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

[TRANSLATION]

Citation: *M. M. v. Canada Employment Insurance Commission,* 2016 SSTGDEI 27

Tribunal File Number: GE-15-2792

BETWEEN:

M. M.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Aline Rouleau

DATE OF HEARING: December 8, 2015

DATE OF DECISION: February 19, 2016

Canada

RESONS AND DECISION

PERSONS IN ATTENDANCE AND FORM OF HEARING

[1] The Tribunal held a hearing by videoconference on December 8, 2015 for the reasons given in the notice of hearing dated October 21, 2015, specifically, because of the information in the file, including the need for additional information and the fact that the Appellant is represented.

[2] The Appellant, M. M., was present and represented by Sylvain Bergeron of L.A.S.T.U.S.E (Lieu d'Actions et de Services Travaillant dans l'Unité avec les Sans Emplois) du Saguenay.

[3] Christine Miron, an intern with L.A.S.T.U.S.E., was also present.

[4] The Respondent Commission was not present at the hearing.

INTRODUCTION – STATEMENT OF FACTS AND PROCEEDINGS

[5] The Appellant established a benefit period that took effect on July 21, 2013 (GD3-2 to GD3-14) after stopping work on July 19, 2013 (GD3-15).

[6] The Commission learned of the official closing by the Employer and the payment by the latter of wages in lieu of notice and compensation. The Commission determined that the amounts received by the Appellant constituted earnings and allocated them beginning on April 6 and ending on June 28, 2014 (GD3-26).

[7] The Appellant filed a request for reconsideration of the Commission's decision to allocate the earnings (GD3-28 to GD3-30), a decision that the Commission upheld (GD3-32 and GD3-33).

[8] The Appellant appealed that decision before the Social Security Tribunal – General Division which, on February 18, 2015, concluded that the allocation of the earnings had been made in accordance with sections 35 and 36 of the *Employment Insurance Regulations* (the "Regulations").

[9] The Appellant filed an application for leave to appeal to the Tribunal's Appeal Division, leave that was granted on June 22, 2015. By its decision dated September 3, 2015, the Appeal Division sent the file back to the General Division for a new hearing on the grounds that the decisions by the General Division was based on elements without evidence in the file, the Commission had not objected to the case being returned to the General Division and it might thereby be able to add the missing information.

[10] On September 23, 2015, in accordance with section 32 of the *Social Security Tribunal Regulations*, the undersigned member of the Tribunal asked the Commission to provide the source of certain additional information on which it had relied to make its decision.

ISSUE

[11] Were the sums received by the Appellant allocated in accordance with sections 35 and 36 of the *Employment Insurance Regulations* (the "Regulations")?

THE LAW

[12] Section 35 of the Regulations defines what constitutes income and section 36 of the same Regulations indicates the manner in which it must be allocated, that is, during which week the earnings are considered to have been earned by a claimant. Sums received from an employer are considered earnings and must be allocated unless they are covered by the exceptions set out in subsection 35(7) of the Regulations.

[13] Subsection 36(9) of the Regulations reads: "*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*."

EVIDENCE

Evidence in the file

[14] The Appellant stopped working for the Employer, PF Résolu, on July 19, 2013 because of a shortage of work (GD3-15).

[15] The Commission stated that it learned, through the CBC website, that the Employer, Produits Forestiers Résolu, had announced the closing of the Saint-Fulgence sawmill (GD3-18 and GD3-19).

[16] On May 28, 2014, a memorandum of agreement was signed between "PF Résolu Canada Inc., scierie St-Fulgence" [St-Fulgence sawmill] and the "Syndicat des salariés de la scierie St-Fulgence (C.S.D.)" concerning employment opportunities following the permanent closing of the St-Fulgence mill and the payment of a special severance allowance to employees [Translation] "still employed on the date of the permanent closing, April 9, 2014" (RGD3-2 to RGD3-5).

[17] The file contains a handwritten note entitled [Translation] "Produits Forestiers Résolu – St-Fulgence Sawmill/Pay in lieu of notice", bearing the Appellant's name and notation of the amounts of $6,408 as pay in lieu and $4,750 as an allowance. This document bears the signature and date "L. G., August 18, 2014" (GD3-23 and GD3-25).

[18] A report by a Commission officer, dated September 10, 2014, indicates a decision by a Commission business expertise advisor on the amounts paid by PFR St-Fulgence (GD3-21 and GD3-22).

[19] The Appellant's average weekly earnings were established at $983.01 (GD3-16).

[20] In the decision sent to the Appellant, the Commission determined that he had received $11,158 as severance pay from the Employer and that that amount was considered income and allocated to his benefits from April 6 to June 28, 2014. As a result, the Appellant's weekly benefit rate changed to $501 rather than $500 (GD3-26).

[21] The Commission's decision to allocate the sums received created an overpayment of $3,500 (GD3-27).

[22] The Appellant stated the following (GD3-28 à GD3-31):

a) He had signed an agreement with L. G. on May 28, 2014 for the eight (8) weeks of pay in lieu of notice ($6,408) that he had received on June 26, 2014. As for the RRSP of $4,750, he had received it in September 2014. When he had received this money, he had been working since June 2 for Mil Davie.

b) He has received an offer to work at another site, which he had refused. He signed the agreement to receive his weeks of wages in lieu and his allowance. The situation was not the same for all employees.

[23] On February 11, 2015, the Appellant's representative placed in the file a document entitled [Translation] "Special severance program" (GD5-2), signed by the Appellant and Mr. L. G., the human resources supervisor, dated May 28, 2014 and by which it was agreed that the Appellant was leaving the company on May 28, 2014 in exchange for a bonus of $4,750 to be paid into an RRSP. This document included the first page from another document entitled [Translation] "Resignation and release" (GD5-3).

Appellant's evidence at the hearing

[24] At the hearing, the evidence adduced by the Appellant made it possible to add the following information.

[25] The facts as they appear in the file and the sums received by the Appellant are not disputed. The Appellant acknowledged that these sums must be allocated under subsection 36(9) of the Regulations but argued that the allocation should begin on the date of the separation from employment. The issue is to determine the date on which the relationship of employment was terminated and the Appellant claims that his employment ended or the employment relationship terminated on May 28, 2014.

[26] A memorandum of agreement was signed by the Employer and the employees and must be taken into consideration as written and not as interpreted by the Commission. The Commission relied on an announcement of the closing of the mill to determine the date on which the allocation of the earnings received must start.

[27] It is important to refer to the decision in *Cantin* (2008 FCA 192) because the facts are similar to those in this matter. That case indicates that the employment relationship terminates at the time of the signing of the resignation and release.

[28] Even though the last page of the document "Departure and Release", placed in the file as Exhibit GD5-3, is missing, that document was signed at the same time as document GD5-2 "Special severance program" and at the same time as the memorandum of agreement signed on May 28, 2014 (RGD3-2 to RGD3-5). The Appellant's representative undertook to provide the Tribunal with the missing page. The Employer, by signing these documents, approved what is written in them and acknowledged that the employment relationship was terminated on May 28, 2014. The allocation of income or the sums received by the Appellant must take place as of May 28, 2014.

[29] Since only one (1) or two (2) weeks remained in the Appellant's benefit period, the Commission cannot claim more than what remained of that benefit period.

[30] The actual closing of the mill began in July 2013 through temporary lay-offs. Some employees stopped working in September 2013. The Employer never sent a notice of closing to its employees. The Commission relied on an announcement in the media.

PARTIES' ARGUMENTS

[31] The Appellant argued as follows:

a) He had already been told that when the agreement was signed, it would take effect for employment insurance.

b) There was an error in respect of the date of the termination of the employment relationship. The core of the problem is the date of the termination of the employment relationship and not the date of the closing. The Commission rejects the definition of the separation from employment that the case law analysed in *Canada (AG) v. Cantin*, 2008 FCA 192 and the segmental analysis of subsection 36(9) of the Regulations in decision GE-13-1194 of the Tribunal.

c) In the event of doubt, the interpretation must favour the claimants as stipulated by the Supreme Court of Canada.

d) The reconsideration did not comment on the claim for which he had never received notice except for a statement of account from the recovery center.

[32] The Respondent Commission argued as follows (GD4-1 to GD4-7, RGD3-1):

a) The Employer had been contacted to verify the information and the amounts payable had been paid because the company shut down.

b) The Appellant had been informed that the amounts had been paid because of the closing of the company, Produits Forestiers Résolu St-Fulgence, and that closing took place in the week beginning April 6, 2014, regardless of the date of the payment and whether there had been a transfer into an RRSP.

c) Sums paid by an employer as a result of a lay-off or separation from employment must be allocated under subsection 39(6) of the Regulations. It is the reason for the payment and not the date of the payment that determines when it must be allocated.

d) Earnings related to the termination of employment are considered as having been paid or payable because of a lay-off or separation from employment and must be allocated as of the date on which the event giving rise to the payment of the sum occurred. The amount paid into an RRSP does not change the nature of the earnings nor the fact that they were payable immediately.

e) The Commission determined that the sums received by the Appellant as severance pay because the company closed down constituted earnings under subsection 35(2) of the Regulations. The reason for the payment of this sum was the company's closing in the week of April 6, 2014. The Appellant's separation from employment or lay-off and/or the date of the termination of the employment relationship occurred in the week of April 6, 2014. Under subsection 36(9) of the Regulations, the severance payment was allocated based on the Appellant's average weekly earnings.

f) Even though the memorandum of agreement had been signed on May 28, 2014, the sums paid by the Employer were paid because of the permanent closing of the mill, which took place on April 9, 2014.

ANALYSIS

[33] First, it is important to recall the principles set out in the Act and clarified by the case law.

[34] With respect to the designation of the monies received by claimants for the purposes of the application of subsection 36(9) of the *Employment Insurance Regulations*, the Federal Court of Appeal established the following in *Canada (AG) v. Savarie,* A-704-95 (emphasis added):

"In my opinion, a payment is made "by reason of" the separation from employment within the meaning of this provision when it becomes due and payable at the time of termination of employment, when it is, so to speak, "triggered" by the expiration of the period of employment, when the obligation it is intended to fulfil was simply a potentiality throughout the duration of the employment, designed to crystallize, becoming liquid and payable, when, and only when, the employment ended. The idea is to cover 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. For if an employee's savings, the monies that are already his, should not bar him from receiving benefits under the ***Unemployment Insurance Act***, in return it would seem but normal that the earnings to which he is entitled at the time of his departure should be taken into consideration before he is eligible to receive those benefits. Accordingly, my construction of the expression "by reason of", like that of many umpires, corresponds to the manifest intention of Parliament . . ."

[35] In *Canada (AG) v. Cantin,* 2008 FCA 192, in which the facts are similar to those in this appeal but the issue is different, the Federal Court of Appeal considered that a collective lay-off did not constitute a separation from employment within the meaning of subsection 36(9) of the Regulations, but rather a lay-off because it was followed by an agreement to pay monies, upon payment of which the respondent waived his rights to be recalled and thus terminated his employment relationship. The Court considered that the final termination of the employment relationship had occurred at the time the agreement was signed.

[36] Having reviewed these principles, the Tribunal will move on to its analysis in light of the facts in evidence and the arguments raised.

[37] The Appellant does not dispute and accepts that the amounts received from his employer qualify as earnings under subsection 36(9) of the Regulations. What he disputes is the starting date that the Commission used to allocate those earnings.

[38] Since the nature of the monies is not in question, the Tribunal confirms that the sums received by the Appellant constitute earnings under section 35 of the Regulations that must be allocated in accordance with subsection 36(9) of those Regulations. The issue is therefore to determine when that allocation should start.

[39] The Commission argues that the Appellant received severance pay of $11,158 because of his separation from employment that occurred when the Employer's mill closed on April 9, 2014. The Commission insists strongly that the date of termination of employment is the same date as the date of the mill's closing.

[40] The Employer did not cease all activity on April 9, 2014; it closed one of its sectors of operation. It provided evidence that a memorandum of agreement between the Employer and the Appellant had been signed on May 28, 2014. By that agreement, the Employer offered employment opportunities to the Appellant because of the need for workers in its other sectors of activity.

[41] In that agreement it states that, if the Appellant is relocated to another sector, he must waive the special severance pay provided for in article 7 of the agreement. Article 7 provides that, for employees who will not be offered employment in one of the company's other sectors and [Translation] "*who are still employed on the date of the permanent closing . . .*", they will be paid special severance pay provided that the employee in question signs an individual agreement [Translation] "*the model of which is provided in Appendix A hereof*" and which provides, in particular, for the employee's resignation and waiving and release of all rights and recourse.

[42] It is this special severance pay that the employee received. The Tribunal underscores that the Appendix A mentioned was not adduced by the Commission at the same time as the

agreement but was adduced by the Appellant who confirmed having signed all of these documents on the same day, May 28, 2014.

[43] It is good to mention that the Appellant had experienced a prior lay-off. There is no legislative mandate for allocating monies paid upon separation to a period following a prior lay-off. The *Employment Insurance Regulations* refer, in respect of the allocation of earnings, to separation from an employment or the date of the termination of employment, and the Federal Court of Appeal has clearly indicated the distinction that must be made between a lay-off and a separation from employment.

[44] Under the agreement entered into between the Employer and the Appellant, it is difficult to claim that the date of the Appellant's separation from employment was April 9, 2014. If the employer required a resignation in that agreement and made it a condition for payment of the special severance pay, it must be concluded that the employment relationship had not been terminated on that date. In this case, the date on which the mill closed is not the key element to consider. Under the agreement, even after the mill closed, the Appellant maintained what the Tribunal considers a right to be recalled because the Employer continued to operate other mills to which the Appellant could have been relocated.

[45] It was when the Appellant refused the offer made under the memorandum of agreement that there was a true termination of the employment relationship or separation from employment within the meaning of subsection 35(9) of the Regulations and that termination was confirmed by the signing of the agreement on May 28, 2014.

[46] The Tribunal concludes that, under subsection 36(9) of the Regulations, the allocation of the earnings received by the Appellant must be made as of May 28, 2014, the date of the separation from employment.

CONCLUSION

[47] The appeal is allowed.

Aline Rouleau
Member, General Division
Employment Insurance Section