review for questions of law is correctness and the applicable standard of review for mixed questions of fact and law is reasonableness.

[14] The Respondent also submitted that:

a) The only issue is whether these monies constitute earnings under section 35 of the Regulations; and

b) It maintains that these monies constitute earnings.

[15] More particularly, the Respondent argued that the sum received from the HWP was income received from "any other person" under subsection 35(1) of the Regulations. In addition, the Respondent submitted that it was a payment under a group sickness or disability wage-loss indemnity plan pursuant to subsection 35(2)(c) of the Regulations, which did not fall within the exception provided for in subsections 35(7) and (8) of the Regulations.

[16] There is no dispute on the actual amount of the sum received by the Appellant. There is also no dispute on where the sum was paid from (the HWP), when it was paid, or the creation and wind up of the HWP.

STANDARD OF REVIEW

[17] As previously determined by the Federal Court of Appeal in *Canada (AG) v. Jewett*, 2013 FCA 243, *Chaulk v. Canada (AG)*, 2012 FCA 190 and other cases, the standard of review for questions of law and jurisdiction in employment insurance appeals, from decisions of the Board of Referees, is that of correctness, while the standard of review for questions of fact and mixed fact and law is reasonableness.

[18] The applicable standard of review will depend upon the nature of the alleged errors involved. Here errors of law and errors of mixed fact and law are alleged.

ANALYSIS

[19] The Board's decision, on page 4, notes that the Appellant's Representative "agreed that the monies the claimant received from the Health and Welfare Plan should be allocated as earnings." On this basis, the Board found that the Appellant did receive monies that should be allocated as earnings and a disentitlement should apply pursuant to subsections 35 and 36 of the

Regulations. The Board requested that the Commission review the overpayment calculation and fully explain its findings to the claimant along with the start date of the benefit period.

[20] The Appellant takes the position that the concession by her previous representative (that the monies received constituted earnings) was wrong in law and that she should not be held to it. Further, because the Board based its decision on this concession, its finding that these monies constitute earnings is not correct and should be set aside.

[21] The Respondent does not hold the Appellant to the concession of her former representative and agrees that the Appeal Division should determine the issue, namely, whether the sum received constitutes earnings under section 35 of the Regulations.

[22] While the Board cited jurisprudence for the proposition that an amount received by a claimant because of separation from employment constitutes earnings under subsection 35(2) of the Regulations that must be allocated as of the separation from employment under subsection 36(9) of the Regulations, the cases cited related to vacation pay and severance pay which are distinguishable from the situation of the HWP.

[23] For the foregoing reasons, I find that the Board erred in law.

[24] Therefore, the Appeal Division is required, under the correctness standard, to make its own analysis and decide whether it should dismiss the appeal, give the decision that the Board should have given, refer the case to the General Division, confirm, reverse or modify the decision.

Background on the HWP

[25] The history and structure of the HWP are not in dispute. It was set up many decades ago, as a trust, by the employees of the predecessor to JS McMillan Fisheries and predates public social security plans that paid sickness benefits to workers. After sickness benefits became available under the employment insurance (EI) system, the HWP was drawn upon in the event that EI sickness benefits could not be claimed by a particular employee. The fund was administered by the employees' union, under the terms of the trust. Only employees contributed to the fund. They paid a certain amount from their after tax salary each month and the employer

transferred that sum directly from the employee's salary to the HWP account. The employer did not contribute to the HWP nor did the employees' union or any other person (individual or collective). Employees who left the company were not paid from the HWP on ceasing their employment. The number of employees participating in the fund varied, from a high of over 600 to about 200 at the time of the plant closure in October 2011. The HWP made investment (interest) money, and its value exceeded the total of the amounts paid to employees over the years.

[26] After the fish plant was closed in 2011, there was a sum of money in the HWP and a decision needed to be made on how to wind up the fund and what to do with the money. The HWP was no longer needed for the purposes specified in the trust and could not fulfill its purposes, since the plant had closed. The reason for the HWP no longer existed, there was no work at the fish plant, and there was no successor employer or workplace. The employees at the time of the closure agreed that the HWP would be wound up and the money remaining in it would be distributed to those working at the plant at the time of closure.

[27] The pay-out to employees of the plant at the time of closure was based on how much and for how long each of them had paid into the HWP, and not related to sickness or injury of the individual employee. In essence, the employees were refunded money that they had previously paid into the HWP. However, the employees did not receive exactly the same amount that they had each contributed to the fund over time. Some employees received more money than they had contributed. Former employees, who were not working at the plant when it closed, did not receive any money.

Characterization of the HWP

[28] The Appellant's Representative made an analogy to a group of people working at the same place deciding to put money in a joint bank account and agreeing to the conditions under which the money could be accessed, such as only in the event of sickness or injury which was not covered by EI. If they decided to wind up the account and agreed on how to do it (on a basis other than exactly what each person had contributed), the amount each received would not be considered earnings for EI purposes. Therefore, argues the Appellant, what she received from the HWP should not be considered earnings.

[29] The Respondent notes that there are differences between the Appellant's analogy and the HWP, including:

a) The people who contributed to the fund were not the same as the people who received money from the closing balance when the fund was wound up;

b) Some workers received more money than they contributed to the fund; and

c) Only the workers at the time of the plant closure were paid from it.

[30] The Respondent also notes that if an employee had received money from the HWP for reasons of sickness or injury when the plant was in operation, the amount received would have been considered earnings for EI purposes. According to the Respondent, such a payment from the HWP would not have come within the exception described in subsections 35(7) and (8) of the Regulations (of not being a group plan). The Appellant's Representative did not disagree as it related to money paid from the HWP while the plant was in operation; but answered that because the plant had ceased operations and the employees were not being paid money for sickness or injury that prevented them from working, the situation was different from income indemnity and the monies received were not received under a group wage-loss indemnity plan.

[31] The parties agree that had the monies been paid while the plant was in operation, those monies would have been a payment received under a group wage-loss indemnity plan. They differ on whether the payment made on winding up the HWP was a payment received under a group wage-loss indemnity plan.

[32] I find that this distinction (between a payment received from the HWP while the plant was in operation and a payment received on the winding up of the HWP) is a fundamental one.

[33] The Respondent argued that because the money received was from the HWP and if received while the plant was in operation it would have been considered earnings, therefore the sum received from the HWP on winding up of the fund should also be considered earnings. I do not agree with this line of reasoning, as it skips the first issue which is to determine whether the sum received is "income" and "earnings" pursuant to section 35 of the Regulations.

Income and Earnings

[34] The earnings to be taken into account are the entire income of the claimant arising out of any employment: subsection 35(2) of the Regulations.

[35] In *Canada (A.G.) v. Vernon* (1995), 189 N.R. 308 (FCA), the Federal Court of Appeal noted that the definition of earnings in the Regulation is very general, simply saying that it comprises the entire income of a claimant arising out of employment. Income, in turn, is defined as any pecuniary or non-pecuniary receipt from an employer or any other person. Given the generality of the wording, the specific meaning of earnings must be derived from case law.

[36] In *Coté v. Canada Employment and Immigration Commission et al.* (1986), 69 N.R. 126 (FCA), Pratte J.A. found that the word "earning" refers only to what is earned by labour and suggested that a receipt (a pension in that case) which resembles earnings in some respects may be considered "earnings", if there is a "sufficient connection between the work done by an employee in employment and the pension arising out of that employment". Therefore, a receipt must evince the character of consideration given in return for work done by the recipient. Marceau J.A. used a similar test in *Coté* and suggested that "earnings in the broad sense are everything the worker derives in the form of pecuniary benefits from his work present or past."

[37] Linden J.A. in *Vernon*, drawing from Pratte J.A. and Marceau J.A. in *Coté*, concluded that to be earnings, the receipt must be as a result of work done by the claimant and not merely as a consequence of one's employment status. He then asked the following question: "Is the …. subsidy in question here a receipt arising out of work done by the employees, and does it bear sufficient connection to that work to be properly found to be consideration for the work so performed?

[38] In *Canada (A.G.) v. Roch*, 2004 FCA 356, some employees of a dairy plant received money during a reorganization of the dairy plant at which they were employed. The plant had to reorganize and discontinue the production of some products. In order to minimize the negative impact of this, the employer implemented a downsizing program and obtained financial assistance from the provincial government (Emploi-Quebec program) as part of a work reduction and distribution program (called ARRT). The AART resulted from a memorandum of agreement between Emploi-Quebec, the employer and the employees' union. It made voluntary

separation more attractive by offering the employees who chose to end their employment additional earnings (of $12 000) over a 36-month period. The Commission treated this receipt as earnings while the claimant maintained that it was not earnings because the money did not come from his employer. The Federal Court of Appeal examined the rationale for the reorganization and the terms of the AART to determine whether the receipt constituted earnings. It found at paragraph 45:

> As stated previously, earnings include any receipt or consideration received for the work done. If, as a result of variable market conditions, a worker receives a sum of money on condition that he give up his work or that he surrender his hours of work to another employee, the amount that he receives has the effect of compensating for his diminished earnings. The amount received represents, to a certain extent, compensation for his undertaking not to work. It also mitigates the situation in which workers find themselves when they are no longer receiving a salary. This sum becomes consideration for not working. It does not necessarily correspond to the same amount as the salary, but it makes up for its absence. At the same time, this amount is one of the conditions of termination of employment because it is an incentive to put an end to the employment. It is closely connected to the employment and has all of the characteristics of earnings even if, in a sense, it is not earnings within the traditional meaning because there is no work done in consideration of the amount received. There is no reason why the notion of earnings cannot be adapted to labour market conditions if it is determined that a sum received, even from a third party, is comparable to consideration for freeing up a position.

The Federal Court of Appeal distinguished a number of cases referred to by the parties where the receipt was vacation pay, part of a severance pay, an amount paid as waiver of the right to resume a former position, or a settlement for wrongful dismissal. It concluded that the AART constituted earnings.

[39] From the Federal Court of Appeal cases mentioned immediately above, I draw the following principles:

a) a sum received which resembles earnings in some respects may be considered "earnings", if it bears sufficient connection to that work to be properly found to be consideration for the work so performed;

b) the sum received must be as a result of work done by the claimant and not merely as a consequence of one's employment status; and

c) a sum received, even from a third party, can be comparable to consideration for freeing up a position.

[40] In the present situation, the sum received was a consequence of the Appellant's employment status, in that the closing balance of the HWP was paid out among the employees of the plant at the time of its closure. However, it is not sufficient for the receipt to be merely as a consequence of one's employment status. It must have the characteristics of consideration for work performed. The sum received, however, was not a result of work done or consideration for freeing up a position. The sum received was a result of employees (and only employees) placing their money in a trust fund which they wound up after the purpose of the trust no longer existed.

[41] The Respondent referred to the following cases in which the sum received by a claimant from a third party was found to bear a sufficient connection to the work done by the employee to be consideration: *Roch*, CUB 77513 and *Canada (A.G.) v. Walford*, [1979] 1 F.C. 768 (FCA).

[42] *Roch* is distinguishable because the sum received, from a third party, was comparable to consideration for freeing up a position. *Walford* is distinguishable because the claimant had sued for wrongful dismissal and the sum received resulted from damages for his loss of income due to his wrongful dismissal.

[43] CUB 77513, being a decision of the Office of the Umpire, is not binding on the Appeal Division of the Tribunal. In addition, the sum received was pursuant to an agreement between the Government of Alberta and the Alberta Teachers' Association in the context of province-wide labour dispute involving teachers employed in 62 school boards. Each teacher included in the collective agreement and employed with one of the school boards had received a lump-sum payment funded by the government, as consideration for labour peace and settlement of an outstanding pension issue. The Umpire found that the lump sum payment was a signing bonus for the collective agreement and, therefore, income paid in connection with the employment of the claimant with the school board. CUB 77513 is clearly distinguishable from the facts in this case.

[44] It should also be noted that the definition of income requires that the sum received be received by a claimant "from an employer or any other person". The sum received was not from the employer. The Appellant argued that the sum received was not from "any other person" as it

was the money of the employees, which they paid to themselves. As such, the amount received from the HWP does not fall within the definition of income. The Respondent argued that the amount received was from "any other person" as it came from a trust fund which is not the same legal person as the Appellant.

[45] Given my finding that the sum received does not bear a sufficient connection to the work done by the employee to be consideration and, therefore, does not constitute earnings, it is unnecessary for me to pronounce on this point.

[46] For the same reason, the Respondent's argument that the sum received by the Appellant was earnings from a group wage-loss indemnity plan is also unnecessary for me to consider. In *obiter dictum*, I make the following brief observations about wage-loss indemnity plans. In *Robinson v. Canada (A.G.)* (June 17, 1987), Doc. No. A-589-86 (FCA), the Federal Court of Appeal found that:

> [The EI Act] sets up a scheme of insurance against the loss of earnings arising from employment. In determining the entitlement to benefit, therefore, it does not take into consideration income received by a claimant from sources other than employment. Insofar as group insurance plans are normally linked with employment … it is normal to consider that payments received under those plans arise, albeit indirectly, from the claimant's employment. The same cannot be said of the payments received under private insurance plans.

Hence, the exemption of any wage-loss indemnity plan that is not a group plan: subsections 35(8) and (9) of the Regulations. The elements of a wage-loss indemnity plan have been discussed in Federal Court of Appeal and CUB decisions: Examples are *Canada (A.G.) v. Burt* (March 4, 1986), Doc. No. A-464-85 (FCA) and CUBs 16327, 14629 and 14625. They need not be discussed further here, given my finding that the sum received by the Appellant did not constitute earnings.

CONCLUSION

[47] Considering the submissions of the parties made during the videoconference hearing, my review of the Board's decision and the appeal file, the law and the jurisprudence, I allow the appeal. Further, because this matter does not require new evidence or a hearing before the General Division, I am giving the decision that the Board should have given.

[48] The appeal is allowed and the disentitlement and overpayment imposed by the Commission are removed.

Shu-Tai Cheng
Member, Appeal Division