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

[TRANSLATION]

Citation: *A. A. v. Canada Employment Insurance Commission*, 2017 SSTADEI 2

Tribunal File Number: AD-13-430

BETWEEN:

A. A.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

DATE OF HEARING: November 7, 2016

DATE OF DECISION: January 16, 2017

Canada

REASONS AND DECISION

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] In October 2013, the majority of the Board of Referees found that:

- The amounts received from Air Canada constituted earnings under section 35 of the *Employment Insurance Regulations* (Regulations) and had to be allocated in accordance with the principle set out in subsection 36(9) of the Regulations.

[3] The Appellant requested leave to appeal to the Appeal Division on October 16, 2013. Leave to appeal was granted on January 25, 2016.

[4] On January 25, 2016, correspondence was sent to Aveos Fleet Performance Inc. and Air Canada to determine if they wished to be added as parties. The Tribunal did not receive a reply and therefore ordered that no parties be added to the present appeal.

[5] On August 4, 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 issues related to procedures.

[6] On August 30, 2016, the parties submitted to the Tribunal the undertakings of the pre-hearing conference.

[7] The appeal hearing was held in Montreal, Quebec on November 7, 2016.

TYPE OF HEARING

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

- The complexity of the issue or issues;

- The information on file, including the need for additional information;

- The need to proceed as informally and quickly as possible in accordance with the Tribunal's rules relating to the circumstances and considerations of fairness and natural justice.

[9] At the hearing, the Appellant was represented by Hans Marotte. The Respondent was represented by Vanessa Luna and Stephanie Yung-Hing. Martin Richard, Jean Millette, and Alain Castonguay 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* (Act), 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 majority of the Board of Referees erred when it concluded that the amount 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 subsection 36(9) of the Regulations.

SUBMISSIONS

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

- The majority of the Board of Referees rendered a decision containing several errors of law, thus justifying the Tribunal's intervention.

- To show that a payment from a former employer (Air Canada) should be considered as payment from lost employment (Aveos), the majority of the Board referred to two sections of the Act that are completely irrelevant to a case relating to the allocation of earnings.

- Although a majority of members acknowledged that [translation] "[...] subsection 36(9) does not explicitly state an obligation to include payments from a previous employer", they nonetheless further state that "[...] the term employer must therefore include the current employer as well as all previous employers for the same job".

- Section 2 of the Act cited by the Board of Referees is in no way related to the issue of determining if a payment from a former employer must be allocated when a subsequent employment is lost.

- In their majority decision, the two members also refer to another section of the Act to prove that there is no distinction between the previous employer (Air Canada) and the successor employer (Aveos).

- The majority of members could not use subsection 82.1 of the Act, which applies only to the specific issue of collection of premiums in the event of a sale or transfer of a business.

- Although the majority of members had before them numerous facts proving that there had clearly been two completely distinct employers in this case, and that these elements had been proven by these members, they nonetheless mistakenly failed to account for these fundamental pieces of evidence in their decision.

- The majority of members disregarded these essential facts that confirm that there are two separate employers in this file.

- Rather, they erred in finding that there is a continuum of employers between Air Canada and Aveos and, as a result, payments made by a previous employer (Air Canada) must be allocated at the time of the end of employment with a successor employer (Aveos). This analysis constitutes a major factual error that justifies the Appeal Division's intervention.

- A close reading of subsection 36(9) of the Regulations reveals that only earnings from the last employer, and not those from a previous employer, may be allocated in accordance with this subsection.

- Had Parliament intended for subsection 36(9) to apply to payments made by a former employer following the termination of the previous employment, it would have worded this subsection as follows: [translation] "in such a manner that the total earnings paid to the claimant by reason of the lay off or

separation from that employment" rather than " in such a manner that the total earnings of the claimant from that employment".

- Had Parliament intended for subsection 36(9) to apply to cases in which payments are made by a former employer, it would have stated this outright using different wording.

- Had Parliament's intention been to take into account the amounts paid by a former employer for the application of subsection 36(9), it would have thus added the following: [translation] "regardless of the source of the earnings".

- The Digest of Benefit Entitlement Principles (Digest) also expressly stipulates that the term “that employment” under subsection 36(9) of the Regulations refers to the lost employment.

- The Appellant informed several claimants that the amounts from Air Canada would not be considered earnings because they did not come from the last employer. This way of seeing things not only complies with the wording of subsection 36(9), as mentioned above, but also corresponds to the Appellant’s own interpretation of this subsection.

- The Digest, which is the interpretation tool supplied to public servants in order to apply the Act, indicates that the total earnings from “that employment” according to subsection 36(9) of the Regulations refer to the earnings from the lost employment.

- A historical analysis of this regulatory provision confirms this interpretation. Research back to the early 70's reveals that, for many years, the wording of several previous provisions considered to be the precursors to the current section 36 specifically included the amounts paid by a previous employer.

- Section 36 of the Regulations as it is now written no longer refers to the two concepts, that is, the employer or the former employer, but only to the "[...] total earnings from that employment [...]".

- This change in the wording of the section confirms that Parliament's intention changed and that section 36 of the Regulations now expressly excludes amounts from a previous employer.

- An analysis of the scheme of the Regulations confirms that Parliament does not want amounts from a previous employer to negatively affect the benefits received on the basis of a new employment. For example, Parliament has ensured in subsection 35(7) of the Regulations that the pension received by a claimant from a first employer is not considered as earnings when the claimant qualifies with new employment.

- Another example is found in paragraph 35(7)(*d*) of the Regulations, which stipulates that retroactive increases in wages or salary do not constitute earnings, regardless of which employer pays them.

- The goal of subsection 36(9) of the Regulations is to delay the payment of benefits when a claimant receives earnings at the end of his or her employment. This has the effect of preventing this claimant from collecting his or her benefits quickly. It therefore limits the right to receive benefits.

- This limitation must therefore be interpreted narrowly according to the jurisprudence of the Supreme Court of Canada and the rules of statutory interpretation.

- Since the Act is social in nature, its provisions should be interpreted broadly and liberally and any doubt should benefit the claimants.

- Since subsection 36(9) does not apply, another section must thus be identified to correctly allocate the earnings paid to the appellants by their former employer, Air Canada. Upon reading all of section 36, the only paragraph that can apply is paragraph (19)(*b*).

- The amounts paid by Air Canada obviously were not received in exchange for services but resulted from a very specific transaction, that is, arbitrator Teplitsky's decision of September 12, 2012.

- It was only as of that date that Air Canada had a legal obligation to pay the amounts owed under the Separation Program it had established with the union (IAMAW).

- Thus, each Appellant should have these earnings received from Air Canada allocated according to paragraph 36(19)(*b*) of the Regulations only to the week of September 9, 2012, this date being the Sunday preceding arbitrator Teplitsky's decision of September 12, 2012.

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

- The Board of Referees did not err in finding that subsection 36(9) of the Regulations applies in this case and that separation payments must be allocated as of March 18, 2012.

- The purpose of Employment Insurance is to compensate claimants for the loss of income related to their employment and to guarantee their economic security for a certain amount of time in order to help them return to the labour market. This purpose can be found in sections 12 and 19 of the Act as well as sections 35 and 36 of the Regulations.

- Once it has been determined that the claimant received earnings within the meaning of section 35 of the Regulations, these earnings must be allocated as prescribed in section 36 of the Regulations.

- It therefore becomes essential to determine the true nature of these earnings. It is not possible to establish the allocation standard to apply section 36 of the Regulations without this determination.

- Where earnings are paid or payable by reason of a lay off or separation from employment, subsection 36(9) of the Regulations stipulates the manner in which this amount is to be allocated.

- According to the wording of subsection 36(9) of the Regulations, in order for this subsection to apply, the claimant must be entitled to payments following their lay off or separation, regardless of when it is paid or payable. The essential conditions for the application of this subsection are: 1) the existence of earnings paid or payable and 2) by reason of separation from employment.

- All earnings paid or payable to a claimant by reason of a lay off or separation from an employment shall be allocated consecutively to a number of weeks, as stipulated in subsection 36(9) of the Regulations.

- The Federal Court of Appeal has repeatedly confirmed that subsection 36(9) of the Regulations, and its predecessor provisions, put the emphasis on the reason for which the earnings were paid.

- It has been well established that severance or termination pay constitute earnings resulting from employment and that these earnings should be allocated under subsection 36(9) of the Regulations.

- There is nothing in the wording of subsection 36(9) of the Regulations or in the decisions of the Federal Court of Appeal requiring that amounts paid by reason of a lay off or separation from an employment come from the assets of the employer that terminated the employment.

- The majority of the Board of Referees found that separation payments were payable following separation from employment with Aveos.

- The evidence on file shows that the essential elements for the application of subsection 36(9) of the Regulations exist.

- The evidence on file shows that the separation payment were paid or payable by reason of lay off or separation from employment. The separation payments were issued by Air Canada in accordance with the Separation Program ordered by the Canadian Industrial Relations Board (CIRB) in Order 9996-U. The Separation Program clearly states that a separation payment was payable in the event of an insolvency, liquidation or bankruptcy involving Aveos resulting in the cancellation of Air Canada-Aveos contracts and in the termination and permanent lay-off of employees (of Aveos), at any time up to June 30, 2013.

- In this case, Aveos became insolvent in March 2012, at which point it terminated the Appellant's employment.

- The Board of Referees' reference to the definition of the term "employer", found in section 2 of the Act as well as subsection 82.1, a provision that involves a successor employer, in a file dealing with the sale of a company and a successor employer is not an error of law that requires the intervention of the Appeal Division.

- Although it is important to recognize and respect the decisions which require a broad and liberal interpretation of the Act, this objective must be reconciled with the goal of compensating unemployed for a loss of income and the related purpose of avoiding paying benefits where there is no loss.

- The Board of Referees' interpretation is consistent with the purpose of avoiding paying benefits to workers where there is no loss of income.

- The Board of Referees' finding that the fact that there are two employers does not preclude the application of subsection 36(9) of the Regulations does not constitute an error of law or fact.

- The Board of Referees' consideration of the legislative context is consistent with the Supreme Court of Canada's approach to legislative interpretation.

- The majority of the Board of Referees rightfully concluded that the last part of subsection 36(9) of the Regulations has no effect on the application of this provision. In other words, reference to "that employment" reflects the fact that the earnings paid or payable by reason of a lay-off or separation from employment must necessarily come from "that employment".

- The majority of the Board of Referees based its conclusion on the decision rendered by arbitrator Teplitsky on September 12, 2012, as well as on the terms of the separation program stated in Appendix A of the CIRB's Order 9996-U. In doing so, the Board did not base 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. Rather, this evidence establishes that the separation payments were paid or payable by reason of the lay off or separation of employment with Aveos in March 2012.

- The separation payment that the Appellant received was paid to him following Aveos' insolvency, resulting in the cancellation of the heavy maintenance contract between Air Canada and Aveos and the severance of his employment relationship with Aveos. These events crystallized Air Canada's obligation to pay separation payments. In other words, separation pay was paid or payable by reason of the lay off or separation from employment with Aveos. Subsection 36(9) of the Regulations applies.

- The separation payment cannot be allocated under subsection 36(9) of the Regulations given that this provision is supplementary and applies only when none of the other provisions of section 36 of the Regulations apply.

STANDARDS OF REVIEW

[14] The parties agree, and the Tribunal agrees, that the Federal Court of Appeal has determined that the standard of review applicable to a decision of a board of referees or an umpire 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 - *Canada (A.G.) v. Hallée*, 2008 FCA 159.

ANALYSIS

Introduction

[15] 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

[16] In its decision, the Board of Referees granted the Applicant the benefit of the doubt by considering that the wording of subsection 36(9) of the Regulations excludes any payments not made by the last employer. The Board of Referees therefore found that the premium became payable following the termination of employment from Aveos and that subsection 36(9) of the Regulations should be applied.

Leave to Appeal

[17] In support of his Application for leave to appeal, the Applicant essentially submits that the Board of Referees erred in fact and in law when it applied subsection 36(9) rather than paragraph 36(19)(*b*) of the Regulations, that it based its decision on two sections of the Act that are in no way relevant to a case relating to the allocation of earnings, and that it overlooked evidence-based facts.

[18] The Tribunal granted leave to appeal on January 25, 2016.

Position of the parties in appeal before the Appeal Division

[19] The Appellant submits that a careful reading of subsection 36(9) of the Regulations reveals that the only earnings that may be allocated under this section are the earnings from the last employment lost, not from a previous employment. The historical analysis of this regulatory provision confirms this interpretation. The Appellant's Digest of Benefit Entitlement Principles also expressly stipulates that the term "that employment" under subsection 36(9) of the Regulations refers to the lost employment. Since subsection 36(9) does not apply, the Appellant should have these earnings received from Air Canada allocated according to paragraph 36(19)(*b*) of the Regulations only to the week of September 9, 2012, this date being the Sunday preceding arbitrator Teplitsky's decision of September 12, 2012.

[20] According to the Respondent, the evidence before the Board of Referees seems to show that the severance pay represents severance packages paid following lay off or termination from Aveos in March 2012. Therefore, the severance pay should be allocated in the manner prescribed in subsection 36(9) of the Regulations, beginning on the week of lay off or termination from Aveos in March 2012.

The undisputed facts

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

[22] In order to resolve any remaining issues in CIRB File No. 26054-C, Air Canada, Aveos and the International Association of Machinists and Aerospace Workers (IAMAW) (parties) entered into a Memorandum of Agreement dated January 8, 2009 (January 2009 MOA).

[23] The January 2009 MOA was concluded to achieve the following objectives:

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.

[24] The January 2009 MOA offered seven transition options to employees of Air Canada, namely to become an Aveos employee. 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 (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)

[25] The employees had to make their choice within 74 days of the date of the CIRB order severing the current bargaining units. Eligible employees assigned to work for the benefit of Aveos on the date of the CIRB order severing the bargaining units who did not select a transition option or return the form by the deadline to make a choice were to be deemed to have selected to become employees of Aveos pursuant to Option 2.

[26] The January 2009 MOA also set out the terms of employment at Aveos depending on which transition option was selected. Employees who chose or who were deemed to select employment with Aveos (Options 2 and 5) maintained their seniority, company service date, and rate of pay. Specifically, these employees were subject to the following terms of employment:

1. The employee will be removed from the Air Canada Seniority List and placed on the Aveos Seniority List.

2. The employee's seniority date with Aveos will be the same as his/her former Air Canada seniority date.

3. The employee's Aveos company service date will be the same as his/her Air Canada company service date.

4. The employee will continue to be paid at the prevailing rates in the applicable collective agreement in force.

5. Aveos will assume responsibility for certain pension and non-pension benefits earned during employment with Air Canada in accordance with the Pension and Benefits Agreement.

6. The employee will participate in the Aveos benefit plans, which will be equivalent to the provisions of the Air Canada benefit plans set out in the applicable collective agreement.

7. Recall rights to other stations held by active employees continue at Aveos, and can be actioned after the completion of an employee's transition.

[27] 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 were entitled, under either the applicable collective agreement or the *Canada Labour Code*, to receive severance pay. The parties agreed to have the outstanding issues resolved through final and binding interest mediation/arbitration before arbitrator Martin Teplitsky or such other arbitrator as he may designate.

[28] The January 2009 MOA provided that the parties agreed to resolve fully and irrevocably the IAMAW's complaint and all issues raised in CIRB File 26054-C in

accordance with the terms of the January 2009 MOA and requested that the CIRB incorporate the January 2009 MOA into an Order. The parties also agreed that Air Canada and Aveos would file a joint application to the CIRB under sections 44 and 45 of the *Canada Labour Code* to seek a declaration of sale of business in the event that the CIRB issued an order incorporating the January 2009 MOA.

[29] 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.

[30] 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 44 and 45 of the *Canada Labour Code* in which they sought a declaration of sale of business and orders in order to facilitate the transition of employees from Air Canada to Aveos.

[31] On October 1, 2010, the IAMAW filed an application with the CIRB (file number 28402-C) seeking a declaration from CIRB that Air Canada and Aveos constitute a single employer.

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

[33] 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 Performance 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 IAMAW's application for a declaration of single employer pursuant to section 35 of the Code is hereby dismissed.

[34] 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 Performance Inc. or related to the consequences of such sale, whether under the Code, the applicable collective agreement or otherwise.

[35] In the context of the litigation in CIRB files 28234-C and 28402-C, Air Canada had offered a Heavy Maintenance Separation Program (Separation Program) to the IAMAW.

[36] 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 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 Performance Inc. or related to the consequences of such sale, whether under the Code, the applicable collective agreement or otherwise.

[37] Air Canada, Aveos and the IAMAW were therefore bound to respect CIRB Orders 9994-U and 9996-U, the January 2009 MOA and the Separation Program, which resolved all issues related to the sale of the business and the consequences flowing from that sale.

[38] 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.

[39] 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 to Air Canada, other than in circumstances described in paragraph 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* or 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.

[40] The employees who accepted or were deemed to have accepted employment with Aveos and were ultimately transferred to Aveos on or around July 24, 2011. 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”.

[41] In March 2012, approximately eight months after the transfer, Aveos became insolvent and placed itself under protection against its creditors pursuant to the C*ompanies' 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 / End of contract or season."

[42] Following the termination of his employment with Aveos, the Appellant filed an initial claim for benefits. Eligible employees received employment insurance benefits

[43] On September 12, 2012, Arbitrator Teplitsky held a hearing on the Separation Program. In a decision rendered the same day, Arbitrator Teplitsky confirmed the exclusion of retired, resigned, or 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.

[44] Around December 2012, approximately nine months after the termination of employment, the employees began to receive the first installment of their separation payments under the Separation Program.

[45] The Respondent determined that the separation payments constituted earnings pursuant to section 35 of the Regulations. Based on subsection 36(9) of the Regulations, the Respondent allocated the value of the separation payments over the weeks of entitlement to Employment Insurance benefits beginning with the week of the insolvency and termination from Aveos.

Earnings under section 35 of the Regulations

[46] As was found by the Board of Referees, the Tribunal also finds that the amount received from Air Canada constitutes earnings within the meaning of section 35 of the Regulations.

[47] 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...”

[48] Case law has also defined the notion of "income". [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.

[49] 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, up to a total of 52 weeks. Paragraph 4 of the Separation Program provides that all IAMAW-represented employees are entitled to severance pay in the event of a termination or permanent layoff of from Aveos.

[50] 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.

[51] 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.

[52] The evidence and the above relevant jurisprudence clearly support the conclusion of the Board of Referees that the separation payment paid by Air Canada constitutes earnings pursuant to section 35 of the Regulations.

Allocation of earnings under section 36 of the Regulations

[53] 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.

[54] The Appellant submits that a close reading of subsection 36(9) of the Regulations would indicate that only payments from the last employer, and not those from a previous employer, may be allocated in accordance with this subsection. The historical analysis of this regulatory provision confirms this interpretation. The Appellant states that even the Digest stipulates that the term "that employment", found in paragraph 36(9), refers to the lost employment.

[55] Therefore, the Appellant is of the view that subsection 36(9) does not apply and, consequently, the allocation of the earnings from Air Canada should be applied in accordance with paragraph 36(19)(b) of the *Regulations,* only to the week of September 9, 2012, this date being the Sunday preceding arbitrator Teplitsky's decision of September 12, 2012.

[56] The Respondent submits 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.

[57] According to the Respondent, the evidence before the Board of Referees seems to show that the severance pay represents severance packages paid following lay off or termination from Aveos in March 2012. Therefore, the severance pay should be allocated in the manner prescribed in subsection 36(9) of the Regulations, beginning on the week of lay off or termination from Aveos in March 2012.

[58] When it dismissed the Appellant's appeal, the majority of the Board of Referees concluded as follows:

> The Board of Referees refers to the arbitration decision of September 12, in which the arbiter stated that the bankruptcy of Aveos, or the loss of the heavy maintenance contract, triggered the payment. Arbitrator Teplitsky confirms the application of Order 9996-U and orders the implementation of the Separation Program pursuant to paragraph 4 of Appendix A of that order.
>
> Paragraph 4 provides for separation packages in the event of the insolvency of Aveos resulting in the cancellation of Air Canada-Aveos contracts and in the termination or permanent lay off of IAMAW-represented employees.
>
> The Board of Referees therefore finds as fact that the separation package is payable following termination of employment with Aveos. The amount therefore must be allocated under subsection 36(9).

[59] For the following reasons, the Tribunal finds that the Board of Referees did not err when it concluded that the amounts received from Air Canada had to be allocated in accordance with the principle set out in subsection 36(9) of the Regulations as of the week of lay off or separation from Aveos, in March 2012.

[60] 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.

[61] 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 to Air Canada, other than in circumstances described in paragraph 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 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 MartinTeplitsky, 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 or 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.

[62] It is not disputed that the Appellant accepted available employment with Aveos and that he was subsequently transferred to Aveos on or around July 24, 2011. 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”.

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

[64] 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, or 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.

[65] Around the end of December 2012, approximately nine months after the termination of employment, the employees affected began to receive the first installment of their separation payments under the Separation Program.

[66] The Separation Program clearly sets out the eligibility criteria for the separation payments, which are the following:

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 lay off of the Aveos employees, if these events occur prior to June 2013.

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

[68] 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.

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

[70] In the present case, and pursuant to the clear terms of the Separation Program, 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 only after the September 2012 decision of Arbitrator Teplitsky.

[71] Furthermore, the Federal Court of Appeal has 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 that

subsection 36(9) of the Regulations emphasizes 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.

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

[73] The Appellant vigorously argues that subsection 36(9) of the Regulations stipulates that only payments from the last employer, and not those from a previous employer, may be allocated in accordance with this subsection. The historical analysis of this regulatory provision confirms this interpretation given that the new version of subsection 36(9) of the Regulations does not refer to the previous employer. The Appellant states that even the Digest stipulates that the term "that employment", found in paragraph 36(9), refers to the lost employment.

[74] 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.

[75] When considering all the evidence in the file, the Board of Referees could not 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 lay off or separation from the employment from Air Canada but by reason of the Separation Package agreed upon by all the parties.

[76] It is true that the severance package is based mostly on years of continuous service at Air Canada but you absolutely had to be an employee of Aveos to benefit from the Separation Package. Pursuant to the terms of the Separation Program, the 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 IAMAW-represented employees.

[77] In addition, arbitrator Teplitsky confirmed in his September 12, 2012, decision that it was the events of March 2012 that triggered the obligation to pay separation payments:

> 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.
>
> (Emphasis added by the undersigned)

[78] The Tribunal finds that, in accordance with the findings of the Board of Referees, the payment made in the present matter meets in all aspects the requirements and conditions of subsection 36(9) of the Regulations, 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 […]

[79] The amount received by the Appellant became due and payable at the time of termination of the employment at Aveos, when it in sorts "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.

[80] 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.

[81] Based on the teachings of the Federal Court of Appeal, the Tribunal has no choice but to conclude that the separation pay represents severance packages paid following the lay off or termination from Aveos in March 2012. As was concluded by the Board of Referees, the severance pay should be allocated in the manner prescribed in subsection 36(9) of the Regulations, beginning on the week of lay off or termination from Aveos in March 2012.

[82] Subsection 36(19) of the Regulations cannot apply in the circumstances given its suppletive nature and the fact that it is applicable only when none of subsections (1) to (18) apply – *Brulotte*, *supra*.

CONCLUSION

[83] The Tribunal dismisses the appeal.

[84] Therefore, the severance pay should be allocated in the manner prescribed in subsection 36(9) of the Regulations, beginning on the week of lay off or termination from Aveos in March 2012.

Pierre Lafontaine

Member, Appeal Division

APPENDIX

Appeal Number	File Name
AD-13-430	A. A.
AD-13-431	G. D.
AD-13-432	É. D.
AD-13-433	S. D.
AD-13-434	M. D.
AD-13-435	A. B.
AD-13-436	S. D.
AD-13-437	M. D.
AD-13-438	B. G.
AD-13-439	M. G.
AD-13-440	C. G.
AD-13-441	M. D.
AD-43-442	P. D.
AD-13-443	J. E.
AD-13-444	M. F.
AD-13-445	J. F.
AD-13-446	F. C.
AD-13-447	M. G.
AD-13-448	A. G.
AD-13-449	J. G.
AD-13-450	E. G.
AD-13-451	F. D.
AD-13-452	M. B.
AD-13-453	F. B.
AD-13-454	N. B.
AD-13-455	E. B.
AD-13-456	D. C.
AD-13-457	V. B.
AD-13-458	P. B.
AD-13-459	S. B.
AD-13-460	J. D.
AD-13-461	M. D.
AD-13-462	R. B.
AD-13-463	J. B.
AD-13-464	R. D.

AD-13-465	F. C.
AD-13-466	J. C.
AD-13-467	D. D.
AD-13-482	M. C.
AD-13-485	J. C.
AD-13-488	S. C.
AD-13-490	E. C.
AD-13-491	A. C.
AD-13-493	P. C.
AD-13-494	J. C.
AD-13-495	I. C.
AD-13-497	P. C.
AD-13-500	B. C.
AD-13-501	C. C.
AD-13-502	C. C.
AD-13-506	L. D.
AD-13-507	M. D.
AD-13-509	A. D.
AD-13-510	S. D.
AD-13-513	J. A.
AD-13-515	P. A.
AD-13-518	G. A.
AD-13-520	M. A.
AD-13-521	A. A.
AD-13-523	S. A.
AD-13-526	D. B.
AD-13-527	P. B.
AD-13-528	S. L.
AD-13-529	G. L.
AD-13-530	J. M.
AD-13-531	J. L.
AD-13-532	A. L.
AD-13-533	P. L.
AD-13-534	M. M.
AD-13-535	A. L.
AD-13-536	M. L.
AD-13-537	B. N.
AD-13-538	M. M.
AD-13-539	M. N.
AD-13-540	B. N.

AD-13-541	G. O
AD-13-542	L. P.
AD-13-543	M. P.
AD-13-544	R. M.
AD-13-545	P. P.
AD-13-546	A. L.
AD-13-547	R. P.
AD-13-548	J. L.
AD-13-550	L. Q.
AD-13-551	E. R.
AD-13-552	J. G.
AD-13-553	E. S.
AD-13-554	P. S.
AD-13-555	R. G.
AD-13-556	J. S.
AD-13-557	R. H.
AD-13-558	G. S.
AD-13-559	D. H.
AD-13-560	C. T.
AD-13-561	A. H.
AD-13-562	H. G.
AD-13-563	E. G.
AD-13-564	M. H.
AD-13-565	A. G.
AD-13-566	A. H.
AD-13-567	B. G.
AD-13-568	J. H.
AD-13-569	P. T.
AD-13-570	M. W.
AD-13-571	S. T.
AD-13-572	T. L.
AD-13-573	F. L.
AD-13-574	R. T.
AD-13-575	H. L.
AD-13-576	B. L.
AD-13-577	P. V.
AD-13-578	N. V.
AD-13-579	M. V.
AD-13-580	A. B.
AD-13-581	D. T.
AD-13-582	R. K.

AD-13-583	B. S.
AD-13-584	F. K.
AD-13-585	J. H.
AD-13-586	F. H.
AD-13-587	D. J.
AD-13-588	C. B.
AD-13-589	F. B.
AD-13-590	P. H.
AD-13-591	R. R.
AD-13-592	D. B.
AD-13-593	S. B.
AD-13-594	D. B.
AD-13-595	B. B.
AD-13-596	D. B.
AD-13-597	Y. B.
AD-13-598	C. B.
AD-13-599	D. G.
AD-13-600	É. B.
AD-13-601	P. B.
AD-13-602	M. D.
AD-13-603	P. B.
AD-13-604	W. D.
AD-13-605	G. B.
AD-13-606	R. B.
AD-13-607	P. B.
AD-13-608	B. B.
AD-13-609	C. B.