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

Citation: *E. E. v. Canada Employment Insurance Commission,* 2016 SSTGDEI 16

Tribunal File Number: GE-15-2294

BETWEEN:

E. E.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Alyssa Yufe

HEARD ON: January 27, 2016

DATE OF DECISION: February 1, 2016

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Appellant attended the hearing by way of telephone conference on January 12, 2016 and January 27, 2016, together with his lawyer. No one else was in attendance.

DECISION

Allocation

[1] With respect to the allocation, the Member of the Social Security Tribunal, General Division, Employment Insurance Section (the "Tribunal") finds that the $10,464.97 Amount (as defined below) and a further amount of $6,028.78 of the $55,000.00 Settlement Agreement Amount (as defined below) should be allocated in accordance with sections 35 and 36 of the *Employment Insurance Regulations*, SOR /96- 332 (the "Regulations"). The Appeal is, accordingly allowed in part.

INTRODUCTION

[2] The Appellant filed an initial claim for benefits on April 17, 2013 (GD3-16). The Appellant's claim was effective April 14, 2013 (GD4-1).

[3] The Canada Employment Insurance Commission (the "Commission") decided on April 8, 2015, that the Appellant received $65,465.00 in monies on separation from his employment and that the income before deductions is earnings, which will be allocated from April 7, 2013 to October 12, 2013 (GD3-21).

[4] A Notice of Debt which was issued on April 11, 2015, is in the amount of $11,022.00 (GD3-23).

[5] The Appellant filed a Request for Reconsideration with the Commission. The Commission decided on June 19, 2015 to modify its original decision and to allocate only $39,695.93 as follows: the amounts paid as vacation pay ($4,807.50) and wages in lieu of notice

($5,657.47) for a total amount of $10,464.97 as earnings (the "$10,464.97 Amount); the amount of $15,000.00 paid for moral damages did not constitute earnings since it was paid for another reason other than to compensate for loss of wages; the amount of $40,000.00 was paid to compensate for loss of salary and must be considered earnings; only the amount of legal fees paid to recover the income replacement portion could be deducted as legal costs. As $15,000.00 (the amount received, which was not earnings) represented 27.27% of the total settlement of $55,000.00, only the balance of $72.73% of the legal costs of $14,808.11 were deducted. As such, $10,769.04 was deducted for legal fees (GD3-71).

[6] The Appellant filed an appeal to the Tribunal on July 28, 2015 (GD-2).

[7] The hearing was held on January 12, 2016. At the hearing, the Tribunal granted the Appellant's request for an adjournment on the basis that he wanted to submit additional documentation and that he had just retained his lawyer (GD6).

[8] On January 19, 2016, the Appellant provided additional submissions at GD6 and an authorization to disclose form at GD7.

FORM OF HEARING

[9] The hearing was heard via teleconference for the reasons indicated in the Notices of Hearing dated November 5, 2015 and January 15 2016.

ISSUE

Allocation

[10] Whether or not the amounts received by the Appellant from the Employer should be allocated pursuant to sections 35 and 36 of the Regulations?

THE LAW

Income:

[11] Income is defined in subsection 35(1) of the Regulations as follows:
"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.

Earnings:

35(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; [Emphasis added]

Exceptions:

[12] Subsection 35(7) sets out certain items which are not included as income. It provides as follows:

35(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*.

Allocation:

[13] Subsections 36(1), and (4), (8), and (9) of the Regulations provide as follows:

36**.** (1) Subject to subsection (2), the earnings of a claimant as determined under section 35 shall be allocated to weeks in the manner described in this section and, for the purposes referred to in subsection 35(2), shall be the earnings of the claimant for those weeks. […]
(4) Earnings that are payable to a claimant under a contract of employment for the performance of services shall be allocated to the period in which the services were performed.

Earnings by Reason of lay-Off or Separation:

> (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. […]
> (11) Where earnings are paid or payable in respect of an employment pursuant to a labour arbitration award or the judgment of a tribunal, or as a settlement of an issue that might otherwise have been determined by a labour arbitration award or the judgment of a tribunal, and the earnings are awarded in respect of specific weeks as a result of a finding or admission that disciplinary action was warranted, the earnings shall be allocated to a number of consecutive weeks, beginning with the first week in respect of which the earnings are awarded, in such a manner that the total earnings of the claimant from that employment are, in each week except the last week, equal to the claimant's normal weekly earnings from that employment.

EVIDENCE

Application for Benefits (April 17, 2013, GD3-2 to 18)

[14] The Appellant worked at "De" (the "Employer") from April 16, 2012 to April 12, 2013. The Appellant was no longer working on account of a shortage of work. The Appellant's salary was $125,000.00 per year.

Motion to Institute Proceedings (GD2-10 to 14, August 28, 2013) (the "Motion")

[15] The Appellant filed the Motion against the Employer on August 28, 2013. The Appellant claimed damages of $125,000.00 representing the Appellant's annual salary, $10,000.00 representing the Appellant's loss of bonus, $5,000.00 in medical expenses and retirement regime; $50,000.00 for the cost of the acquiring new equipment for the Appellant's engineering firm, $24,000.00 for fees to be paid to a placement firm for finding new employees, $20,000.00 to train new employees for one year, $3,632.66 representing arrears accumulated by the Appellant in his RRSP, which the Employer detained, and $100,000.00 as a violation to his fundamental rights and for damages to his stress and reputation and for inconvenience.

Receipt, Release, Discharge and Transaction (November 24, 2014, GD2-27 to 29 (GD3-27 to 29) (the "Settlement Agreement")

[16] The Employer and Appellant entered into the Settlement Agreement wherein the Employer agreed to pay, "the total amount of $55,000.00, in capital, interests and costs, which is ventilated as follows: a) the amount of 40,000.00$ to be paid in the [Appellant's] RRSP account within twenty (20) days further to the receipt by the [Employer] of the relevant details of [the Appellant's] RRSP account…"; b) "the amount of $15,000.00 for the alleged moral damages suffered by the [Appellant] within 20 days of the signature of the present [Settlement Agreement].

[17] In the Settlement Agreement, the Appellant acknowledged, *inter alia*, that the amounts mentioned represented the "full and final settlement in regard to any right, action, complaint, recourse, demand, damage, or claim of any nature whatsoever, including, those related to [the Appellant's court action], and any right or claim related to the [Appellant's] employment with the [Employer] or the termination thereof…"

[18] The preamble also provided that the Appellant commenced an action against the Employer and that the parties wished to settle their dispute regarding the proceedings or the Motion and "the employment of the [Appellant] with the [Employer] and the termination thereof" and that the Appellant "alleged having suffered moral damages in relation to the [p]roceedings". Paragraph one of the Settlement Agreement provided that the preamble formed an integral part of the Settlement Agreement.

Appellant's Communications with the Commission

[19] The Appellant confirmed that he received the amounts indicated on the ROE for vacation pay and wages in lieu of notice. The Appellant advised that he would send the receipts for the legal costs, which were paid to his lawyers (Commission notes, May 29, 2015, GD3-31).

[20] On May 31, 2015, the Appellant provided copies of the invoices from his lawyer (May 31, 2015, GD3-32 to 57).

[21] The Appellant agreed with the Commission after some debate, that the total amount paid to his lawyer appears to have been $14,808.11 when the previous balances are excluded from the calculation (Commission notes, June 1, 2015, GD3-58).

[22] The Appellant agreed that the amount of $10,465.07, which was paid on account of vacation and wages in lieu of notice is earnings (Commission notes, June 1, 2015, GD3-58).

[23] The Appellant argued that the whole $55,000.00 amount and not just the $15,000.00 amount should be considered as moral damages. The Appellant argued that he had suffered stress and health problems for more than a year and that the he claimed more than $300,000.00. The Appellant argued that the $40,000.00 was not for loss of wages and that the Settlement Agreement does not state this (Commission notes, June 1, 2015, GD3-58).

[24] The Appellant advised that his lawyer would contact the Employer's lawyer. The Commission advised that it would also be contacting the Employer. The Appellant advised that he would have his lawyer send in written authorization to communicate with the Commission (Commission notes, June 1, 2015, GD3-58).

[25] The Appellant argued that the preamble to the agreement states that the amount is for moral damages and that it is very clear. The Appellant never agreed to anything to the contrary. The Employer made the Appellant close his business (Commission notes, June 1, 2015, GD3-59).

[26] The Appellant was in touch with his lawyer who contacted the Employer's lawyer regarding the settlement. The lawyer at the Employer advised that he would provide a letter advising that the amount of the settlement was for moral damages. The lawyer is on vacation until June 10, 2015. The Appellant's lawyer will also send a letter (Commission notes, June 2, 2015, GD3-60).

[27] The Appellant wanted to confirm that the issue will be put on hold until the lawyer is back on June 10, 2015. The Appellant would be leaving the country and would have his lawyer submit the authorization (Commission notes, June 3, 2015, GD3-64).

[28] The Commission noted that it did not receive an authorization or a returned call from the lawyer (Commission notes, June 15, 2015, GD3-67).

Additional Evidence from the Appellant

[29] By letter dated June 16, 2015, the Appellant's lawyer wrote to the Employer's lawyer and advised that he did not understand how the Employer could advise the Commission that $40,000.00 was on account of remuneration when the agreement never mentioned this. The lawyer requested that the lawyer discuss the issue with the Employer and provide confirmation that the amount was provided on account of moral damages. The lawyer advised that if the amounts were provided for any other reason, his client would not have accepted the agreement (letter from the Appellant's lawyer, June 16, 2015, GD3-69).

[30] By way of letter dated June 17, 2015, the Appellant advised the Commission (while he was abroad) that the declarations of the Employer are false and his lawyers have issued a response and have requested that the Employer respect the terms of the agreement. The Appellant advised that he was attaching the letter from his lawyer to the Employer. The Appellant requested that the file be kept open until his return (Letter from Appellant, June 17, 2015, GD3-68).

Employer Evidence: Records of Employment:

[31] According to the record of employment dated May 1, 2013 ("ROE 1"), the Appellant worked as a professional from April 16, 2012 to April 12, 2013. The reason for issuing the ROE was "k" for "other" (GD3-19). The Appellant was paid $5,657.47 as vacation pay and $4,807.50 as an "indemnité de préavis". The comment box provided, "préavis non travaille non repond pas aux exigences du poste".

[32] According to the record of employment dated December 10, 2014 ("ROE 2"), the Appellant worked as a professional from April 16, 2012 to April 12, 2013. The reason for issuing the ROE was "k" for "other" (GD3-20). The Appellant was paid $5,657.47 as vacation pay and $4,807.50 as an "indemnité de préavis" and $55,000.00 as an "indemnité de depart." The comment box provided, "préavis non travaillé ne répond pas aux exigences du poste. $55000 alloc de départ n.e, dont $40,000 tranfenreer".

[33] According to the record of employment dated June 10, 2015 ("ROE 3") , the Appellant worked as a professional from April 16, 2012 to April 12, 2013. The reason for issuing the ROE was "k" for "other" (GD3-66). The Appellant was paid $5,657.47 as vacation pay and $4,807.50 as an "indemnité de préavis" and $40,000.00 as an "indemnité de depart." The comment box provided, "préavis non travaillé ne répond pas aux exigences du poste. $40000 alloc de départ règlement de la cour supérieur & transfreer".

Commission's Conversations with the Employer:

[34] The Employer, SL, advised that it would verify the information and call back (Commission notes, June 2, 2015, GD3-61). SL phoned back and advised that the $55,000.00 was for moral damages (Commission notes, June 2, 2015, GD3-62). SL telephoned the Commission agent a few minutes later and advised that there was a doubt and she will verify with the person responsible. SL requested that the file be put on the side until she can obtain confirmation (Commission notes, June 2, 2015, GD3-63).

[35] SL advised that she will send in ROE#3, which will show that there was an indemnité de depart of 40,000.00$. Pursuant to the Settlement Agreement, the Appellant was entitled to moral damages of $15,000.00. As this amount was not considered remuneration, it will not be shown anywhere. SL confirmed that only $15,000.00 of the $50,000.00 was considered moral damages (Commission notes, June 9, 2015, GD3-65).

Testimony at the Hearing of January 12, 2016:

[36] The Appellant testified under solemn affirmation.

[37] The Appellant's lawyer agreed to provide the Tribunal with a duly completed authorization to disclose document.

[38] The Appellant submitted that he agreed that the amount of $10,464.97, which he had originally received on account of "vacation pay" and "termination pay" was to be allocated.

[39] The Appellant submitted that the entire $55,000.00 amount was on account of moral damages.

[40] The lawyer pointed out that the preamble formed part of the entire Settlement Agreement and that the agreement provided that the Appellant had alleged moral damages. The Settlement Agreement also referred to the Motion. The lawyer argued that many of the amounts requested under paragraph 22 related to costs of restarting the Appellant's business and also related to moral damages and that the claims for $125,000.00 in remuneration and the bonus amount were not strong claims. The lawyer argued that the Appellant's strongest claims were for moral damages.

[41] The Appellant testified that during the mediation process, the lawyer for the Employer advised that it would not be paying any money on account of lost salary or remuneration and that it would only pay for moral damages.

[42] In response to the Tribunal's query, the lawyer submitted that the amount, which the Employer paid to the Appellant would have been deductible to the same extent by the Employer whether it had been paid as moral damages or whether it had been paid as remuneration.

[43] The lawyer advised that it had further correspondence on hand, which indicated that there were continuing conflicting issues regarding the Employer and the Appellant and that this is why the Employer took the position, which it took with the Commission.

[44] The Appellant testified that pursuant to paragraph 3 of the Settlement Agremeent, the Employer was supposed to transfer the Appellant's telephone line to the Employer. The Appellant testified that this only occurred 4 or 5 months after the telephone line was transferred and that the Appellant had to resort to threatening litigation for this to have occurred. His point of contact at the Employer for the transfer of the telephone line, "DG" was the same person to whom SL of the Employer referred the Commission for further information. The Appellant implied that this was the reason why the Employer was not cooperating or providing the Commission with the correct information.

[45] The lawyer for the Appellant, also argued that the Employer had changed its mind because there was an indication in the file that the Employer would originally advise that the amount was provided for moral damages.

[46] The lawyer for the Appellant submitted that the Settlement Agreement had not been drafted clearly.

Documentation Filed on January 19, 2016 (GD6):

[47] By way of email dated June 2, 2015, the Appellant's lawyer responded to correspondence from the Employer's lawyer and advised that notwithstanding that he is of the opinion that it is the Appellant's job to communicate with the Commission and the government, he would respond to the Appellant's request upon his return from vacation after June 10, 2015. The Employer's lawyer also advised the Appellant's lawyer to confirm that the client provided the Commission with a copy of the Settlement Agreement. The Employer's lawyer added in parentheses as follows: "this document demonstrates perfectly the reason for which the amounts were paid to [the Appellant]." The lawyer also requested that the Appellant cease contacting the Employer. The lawyer mentioned that the Appellant did this many times with respect to the cellular telephone issue and that the Employer has no more time to respond to the Appellant's telephone calls.

[48] By way of email dated June 2, 2015, the Appellant wrote to his lawyer and advised that he had no interest in speaking with the Employer again and that the Employer caused issues because it did not provide adequate information with respect to the phone transfer or the proper address. The Appellant advised that the final agreement was reached on the basis that the money was for moral damages and that he would not have agreed on the settlement if it had been paid any other way.

Testimony at the Hearing of January 27, 2016

[49] The Appellant repeated that he would not have entered into the Settlement Agreement if the amount was not paid on account of moral damages.

[50] The Appellant's lawyer explained that because the Appellant worked at the Employer for less than 1 year, the Appellant's claim for $125,000.00 in remuneration and the bonus amount were not considered strong claims by the lawyers during the negotiations. The Appellant's lawyer advised that the Employer let the Appellant go one day less a year to avoid the effects of the law upon the Appellant's dismissal.

[51] The Appellant testified that the Employer's lawyer had drafted the Settlement Agreement originally.

[52] The Appellant repeated that "DG" at the Employer (the person to whom the Commission was referred at GD3-65) was one of the people with whom he argued during the long dispute, which he had over the cellular telephone issue after the Settlement Agreement had been concluded.

[53] The Appellant's lawyer argued that the amounts were paid to the Appellant for a "different purpose" and he submitted that the cases of *Hamilton* 2007 FCA 104 and *Forest* 2007 FCA 362 were analogous.

SUBMISSIONS

[54] **The Appellant** submitted that the amount should not be allocated in the manner proposed by the Commission for the following reasons:

a) Part of the $65,465.00 received from the Employer, was for moral damages and $16,146.67 was paid for legal fees (Request for Reconsideration, April 27, 2015, GD3-24).

b) The $15,000.00 was for moral damages and the $40,000.00 was for damages on account of the $337,632.66 claimed in the Motion. Lawyer fees were paid in the amount of $16,143.67 and $10,465.00 is the difference between $65,465.00 and $55,000.00 (Request for Reconsideration, April 27, 2015, GD3-26);

c) The Employer's declarations are false (testimony);

d) The Appellant would not have accepted the Settlement Agreement if the amount was on account of anything other than moral damages (GD6, testimony);

e) The Employer was not being honest because the relationship between the Employer and the Appellant was poor (testimony);

f) The Settlement Agreement provided that the amount was paid on account of moral damages and this was reinforced in paragraphs 1 and 2(b) of the Settlement Agreement and in the preamble (testimony);

g) The claims in the Motion on account of employment income and earnings were not strong and this is why the Employer only agreed to pay the Appellant on account of moral damages (testimony); and,

h) *Hamilton* 2007 FCA 104 and *Forest* 2007 FCA 362 are analogous.

[55] The **Respondent** submitted as follows:

a) Sums received from an employer are presumed earnings and must therefore be allocated unless the amount falls within an exception in subsection 35(7) of the Regulations or does not arise from employment (GD4-3);

b) Earnings paid by an employer by reason of separation from employment must be allocated pursuant to subsection 36(9) of the Regulations. It is the reason or motive for the payment and not the date of payment that determines the date from which the allocation must begin (GD4-3);

c) Vacation pay, severance pay and wages in lieu of notice are earnings paid or payable by reason of lay-off or separation. It is therefore allocated at normal weekly earnings from the date of lay-off or separation, depending on which event gave right to the money (GD4-3);

d) Money paid by the Employer specifically to reimburse legal expenses is not income because it is not intended to pay for lost wages or lost employment related benefits (GD4-3);

e) Only the amount of the legal fees paid to recover the income replacement portion can be deducted as the legal costs. This amount is obtained using the percentage that the income replacement portion is of the total award amount received (GD4- 3);

f) Based upon the facts, the Commission determined that the 40,000.00$ as severance pay to be paid in the RRSP account constituted earnings pursuant to subsection 35(2) of the Regulations because the payment was made to compensate for loss of salary (GD4-3);

g) The payment of $40,000.00 was made by reason of the Appellant's separation from employment (GD4-3);

h) Consequently, the severance pay was allocated pursuant to subsection 36(9) of the Regulations according to the Appellant's normal weekly earnings from April 14, 2013 (GD4-3);

i) Even if the Appellant states that he received the total amount to compensate for his moral damages, this is not what the agreement signed between him and the Employer stipulates (GD4-4);

j) Amounts paid because of the severance of the employment relationship constitute earnings within the meaning of section 35 of the Regulations and must be allocated in accordance with subsection 36(9) of the Regulations (*Boucher Dancause* 2010 FCA 270; *Cantin* 2008 FCA 192), unless the claimant can demonstrate that due to "special circumstances", some portion of its should be regarded as compensation for some other expense or loss (*Radigan* A-567- 99)(GD4-4); and,

k) The onus is on the claimant to establish that all or part of the sums received as a result of his or her dismissal amounted to something other than earnings within the meaning of the Act (*Bourgeois* 2004 FCA 117).

ANALYSIS

Defining Earnings:

[56] The Tribunal finds that the Regulations dealing with earnings and allocation have been drafted and interpreted broadly, to include the "entire income of a claimant arising out of any employment" (*McLaughlin* 2009 FCA 365).

[57] It is a long standing principle and consistent with the Act and Regulations that sums received from an employer are presumed to be earnings and must be allocated unless the amount falls within an exception in subsection 35(7) of the Regulations or the sums do not arise from employment (*Ledzy Lam* Cub 51191)(Cub 27140).

[58] The rationale for the allocation of the earnings, which a claimant received while on benefits is the avoidance of double-compensation. In *Attorney General of Canada v. Walford*, A-263-78, December 5, 1978, Justice Pratte stated:

> "The purpose of the scheme is obviously to compensate unemployed persons for a loss […] A loss which has been compensated no longer exists. The Act and Regulations must, therefore, in so far as possible, be interpreted so as to prevent those who have not suffered any loss of income from claiming benefits under the Act."

[59] These dicta were repeated and relied upon in subsequent decisions, including, in *Chartier* 2010 FCA 150.

Burden of Proof:

[60] With respect to the burden of proof, it is the Appellant who must prove, on a balance of probabilities that the amount paid or payable is not earnings within the meaning of the Act. The Appellant is also obligated to disclose all of the amounts received (*Ledzy Lam* CUB 51191, CUB 27140, *Déry* 2008 FCA 291, Cub 70735, Cub 11077, *Romero*, 1997 CanLII 6067 (FCA) (A-815-96).

[61] The same is true in the context of termination of employment or dismissal or termination because of bankruptcy. The onus is on the claimant to establish that all of part of the sums received as a result of his or her dismissal amounted to something other than "earnings" within the meaning of the Act and Regulations (*Bourgeois* 2004 FCA 117).

Were the Amounts Received from the Employer "Earnings"?

The Settlement Agreement:

[62] With respect to the amount received by the Appellant pursuant to the Settlement Agreement, the Tribunal finds that the Appellant has proven on a balance of probabilities that 85% of the Settlement Agreement amount of $55,000.00 (the "Settlement Agreement Amount") was not earnings and that it was paid as moral damages or otherwise as compensation for some other agreement or loss (*Boucher Dancause* 2010 FCA 270; *Cantin* 2008 FCA 192; *Bourgeois* 2004 FCA 117).

The Ambiguity:

[63] Paragraph 2 of the Settlement Agreement provides that the Appellant was to be paid $55,000.00. The $55,000.00 amount is then divided into two separate payments in paragraphs 2A and 2B of the Settlement Agreement.

[64] While paragraph 2B provides that a $15,000.00 amount would be paid as moral damages, paragraph 2A only provides that an amount of $40,000.00 would be paid into the Appellant's "RRSP".

[65] Unlike paragraph 2B, paragraph 2A is silent as to the nature, purpose or character of the $40,000.00 payment. Paragraph 2A appears to be more concerned with the manner or method of payment (presumably to insulate the amount from unfavourable tax consequences) and less concerned with defining its nature. This begs the question, as to what the $40,000.00 payment comprises and this renders this part of the Settlement Agreement somewhat ambiguous.

[66] At first blush, the Tribunal found the Commission's argument tenable that the amount related to loss of employment income because the Motion mentioned many heads of damages, including, damages relating the Appellant's employment situation and because the Employer advised in the ROE and by telephone that the amount was not paid on account of moral damages (GD3-65, ROE3).

[67] In the presence of the ambiguity, however, the Tribunal had to examine the entire agreement, including the preamble, the Motion, and any and all evidence regarding the intention of the parties.

The Preamble:

[68] With respect to the preamble, the Appellant argued that it was clear that the whole $55,000.00 amount related to "moral damages" because this is what the preamble mentioned and because paragraph 1 of the Settlement Agreement incorporated the preamble by reference and provided that it was an integral part of the Settlement Agreement.

[69] While the labels used by the parties in the Settlement Agreement to describe the amounts paid, are by no means determinative, the Tribunal found that it was significant that the Motion mentioned many other heads of damages and that "moral damages" was the only allegation or label, which was retained or mentioned in the Settlement Agreement. This lent support to the Appellant's contention that the full $55,000.00 amount was paid as moral damages (*Finlay* v. *Canada (Minister of Finance)*, [1993] 1. S.C.R. 1080 at 1123; *New Brunswick (Minister of Health & Community Services*) v. *C. (G.C.)* [1988] 1 S.C.R. 1073; *R.* v. *C.D.* [2005] 3 S.C.R. 668; *Bell Express Vu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559).

[70] The Tribunal could not, however, ignore that the preamble also mentioned that the parties wished to settle their dispute with respect to the Motion and the termination of the Appellant's employment.

The Intention of the Parties

[71] The evidence with respect to the parties' intentions was contradictory.

[72] The Employer submitted ROE3 at GD3-66 on June 15, 2010, and it made several statements to the Commission contemporaneously, which advised that the $40,000.00 payment was an "indemnité de depart" and that it was not paid on account of moral damages (GD3-65).

[73] At the same time, the Appellant provided documentation at GD6 which included a statement in an email dated June 2, 2015, from the Employer's lawyer which appeared to support the Appellant's position regarding the characterization of the payments. The Employer's lawyer's email preceded the final position taken by the Employer at ROE3 and GD3-65 and 66. The Employer's lawyer's advice may have been more reliable than the Employer's final statements in light of the Appellant's testimony that the Employer's lawyer was the person who had drafted the Settlement Agreement and that the Appellant had an acrimonious relationship with the Employer at the time that the statements at GD3-65 and 66 and ROE3 were made.

[74] It was also clear from GD6 that as of June 2015, when the Employer communicated its position to the Commission, there was still acrimony between the parties. It was, therefore, possible that the Employer may have been less cooperative or honest in its statements to the Commission regarding the intention of the parties and the nature of the $40,000.00 amount in the Settlement Agreement.

[75] By contrast, the Tribunal found the Appellant's testimony overall to have been cogent, consistent, reliable and credible, including, the Appellant's statements that he would not have entered into the Settlement Agreement if the amounts had been paid as anything other than moral damages.

[76] The Appellant was present at the hearings and answered all of the Tribunal's questions to its satisfaction and in an manner, which explained the merits of its position. In this regard, the Tribunal preferred the Appellant's direct evidence as *viva voce* (telephone) testimony on these points, over the Employer's somewhat contradictory evidence in the file, which amounted to indirect hearsay evidence (*Larivee* 2007 FCA 312; *Meunier* A-130-96, 1996 Canlii 8983 FCA; *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 SCR 41; *Falardeau* A-396-85; *Bartone* A-369-88; *Davlut* A-241-82, [1983] S.C.C.A 398).

The Motion:

[77] The substance of the Motion alleged many heads of damages, which were not related specifically to employment income or earnings and which, (in addition to moral damages) would be seen to have included damages for misrepresentation and damages for restitution for the loss of the Appellant's business interests when he decided to wind down his business and take a position at the Employer.

[78] The Tribunal also found the Appellant's testimony credible regarding the Employer's position in the negotiations. It was entirely conceivable, where the duration of employment is less than one year, for an Employer to argue that the Appellant's claims for loss of employment or lost wages in the Motion would have little or no support at law and that the Employer would not pay any settlement amount with respect to this head of damage.

[79] Still, the Tribunal had to reconcile the reality that even though the Appellant's legal position with respect to his employment status may have been weak or even barely meritorious, the termination of the employment relationship formed the backdrop of the Settlement Agreement and was intricately connected to the moral damages and was mentioned in the preamble to the Settlement Agreement and in the Settlement Agreement itself at paragraph 5.

[80] The Tribunal considered this question carefully and finds that in the circumstances, only 15% of the Settlement Amount related to compensation for the loss of earnings from the termination of the employment relationship.

Conclusion Regarding the Settlement Agreement:

[81] The Tribunal finds that upon viewing the Motion, the Settlement Agreement as a whole, including the preamble, and the evidence as to the intention of the parties, the Appellant has proven on a balance of probabilities that the parties agreed to characterize 85% of the Settlement Agreement Amount as moral damages or as damages which were unrelated to earnings, such as damages for the loss of the Appellant's business interests. In this regard, the Tribunal finds that the failure to mention this in paragraph 2A was the product of a typographical error, oversight or other error on the part of the lawyers who drafted the agreement.

[82] The Tribunal finds that the Appellant has met the onus of establishing on a balance of probabilities (*Hamilton* 2007 FCA 104; *Forest* 2007 FCA 362; *F.H. v. McDougall,* 2008 SCC 53, [2008] 3 SCR 41), that 85% of the payments received from the Employer in the Settlement Agreement amounted to moral damages or something other than earnings as that term is understood in accordance with the Act, Regulations and jurisprudence/case law (*Boucher Dancause* 2010 FCA 270; *Cantin* 2008 FCA 192).

[83] For greater certainty, the Tribunal finds that 15% of the $55,000.00 amount (the "$8,250.00 Amount") was paid to the Appellant by the Employer on account of loss of salary and bonus and income from employment.

The $10,464.97 Amount and the $8,250.00 Amount:

[84] The Tribunal finds that the $10,464.97 Amount was paid by the Employer to the Appellant as vacation pay and termination pay or wages in lieu of notice. The Appellant did not dispute this fact (testimony, GD3-58, GD3-26).

[85] The Tribunal finds that the $8,250.00 Amount was paid on account of loss of salary and bonus and income from employment.

[86] The Tribunal finds that the amount of $10,464.97, and the $8,250.00 Amount do not fit within any of the exceptions in subsection 35(7) of the Regulations.

[87] On this basis, the Tribunal finds that the amount of $18,714.97 was earnings for the purpose of section 35.

Allocating the $10,464.97 Amount and the $8,250.00 Amount:

[88] Section 36 of the Regulations describes how earnings are to be allocated and in which weeks they will be considered to have been earned by the claimant *(Boone* 2002 FCA 257).

[89] The Tribunal finds that in deciding which subsection of section 36 should be resorted to in determining the method for the allocation, it is the reason or motive for the payment and not the date of the payment, which determines the date from which the allocation must begin (*Sarrazin* 2006 FCA 313, CUB 74461, 2010; CUB 77407, 2011; CUB 49309, 2000).

[90] The Tribunal agrees with the Commission that the $10,464.97 amount was paid because of the termination from employment and was paid or payable at the separation from employment (GD3-19). The Tribunal finds further that the $8,250.00 Amount was earnings and was payable at the separation from employment.

[91] Subsection 36(9) explains how earnings paid or payable by reason of separation or lay off are allocated. It specifies that the allocation begins with the week of the lay off or separation in amounts equal to the Appellant's normal weekly earnings.

[92] The Tribunal finds, accordingly, that pursuant to subsection 36(9) of the Regulations, the $10,464.97 Amount and the $8,250.00 Amount had to be allocated on the basis of the Appellant's normal weekly earnings commencing with the week of the lay off or separation.

Legal Fees

[93] Given the Tribunal's findings that only 15% of the Settlement Agreement Amount was earnings, only 15% of the legal fees incurred of $14,808.11 (the $2,221.22) was capable of being deducted from the amount to be allocated.

[94] The Tribunal finds that no legal costs can be deducted on account of the $10,464.97 Amount. This is because the legal fees were incurred after the amount to be allocated of $10,464.97 was paid to the Appellant (GD3-19 and GD3-33 to 57) and the legal fees were not related to this amount.

[95] In this regard, the Appellant has only proven on balance of probabilities that $2,221.22 of the legal fees were expenses or costs to be deducted from income because they were incurred for the direct purpose of earning that income pursuant to paragraph 35(10)(a) of the Regulations (*Radigan* [2001] 267 N.R. 129 (FCA)).

[96] Accordingly, only $16,493.75 (($8,250.00 - $2,221.22) + $10,464.97) are earnings and are subject to allocation in accordance with subsection 36(9) of the Regulations.

CONCLUSION

[97] The Tribunal finds that 15% of the Settlement Agreement Amount and the full $10,464.67 Amount were earnings and had to be allocated in accordance with subsection 36(9) of the Regulations, after deducting $2,221.22 on account of legal costs and expenses for a total allocation amount of $16,493.75.

[98] For the foregoing reasons, the appeal is allowed in part.

Alyssa Yufe

Member, General Division - Employment Insurance Section