Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: ***Canada Employment Insurance Commission v. E. A.*****, 2016 SSTADEI 36**

Date: January 25, 2016

File number: AD-15-593

APPEAL DIVISION

Between:

Canada Employment Insurance Commission

Applicant

and

E. A.

Respondent

and

ACE Aviation Holdings Inc.

Added Party

and

Aveos Fleet Performance Inc.

Added Party

Decision by: Pierre Lafontaine, Member, Appeal Division

Canada

REASONS AND DECISION

DECISION

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

INTRODUCTION

[2] On June 15, 2015, the General Division of the Tribunal determined that:

- The amounts received by the Appellants from Air Canada constitute earnings under section 35 of the *Employment Insurance Regulations* ("*Regulations*") and must be allocated in accordance with the principle set out in paragraph 36(19)(b) of the *Regulations*, on March 20, 2012 and to that week.

[3] The Applicant requested leave to appeal to the Appeal Division on July 14, 2015.

ISSUE

[4] The Tribunal must decide if the appeal has a reasonable chance of success.

THE LAW

[5] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* (the "*DESD Act")*, "an 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 *DESD Act* provides that "leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success".

ANALYSIS

[7] Considering the obligation of the Tribunal to conduct proceedings as informally and quickly as the circumstances and the considerations of fairness and natural justice permit, obligation prescribed by section 3.(1) of the *Social Security Tribunal Regulations*, the present decision will also apply to the files mentioned in the attached annex since they essentially raise the same questions of fact and law.

[8] Subsection 58(1) of the *DESD Act* states that the only grounds of appeal are the following:

(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.

[9] In regards to the application for permission to appeal, the Tribunal needs to be satisfied that the reasons for appeal fall within any of the above mentioned grounds of appeal and that at least one of the reasons has a reasonable chance of success before leave can be granted.

[10] In its application for permission to appeal, the Applicant submits that:

- It is settled law that severance or termination pay constitutes 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* as authority for the proposition that a payment made under subsection 36(9) 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) when it stated that it had to determine "…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;

- The source of the earnings is not a criterion found in subsection 36(9) and this provision can therefore apply to earnings that come from a source other than the employer who terminated the employment. There is judicial precedent for allocating earnings received from sources other than the employer under the former subsection 58(9) of the *Regulations*, which was the predecessor provision to subsection 36(9);

- The General Division's interpretation of subsection 36(9) is incompatible with the objective of the *Employment Insurance Act* (the "*Act*") of avoiding double compensation;

- The General Division's interpretation is also at odds with sections 35 and 36 of the *Regulations* and in particular the intent behind subsection 36(9) to allocate earnings paid by reason of a separation from employment in a consecutive manner;

- The fact that there may be a successor employer does not preclude the application of subsection 36(9), which emphasizes the reason for which the earnings are paid or payable. Earnings received from a former employer can be allocated pursuant to subsection 36(9) if they are paid or payable by reason of a lay-off or separation from employment;

- The obligation to include earnings paid by a previous employer flows from the *Act*. The definition of "employer" in section 2 of the *Act* includes "…a person who has been an employer…" In addition, the term "employment" is defined as meaning "…the act of employing or the state of being employed." In the case of an employment in which there is a vendor employer and a successor employer, the "employer" therefore includes the present employer as well as former employers for that same employment;

- The obligation to allocate earnings received from former employers for the same employment is clear considering the definitions of "income" and "employment" in subsection 35(1) of the *Regulations*;

- Subsection 35(2) of the *Regulations* provides that the earnings that are to be taken into account for the purposes of section 19 of the *Act* are the entire income of a claimant 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 employment;

- The definitions of "income" and "employment" in section 35 of the *Regulations* are broad enough to include the separation payments paid by Air Canada to the employees following the end of employment with Aveos, which by the terms of the CIRB Order 9996-U and other evidence in the record, was an amalgam of the employment with Air Canada and Aveos;

- The General Division erred in law when it did not apply subsection 36(9) in part due to a lack of "temporal connectivity" between the termination of employment and the payment made by Air Canada nine months later;

- This approach is inconsistent with the earlier statement of the General Division that the timing of the payment was not relevant; The General Division therefore introduced a criterion that subsection 36(9) explicitly excludes, 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 were paid following a termination or loss from employment and that one of the conditions for payment was the "loss of employment.";

- The Federal Court of Appeal jurisprudence is well established and clear that subsection 36(9) 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;

- After having found that the separation payments were paid by reason of a termination from employment pursuant to a CIRB order and an arbitral decision, the General Division erred in qualifying the events of March 2012 as a "transaction.";

- 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 in the record;

- The General Division made a material 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 in the record 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 the employment in March 2012 that triggered the separation payments.

[11] The dispute between the parties originates from the interpretation to be given to paragraphs 35, 36(9) and 36(19) of the *Regulations*.

[12] Between 2007 and 2011, Air Canada sold a portion of its heavy maintenance activities to an entity that later became Aveos. In 2012, Aveos closed its doors and Air Canada subsequently paid amounts to its former employees who lost their employment at Aveos, following an order from the Canada Industrial Relations Board (CIRB) and a decision by arbitrator Martin Teplitsky.

[13] The Applicant submitted to the General Division that the amounts received by the Respondents from Air Canada constituted earnings under section 35 of the *Regulations* and had to be allocated in accordance with the principle set out in paragraph 36(9) of the *Regulations*.

[14] The Applicant pleaded before the General Division that the evidence, the legislation and the jurisprudence supported its position that the severance payments had to be allocated in the manner prescribed in section 36(9) of the *Regulations*, effective from the week of the termination or lay-off from Aveos in March 2012.

[15] The General Division determined that the amounts received constituted earnings in accordance with section 35 of the *Regulations* and that the amounts received by the Respondents from Air Canada had to be allocated in accordance with the principle set out in paragraph 36(19)(b) of the *Regulations*. The date of the transaction being March 20, 2012, the General Division concluded that it was on that date and to that week that the earnings had to be allocated for the total amount.

[16] According to the General Division, for subsection 36(9) of the *Regulations* to apply, not only must earnings have been paid by reason of lay-off or separation from employment, but the amount must also have been paid for the separation from the employment lost, not for the earnings paid by a previous employer, even if the loss of employment is one of the conditions for obtaining the amount in question from the previous employer.

[17] The Applicant pleads that the General Division erred in fact and in law since it is settled law that severance or termination pay constitutes earnings resulting from employment and that these earnings should be allocated under subsection 36(9) of the *Regulations*. The Applicant invokes, in support of its position, *Lemay v. Canada (Attorney General)*, 2005 FCA 433, *Staikos v. Canada (Attorney General)*, 2014 FCA 31, *Canada (Attorney General) v. Savarie*, A-704-95.

[18] 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 for the proposition that a payment made under subsection 36(9) 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.".

[19] The Applicant further submits that the General Division erred in not applying subsection 36(9) and the above mentioned case law of the Federal Court of Appeal despite its finding of fact that the separation payments were paid following a termination or loss from employment and that one of the conditions for payment was the "loss of employment" at Aveos.

[20] After reviewing the docket of appeal, the decision of the General Division and considering the arguments of the Applicant in support of its request for leave to appeal, the Tribunal finds that the appeal has a reasonable chance of success. The Applicant has set out reasons which fall into the above enumerated grounds of appeal that could possibly lead to the reversal of the disputed decision.

CONCLUSION

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

Pierre Lafontaine
Member, Appeal Division

ANNEX - CEIC Appeals of Represented Claimants Files

File Name	Appeal Division File Number	General Division File Number
S. B.	AD-15-593	GE-13-1270
P. B.	AD-15-595	GE-13-1288
N. B.	AD-15-598	GE-13-1233
D. B.	AD-15-601	GE-13-1414
H. T. C.	AD-15-614	GE-14-4254
A. C.	AD-15-698	GE-13-1553
T. D. C.	AD-15-707	GE-13-1315
O. C.	AD-15-721	GE-13-1318
R. C.	AD-15-713	GE-13-1312
G. C.	AD-15-710	GE-13-1460
J. D. M.	AD-15-701	GE-13-1500
M. D.	AD-15-699	GE-13-1303
C. D.	AD-15-692	GE-13-1515
M. D.	AD-15-690	GE-13-1442
A. F.	AD-15-688	GE-13-1447
J. F.	AD-15-600	GE-13-1277
M. F.	AD-15-602	GE-13-1209
G. I.	AD-15-605	GE-13-1588
K. K.	AD-15-607	GE-13-1524
C. L.	AD-15-610	GE-13-1333
L. L.	AD-15-664	GE-13-1251
G. L.	AD-15-623	GE-13-1271
R. M.	AD-15-628	GE-13-1469
G. M.	AD-15-632	GE-13-1422
J. M.	AD-15-639	GE-13-1439
L. M.	AD-15-648	GE-13-1441
L. O.	AD-15-655	GE-13-1301
M. P.	AD-15-669	GE-13-1260
A. P.	AD-15-671	GE-13-1309
C. R.	AD-15-629	GE-13-1311
E. R.	AD-15-634	GE-13-1291
S. R.	AD-15-642	GE-13-1193
F. S.	AD-15-645	GE-13-1342
J. S.	AD-15-651	GE-13-1338
C. S.	AD-15-652	GE-13-1339
M. S.	AD-15-694	GE-13-1336
B. S.	AD-15-704	GE-13-1306
S. S.	AD-15-731	GE-13-1347

File Name	Appeal Division File Number	General Division File Number
R. T.	AD-15-751	GE-13-1492
J. V. L.	AD-15-754	GE-13-1246
E. V.	AD-15-755	GE-13-1240
S. V.	AD-15-757	GE-13-846
G. W.	AD-15-764	GE-13-1212
	AD-15-736	GE-13-1378

ANNEX - CEIC Appeals of Non-Represented Claimants Files

File Name	Appeal Division File Number	General Division File Number
J. A.	AD-15-505	GE-13-784
N. A.	AD-15-545	GE-13-1080
G. B.	AD-15-515	GE-13-794
R. B.	AD-15-477	GE-13-575
D. B.	AD-15-562	GE-13-1151
A. B.	AD-15-557	GE-13-1134
P. B.	AD-15-566	GE-13-2496
R. B.	AD-15-466	GE-13-401
E. C.	AD-15-458	GE-13-37
H. C.	AD-15-528	GE-13-806
J. C.	AD-15-503	GE-13-782
F. C.	AD-15-576	GE-14-3164
R. C.	AD-15-499	GE-13-780
S. D.	AD-15-476	GE-13-560
B. D.	AD-15-578	GE-14-3270
N. D.	AD-15-500	GE-13-781
N. E.	AD-15-561	GE-13-1147
J. F.	AD-15-482	GE-13-596
F. F.	AD-15-531	GE-13-807
J. G.	AD-15-542	GE-13-956
B. H.	AD-15-465	GE-13-390
S. H.	AD-15-579	GE-14-3314
O. I.	AD-15-504	GE-13-783
S. J.	AD-15-526	GE-13-804
J. K.	AD-15-513	GE-13-792
N. K.	AD-15-470	GE-13-495
S. K.	AD-15-553	GE-13-1116
L. K.	AD-15-519	GE-13-797

File Name	Appeal Division File Number	General Division File Number
C. K.	AD-15-491	GE-13-773
R. L.	AD-15-464	GE-13-355
K. L.	AD-15-532	GE-13-808
A. L.	AD-15-485	GE-13-652
L. L.	AD-15-555	GE-13-1132
F. M.	AD-15-507	GE-13-786
M. M.	AD-15-511	GE-13-789
L. M.	AD-15-564	GE-13-1593
A. M.	AD-15-473	GE-13-498
E. M.	AD-15-480	GE-13-580
D. M.	AD-15-565	GE-13-2442
S. M.	AD-15-468	GE-13-443
C. M.	AD-15-496	GE-13-777
J. M.	AD-15-474	GE-13-511
O. M.	AD-15-537	GE-13-816
D. N.	AD-15-509	GE-13-788
D. N.	AD-15-538	GE-13-818
K. N.	AD-15-497	GE-13-779
R. O.	AD-15-536	GE-13-815
S. P.	AD-15-554	GE-13-1128
B. P.	AD-15-533	GE-13-812
B. P.	AD-15-516	GE-13-796
R. P.	AD-15-494	GE-13-775
B. P.	AD-15-558	GE-13-1136
P. P.	AD-15-475	GE-13-539
R. S.	AD-15-540	GE-13-819
D. S.	AD-15-544	GE-13-1066
R. S.	AD-15-552	GE-13-1083
D. S.	AD-15-575	GE-14-2652
W. S.	AD-15-574	GE-14-1082
W. S.	AD-15-573	GE-14-1049
W. T.	AD-15-548	GE-13-1081
B. T.	AD-15-461	GE-13-64
J. T.	AD-15-490	GE-13-724
S. T.	AD-15-463	GE-13-315
A. V.	AD-15-559	GE-13-1144
E. V.	AD-15-467	GE-13-440
R W.	AD-15-462	GE-13-149
A. W.	AD-15-524	GE-13-799

File Name	Appeal Division File Number	General Division File Number
S. W.	AD-15-487	GE-13-723
M. W.	AD-15-506	GE-13-785
D. Y.	AD-15-469	GE-13-456
D. Z.	AD-15-534	GE-13-814
J. Z.	AD-15-483	GE-13-610
S. Z.	AD-15-569	GE-14-294