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

Citation: *S. F. v. Canada Employment Insurance Commission*, 2017 SSTADEI 1

Tribunal File Number: AD-13-1199

BETWEEN:

S. F.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

SOCIAL SECURITY TRIBUNAL MEMBER:	Pierre LAFONTAINE
DATE OF DECISION:	January 16, 2017
DATE OF HEARING:	November 1, 2016

Canada

REASONS AND DECISION

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] On September 30, 2013, a Board of Referees determined that the monies received by the Appellant from Air Canada constituted earnings under section 35 of the *Employment Insurance Regulations* (*Regulations*) and that said amount had to be allocated in accordance with section 36 of the *Regulations*.

[3] The Appellant requested leave to appeal to the Appeal Division on November 21, 2013. The Tribunal allowed the late application and granted leave to appeal on January 25, 2016.

[4] On January 25, 2016, a correspondence was sent to Aveos Fleet Performance Inc. and Air Canada to determine if they wished to be added as a party. No interest was shown by either party to be added in the present appeal. No reply was received by the Tribunal. The Tribunal therefore ordered that no parties be added to the present appeal.

[5] On August 3, 2016, the Tribunal held a pre-hearing conference so that the parties could:

- clarify certain procedural issues raised in the above-noted appeal;
- present the approximate time required for arguments;
- submit any pre-hearing admissions and agreements;
- determine the possibility of further agreements between the parties on certain issues;

- determine the next steps and available dates of the parties for the hearing and discuss related procedure questions.

[6] On August 31, 2016, the parties submitted to the Tribunal the undertakings of the pre-hearing conference.

[7] The appeal hearing was held on November 1, 2016, in Winnipeg, Manitoba.

TYPE OF HEARING

[8] The Tribunal held an in person and teleconference hearing for the following reasons:

- The request of the parties.
- The complexity of the issue under appeal.
- The information in the file, including the need for additional information.
- The requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness, and natural justice permit.

[9] At the hearing, the Appellant was not present but represented by Doug Simpson and Sandra Guevara-Holguin. The Respondent was represented by Vanessa Luna and Stephanie Yung-Hing. Mike Maskell, Wayne Whelan, Renald Courcelle and Christine Herner also attended the hearing.

THE LAW

[10] The only grounds of appeal presentable to the Tribunal mentioned in former subsection 115(2) of the *Employment Insurance Act* and now subsection 58(1) of the *Department of Employment and Social Development Act* (*DESD Act*) are that:

a) The Board of Referees failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

b) The Board of Referees erred in law in making its decision, whether or not the error appears on the face of the record; or

c) The Board of Referees 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.

ISSUE

[11] The Tribunal must decide if the Board of Referees erred when it concluded that the monies received by the Appellant from Air Canada constituted earnings under section 35 of the *Regulations* and that said amount had to be allocated in accordance with section 36 of the *Regulations*.

ARGUMENTS

[12] The Appellant submits the following arguments in support of the appeal:

- The Board ignored significant evidence presented to it and dismissed the appeal based on errors in law in that they totally ignored the eight pages of evidence presented by the Appellant and failed to explain the reason it disregarded this evidence;

- It is essential to fulfill the requirement of natural justice that a Board clearly and fully explain the reasons for it's decision;

- As well, it is customary also to explain to the claimant why the Respondent's evidence was accepted over the claimant's. This explanation was not provided by the Board;

- The Board simply stated: "The Board finds as fact that the monies received are to be allocated pursuant to Section 35 and 36 of the E.I. Regulations". In addition, they did not stipulate which subsection of section 36 applied in this matter;

- The decision of the Board is less than acceptable and lacks specific reasons for coming to its conclusion; The Board does not explain why it discounted the position that Air Canada employees relinquished their right to reinstatement;

- The appeal docket prepared by the Respondent, specifically at Exhibit 4-19, quotes 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 is sections 35 and 36 of the *Regulations* and should not be allocated.

[13] The Respondent submits the following arguments against the appeal:

- Subsection 35(2) of the *Regulations* stipulates that the earnings to be taken into account to determine the amount to be deducted from benefits are "... the entire income of a claimant arising out of any employment." Unless the amount falls within an exception in subsection 35(7) of the *Regulations* or does not arise from employment, it is considered earnings that must be allocated under section 36 of the *Regulations*;

- The Federal Court of Appeal has affirmed that severance or termination pay constitutes earnings resulting from employment;

- That the evidence in the record supports a finding that the separation payments were equivalent to severance or otherwise arose from the Appellant's employment;

- Paragraph 2 of the Separation Program states that the separation payments were to be in an amount representing two weeks' pay for each completed year of continuous service at Air Canada and Aveos. Paragraph 4 of the Separation Program provides further support that the monies paid were equivalent to severance pay as one of the eligibility conditions was the termination or permanent layoff of IAMAW-represented employees;

- Paragraph 9 of the Separation Program states that the separation payments were "...inclusive of and in complete satisfaction of any and all payment in lieu of notice of termination or layoff and severance pay to which an employee in receipt of the separation package" was entitled from Air Canada and/or Aveos under the *Canada Labour Code* and under the applicable collective agreement;

- Therefore, based on the record, it was reasonable for the Board of Referees to conclude that the monies "constitute a severance benefit derived from employment income." The Board's conclusion was not capricious or arbitrary and was made with regard to the material before it;

- The evidence and the relevant jurisprudence provide an ample basis for the Board's conclusion that the separation payments constitute earnings pursuant to section 35 of the *Regulations*. The Respondent submits that the Board's decision is based on an assessment of all of the evidence. The Board made no error that would justify the Appeal Division's intervention;

- The Board of Referees did not err in finding that the separation payment received by the Appellant was earnings under section 35 of the *Regulations*,

thereby implicitly rejecting the argument that the separation payments were received in exchange for waiving a right to recall or reinstatement;

- There is no evidence in the record that the Appellant sought reinstatement through a grievance or otherwise. Importantly, the evidence is insufficient to prove that the separation payments were paid to compensate the relinquishment of the right to reinstatement. The Federal Court of Appeal jurisprudence dealing with money received in exchange for waiving the right to reinstatement is therefore inapplicable to this appeal;

- In *Canada (A.G.) v. Cantin*, 2008 FCA 192, the Federal Court of Appeal noted that the employees in that case had waived their right to be recalled. Nonetheless, the Court held that the money received constituted earnings that had to be allocated under subsection 36(9) of the *Regulations* because it was paid by reason of a separation from employment;

- The text of Exhibit 4-19 is insufficient to support the Appellant's position that the separation payments were paid or payable in exchange for a relinquishment of the right to recall;

- The Board of Referees did not make its decision without regard to the evidence of the Appellant;

- Although it may not have referred to each and every page of the record, the Respondent submits that the Appellant has failed to demonstrate that the Board made its decision without regard to his evidence. The Board was alive to the Appellant's argument and the evidence that he adduced in support, including the January 2009 Memorandum of Agreement;

- If the Appeal Division finds that the separation payments constitute earnings, they must be allocated pursuant to section 36 of the *Regulations*;

- The separation payments should be allocated under subsection 36(9) of the *Regulations* to consecutive weeks beginning with the week of the layoff or separation from employment from Aveos, which is the week of March 18, 2012;

- The separation payments should be allocated pursuant to subsection 36(9) of the *Regulations* because they were paid or payable by reason of a lay-off or separation from employment;

- The Federal Court of Appeal has noted 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 ";

- Subsection 36(9) of the *Regulations* emphasizes the reason for which the earnings were paid. The timing of the payment and the source of the earnings are not relevant;

- The evidence supports a conclusion that the separation payments were paid or payable by reason of the layoff or separation from employment from Aveos;

- The Separation Program sets out the eligibility criteria for the separation payments. Paragraph 4 provided that the separation payments could be triggered by the insolvency of Aveos resulting in the cancellation of Air Canada-Aveos contracts and the termination or permanent layoff of the Aveos employees before June 2013. These events occurred on or around March 20, 2012;

- In other words, the obligation to pay the separation payments became liquid and payable as a result of Aveos' insolvency that led to the cancellation of the heavy maintenance contract and the termination of the Appellant's employment;

- Arbitrator Teplitsky confirmed in his September 12, 2012 decision that no payment was due on separation from Air Canada. Rather, "... the bankruptcy of Aveos, or the loss of the heavy maintenance contract, triggered the payment.";

- It was confirmed by Arbitrator Teplitsky in his March 5, 2009 decision that, for employees who accepted employment with Aveos, the transition to Aveos did not give rise to an entitlement to severance pay;

- The law and the jurisprudence support the Respondent's position that the separation payments should be allocated according to the manner prescribed in subsection 36(9) of the *Regulations*, beginning with the week of the layoff or separation from Aveos, which was the week of March 18, 2012.

STANDARD OF REVIEW

[14] The parties agree and submit that the applicable standard of review of decisions of the Board of Referees regarding questions of law is the standard of correctness and to questions of fact and law is reasonableness - *Canada (A. G.) v. Jean* 2015 FCA 242.

[15] The Tribunal acknowledges that the Federal Court of Appeal determined that the standard of review applicable to a decision of a Board of Referees regarding questions of law is the standard of correctness - *Martens c. Canada (A.G.)*, 2008 FCA 240 and that the standard of review applicable to questions of fact and law is reasonableness – *Dunsmuir v. New Brunswick*, 2008 SCC 9, *Canada (A.G.) v. Hallée*, 2008 FCA 159.

ANALYSIS

Introduction

[16] 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, an obligation prescribed by subsection 3(1) of the *Social Security Tribunal Regulations*, and by agreement of all parties, the present decision applies to the files mentioned in the attached annex since they raise the same questions of fact and law.

Decision of the Board of Referees

[17] The argument put forward by the Appellant before the Board of Referees was that the money received by him and other former Air Canada employees did not meet the definition of earnings and therefore should not be allocated to their claim. It was argued that these monies where in fact paid to them to relinquish their right to reinstatement.

[18] On September 30, 2013, the Board of Referees unanimously dismissed the appeal. After reviewing the evidence, the Board of Referees concluded that the separation payments constituted a severance benefit derived from employment income and was to be allocated pursuant to section 36 of the *Regulations*.

Leave to appeal to the Appeal Division

[19] In support of the leave application, the Appellant argued 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, any monies paid to the claimant as a result does not meet the definition of earnings established by sections 35 and 36 of the *Regulations* and should not be allocated.

[20] Leave to appeal to the Appeal Division was granted on January 25, 2016.

Position of the parties in appeal before the Appeal Division

[21] The Appellant submits that the Board of Referees ignored significant evidence presented to it and dismissed the appeal based on errors in law in that the Board totally ignored the eight pages of evidence presented by the Appellant and failed to explain the reason it disregarded this evidence. The Appellant argues that the decision of the Board is less than acceptable and lacks specific reasons for coming to its conclusion. In view of these errors, the Appellant wants the Appeal Division to intervene and render the decision that should have been rendered by the Board of Referees.

[22] The Appellant is no longer contesting that the payments constitute earnings under subsection 35(2) of the *Regulations*. He now takes the position that the earnings should be allocated under subsection 36(19) of the *Regulations* considering that the requirements of subsection 36(9) are not fulfilled.

[23] The Respondent submits that the law and jurisprudence support the position that the separation payments should be allocated according to the manner prescribed in subsection 36(9) of the *Regulations*, beginning with the week of the layoff or separation from Aveos, which was the week of March 18, 2012.

New grounds of appeal

[24] The Respondent takes the position that the appeal of the Appellant should be dismissed considering that the grounds of appeal raised by the Appellant are different than the ones for which leave to appeal was granted.

[25] The Tribunal finds that leave to appeal was granted on the basis that the dispute between the parties raised questions regarding the interpretation to be given to sections 35 and 36 of the *Regulations*.

[26] Furthermore, the order granting leave was not specifically restricted to the grounds that were found to have a reasonable chance of success. The decision simply states that leave to appeal is granted - *Mette v. Canada (A.G.)* 2016 FCA 276.

[27] Therefore, the Tribunal will consider all grounds of appeal raised by the Appellant. At the hearing, the Respondent declared itself ready to proceed on these new grounds of appeal.

Did the Board of Referees err in law?

[28] The Appellant submits that the Board of Referees ignored significant evidence presented to it and dismissed the appeal based on errors in law in that the Board totally ignored the eight pages of evidence presented by the Appellant and failed to explain the reason it disregarded this evidence. The Appellant argues that the decision of the Board is less than acceptable and lacks specific reasons for coming to its conclusion.

[29] The Respondent submits that a tribunal need not refer in its reasons to each and every piece of evidence before it and is presumed to have considered all the evidence. More importantly, in the present matter, the Board of Referees decision refers to the Appellant's written presentation (Exhibit 18-1 to 18-8) and specifically to the Appellant's argument that the separation payments were received in exchange for the relinquishment to the right of reinstatement. The Board of Referees also refers in its decision to Exhibit 4-14, which is a page of the January 2009 Memorandum of Agreement (MOA).

[30] The Tribunal finds that the Board of Referees did not consider the evidence submitted by the Appellant in support of his then position that the amount paid by Air Canada was a financial contribution to relinquish his right of reinstatement and therefore should not be allocated as earnings.

[31] It is true that the Board of Referees refers to the Appellant's written presentation (Exhibit 18-1 to 18-8) and specifically to the Appellant's argument that the separation payments were received in exchange for the relinquishment to the right of reinstatement in the “Evidence at the hearing” section. However, the Board then goes on to ignore the evidence in its findings of “Fact, Application of the law” section. The Tribunal finds that if one were to only read the analysis part of the decision of the Board, one could not determine what the position of the Appellant was in that appeal.

[32] The Tribunal cannot accept the argument of the Respondent that the Board of Referees "implicitly" rejected the arguments of the Appellant by concluding that the monies received were to be allocated pursuant to sections 35 and 36 of the *Regulations*.

[33] It is well established that the Board of Referees must analyze all relevant evidence, and if it decides to dismiss certain evidence or to not assign it the probative value that this evidence appears to reveal or convey, it must explain clearly why – *Bellefleur v. Canada (A.G.)*, 2008 FCA 13. The Board of Referees failed to do so in the present case and this constitutes an error in law.

[34] Furthermore, the Tribunal finds that the decision of the Board of Referees is ambiguous and lacks clarity. It most importantly fails to mention what relevant portion of section of 36 of the *Regulations* applies to the situation of the Appellant.

[35] In view of the above errors, and considering that the facts are not in dispute, the Tribunal is justified to intervene and render the decision that should have been rendered by the Board of Referees.

The undisputed facts

[36] Following the pre-hearing conference and during the appeal hearing, the parties agreed to the below mentioned statement of facts.

[37] On December 14, 2006, the International Association of Machinists and Aerospace Workers (IAMAW) filed a complaint (file no. 26054-C) with the Canada Industrial Relations Board (CIRB) under the *Canada Labour Code* concerning the sale of all or part of Air Canada Technical Services (ACTS LP), a limited partnership created by the conversion of Air Canada's internal technical operations department into a distinct entity.

[38] In October 2007, ACTS LP sold its business to a consortium consisting of Sageview Capital LLC and KKR Private Equity Investors, L.P. The business was carried

on by the purchaser and new employer then known as ACTS Aero Technical Support and Services Inc. Since September 2008, the business operated under the name Aveos.

[39] In order to resolve any remaining issues in CIRB File No. 26054-C, Air Canada, Aveos and the IAMAW (parties) entered into a Memorandum of Agreement dated January 8, 2009 (January 2009 MOA). The January 2009 MOA was concluded to achieve the following objectives in the event that the CIRB issued an order severing the current bargaining units as a result of the sale of ACTS LP:

1. To facilitate the orderly transition of certain Air Canada Employees to Aveos in accordance with the expressed preference of those employees; and

2. To establish terms and conditions of employment that will apply to those Air Canada Employees who elect to become employees of Aveos.

[40] The January 2009 MOA offered seven transition options to employees of Air Canada. Employees had to choose between the following options:

1. Remain employees of Air Canada (Option 1)

2. Accept available employment with Aveos (Option 2)

3. Retire from Air Canada in order to accept a position with Aveos, available to eligible employees assigned to work for the benefit of Aveos on the date of the CIRB order severing the bargaining units (Option 3)

4. Resign from Air Canada to accept a position with Aveos, available to eligible employees assigned to work for the benefit of Aveos on the date of the CIRB order severing the bargaining units (Option 4)

5. Employees eligible for retirement who stayed with Air Canada (Option 1) had the option of accepting employment with Aveos if their seniority did not allow them to remain employed by Air Canada (Option 5)

6. Eligible employees not assigned to work for the benefit of Aveos and who chose under Option 1 to remain employees of Air Canada and who were eligible to retire had the option to retire from Air Canada in order to accept a position with Aveos (Option 6)

7. Eligible employees not assigned to work for the benefit of Aveos and who chose under Option 1 to remain employees of Air Canada, could resign from Air Canada to accept a position with Aveos (Option 7).

[41] If eligible employees assigned to work for the benefit of Aveos on the date of the CIRB order severing the bargaining units did not select a transition option or return the form by the selection deadline, they were to be deemed to have selected to become employees of Aveos pursuant to Option 2.

[42] The January 2009 MOA set out the terms of employment at Aveos in accordance with the selected option. Employees who selected or who were deemed to have selected employment with Aveos (Options 2 and 5) maintained their seniority, company service date, and rate of pay. The terms and conditions also included a provision in regards to recall rights for employees who chose Options 2 or 5: "Recall rights to other stations held by active employees continue at Aveos, and can be actioned after the completion of an employee's transition."

[43] The January 2009 MOA summarized the outstanding issues between the parties, namely the question of whether Air Canada employees who accepted available employment with Aveos, or who elected laid off status with recall rights to Air Canada were entitled, under either the applicable collective agreement or the *Canada Labour Code*, to receive severance pay and two questions related to the right to recall in the case of certain employees. The parties agreed to have the outstanding issues resolved through final and binding interest mediation/arbitration.

[44] On January 22, 2009 the CIRB issued an Order declaring that the January 2009 MOA complied with the requirements of the *Canada Labour Code* and constituted a full and final settlement of complaint No. 26054-C. 17.

[45] On March 5, 2009, Arbitrator Martin Teplitsky rendered a decision on the interpretation of the January 2009 MOA with respect to the outstanding issues between the parties. One issue that was addressed in his decision was entitlement to severance pay.

[46] On June 25, 2010, as agreed in the January 2009 MOA, Air Canada and Aveos filed a joint application with the CIRB (file number 28234-C) pursuant to sections 18.1,

44, 45 and 46 of the *Canada Labour Code* in which they sought a declaration of sale of business and orders from the CIRB to implement the agreement of the parties for the transition of employees from Air Canada to Aveos.

[47] On October 1, 2010, the IAMAW filed an application with the CIRB (file number 28402-C) pursuant to section 35 of the *Canada Labour Code* seeking a declaration that Air Canada and Aveos constitute a single employer.

[48] The CIRB ordered that the sale of business application (file number 28234-C) and the single employer application (file number 28402-C) be consolidated.

[49] On January 31, 2011, the CIRB issued a decision (Order No. 9994-U) in files 28234-C and 28402-C declaring that :

> (1) the sale of assets and liabilities pursuant to the Asset Purchase Agreement dated June 22, 2007 between ACTS LP and Aveos Fleet Perfonnance Inc., as it is now designated, constitutes a sale of business within the meaning of section 44 of the Code;
>
> (2) Aveos Fleet Performance Inc. is the successor employer to Air Canada Technical Services (ACTS) Limited Partnership; and
>
> (3) Aveos Fleet Performance Inc. and Air Canada constitute distinct employers and the IAMA W's application for a declaration of single employer pursuant to section 35 of the Code is hereby dismissed.

[50] Order No. 9994-U also ordered that the IAMAW was certified to be the bargaining agent for a unit comprising:

> all employees of Aveos Fleet Performance Inc. engaged in technical, maintenance and operational support functions in Maintenance, Repair and Overhaul, excluding those performing management functions; those employed in a confidential capacity in matters relating to industrial relations and otherwise; employees covered by any other certification order; and employees in discrete positions and functions not included within the bargaining unit at the time this certification order was issued.

[51] The CIRB also ordered in Order No. 9994-U that:

> [...]

> AND FURTHERMORE, the Canada Industrial Relations Board hereby declares that the [January 2009 MOA], the Heavy Maintenance Separation Program ordered pursuant to Order No. 9996-U and the present Order properly and fully dispose of all matters arising from the sale of business from ACTS LP to Aveos Fleet Perfonnance Inc. or related to the consequences of such sale, whether under the Code, the applicable collective agreement or otherwise

[52] On January 31, 2011, the CIRB issued CIRB Order No. 9996-U and ordered that the Separation Program offered by Air Canada, as set out in Appendix A of that Order, be implemented. The CIRB also ordered that:

> [...]
>
> 5) the parties are to fully comply with the terms of the [January 2009 MOA], as amended by the June 8, 2009 MOA, and the Heavy Maintenance Separation Program.
>
> AND FURTHERMORE, the Board hereby declares that the [January 2009 MOA] ... the Heavy Maintenance Separation Program ... attached as Appendix A, and the present Order properly and fully dispose of all matters arising from the sale of business from ACTS LP to Aveos Fleet Performance Inc. or related to the consequences of such sale, whether under the Code, the applicable collective agreement or otherwise...

[53] Pursuant to the terms of the Separation Program, Air Canada would pay a maximum of 1,500 separation packages to eligible IAMAW-represented employees in the event that certain events took place within a specified timeframe.

[54] The terms and conditions of the Separation Program were as follows:

1. The separation program will consist of a maximum of 1,500 separation packages.

2. A separation payment under this program shall be an amount representing two weeks' pay for each completed year of continuous service at Air Canada and Aveos up to a maximum of 52 weeks...

3. The separation packages, ... will be made available to IAMAW-represented employees at any time up to June 30, 2015, in the event that employees are permanently laid-off, or terminated or a temporary layoff

becomes permanent as a direct result of Aveos ceasing to be the exclusive provider of heavy maintenance services lo Air Canada, other than in circumstances described in para. 4 below. Such an event may occur before June 30, 2013, but no later than June 30, 2015.

4. The separation packages ... will also be made available at any time up to June 30, 2013, to IAMA W-represented employees, in the event of an insolvency, liquidation or bankruptcy involving Aveos resulting in the cancellation of Air Canada-Aveos contracts and in the termination or permanent layoff of IAMA W-represented employees. [...]

6. Aveos has and shall have no liability whatsoever or financial responsibility for the Program. [...]

8. Any disputes of implementation concerning this separation program that cannot be resolved by Air Canada, the IAMAW and Aveos shall be referred for final and binding mediation/arbitration before Martin Teplitsky, Q.C. or to a mutually agreed alternative arbitrator.

9. Any separation package extended to an employee by Air Canada under this separation program is inclusive of and in complete satisfaction of any and all payment in lieu of notice of termination or layoff and severance pay to which an employee in receipt of the separation package may be entitled from Air Canada and/or Aveos under the Canada Labour Code ... and under the applicable collective agreement.

10. The separation payments contemplated by the Air Canada separation program fulfill any and all requirements for severance pay, in relation to employees in receipt of separation payments, in any adjustment program negotiated or arbitrated under Division IX of the Code and the provisions of section 228 may be invoked as may be necessary to confirm this result.

[55] The Appellant was transferred to Aveos. Subsequently, Air Canada issued a record of employment (ROE), describing the reason for the ROE at box 16 as "other" and noting at box 18 in the comments: "Termination - Aveos transition 24/07/2011”.

[56] In March 2012, Aveos became insolvent and placed itself under protection against its creditors pursuant to the Companies' Creditors Arrangement Act. On March 20, 2012, Aveos ceased its operations and terminated the employees' employment. Aveos subsequently issued ROEs describing the reason for the ROE at box 16 as "Shortage of Work I End of contract or season."

[57] Following the termination of their employment with Aveos, eligible employees applied for and received employment insurance benefits.

[58] On September 12, 2012, Arbitrator Teplitsky held a hearing and issued a decision the same day to deal with issues arising from the Separation Program. Arbitrator Teplitsky confirmed the exclusion of retired/resigned/rehired employees from the Separation Program. Arbitrator Teplitsky also determined the date of service on which the calculation was to be based as well as the method of payment.

[59] In March 2013, Service Canada communicated its decision that the payments from Air Canada constituted earnings that were received on separation from employment and that they would be applied against the Appellant's employment insurance claim.

Earnings under 35 of the Regulations

[60] The Tribunal finds that the amount received by the Appellant from Air Canada constitutes earnings according to the wording of section 35 of the *Regulations*.

[61] Subsection 35(2) of the *Regulations* states that "the earnings to be taken into account ... are the entire income of a claimant arising out of any employment..."

[62] According to the principles established in *Canada (A.G.) v. Roch*, 2003 FCA 356, it is important for there to be a sufficient connection between the income and the employment held. In other words, the income should result from the work or be given in compensation for work performed.

[63] Paragraph 2 of the Separation Program specifically states that the separation payments are to be in an amount representing two weeks' pay for each completed year of continuous service at Air Canada and Aveos. Paragraph 4 of the Separation Program provides further support that the monies paid were equivalent to severance pay as one of the eligibility conditions was the termination or permanent layoff of IAMAW-represented employees.

[64] Paragraph 9 of the Separation Program also states that the separation payments were "...inclusive of and in complete satisfaction of any and all payment in lieu of notice of termination or layoff and severance pay to which an employee in receipt of the separation package" was entitled from Air Canada and/or Aveos under the *Canada Labour Code* and under the applicable collective agreement.

[65] The Federal Court of Appeal has affirmed that severance or termination pay constitutes earnings resulting from employment - *Canada (A.G.) v. Savarie*, [1996] F.C.J. No. 1270.

[66] The evidence and the above relevant jurisprudence clearly support the conclusion of the Board of Referees that the separation payment received by the Appellant constitutes earnings pursuant to section 35 of the *Regulations*.

Allocation of earnings under 36 of the Regulations

[67] The Appellant submits that the mode of allocation is the one set out in subsection 36(19) of the *Regulations*, which states:

> 36(19) Where a claimant has earnings to which none of subsections (1) to (18) apply, those earnings shall be allocated
>
> > (a) if they arise from the performance of services, to the period in which the services are performed; and
> >
> > (b) if they arise from a transaction, to the week in which the transaction occurs.

[68] The Appellant argues that only the earnings paid by the last employer can be allocated under subsection 36(9) of the *Regulations*. He argues that the use of the phrase “from that employment” in subsection 36(9) means the employment from which an employee was laid off or that ceased to exist, in this case the employment at Aveos, not employment with a previous employer, namely, Air Canada.

[69] The Appellant pleads that the words “former employer” were removed from the relevant provision over time because Parliament no longer wanted to consider the former employer. The earnings resulting from a previous employer should not be considered as earnings from that employment (the lost employment). The Appellant finally submits that the Respondent’s own Digest states that earnings resulting from a different employer are not considered to be earnings “from that employment”.

[70] Therefore, the Appellant is of the view that subsection 36(9) does not apply and, consequently, the allocation should be done in accordance with paragraph 36(19)(b) of the *Regulations*.

[71] The Respondent argues that the mode of allocation is the one set out in subsection 36(9) of the *Regulations*, which states:

> 36(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.

[72] The Respondent submits that the separation payments should be allocated pursuant to subsection 36(9) of the *Regulations* because they were paid or payable by reason of a lay-off or separation from the employment at Aveos.

[73] The Tribunal has to decide if subsection 36(9) or subsection 36(19) of the *Regulations* receives application in the present case.

[74] The evidence before the Board of Referees shows that pursuant to the terms of the Separation Program, Air Canada was to pay a maximum of 1,500 separation packages to eligible IAMAW-represented employees in the event that certain events took place within a specified timeframe.

[75] The terms and conditions of the Separation Program were as follows:

1. The separation program will consist of a maximum of 1,500 separation packages.

2. A separation payment under this program shall be an amount representing two weeks' pay for each completed year of continuous service at Air Canada and Aveos up to a maximum of 52 weeks...

3. The separation packages, ... will be made available to IAMA W-represented employees at any time up to June 30, 2015, in the event that employees are permanently laid-off, or terminated or a temporary layoff becomes permanent as a direct result of Aveos ceasing to be the exclusive provider of heavy maintenance services to Air Canada, other than in circumstances described in para. 4 below. Such an event may occur before June 30, 2013, but no later than June 30, 2015.

4. The separation packages ... will also be made available at any time up to June 30, 2013, to IAMAW-represented employees, in the event of an insolvency, liquidation or bankruptcy involving Aveos resulting in the cancellation of Air Canada-Aveos contracts and in the termination or permanent layoff of IAMAW-represented employees. …

6. Aveos has and shall have no liability whatsoever or financial responsibility for the Program. …

8. Any disputes of implementation concerning this separation program that cannot be resolved by Air Canada, the IAMAW and Aveos shall be referred for final and binding mediation/arbitration before Martin Teplitsky, Q.C. or to a mutually agreed alternative arbitrator.

9. Any separation package extended to an employee by Air Canada under this separation program is inclusive of and in complete satisfaction of any

> and all payment in lieu of notice of termination or layoff and severance pay to which an employee in receipt of the separation package may be entitled from Air Canada and/or Aveos under the Canada Labour Code ... and under the applicable collective agreement.
>
> 10. The separation payments contemplated by the Air Canada separation program fulfill any and all requirements for severance pay, in relation to employees in receipt of separation payments, in any adjustment program negotiated or arbitrated under Division IX of the Code and the provisions of section 228 may be invoked as may be necessary to confirm this result.

[76] It is not disputed that the Appellant accepted available employment with Aveos. Subsequently, Air Canada issued a record of employment (ROE) dated July 29, 2011, describing the reason for the ROE at box 16 as "other" and noting at box 18 in the comments: "Termination - Aveos transition 24/07/2011."

[77] In March 2012, Aveos became insolvent and placed itself under protection against its creditors pursuant to the *Companies' Creditors Arrangement Act*. On March 20, 2012, Aveos ceased its operations and terminated the employees' employment.

[78] On September 12, 2012, Arbitrator Teplitsky held a hearing and issued a decision the same day to deal with issues arising from the Separation Program. Arbitrator Teplitsky confirmed the exclusion of retired/resigned/rehired employees from the Separation Program. Arbitrator Teplitsky also determined the date of service on which the calculation was to be based as well as the method of payment by Air Canada.

[79] Following the September 2012 hearing and decision, payment was effectively made to the Appellant by Air Canada.

[80] The Tribunal finds that the Separation Program clearly sets out the eligibility criteria for the separation payments:

a) Firstly, you have to be an employee of Aveos to receive the payment; and

b) Secondly, paragraph 4 of the Separation Program provides that the separation payment is triggered by the insolvency of Aveos resulting in the cancellation of Air Canada-Aveos contracts and the termination or permanent layoff of the Aveos employees if these events occur prior to June 2013.

[81] The insolvency of Aveos resulting in the cancellation of Air Canada-Aveos contracts and the termination or permanent layoff of the Aveos employees occurred on or about March 20, 2012.

[82] The Federal Court of Appeal has ruled on many occasions 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" - *Brulotte v. Canada (A.G.)*, 2009 FCA 149, *Lemay v. Canada (A.G.)*, 2005 FCA 433.

[83] The Federal Court of Appeal has also established that the allocation must be effected in accordance with subsection 36(9) of the *Regulations*, regardless of the period in respect of which the earnings are purported to be paid or payable - *Canada (A.G.) v. Roch*, 2003 FCA 356.

[84] In the present case, the earnings became due and payable at the time of termination of the contract of employment at Aveos and the commencement of unemployment even though the payment was made by Air Canada after the September decision of Arbitrator Teplitsky.

[85] The Federal Court of Appeal has further determined that the source of the payment is irrelevant in determining the application of section 36(9) of the *Regulations*. With regard to the allocation of the earnings, the Court has given instructions to emphasize on the reason for which the earnings are paid and not by whom they were

paid– *Brulotte*, v. *Canada (A.G.)*, 2009 FCA 149, *Canada (A.G.) v. Roch*, 2003 FCA 356, *Canada (A.G.) v. King*, [1996] F.C.J. No. 483.

[86] The evidence clearly supports a conclusion that the separation payments were paid or payable by reason of the layoff or separation from employment from Aveos.

[87] The Appellant vigorously argues that the use of the phrase "from that employment" in subsection 36(9) means the employment from which an employee was laid off or that ceased to exist, in this case the employment at Aveos, not employment with a previous employer, namely, Air Canada. He pleads that the previous version of subsection 36(9) specifically mentioned the possibility of earnings from a previous employer but not its later version. According to the Appellant, this demonstrates the intention of the legislator not to consider earnings from a previous employer but only the earnings from the lost employment. He submits that the Respondent's own Digest supports his position that earnings paid by another employer (Air Canada) are not considered as earnings from the lost employment (Aveos).

[88] It is important to reiterate that the Digest is an interpretive guide that is not binding on this Tribunal - *Canada (A.G.) v. Greey*, 2009 FCA 296, *Canada (A.G.) v. Savard*, 2006 FCA 327. This having been said, the Tribunal finds no contradictions between its conclusions and the wording of the Digest.

[89] When considering all the evidence in the file, the Tribunal cannot come to the conclusion that the payments were made by reason of the layoff or separation from employment from the previous employer, Air Canada. This conclusion is simply not supported by the evidence. Therefore, the argument that the earnings resulting from the previous employer, Air Canada, should not be considered as earnings from Aveos, the lost employment, is without merits, since the payments were not made by reason of the layoff or separation from the employment from Air Canada but by reason of the Separation Package agreed upon by all the parties.

[90] It is true that the severance package is based mostly on years of continuous service at Air Canada but you had to be an employee of Aveos to benefit from the Separation Package. Pursuant to the terms of the Memorandum of Agreement, the severance payment became due and eligible only following the insolvency of Aveos resulting in the cancellation of Air Canada-Aveos contracts and the termination or permanent layoff of the Aveos employees. Therefore, the earnings undoubtedly derived from the loss of employment at Aveos, as per the requirements of subsection 36(9) of the *Regulations*.

[91] As early as March 2009, Arbitrator Teplitsky was asked by the partiesto determine whether any Air Canada Employee who accepted available employment with Aveos or who elected laid off status with recall rights to Air Canada, pursuant to the terms of the Memorandum of Agreement, was as a result entitled, under either the applicable Collective Agreement or the *Canada Labour Code*, to receive severance pay. The Arbitrator ruled that:

> "It seems clear to me based on a plain reading of the legislation and as was found in *Bebeau v. Bank of Montreal* [2001] C.L.A.D. No. 447 and other authorities, that there is no layoff when a sale of a business occurs if the employee accepts employment by the purchaser.
>
> Accordingly, employees who accept employment with Aveos are not entitled to severance pay."
>
> (Underlined by the undersigned)

[92] On September 12, 2012, Arbitrator Teplitsky held a hearing and issued a decision the same day to deal with issues arising from the Separation Program. He then reiterated his March 2009 ruling and stated:

> "I should note that although described as a separation package, in fact, no payment was due on separation. Rather, the bankruptcy of Aveos, or the loss of the heavy maintenance contract, triggered the payment."
>
> (Underlined by the undersigned)

[93] The Tribunal finds that the payment made in the present matter meets in all aspects the requirements and conditions of subsection 36(9) as stated by Marceau J.A. of the Federal Court of Appeal in *Canada (A.G.) v. Savarie*, [1996] F.C.J. No. 1270. The Honorable Justice Marceau J.A. wrote:

> 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 […]

[94] The amount received by the Appellant became due and payable at the time of termination of the employment at Aveos, when it was sort of speak "triggered" by the insolvency of Aveos resulting in the cancellation of Air Canada-Aveos contracts and the termination of employment at Aveos, when the obligation it was 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 at Aveos.

[95] As stated by the Federal Court of Appeal, the idea of subsection 36(9) 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 so that the earnings to which a claimant is entitled at the time of his departure is taken into consideration before he is eligible to receive those benefits.

[96] Therefore, the evidence, law and jurisprudence of the Federal Court of Appeal support the position that the separation payments should be allocated according to the

manner prescribed in subsection 36(9) of the *Regulations*, beginning with the week of the layoff or separation from Aveos, which was the week of March 18, 2012.

[97] In view of the above conclusions of the Tribunal, subsection 36(19) of the *Regulations* cannot apply given its suppletive nature and the fact that it is applicable only when none of subsections (1) to (18) apply – *Brulotte*, *precited*.

[98] For all of the above reasons, the appeal is dismissed.

CONCLUSION

[99] The appeal is dismissed.

[100] The separation payments are to be allocated according to the manner prescribed in subsection 36(9) of the *Regulations*, beginning the week of the layoff or separation from Aveos, which was the week of March 18, 2012.

Pierre Lafontaine

Member, Appeal Division

ANNEX

Appeal Number	File Name
AD-13-1199	S. F.
AD-13-1200	W. R.
AD-13-1201	A. F.
AD-13-1202	J. F.
AD-13-1203	M. M.
AD-13-1204	W. A.
AD-13-1205	D. G.
AD-13-1206	M. R.
AD-13-1207	D. G.
AD-13-1208	J. A.
AD-13-1209	J. R.
AD-13-1210	B. G.
AD-13-1211	C. M.
AD-13-1212	P. G.
AD-13-1213	A. S.
AD-13-1214	N. M.
AD-13-1215	D. G.
AD-13-1216	M. A.
AD-13-1217	B. S.
AD-13-1218	D. G.
AD-13-1219	M. A.
AD-13-1220	R. G.
AD-13-1221	B. S.
AD-13-1222	R. M.
AD-13-1223	D. S.
AD-13-1224	B. G.
AD-13-1225	S. M.
AD-13-1226	S. S.
AD-13-1227	M. A.
AD-13-1228	A. M.
AD-13-1229	T. S.
AD-13-1230	J. M.
AD-13-1231	K. G.
AD-13-1232	A. A.
AD-13-1233	C. S.
AD-13-1234	E. G.
AD-13-1235	B. M.

AD-13-1236	R. A.
AD-13-1237	R. G.
AD-13-1238	J. M.
AD-13-1239	G. S.
AD-13-1240	S. H.
AD-13-1241	W. S.
AD-13-1242	P. M.
AD-13-1243	A. H.
AD-13-1244	E. S.
AD-13-1245	K. H.
AD-13-1246	A. L.
AD-13-1247	M. A.
AD-13-1248	R. H.
AD-13-1252	B. S.
AD-13-1253	R. H.
AD-13-1254	C. H.
AD-13-1255	A. S.
AD-13-1256	F. H.
AD-13-1257	S. S.
AD-13-1259	G. S.
AD-13-1260	A. A.
AD-13-1261	A. S.
AD-13-1262	R. H.
AD-13-1263	G. A.
AD-13-1264	J. L.
AD-13-1265	S. H.
AD-13-1267	J.M.
AD-13-1268	B. S.
AD-13-1269	J. B.
AD-13-1270	G. M.
AD-13-1271	K. S.
AD-13-1272	I. B.
AD-13-1273	G. M.
AD-13-1274	S. S.
AD-13-1275	G. M.
AD-13-1276	S. B.
AD-13-1277	J. S.
AD-13-1278	D. M.
AD-13-1279	P. B.
AD-13-1280	D. S.

AD-13-1281	T. M.
AD-13-1282	A. I.
AD-13-1283	J. M.
AD-13-1284	M. J.
AD-13-1285	B. S.
AD-13-1286	D. J.
AD-13-1287	N. B.
AD-13-1288	T. M.
AD-13-1289	G. J.
AD-13-1290	R. J.
AD-13-1291	R. N.
AD-13-1292	N. S.
AD-13-1293	M. B.
AD-13-1294	L. T.
AD-13-1295	P. K.
AD-13-1296	R. N.
AD-13-1298	M. K.
AD-13-1299	M. T.
AD-13-1300	F. B.
AD-13-1301	T. K.
AD-13-1302	K. N.
AD-13-1303	T. T.
AD-13-1304	D. B.
AD-13-1305	R. V.
AD-13-1306	R. T.
AD-13-1307	G. N.
AD-13-1309	M. T.
AD-13-1310	L. K.
AD-13-1311	D. T.
AD-13-1312	K. T.
AD-13-1314	C. V.
AD-13-1315	L. N.
AD-13-1316	M. N.
AD-14-1	D. K.
AD-14-10	R. P.
AD-14-11	A. K.
AD-14-12	O. E.
AD-14-13	G. E.
AD-14-14	K. B.
AD-14-15	S. P.

AD-14-16	J. W.
AD-14-17	M. E.
AD-14-18	J. F.
AD-14-19	B. P.
AD-14-2	J. D.
AD-14-20	M. W.
AD-14-21	J. B.
AD-14-22	J. P.
AD-14-23	S. B.
AD-14-24	V. W.
AD-14-25	E. M.
AD-14-26	L. W.
AD-14-27	R. C.
AD-14-28	J. P.
AD-14-29	W. W.
AD-14-3	E. O.
AD-14-30	P. W.
AD-14-31	R. D.
AD-14-32	S. W.
AD-14-33	A. Y.
AD-14-34	S. K.
AD-14-35	E. Y.
AD-14-36	I. K.
AD-14-37	C. K.
AD-14-379	D. W.
AD-14-38	T. Y.
AD-14-39	K. D.
AD-14-4	A. V.
AD-14-40	S. D.
AD-14-41	P. D.
AD-14-42	R. K.
AD-14-43	R. D.
AD-14-44	J. Y.
AD-14-45	R. K.
AD-14-46	D. C.
AD-14-47	A. L.
AD-14-48	D. D.
AD-14-49	R. C.
AD-14-5	T. K.
AD-14-50	D. L.

AD-14-51	J. L.
AD-14-52	J. C.
AD-14-53	K. L.
AD-14-54	R. C.
AD-14-55	G. C.
AD-14-56	S. L.
AD-14-57	P. C.
AD-14-58	B. L.
AD-14-59	D. L.
AD-14-6	M. B.
AD-14-60	J. P.
AD-14-61	B. C.
AD-14-62	M. R.
AD-14-63	F. P.
AD-14-64	J. C.
AD-14-65	T. R.
AD-14-66	R. R.
AD-14-67	T. P.
AD-14-68	G. R.
AD-14-69	T. C.
AD-14-7	R. O.
AD-14-70	M. P.
AD-14-71	I. R.
AD-14-72	R. C.
AD-14-73	T. P.
AD-14-74	F. R.
AD-14-75	D. R.
AD-14-76	D. D.
AD-14-77	B. C.
AD-14-78	P. R.
AD-14-79	E. D.
AD-14-8	S. W.
AD-14-80	D. R.
AD-14-81	R. D.
AD-14-82	L. D.
AD-14-83	C. D.
AD-14-84	J. Z.
AD-14-85	R. D.
AD-14-86	X. Z.
AD-14-87	S. Z.

AD-14-88	S. L.
AD-14-89	T. L.
AD-14-9	S. E.
AD-16-446	M. M.
AD-16-448	D. N.