



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

[TRANSLATION]

Citation: *Canada Employment Insurance Commission v. A. A.*, 2016 SSTADEI 35

Date: January 25, 2016

File number: AD-15-603

APPEAL DIVISION

Between:

Canada Employment Insurance Commission

Applicant

and

A. A.

Respondent

and

ACE Aviation Holdings Inc.

Added Party

and

Aveos Fleet Performance Inc.

Added Party

Decision by: Pierre Lafontaine, Member, Appeal Division

REASONS AND DECISION

DECISION

[1] The Tribunal grants leave to appeal before the Appeal Division of the Social Security Tribunal.

INTRODUCTION

[2] On June 15, 2015, the Tribunal's General Division determined the following:

- The amount received from Air Canada constitutes earnings under section 35 of the *Employment Insurance Regulations* (Regulations) and must be allocated in accordance with paragraph 36(19)(b) of the Regulations, as of March 20, 2012, and up to this week.

[3] The Applicant filed an application for leave to appeal to the Appeal Division on July 14, 2015.

ISSUE

[4] The Tribunal must determine whether the appeal has a reasonable chance of success.

THE LAW

[5] As stated in subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act*, “[a]n appeal to the Appeal Division may only be brought if leave to appeal is granted” and the Appeal Division “must either grant or refuse leave to appeal”.

[6] Subsection 58(2) of the *Department of Employment and Social Development Act* states that “[l]eave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success”.

ANALYSIS

[7] Given the Tribunal's obligation to conduct proceedings as informally and quickly as circumstances, fairness, and natural justice permit, obligation prescribed by subsection 3.(1)

of the *Social Security Tribunal Regulations*, the present decision will also apply to the files listed in the Appendix to this decision since they essentially raise the same questions of fact and law.

[8] Under subsection 58(1) of the *Department of Employment and Social Development Act*, the following are the only grounds of appeal:

- (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 or order, whether or not the error appears on the face of the record; or
- (c) The General Division based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

[9] An application for leave to appeal is a preliminary step to a hearing on the merits. It is a first hurdle for the Applicant to meet, but it is lower than the one that must be met on the hearing of the appeal on the merits. At the application for leave to appeal stage, the Applicant does not have to prove their case.

[10] The Tribunal will grant leave to appeal if it is satisfied that any of the above grounds of appeal has a reasonable chance of success.

[11] This means that the Tribunal must be in a position to determine, in accordance with subsection 58(1) of the *Department of Employment and Social Development Act*, whether there is a question of law, fact, or jurisdiction to which the response might justify setting aside the decision under review.

[12] In light of the foregoing, does the Applicant's appeal have a reasonable chance of success?

[13] In its application for leave to appeal, the Applicant submits the following:

- It has been well-established that severance or termination pay constitute earnings resulting from employment and that these earnings should be allocated under subsection 36(9) of the Regulations.
- In *Brulotte*, the Federal Court of Appeal cited its decision in *Lemay* to support its position that a payment made under subsection 36(9) of the Regulations covers “...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”.
- The General Division erred in stating the test for the application of subsection 36(9) of the Regulations as “...why the amounts were paid, by whom they were paid, and by virtue of what employment”. In so doing, the General Division erroneously introduced a criterion for the application of subsection 36(9) that is absent from that provision, namely the source of the earnings.
- Earnings were allocated based on legal precedents pursuant to subsection 58(9) of the Regulations (section preceding subsection 36(9)), whereas they came from a source other than the employer who terminated the employment.
- The General Division's interpretation of subsection 36(9) conflicts with the objective of the *Employment Insurance Act* (Act) to avoid double compensation and the Regulation's objective to allocate earnings in a consecutive manner.
- The General Division's interpretation is also at odds with sections 35 and 36 of the Regulations, particularly the objective of subsection 36(9) to allocate earnings paid by reason of a separation of employment beginning on the week of lay-off or termination in a consecutive manner.
- Having a successor employer does not preclude the application of subsection 36(9), which, it bears repeating, emphasizes the reason for which the earnings are paid or payable—not other criteria such as the source of the earnings or the number of employers.

- The obligation to include earnings paid by a previous employer flows from the Act. The definition of the term "employer" in section 2 of the Act includes "a person who has been an employer". In addition, the term "employment" is defined as "the act of employing or the state of being employed". In the case of a specific employment, "employer" thus includes a current employer as well as previous employers for the same employment. This obligation is obvious given the definitions of "income" and "employment" in subsection 35(1) of the Regulations.
- Subsection 35(2) of the Regulations provides that the earnings that must be taken into account when deducting benefits payable under section 19 of the Act consist of the claimant's entire income arising out of any employment.
- Despite the broad definition of "income", the General Division seems to have limited the meaning of this term to only those situations in which an amount is paid from the assets of the employer who terminated the claimant's employment.
- The definitions of "income" and "employment" in the Regulations are broad enough to include the separation payments paid by Air Canada to employees following the end of employment with Aveos, which by the terms of the CIRB Order 9996-U and other evidence on file, was an amalgam of the employment with Air Canada and Aveos.
- The General Division seems to reject the application of subsection 36(9) partly due to a lack of "temporal connectivity" between the employees' termination of employment and the severance payment made by Air Canada nine months later.
- This approach is inconsistent with the General Division's finding that the timing of the payment was not relevant. The General Division later introduced a criterion that is explicitly excluded from subsection 36(9), namely the period for which earnings are purported to be paid or payable.
- The General Division erred in not applying subsection 36(9) despite its finding of fact that the separation payments paid by Air Canada were paid following the

termination of employment and that one of the conditions for payment of the amount in question was the “loss of former employment”.

- The Federal Court of Appeal jurisprudence is well established and clear that subsection 36(9) of the Regulations emphasizes the reason for which the earnings were paid. Once it is determined that earnings were paid by reason of a lay-off or separation from employment, the earnings must be allocated pursuant to subsection 36(9) to a number of consecutive weeks beginning with the week of the lay-off or separation from employment.
- The General Division erred in concluding that there was no continuity between the employment with Air Canada and Aveos, the successor employer. This finding of fact is not justified given the relevant and probative evidence on file.
- The General Division also made an error of fact without regard for the evidence before it when it concluded that Air Canada paid the separation payments as a former employer to its former employees.
- The evidence on file rather supports a conclusion that the employees were not entitled to severance pay by reason only of their transfer from Air Canada to Aveos and that it was Aveos’ insolvency and the termination of employment in March 2012 that triggered the separation payments.

[14] The Tribunal finds that the issue between the parties stems from the interpretation of section 35 and subsections 36(9) and 36(19) of the Regulations.

[15] Between 2007 and 2011, Air Canada sold a portion of its heavy maintenance operations to an entity that would eventually become Aveos. In 2012, Aveos shut its doors, and following an order from the Canada Industrial Relations Board (CIRB) and a decision by Umpire Martin Teplitsky, Air Canada eventually paid a sum to its former employees who had lost their jobs at Aveos.

[16] The Applicant submitted to the General Division that the Respondents had received earnings within the meaning of section 35 of the Regulations and that the severance pay

from Air Canada should be allocated in the manner stated in subsection 36(9) of the Regulations.

[17] According to the Applicant, the evidence before the General Division seems to show that the severance pay represents severance packages paid following lay-off or termination from Aveos in March 2012. Therefore, the severance pay should be allocated in the manner prescribed in subsection 36(9) of the Regulations, beginning on the week of lay-off or termination from Aveos in March 2012.

[18] The General Division found that the severance pay should not have been allocated consecutively beginning on the week that employment with Aveos was terminated under subsection 36(9) of the Regulations, but rather, should be allocated to the week in which the transaction occurred, pursuant to paragraph 36(19)(b) of the Regulations.

[19] As far as the General Division is concerned, the application of subsection 36(9) of the Regulations depends not only on earnings paid as a result of a lay-off or termination of employment, but also on the payment being made for the separation from the lost employment, not only for a payment by a former employer, even if the loss of employment constitutes one of the conditions for receiving the payment in question from the former employer.

[20] The Applicant essentially pleads that the General Division erred in fact and in law given that the Federal Court of Appeal has already established that severance or termination pay constitutes earnings resulting from employment and that these earnings should be allocated under subsection 36(9) of the Regulations. To support its position, the Applicant invokes *Lemay v. Canada (Attorney General)*, 2005 FCA 433, *Staikos v. Canada (Attorney General)*, 2014 FCA 31, *Canada (Attorney General) v. Savarie*, A-704-95 (FCA).

[21] The Applicant submits that in *Brulotte v. Canada (Attorney General)*, 2009 FCA 149, the Federal Court of Appeal cited its decision in *Lemay* as authority that a payment made under subsection 36(9) of the Regulations covers "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".

[22] The Applicant further submits that the General Division erred in not applying subsection 36(9) of the Regulations and the above-mentioned Federal Court of Appeal case law despite its finding of fact that the separation payments paid by Air Canada were paid following a loss of employment at Aveos.

[23] Upon review of the appeal file, the General Division's decision, and the arguments in support of the application for leave to appeal, the Tribunal finds that the appeal has a reasonable chance of success. The General Division's interpretation and application of sections 35 and 36 of the Regulations raise several questions of fact and law, the answer to which may lead to the setting aside of the decision under review.

CONCLUSION

[24] The Tribunal grants leave to appeal before the Appeal Division of the Social Security Tribunal.

Pierre Lafontaine
Member, Appeal Division

APPENDIX - CEIC Appeals of Represented Claimants Files

File Name	Appeal Division File	General Division File
A. A.	AD-15-603	GE-13-1289
C. A.	AD-15-604	GE-13-1282
J. B.	AD-15-791	GE-13-1281
P. B.	AD-15-606	GE-13-1287
S. A.	AD-15-608	GE-13-1279
R. B.	AD-15-609	GE-13-1332
Y. B.	AD-15-611	GE-13-1278
S. B.	AD-15-612	GE-13-1300
A. B.	AD-15-613	GE-13-1227
A. B.	AD-15-615	GE-13-1194
M. B.	AD-15-616	GE-13-1215
P. B.	AD-15-617	GE-13-1196
G. B.	AD-15-618	GE-13-1297
E. B.	AD-15-619	GE-13-1298
S. B.	AD-15-620	GE-13-1548
S. B.	AD-15-621	GE-13-1482
A. B.	AD-15-792	GE-13-1294
F. C.	AD-15-796	GE-15-1336
R. C.	AD-15-800	GE-15-1335
G. C.	AD-15-622	GE-13-1550
M. C.	AD-15-624	GE-13-1470
P. C.	AD-15-625	GE-13-1474
R. C.	AD-15-636	GE-13-1466
J. C.	AD-15-637	GE-13-1310
E. C.	AD-15-640	GE-13-1456
J. C.	AD-15-641	GE-13-1450
A. C.	AD-15-644	GE-13-1408
S. C.	AD-15-654	GE-13-1220
B. C.	AD-15-647	GE-13-1448
M. C.	AD-15-656	GE-13-1228
N. C.	AD-15-658	GE-13-1308
M. S.	AD-15-661	GE-13-1320
A. D.	AD-15-663	GE-13-1231
C. D.	AD-15-665	GE-13-1530
B. D.	AD-15-668	GE-13-1230
Y. D.	AD-15-742	GE-13-1305
L. D.	AD-15-743	GE-13-1426

File Name	Appeal Division File	General Division File
M. D.	AD-15-744	GE-13-1532
R. D.	AD-15-745	GE-13-1286
G. D.	AD-15-746	GE-13-1284
L. D.	AD-15-747	GE-13-1283
J. D.	AD-15-749	GE-13-1564
S. D.	AD-15-750	GE-13-1558
M. H.	AD-15-752	GE-13-1253
M. E.	AD-15-803	GE-13-1280
G. F.	AD-15-682	GE-13-1434
Y. F.	AD-15-758	GE-13-1269
M. F.	AD-15-762	GE-13-1435
F. G.	AD-15-765	GE-13-1307
L. G.	AD-15-824	GE-13-1268
L. G.	AD-15-771	GE-13-1275
S. G.	AD-15-774	GE-13-1274
M. G.	AD-15-776	GE-13-1273
S. G.	AD-15-779	GE-13-1272
M. G.	AD-15-793	GE-13-1252
M. G.	AD-15-795	GE-13-1254
C. G.	AD-15-798	GE-13-1255
B. G.	AD-15-802	GE-13-1262
S. G.	AD-15-814	GE-13-1256
J. G.	AD-15-805	GE-13-1264
S. G.	AD-15-815	GE-13-1257
P. G.	AD-15-809	GE-13-1265
J. G.	AD-15-817	GE-13-1266
C. G.	AD-15-660	GE-13-1258
N. G.	AD-15-822	GE-13-1259
S. H.	AD-15-769	GE-13-1420
N. H.	AD-15-772	GE-13-1198
P. J.	AD-15-775	GE-13-1516
L. J.	AD-15-773	GE-13-1200
P. J.	AD-15-778	GE-13-1293
A. J.	AD-15-781	GE-13-1201
E. J.	AD-15-783	GE-13-1202
P. J.	AD-15-784	GE-13-1521
A. J.	AD-15-785	GE-13-1250
P. L.	AD-15-787	GE-13-1203

File Name	Appeal Division File	General Division File
L. L.	AD-15-789	GE-13-1295
G. L.	AD-15-788	GE-13-1204
S. L.	AD-15-790	GE-13-1206
F. L.	AD-15-794	GE-13-1207
A. L.	AD-15-801	GE-13-1296
R. L.	AD-15-804	GE-13-1574
E. L.	AD-15-808	GE-13-1449
Y. L.	AD-15-811	GE-13-1452
S. L.	AD-15-810	GE-13-1451
S. L.	AD-15-813	GE-13-1299
L. L.	AD-15-818	GE-13-1454
P. L.	AD-15-820	GE-13-1455
M. L.	AD-15-821	GE-13-1302
K. L.	AD-15-825	GE-13-1458
S. L.	AD-15-827	GE-13-1245
M. L.	AD-15-826	GE-13-1304
S. L.	AD-15-828	GE-13-1461
H. L.	AD-15-829	GE-13-1248
K. L.	AD-15-626	GE-13-1465
M. L.	AD-15-627	GE-13-1586
S. L.	AD-15-631	GE-13-1585
F. L.	AD-15-630	GE-13-1249
D. L.	AD-15-633	GE-13-1587
C. L.	AD-15-635	GE-13-1261
R. L.	AD-15-638	GE-13-1472
P. L.	AD-15-649	GE-13-1242
J. L.	AD-15-646	GE-13-1239
B. L.	AD-15-643	GE-13-1241
P. L.	AD-15-786	GE-13-1427
M. L.	AD-15-650	GE-13-1534
P. L.	AD-15-653	GE-13-1536
D. L.	AD-15-657	GE-13-1429
S. L.	AD-15-659	GE-13-1567
F. L.	AD-15-662	GE-13-1540
P. M.	AD-15-666	GE-13-1535
A. M.	AD-15-667	GE-13-1758
M. M.	AD-15-670	GE-13-1544
V. M.	AD-15-672	GE-13-1507

File Name	Appeal Division File	General Division File
C. M.	AD-15-673	GE-13-1495
S. M.	AD-15-674	GE-13-1490
J. M.	AD-15-675	GE-13-1503
S. M.	AD-15-676	GE-13-1555
F. M.	AD-15-678	GE-13-1520
G. M.	AD-15-677	GE-13-1523
C. M.	AD-15-679	GE-13-1526
S. M.	AD-15-680	GE-13-1512
M. M.	AD-15-681	GE-13-1432
J. M.	AD-15-683	GE-13-1424
S. M.	AD-15-684	GE-13-1263
J. M.	AD-15-685	GE-13-1236
S. M.	AD-15-686	GE-13-1238
A. M.	AD-15-687	GE-13-1539
M. M.	AD-15-689	GE-13-1570
T. M.	AD-15-691	GE-13-1568
F. M.	AD-15-693	GE-13-1438
L. N.	AD-15-695	GE-13-1543
Q. T.	AD-15-696	GE-13-1546
W. N.	AD-15-697	GE-13-1531
M. O.	AD-15-807	GE-13-1436
M. O.	AD-15-700	GE-13-1433
G. P.	AD-15-702	GE-13-1430
J. P.	AD-15-703	GE-13-1428
V. P.	AD-15-705	GE-13-1425
M. P.	AD-15-706	GE-13-1757
A. P.	AD-15-708	GE-13-1549
A. P.	AD-15-709	GE-13-1423
F. P.	AD-15-711	GE-13-1421
J. P.	AD-15-712	GE-13-1419
P. P.	AD-15-714	GE-13-1552
C. P.	AD-15-716	GE-13-1417
R. P.	AD-15-717	GE-13-1313
J. P.	AD-15-718	GE-13-1377
T. P.	AD-15-724	GE-13-1379
P. P.	AD-15-726	GE-13-1380
M. P.	AD-15-761	GE-13-1314
Y. P.	AD-15-729	GE-13-1316

File Name	Appeal Division File	General Division File
B. Q.	AD-15-730	GE-13-1319
M. R.	AD-15-734	GE-13-1401
D. R.	AD-15-735	GE-13-1322
S. R.	AD-15-737	GE-13-1373
Y. R.	AD-15-738	GE-13-1324
J. R.	AD-15-739	GE-13-1372
C. R.	AD-15-741	GE-13-1292
M. R.	AD-15-763	GE-13-1766
B. R.	AD-15-766	GE-13-1365
M. R.	AD-15-767	GE-13-1290
F. R.	AD-15-768	GE-13-1355
J. R.	AD-15-715	GE-13-1370
D. R.	AD-15-719	GE-13-1329
B. R.	AD-15-720	GE-13-1362
J. R.	AD-15-722	GE-13-1360
L. R.	AD-15-723	GE-13-1479
D. R.	AD-15-725	GE-13-1481
D. S.	AD-15-728	GE-13-1485
D. S.	AD-15-732	GE-13-1351
G. S.	AD-15-733	GE-13-1487
L. S.	AD-15-740	GE-13-1415
G. T.	AD-15-748	GE-13-1413
D. T.	AD-15-753	GE-13-1409
J. T.	AD-15-756	GE-13-1489
J. T.	AD-15-759	GE-13-1404
S. T.	AD-15-760	GE-13-1392
M. T.	AD-15-770	GE-13-1389
C. V.	AD-15-780	GE-13-1387
J. V.	AD-15-782	GE-13-1330
M. V.	AD-15-797	GE-13-1590
D. V.	AD-15-799	GE-13-1759
M. V.	AD-15-806	GE-13-1325
T. V.	AD-15-812	GE-13-1327
R. W.	AD-15-816	GE-13-1334
A. W.	AD-15-819	GE-13-1326
L. Z.	AD-15-823	GE-13-1321

APPENDIX - CEIC Appeals of Unrepresented Claimants Files

File Name	Appeal Division File	General Division File
G. B.	AD-15-460	GE-13-527
D. B.	AD-15-471	GE-13-811
D. B.	AD-15-478	GE-13-1139
M. B.	AD-15-479	GE-13-802
S. B.	AD-15-481	GE-13-771
Estate of S. B.	AD-15-484	GE-13-970
P. B.	AD-15-486	GE-13-370
M. B.	AD-15-489	GE-13-383
J. B.	AD-15-492	GE-13-467
D. C.	AD-15-493	GE-13-810
G. C.	AD-15-498	GE-13-514
D. C.	AD-15-508	GE-13-1125
S. C.	AD-15-510	GE-13-1122
P. D.	AD-15-514	GE-13-1140
L. D.	AD-15-517	GE-13-798
S. D.	AD-15-518	GE-13-787
P. D.	AD-15-520	GE-13-803
J. D.	AD-15-521	GE-13-813
B. D.	AD-15-523	GE-13-800
M. F.	AD-15-525	GE-13-1113
D. F.	AD-15-527	GE-13-1153
F. G.	AD-15-530	GE-13-268
M. G.	AD-15-535	GE-13-778
B. H.	AD-15-488	GE-13-1046
P. H.	AD-15-539	GE-13-790
E. J.	AD-15-541	GE-14-1406
I. L.	AD-15-543	GE-13-795
B. L.	AD-15-546	GE-13-1135
M. L.	AD-15-549	GE-13-805
B. L.	AD-15-550	GE-13-2182
R. L.	AD-15-551	GE-13-874
B. L.	AD-15-560	GE-13-793
P. M.	AD-15-563	GE-13-1131
S. M.	AD-15-568	GE-13-791
M. P.	AD-15-571	GE-13-774
M. P.	AD-15-570	GE-13-537
J. P.	AD-15-572	GE-13-1114

File Name	Appeal Division File	General Division File
A. P.	AD-15-577	GE-13-809
T. R.	AD-15-581	GE-13-1129
M. R.	AD-15-582	GE-13-628
R. R.	AD-15-585	GE-13-438
M. R.	AD-15-586	GE-13-776
M. S.	AD-15-587	GE-13-382
N. S.	AD-15-588	GE-13-1123
M. S.	AD-15-589	GE-13-1118
L. S.	AD-15-590	GE-13-2543
R. T.	AD-15-591	GE-13-477
R. T.	AD-15-592	GE-13-459
A. T.	AD-15-599	GE-13-801
H. V.	AD-15-596	GE-13-446
P. Z.	AD-15-597	GE-13-772