



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *S. F. v. Canada Employment Insurance Commission*, 2016 SSTADEI 37

Date: January 25, 2016

File number: AD-13-1199

APPEAL DIVISION

Between:

S. F.

Applicant

and

Canada Employment Insurance Commission

Respondent

Decision by: Pierre Lafontaine, Member, Appeal Division

REASONS AND DECISION

DECISION

[1] The Tribunal grants an extension of time to file the application requesting leave to appeal and grants leave to appeal to the Appeal Division.

INTRODUCTION

[2] On September 30, 2013, a Board of Referees determined that:

- The amount received by the Appellant from Air Canada constitutes earnings under section 35 of the *Employment Insurance Regulations* (“*Regulations*”) and must be allocated in accordance with the principle set out in paragraph 36 of the *Regulations*.

[3] The Applicant requested leave to appeal to the Appeal Division on November 21, 2013.

ISSUES

[4] The Tribunal must decide if it will allow the late application and 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 consideration 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 late application for permission to appeal, the Applicant states that the appeal of the Board of Referees decision was filed within the legal delay with Service Canada Edmonton. The twelve day delay, if any, was caused by confusion in the cross over from appealing Board of Referees decisions to the Umpire now to the *Social Security Tribunal*. The *Social Security Tribunal* web site was also unclear that the R4R process was to be used exclusively for Commission decisions made on a claimants request for benefits and not to appeal Board of Referees decisions.

[10] The Tribunal finds, in the present circumstances, that it is in the interest of justice to grant the Applicant's request for an extension of time to file an application for permission to appeal without prejudice to the Respondent - *X (Re)*, 2014 FCA 249, *Grewal c. Minister of Employment and Immigration*, [1985] 2 F.C. 263 (F.C.A.).

[11] 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.

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

- The Board of Referees ignored clear and pertinent evidence as shown in the appeal documents;
- More precisely, in the Appeal Docket prepared by the Respondent, at Exhibit 4-19, it is quoted that “Air Canada employees, who, by reason of the transfer of operations to Aveos, at the CIRB date, choose to resign from Air Canada and waive their right of recall to any position be it at Air Canada or Aveos”;
- This establishes that all the claimants relinquished their right to reinstatement and any monies paid to them as a result does not meet the definition of earnings as shown in sections 35 and 36 of the *Regulations* and should not be allocated;
- This is further confirmed at section 35.2 (a) of the *Regulations*, General Principles, Characterization of payment from the Employment Insurance Statutes, when it states “In determining whether an amount is earnings, the true nature of the income payment rather than its declared form, is the key to classification of such amounts for the purpose of classification”.

[13] The dispute between the parties originates from the interpretation to be given to paragraphs 35 and 36 of the *Regulations*.

[14] 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.

[15] The Applicant submitted to the Board of Referees that all the claimants relinquished their right to reinstatement and any monies paid to them as a result did not meet the definition of earnings and should therefore not be allocated as per sections 35 and 36 of the *Regulations*.

[16] The Respondent pleaded before the Board of Referees that the amounts received by the Applicant 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*.

[17] The Board of Referees determined that the amounts received by the Appellant constituted earnings in accordance with section 35 of the *Regulations* and that the amounts received had to be allocated in accordance with the principle set out in paragraph 36 of the *Regulations*, effective as of March 2012.

[18] In support of the application for permission to appeal, the Applicant argues that the Board of Referees erred in fact and in law since it is clear law that when a claimant relinquishes a right to reinstatement, that any monies paid to the claimant as a result does not meet the definition of earnings as shown in sections 35 and 36 of the *Regulations* and should not be allocated.

[19] The Applicant submits that in the appeal docket prepared by the Respondent, at Exhibit 4-19, it is quoted that “Air Canada employees, who, by reason of the transfer of operations to Aveos, at the CIRB date, choose to resign from Air Canada and waive their right of recall to any position be it at Air Canada or Aveos”.

[20] The Tribunal notes that the Federal Court of Appeal has previously ruled that, in certain situations, a payment received for renunciation of a right to reinstatement does not constitute earnings under the *Regulations* – *Meechan v. Canada (AG)*, 2003 FCA 368.

[21] After reviewing the docket of appeal, the decision of the Board of Referees and considering the arguments of the Applicant in support of the 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

[22] The Tribunal grants an extension of time to file the application requesting leave to appeal and grants leave to appeal to the Appeal Division.

Pierre Lafontaine
Member, Appeal Division

ANNEX - Appeals of Claimants Represented by C.U.H.C.

Appellant Name	File Number
W. A.	AD-13-1204
J. A.	AD-13-1208
M. A.	AD-13-1216
M. A.	AD-13-1219
M. A.	AD-13-1227
A. A.	AD-13-1232
R. A.	AD-13-1236
M. A.	AD-13-1247
A. A.	AD-13-1260
G. A.	AD-13-1263
J. B.	AD-13-1269
I. B.	AD-13-1272
S. B.	AD-13-1276
P. B.	AD-13-1279
N. B.	AD-13-1287
M. B.	AD-13-1293
F. B.	AD-13-1300
D. B.	AD-13-1304
M. B.	AD-14-6
K. B.	AD-14-14
J.B.	AD-14-21
S. B.	AD-14-23
R. C.	AD-14-27
D. C.	AD-14-46
J. C.	AD-14-52
R. C.	AD-14-49
R. C.	AD-14-54
G. C.	AD-14-55
P. C.	AD-14-57
B. C.	AD-14-61
J. C.	AD-14-64
T. C.	AD-14-69
R. C.	AD-14-72
B. C.	AD-14-77
D. S.	AD-14-48
R. D.	AD-14-81
L. D.	AD-14-82
C. D.	AD-14-83

Appellant Name	File Number
R. D.	AD-14-85
D. D.	AD-14-76
E. D.	AD-14-79
R. D.	AD-14-31
K. D.	AD-14-39
S. D.	AD-14-40
J. D.	AD-14-2
P. D.	AD-14-41
R. D.	AD-14-43
S. E.	AD-14-9
O. E.	AD-14-12
G. E.	AD-14-13
M. E.	AD-14-17
J. F.	AD-14-18
S. F.	AD-13-1199
A. F.	AD-13-1201
J. F.	AD-13-1202
D. G.	AD-13-1205
D. G.	AD-13-1207
B. G.	AD-13-1210
P. G.	AD-13-1212
D. G.	AD-13-1215
D. G.	AD-13-1218
R. G.	AD-13-1220
B. G.	AD-13-1224
K. G.	AD-13-1231
E. G.	AD-13-1234
R. G.	AD-13-1237
S. H.	AD-13-1240
A. H.	AD-13-1243
K. H.	AD-13-1245
R. H.	AD-13-1248
R. H.	AD-13-1253
C. H.	AD-13-1254
F. H.	AD-13-1256
R. H.	AD-13-1262
J. L.	AD-13-1264
S. H.	AD-13-1265
A. I.	AD-13-1282

Appellant Name	File Number
M. J.	AD-13-1284
D. J.	AD-13-1286
G. J.	AD-13-1289
R. J.	AD-13-1290
P. K.	AD-13-1295
M. K.	AD-13-1298
T. K.	AD-13-1301
L.K.	AD-13-1310
D. K.	AD-14-1
T. K.	AD-14-5
A. K.	AD-14-11
I. K.	AD-14-36
S. K.	AD-14-34
C. K.	AD-14-37
R. K.	AD-14-42
R. K.	AD-14-45
A.L.	AD-14-47
D. L.	AD-14-50
J.L.	AD-14-51
K. L.	AD-14-53
S. L.	AD-14-56
B. L.	AD-14-58
D. L.	AD-14-59
S. L.	AD-14-88
T. L.	AD-14-89
A. M.	AD-13-1228
N. M.	AD-13-1214
C. M.	AD-13-1211
S. M.	AD-13-1225
M. M.	AD-13-1203
J. M.	AD-13-1230
R. M.	AD-13-1222
B. M.	AD-13-1235
J. M.	AD-13-1238
P. M.	AD-13-1242
A. M.	AD-13-1246
J. M.	AD-13-1267
G. M.	AD-13-1273
G. M.	AD-13-1275

Appellant Name	File Number
E. M.	AD-14-25
G. M.	AD-13-1270
D. M.	AD-13-1278
T. M.	AD-13-1281
J. M.	AD-13-1283
T. M.	AD-13-1288
R. N.	AD-13-1291
R. N.	AD-13-1296
K. N.	AD-13-1302
G. N.	AD-13-1307
M. N.	AD-13-1316
L. N.	AD-13-1315
E. O.	AD-14-3
R. O.	AD-14-7
R. P.	AD-14-10
S. P.	AD-14-15
B. P.	AD-14-19
J. P.	AD-14-22
J. P.	AD-14-28
J. P.	AD-14-60
T. P.	AD-14-67
F. P.	AD-14-63
M. P.	AD-14-70
T. P.	AD-14-73
D. R.	AD-14-75
P. R.	AD-14-78
D. R.	AD-14-80
G. R.	AD-14-68
T. R.	AD-14-65
F. R.	AD-14-74
R. R.	AD-14-66
I. R.	AD-14-71
M. R.	AD-14-62
W. R.	AD-13-1200
M. R.	AD-13-1206
J. R.	AD-13-1209
B. S.	AD-13-1217
A. S.	AD-13-1213
B. S.	AD-13-1221

Appellant Name	File Number
D. S.	AD-13-1223
S. S.	AD-13-1226
T.S.	AD-13-1229
C. S.	AD-13-1233
G. S.	AD-13-1239
W. S.	AD-13-1241
E. S.	AD-13-1244
S. S.	AD-13-1274
B. S.	AD-13-1252
A. S.	AD-13-1255
S. S.	AD-13-1257
G. S.	AD-13-1259
B.S.	AD-13-1268
K. S.	AD-13-1271
A. S.	AD-13-1261
J. S.	AD-13-1277
D. S.	AD-13-1280
B. S.	AD-13-1285
N. S.	AD-13-1292
L. T.	AD-13-1294
M. T.	AD-13-1299
T. T.	AD-13-1303
R. T.	AD-13-1306
M. T.	AD-13-1309
D. T.	AD-13-1311
K. T.	AD-13-1312
R. V.	AD-13-1305
C. V.	AD-13-1314
A. V.	AD-14-4
S. W.	AD-14-8
J. W.	AD-14-16
L. W.	AD-14-26
M. W.	AD-14-20
W. W.	AD-14-29
V. W.	AD-14-24
D. W.	AD-14-379
P.W.	AD-14-30
S. W.	AD-14-32
A. Y.	AD-14-33

Appellant Name

E. Y.

T. Y.

J. Y.

X. Z.

J. Z.

S. Z.

File Number

AD-14-35

AD-14-38

AD-14-44

AD-14-86

AD-14-84

AD-14-87