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

Citation: *Canada Employment Insurance Commission v. E. A.*, 2017 SSTADEI 4

Tribunal File Number: AD-15-593

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

E. A.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

DATE OF HEARING: November 10, 2016

DATE OF DECISION: January 16, 2017

Canada

REASONS AND DECISION

DECISION

[1] The appeal is allowed.

INTRODUCTION

[2] On June 15, 2015, the General Division of the Tribunal determined 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 paragraph 36(19)(b) of the *Regulations*, on March 20, 2012 and to that week.

[3] The Appellant requested leave to appeal to the Appeal Division on July 14, 2015. Leave to appeal was granted 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 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 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 10, 2016, in Montreal, Quebec.

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 represented by Vanessa Luna and Stéphanie Yung-Hing. The Respondent was represented by Hans Marotte. Martin Richard, Lea Bacon, Jean Millette, Alexandre Pigeon, Susanne-Joanne Labris and Mohamed Kallad were also present at the hearing.

THE LAW

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

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

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

c) The General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

ISSUE

[11] The Tribunal must decide if the General Division erred when it concluded that the monies received 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 General Division erred in its analysis and interpretation of subsection 36(9) of the *Regulations*, which led it to use the wrong test for the application of subsection 36(9);

- According to the General Division, it had to determine "... why the amounts were paid, by whom they were paid, and by virtue of what employment.";

- It appears that the General Division erroneously introduced a criteria for applying subsection 36(9) of the *Regulations* that is not present, in particular the requirement to establish a connection between the source of the earnings and the lost employment. In doing so, the General Division erred with respect to the test used to apply subsection 36(9);

- Neither the wording of this subsection nor the jurisprudence of the Federal Court of Appeal support the General Division's interpretation. The conditions for applying subsection 36(9) of the *Regulations* are clear and the Federal Court of Appeal has issued several judgments dealing with them;

- First, the wording of subsection 36(9) of the *Regulations* clearly establishes that the conditions for applying this provision are set out in the "first part," that is, the existence of earnings paid or payable by reason of a lay-off or separation from employment;

- The "third part" of subsection 36(9) of the *Regulations*, " ... 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", does not set out conditions for applying 36(9). This third part simply indicates the manner in which the allocation is to take place. It becomes relevant only once it has been determined that the conditions for the application of 36(9), set out in the first part of the provision, are met;

- Consequently, for the purposes of applying subsection 36(9) of the *Regulations*, given that the General Division found that the amounts received by the Respondent constituted a separation payment and were therefore considered earnings within the meaning of section 35 of the *Regulations*, the only remaining question was when the obligation to pay the separation payment crystallized. In other words, did the separation payment become payable at the time the Respondent was transferred to Aveos in July 2011, or at the time of the insolvency and lay-off or termination in March 2012?;

- By making the third part a condition for applying subsection 36(9) of the *Regulations*, the General Division was led to asking the wrong question in

order to determine whether the separation payments received by the Respondent should be allocated under this provision;

- 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;

- 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;

- Although it is important to recognize and respect the decisions which require a broad and liberal interpretation of the *Employment Insurance Act* (*Act*) in order to "make benefits available to the unemployed" this objective must be reconciled with the goal of compensating unemployed workers for a loss of income and the related purpose of avoiding paying benefits to workers where there is no loss of income;

- The General Division's interpretation is counter to the purpose of avoiding paying benefits to workers where there is no loss of income. This purpose can be found in sections 12 and 19 of the *Act* as well as sections 35 and 36 of the *Regulations*;

- The General Division's refusal to apply subsection 36(9) of the *Regulations*, even though it recognizes that these amounts constitute separation payments, leads to an inconsistent application of the *Act* and *Regulations*;

- The jurisprudence on this point is consistent in stating that separation payments constitute earnings within the meaning of section 35 of the *Regulations* and must be allocated pursuant to subsection 36(9) of the

Regulations to a number of weeks that begins with the week of the lay-off or separation from employment;

- The General Division concluded that the separation payments were paid or payable to the Respondent as a former employee of Air Canada, not by reason of the lay-off or separation from employment at Aveos. Although the Appellant does not support this conclusion, the General Division determined that the reason for the separation payments was the loss of employment;

- The evidence shows that the separation payments were paid or payable by reason of a 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 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;

- The General Division erred in fact and law by refusing to allocate the value of the separation payments under subsection 36(9) of the *Regulations* to a number of weeks that begins with the week of the lay-off or separation from employment from Aveos in March 2012;

- The obligation to pay separation payments crystallized in March 2012 when the conditions of paragraph 4 of the Separation Program were met;

- The General Division itself recognized that one of the conditions of eligibility for separation payments was the lay-off of employees by Aveos;

- The separation payment cannot be allocated under subsection 36(19) of the *Regulations*. This provision is supplementary and applies only when none of the other provisions of section 36 of the *Regulations* apply;

- The General Division erred in its application of the Nova Scotia Court of Appeal case, *Conrad v. Imperial Oil Limited and McColl-Frontenac Petroleum Inc.,* [1999] NSJ No 68 (QL), since it applies the position of the Appellant who ultimately was not successful.

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

- The very wording of subsection 36(9) of the *Regulations* clearly indicates that only the amounts paid by the last employer may be allocated under this section;

- 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;

- If Parliament had wanted subsection 36(9) of the *Regulations* to apply to the amounts paid by a previous employer after separation from the last employment, it instead would have worded this subsection as follows: in such a manner that the total earnings of the claimant by reason of the lay-off or separation from that employment;

- If Parliament had wanted subsection 36(9) of the *Regulations* to apply in cases of amounts paid by a previous employer, it would have stated this outright using different wording;

- If Parliament's intention was to take into account the amounts paid by a previous employer for the application of subsection 36(9) of the *Regulations*, it then would have added: "regardless of the source of the earnings";

- 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;

- 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;

- The Digest also states that the amounts paid by a previous employer must not be considered as earnings from the lost employment (that employment);

- The historical analysis of this regulatory provision confirms this interpretation. The provisions regarding the allocation of the earnings paid on separation from employment have existed in the *Regulations* for a very long time. Research back to the early 70s 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;

- The amount paid by Air Canada can only be allocated under subsection 36(19) of the *Regulations*. Since subsection 36(9) does not apply, upon reading all of section 36 of the *Regulations*, 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;

- 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.

STANDARD OF REVIEW

[14] The parties agree and submit that with respect to the deference the Appeal Division should accord to the General Division, the Appeal Division should show deference to mixed questions of fact and law. The Appellant further submits that the Appeal Division should show no deference with respect to questions of law.

[15] The Tribunal notes that the Federal Court of Appeal in the case of *Canada (A.G.) v. Jean*, 2015 FCA 242, indicates in paragraph 19 of its decision that "[w]hen it acts as an administrative appeal tribunal for decisions rendered by the General Division of the Social Security Tribunal, the Appeal Division does not exercise a superintending power similar to that exercised by a higher court".

[16] The Federal Court of Appeal further indicated that:

> [n]ot only does the Appeal Division have as much expertise as the General Division of the Social Security Tribunal and thus is not required to show deference, but an administrative appeal tribunal also cannot exercise the review and superintending powers reserved for higher provincial courts or, in the case of "federal boards", for the Federal Court and the Federal Court of Appeal.

[17] The Court concluded that "[w]he[n] it hears appeals pursuant to subsection 58(1) of the *Department of Employment and Social Development Act*, the mandate of the Appeal Division is conferred to it by sections 55 to 69 of that Act".

[18] The mandate of the Appeal Division of the Social Security Tribunal as described in *Jean* was later confirmed by the Federal Court of Appeal in *Maunder v. Canada (A.G.)* 2015 FCA 274.

[19] Therefore, unless the General Division failed to observe a principle of natural justice, erred in law, 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, the Tribunal must dismiss the appeal.

ANALYSIS

Introduction

[20] 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 General Division

[21] The General Division determined that the amounts received constituted earnings in accordance with section 35 of the *Regulations* and that the amounts received by the Respondents from Air Canada had to be allocated in accordance with the principle set out in paragraph 36(19)(b) of the *Regulations*. The date of the transaction being March 20, 2012, the General Division concluded that it was on that date and to that week that the earnings had to be allocated for the total amount.

[22] According to the General Division, for subsection 36(9) of the Regulations to apply, not only must earnings have been paid by reason of lay-off or separation from

employment, but the amount must also have been paid for the separation from the employment lost, not for the earnings paid by a previous employer, even if the loss of employment is one of the conditions for obtaining the amount in question from the previous employer.

Leave to appeal to the Appeal Division

[23] In support of the leave application, the Appellant argued that the evidence before the General Division, the legislation and the jurisprudence supported its position that the severance payments had to be allocated in the manner prescribed in subsection 36(9) of the *Regulations*, effective from the week of the termination or lay-off from Aveos in March 2012.

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

Position of the parties in appeal before the Appeal Division

[25] The Appellant submits that the evidence, 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.

[26] The Respondent 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 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. Since subsection 36(9) does not apply, the Respondent 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.

The undisputed facts

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

[28] 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). 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 Air Canada Technical Service Limited Partnership (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.

[29] 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).

[30] The employees had to make their choice within seventy four 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.

[31] 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 with participate in 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.

[32] 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 before arbitrator Martin Teplitsky or such other arbitrator as he may designate.

[33] 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.

[34] 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.

[35] 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.

[36] 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.

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

[38] 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.

[39] 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

[40] 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.

[41] 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...

[42] 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.

[43] 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.

[44] 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.

[45] The employees 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".

[46] 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."

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

[48] 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.

[49] 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.

[50] The Appellant determined that the separation payments constituted earnings pursuant to section 35 of the *Regulations*. The Appellant then determined that the value of the separation payments should be allocated according to subsection 36(9) of the *Regulations* beginning with the week of the insolvency and termination from Aveos in March 2012.

Earnings under 35 of the Regulations

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

[52] 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..."

[53] 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.

[54] 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.

[55] 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.

[56] 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.

[57] The evidence and the above relevant jurisprudence clearly support the conclusion of the General Division that the separation payment received by the Respondent constitutes earnings pursuant to section 35 of the *Regulations*.

Allocation of earnings under 36 of the Regulations

[58] The Appellant 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.

[59] The Appellant 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.

[60] The Respondent 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.

[61] The Respondent 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.

[62] The Respondent 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 Respondent finally submits that the Appellant's own Digest states that earnings resulting from a different employer are not considered to be earnings "from that employment".

[63] Therefore, the Respondent 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,* only to the week of September 9, 2012, this date being the Sunday preceding arbitrator Teplitsky's decision of September 12, 2012.

[64] For the following reasons, the Tribunal finds that the General Division erred when it concluded that the amounts received from Air Canada had to be allocated in accordance with the principle set out in paragraph 36(19)(b) of the *Regulations*, on March 20, 2012 and to that week.

[65] The evidence before the General Division shows that pursuant to the terms of a 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.

[66] 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.

[67] It is not disputed that the Respondent 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."

[68] 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 ceased its operations and terminated the employees' employment.

[69] 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.

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

[71] The Tribunal finds that the Separation Program clearly set 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.

[72] 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 March 20, 2012.

[73] 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.

[74] 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.

[75] 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.

[76] The Tribunal finds that the General Division erred when it determined that the source of the payment was a condition of application of subsection 36(9) of the

Regulations. In other words, the General Division erred when it asked itself by whom the amounts where paid in its analysis of section 36 of the *Regulations*.

[77] 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 to emphasize on the reason for which the earnings are paid and not by whom they were paid and/or on what date 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.

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

[79] The Respondent 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 Respondent, 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 Appellant's own Digest supports his position that earnings paid by another employer (Air Canada) are not to be considered as earnings from the lost employment (Aveos).

[80] 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.

[81] When considering all the evidence in the file, the General Division 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 layoff or separation from the employment from Air Canada but by reason of the Separation Package agreed upon by all the parties.

[82] 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 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*.

[83] As early as March 2009, Arbitrator Teplitsky was asked by the parties themselves to 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)

[84] 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)

[85] The Tribunal finds, contrary to the conclusions of the General Division, 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 […]

[86] The amount received by the Respondent 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.

[87] 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.

[88] 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.

[89] With the upmost respect for the General Division, 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*, *precited*.

[90] For all of the above reasons, the appeal is allowed.

CONCLUSION

[91] The appeal is allowed.

[92] 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.

Pierre Lafontaine

Member, Appeal Division

ANNEX

Appeal Number	File Name
AD-15-593	E. A.
AD-15-595	S. B.
AD-15-598	P. B.
AD-15-600	A. F.
AD-15-601	N. B.
AD-15-602	J. F.
AD-15-605	M. F.
AD-15-607	G. I.
AD-15-610	K. K.
AD-15-614	D. B.
AD-15-623	M. L.
AD-15-628	G. L.
AD-15-629	A. P.
AD-15-632	R. M.
AD-15-634	C. R.
AD-15-639	G. M.
AD-15-642	E. R.
AD-15-645	S. R.
AD-15-648	J. M.
AD-15-651	F. S.
AD-15-652	J. S.
AD-15-655	L. M.
AD-15-664	C. L.
AD-15-669	L. O.
AD-15-671	M. P.
AD-15-688	M. D.
AD-15-690	C. D.
AD-15-692	M. D.
AD-15-694	C. S.
AD-15-698	H. C.
AD-15-699	J. M.
AD-15-704	M. S.
AD-15-707	A. C.
AD-15-710	R. C.

AD-15-713	O. C.
AD-15-721	T. D.
AD-15-731	B. S.
AD-15-736	G. W.
AD-15-751	S. T.
AD-15-754	R. T.
AD-15-755	J. L.
AD-15-757	E. V.
AD-15-764	S. V.