



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *O. A. v. Canada Employment Insurance Commission*, 2017 SSTGDEI 78

Tribunal File Number: GE-16-4311

BETWEEN:

O. A.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Takis Pappas

HEARD ON: May 24, 2017

DATE OF DECISION: June 5, 2017

REASONS AND DECISION

PERSONS IN ATTENDANCE: O. A.

INTRODUCTION

[1] The Appellant established an initial claim for Employment Insurance benefits effective May 29, 2016.

[2] The Respondent notified the Appellant that the severance and vacation pay were considered earnings and would be applied against his claim from May 29, 2016 to June 18, 2016 and a balance of \$67.00 would be applied against his benefits for the week beginning June 19, 2016 according to sections 35 and 36 of the *Employment Insurance Regulations* (the Regulations).

[3] On September 1, 2016 the Appellant requested a reconsideration of the Respondent's decision. The Respondent maintained its original decision and on November 18, 2016 the Appellant appealed to the General Division of the Social Security Tribunal.

[4] The hearing was held by Teleconference for the following reasons:

- a) The complexity of the issue(s) under appeal.
- b) The fact that the appellant will be the only party in attendance.
- c) The information in the file, including the need for additional information.
- d) The form of hearing respects the requirement under the Social Security Tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

ISSUE

[5] Whether the appeal of the Respondent's decision regarding the allocation of the Appellant's earnings has merit under sections 35 and 36 of the Regulations.

EVIDENCE

[6] The Appellant established an initial claim for Employment Insurance benefits effective May 29, 2016.

[7] The Appellant was employed until May 27, 2016. He was paid vacation pay in the amount of \$88.83 (GD3-12).

[8] The Respondent notified the Appellant that the vacation was considered earnings and would be applied against his claim from May 29, 2016 to June 4, 2016 (GD3-13 to GD-14).

[9] The employer issued an amended record of employment on July 22, 2016 indicating severance pay of 2,000.00 (GD3-15).

[10] The Respondent notified the Appellant that the severance and vacation pay were considered earnings and would be applied against his claim from May 29, 2016 to June 18, 2016 and a balance of \$67.00 would be applied against his benefits for the week beginning June 19, 2016 according to sections 35 and 36 the Regulations.

[11] In his request for reconsideration, the Appellant wrote that the \$1800.00 (after tax) he received was not wages but a settlement to a grievance and the union came to a resolution (GD3- 19 to GD3-22).

[12] At the hearing, the Appellant gave a detailed account as to why he was dismissed from his employment. He concluded by stating that his dismissal should not have happened.

SUBMISSIONS

[13] The Appellant submitted that:

- a) The grounds for his dismissal remain unfair, malicious and discriminatory. He provided a details description of the events that led up to his dismissal. He was dismissed on the wrong grounds and this issue needs to be reviewed.

- b) The \$2000.00 given to him by his company was not for past work or due to grievance. The union bargained for him to get his position back and the alternative for him was to receive the money.

[14] The Respondent submitted that:

- a) Sums received from an employer are presumed earnings and must therefore be allocated to a period on claim unless the amount falls within an exception in subsection 35(7) of the Regulations or does not arise from employment.
- b) Earnings paid by an employer by reason of the separation from employment must be allocated pursuant to subsection 36(9) of the Regulations. It is the reason or motive for the payment, and not the date of payment that determines the date from which the allocation must begin.
- c) The payment was made by reason of his separation from employment. Consequently, this money was allocated pursuant to subsection 36(9) of the Regulations, from May 28, 2016.

ANALYSIS

[15] The relevant legislative provisions are reproduced in the Annex to this decision.

[16] When a question arises as to whether certain amounts should result in, for example, repayment of benefits, two questions need to be asked:

- a) Are the amounts in question earnings and if so,
- b) To which weeks are the earnings to be allocated?

[17] Section 35 of the Regulations defines “income” as “any pecuniary or non-pecuniary income that is or will be received by a claimant from an employer or any other person, including a trustee in bankruptcy.” This section also sets out which income is considered earnings.

[18] Once this is established, section 36 of the Regulations sets out how the allocation of earnings is conducted over specific weeks.

[19] Money arising out of employment is considered earnings and must be allocated, unless it falls under the exceptions set out in subsection 35(7) of the Regulations.

[20] Is the amount the Appellant received in item earnings?

[21] The employer has confirmed that the amended record of employment was issued due to the payment of severance pay (GD3-16) and the amount is 2000.00 (GD3-15). The Appellant refused to provide the Respondent with the settlement agreement (GD3-23). The Respondent contends that the Appellant has not been able to provide evidence that clearly demonstrates that the monies paid is not for lost employment-related income.

[22] The Respondent submitted that the money the Appellant received was related to his employment and constituted earnings according to subsection 35(2) of the Regulations and was correctly allocated in accordance with subsection 36(9) of the Regulations.

[23] The Appellant did provide the Tribunal with the settlement agreement. In GD5-2 paragraph 2, this agreement states: “The Company shall pay to the Grievor the equivalent of \$2,000.00, less required statutory deductions, within 7 days of the last party signing these minutes of settlement. The payments noted above include any hours owed including sick pay vacation pay and severance entitled under any statute, Collective Agreement or otherwise”.

[24] The clear and undisputed evidence before the Tribunal is that the Appellant received money from his employer because of separation from employment. The payment was made to him for vacation pay and severance pay.

[25] The Tribunal finds that subsection 36(9) of the Regulations is clear that 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.

[26] The evidence in the file indicates that the Appellant received severance and vacation pay because of a permanent separation from employment.

[27] Based on the above information, the Tribunal finds that this money constitutes earnings according to section 35 of the Regulations because it is income arising out of employment and has to be allocated according to subsection 36 of the Regulations.

[28] Finally, the Appellant felt that he was dismissed on the wrong grounds and this issue needs to be reviewed. The Tribunal wishes to note that it does not have the jurisdiction to rule on the employer's actions in dismissing an employee. This issue could properly be addressed by the Appellant approaching the appropriate authorities in the Ministry of Labour and obtaining information about what options are available to him under the governing legislation of that Ministry.

CONCLUSION

[29] The appeal is dismissed.

Takis Pappas

Member, General Division - Employment Insurance Section

ANNEX

THE LAW

Employment Insurance Act

Employment Insurance Regulations

35 (1) The definitions in this subsection apply in this section.

employment means

(a) any employment, whether insurable, not insurable or excluded employment, under any express or implied contract of service or other contract of employment,

(i) whether or not services are or will be provided by a claimant to any other person, and

(ii) whether or not income received by the claimant is from a person other than the person to whom services are or will be provided;

(b) any self-employment, whether on the claimant's own account or in partnership or co-adventure; and

(c) the tenure of an office as defined in subsection 2(1) of the *Canada Pension Plan*. (*emploi*)

income means any pecuniary or non-pecuniary income that is or will be received by a claimant from an employer or any other person, including a trustee in bankruptcy. (*revenu*)

pension means a retirement pension

(a) arising out of employment or out of service in any armed forces or in a police force;

(b) under the *Canada Pension Plan*; or

(c) under a provincial pension plan. (*pension*)

self-employed person has the same meaning as in subsection 30(5). (*travailleur indépendant*)

(2) Subject to the other provisions of this section, the earnings to be taken into account for the purpose of determining whether an interruption of earnings under section 14 has occurred and

the amount to be deducted from benefits payable under section 19, subsection 21(3), 22(5), 152.03(3) or 152.04(4) or section 152.18 of the Act, and to be taken into account for the purposes of sections 45 and 46 of the Act, are the entire income of a claimant arising out of any employment, including

(a) amounts payable to a claimant in respect of wages, benefits or other remuneration from the proceeds realized from the property of a bankrupt employer;

(b) workers' compensation payments received or to be received by a claimant, other than a lump sum or pension paid in full and final settlement of a claim made for workers' compensation payments;

(c) payments a claimant has received or, on application, is entitled to receive under

(i) a group wage-loss indemnity plan,

(ii) a paid sick, maternity or adoption leave plan,

(iii) a leave plan providing payment in respect of the care of a child or children referred to in subsection 23(1) or 152.05(1) of the Act,

(iv) a leave plan providing payment in respect of the care or support of a family member referred to in subsection 23.1(2) or 152.06(1) of the Act, or

(v) a leave plan providing payment in respect of the care or support of a critically ill child;

(d) notwithstanding paragraph (7)(b) but subject to subsections (3) and (3.1), the payments a claimant has received or, on application, is entitled to receive from a motor vehicle accident insurance plan provided under a provincial law in respect of the actual or presumed loss of income from employment due to injury, if the benefits paid or payable under the Act are not taken into account in determining the amount that the claimant receives or is entitled to receive from the plan;

(e) the moneys paid or payable to a claimant on a periodic basis or in a lump sum on account of or in lieu of a pension; and

(f) where the benefits paid or payable under the Act are not taken into account in determining the amount that a claimant receives or is entitled to receive pursuant to a provincial law in respect of an actual or presumed loss of income from employment, the indemnity payments the claimant has received or, on application, is entitled to receive pursuant to that provincial law by reason of the fact that the claimant has ceased to work for the reason that continuation of work entailed physical dangers for

(i) the claimant,

(ii) the claimant's unborn child, or

(iii) the child the claimant is breast-feeding.

(3) Where, subsequent to the week in which an injury referred to in paragraph (2)(d) occurs, a claimant has accumulated the number of hours of insurable employment required by section 7 or 7.1 of the Act, the payments referred to in that paragraph shall not be taken into account as earnings.

(3.1) If a self-employed person has sustained an injury referred to in paragraph (2)(d) before the beginning of the period referred to in section 152.08 of the Act, the payments referred to in that paragraph shall not be taken into account as earnings.

(4) Notwithstanding subsection (2), the payments a claimant has received or, on application, is entitled to receive under a group sickness or disability wage-loss indemnity plan or a workers' compensation plan, or as an indemnity described in paragraph (2)(f), are not earnings to be taken into account for the purpose of subsection 14(2).

(5) Notwithstanding subsection (2), the moneys referred to in paragraph (2)(e) are not earnings to be taken into account for the purposes of section 14.

(6) Notwithstanding subsection (2), the earnings referred to in subsection 36(9) and allowances that would not be deducted from benefits by virtue of subsection 16(1) are not earnings to be taken into account for the purposes of section 14.

(7) That portion of the income of a claimant that is derived from any of the following sources does not constitute earnings for the purposes referred to in subsection (2):

(a) disability pension or a lump sum or pension paid in full and final settlement of a claim made for workers' compensation payments;

(b) payments under a sickness or disability wage-loss indemnity plan that is not a group plan;

(c) relief grants in cash or in kind;

(d) retroactive increases in wages or salary;

(e) the moneys referred to in paragraph (2)(e) if

(i) in the case of a self-employed person, the moneys became payable before the beginning of the period referred to in section 152.08 of the Act, and

(ii) in the case of other claimants, the number of hours of insurable employment required by section 7 or 7.1 of the Act for the establishment of their benefit period was accumulated after the date on which those moneys became payable and during the period in respect of which they received those moneys; and

(f) employment income excluded as income pursuant to subsection 6(16) of the *Income Tax Act*.

(8) For the purposes of paragraphs (2)(c) and (7)(b), a sickness or disability wage-loss indemnity plan is not a group plan if it is a plan that

- (a)** is not related to a group of persons who are all employed by the same employer;
- (b)** is not financed in whole or in part by an employer;
- (c)** is voluntarily purchased by the person participating in the plan;
- (d)** is completely portable;
- (e)** provides constant benefits while permitting deductions for income from other sources, where applicable; and
- (f)** has rates of premium that do not depend on the experience of a group referred to in paragraph (a).

(9) For the purposes of subsection (8), "portable", in respect of a plan referred to in that subsection, means that the benefits to which an employee covered by the plan is entitled and the rate of premium that the employee is required to pay while employed by an employer will remain equivalent if the employee becomes employed by any other employer within the same occupation.

(10) For the purposes of subsection (2), "income" includes

(a) in the case of a claimant who is not self-employed, that amount of the claimant's income remaining after deducting

(i) expenses incurred by the claimant for the direct purpose of earning that income, and

(ii) the value of any consideration supplied by the claimant; and

(b) in the case of a claimant who is self-employed in farming, the gross income from that self-employment, including any farming subsidies the claimant receives under any federal or provincial program, remaining after deducting the operating expenses, other than capital expenditures, incurred in that self-employment;

(c) in the case of a claimant who is self-employed in employment other than farming, the amount of the gross income from that employment remaining after deducting the operating expenses, other than capital expenditures, incurred therein; and

(d) in the case of any claimant, the value of board, living quarters and other benefits received by the claimant from or on behalf of the claimant's employer in respect of the claimant's employment.

(11) Subject to subsection (12), the value of the benefits referred to in paragraph (10)(d) shall be the amount fixed by agreement between the claimant and the claimant's employer and shall be an amount that is reasonable in the circumstances.

(12) Where the claimant and the employer do not agree on the value of the benefits referred to in paragraph (10)(d), or where the value fixed for those benefits by agreement between the claimant and the claimant's employer is not reasonable in the circumstances, the value shall be determined by the Commission based on the monetary value of the benefits.

(13) The value of living quarters referred to in paragraph (10)(d) includes the value of any heat, light, telephone or other benefits included with the living quarters.

(14) Where the value of living quarters is determined by the Commission, it shall be computed on the rental value of similar living quarters in the same vicinity or district.

(15) Where the remuneration of a claimant is not pecuniary or is only partly pecuniary and all or part of the non-pecuniary remuneration consists of any consideration other than living quarters and board furnished by the employer, the value of that consideration shall be included in determining the claimant's income.

(16) For the purposes of this section, living quarters means rooms or any other living accommodation.

36 (1) Subject to subsection (2), the earnings of a claimant as determined under section 35 shall be allocated to weeks in the manner described in this section and, for the purposes referred to in subsection 35(2), shall be the earnings of the claimant for those weeks.

(2) For the purposes of this section, the earnings of a claimant shall not be allocated to weeks during which they did not constitute earnings or were not taken into account as earnings under section 35.

(3) Where the period for which earnings of a claimant are payable does not coincide with a week, the earnings shall be allocated to any week that is wholly or partly in the period in the proportion that the number of days worked in the week bears to the number of days worked in the period.

(4) Earnings that are payable to a claimant under a contract of employment for the performance of services shall be allocated to the period in which the services were performed.

(5) Earnings that are payable to a claimant under a contract of employment without the performance of services or payable by an employer to a claimant in consideration of the claimant returning to or beginning work shall be allocated to the period for which they are payable.

(6) The earnings of a claimant who is self-employed, or the earnings of a claimant that are from participation in profits or commissions, that arise from the performance of services shall be allocated to the weeks in which those services are performed.

(6.1) The earnings of a claimant who is self-employed, or the earnings of a claimant that are from participation in profits or commissions, that arise from a transaction shall be allocated

(a) if the aggregate amount of earnings that arise from a transaction occurring in a week is greater than the maximum yearly insurable earnings referred to in section 4 of the Act divided by 52, to the weeks in which the work that gave rise to the transaction was performed, in a manner that is proportional to the amount of work that was performed during each of those weeks or, if no such work was performed, to the week in which the transaction occurred; or

(b) if the aggregate amount of earnings that arise from a transaction occurring in a week is less than or equal to the maximum yearly insurable earnings referred to in section 4 of the Act divided by 52, to the week in which the transaction occurred or, if the claimant demonstrates that the work that gave rise to the transaction occurred in more than one week, to the weeks in which the earnings were earned, in a manner that is proportional to the amount of work that was performed during each of those weeks.

(6.2) The earnings of a claimant who is self-employed, or the earnings of a claimant that are from participation in profits or commissions, that do not arise from the performance of services or from a transaction shall be allocated equally to each week falling within the period in which the earnings were earned.

(7) The earnings of a claimant who is self-employed in farming shall be allocated

(a) if they arose from a transaction, in accordance with subsection (6.1); and

(b) if they were received in the form of a subsidy, to the week in which the subsidy was paid.

(8) Where vacation pay is paid or payable to a claimant for a reason other than a lay-off or separation from an employment, it shall be allocated as follows:

(a) where the vacation pay is paid or payable for a specific vacation period or periods, it shall be allocated

(i) to a number of weeks that begins with the first week and ends not later than the last week of the vacation period or periods, and

(ii) in such a manner that the total earnings of the claimant from that employment are, in each consecutive week, equal to the claimant's normal weekly earnings from that employment; and

(b) in any other case, the vacation pay shall, when paid, be allocated

(i) to a number of weeks that begins with the first week for which it is payable, and

(ii) in such a manner that, for each week except the last, the amount allocated under this subsection is equal to the claimant's normal weekly earnings from that employment.

(9) Subject to subsections (10) to (11), all earnings paid or payable to a claimant by reason of a lay-off or separation from an employment shall, regardless of the period in respect of which the earnings are purported to be paid or payable, be allocated to a number of weeks that begins with the week of the lay-off or separation in such a manner that the total earnings of the claimant from that employment are, in each consecutive week except the last, equal to the claimant's normal weekly earnings from that employment.

(10) Subject to subsection (11), where earnings are paid or payable to a claimant by reason of a lay-off or separation from an employment subsequent to an allocation under subsection (9) in respect of that lay-off or separation, the subsequent earnings shall be added to the earnings that were allocated and, regardless of the period in respect of which the subsequent earnings are purported to be paid or payable, a revised allocation shall be made in accordance with subsection

(9) on the basis of that total.

(10.1) The allocation of the earnings paid or payable to a claimant by reason of a lay-off or separation from an employment made in accordance with subsection (9) does not apply if

(a) the claimant's benefit period begins in the period beginning on January 25, 2009 and ending on May 29, 2010;

(b) the claimant contributed at least 30% of the maximum annual employee's premium in at least seven of the 10 years before the beginning of the claimant's benefit period;

(c) the Commission paid the claimant less than 36 weeks of regular benefits in the 260 weeks before the beginning of the claimant's benefit period; and

(d) during the period in which the earnings paid or payable by reason of the claimant's lay-off or separation from an employment are allocated in accordance with subsection (9) or, if the earnings are allocated to five weeks or less, during that period of allocation or within six weeks following the notification of the allocation, the claimant is referred by the Commission, or an authority that the Commission designates, under paragraph 25(1)(a) of the Act, to a course or program of instruction or training

(i) that is full-time,

(ii) that has a duration of at least 10 weeks or that costs at least \$5,000 or 80% of the earnings paid or payable by reason of the claimant's lay-off or separation from employment,

(iii) for which the claimant assumes the entire cost, and

(iv) that begins during one of the 52 weeks following the beginning of the claimant's benefit period.

(10.2) If any of the conditions under which the Commission may terminate the claimant's referral under paragraph 27(1.1)(b) of the Act exists, the earnings paid or payable to the claimant by reason of a lay-off or separation from an employment shall be re-allocated under subsection (9).

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

(12) The following payments shall be allocated to the weeks in respect of which the payments are paid or payable:

(a) payments in respect of sick leave, maternity leave or adoption leave or leave for the care of a child or children referred to in subsection 23(1) or 152.05(1) of the Act;

(b) payments under a group sickness or disability wage-loss indemnity plan;

(c) payments referred to in paragraphs 35(2)(d) and (f);

(d) workers' compensation payments, other than a lump sum or pension paid in full and final settlement of a claim made for workers' compensation payments;

(e) payments in respect of the care or support of a family member referred to in subsection 23.1(2) or 152.06(1) of the Act; and

(f) payments in respect of the care or support of a critically ill child.

(13) A payment paid or payable to a claimant in respect of a holiday or non-working day that is observed as such by law, custom or agreement, or a holiday or non-working day immediately preceding or following a holiday or non-working day that occurs at the establishment of the employer or former employer from whom the claimant receives that payment, shall be allocated to the week in which that day occurs.

(14) The moneys referred to in paragraph 35(2)(e) that are paid or payable to a claimant on a periodic basis shall be allocated to the period for which they are paid or payable.

(15) The moneys referred to in paragraph 35(2)(e) that are paid or payable to a claimant in a lump sum shall be allocated beginning with the first week that those moneys are paid or payable to the claimant in such a manner that those moneys are equal in each week to the weekly amount, calculated in accordance with subsection (17), to which the claimant would have been entitled if the lump sum payment had been paid as an annuity.

(16) The moneys allocated in accordance with subsection (14) or (15) shall not be taken into account in the allocation of other earnings under this section.

(17) The weekly amount shall be calculated in accordance with the following formula, according to the claimant's age on the day on which the lump sum payment is paid or payable:

$$A / B$$

where

A is the lump sum payment; and

B is the estimated actuarial present value* of \$1 payable at the beginning of every week starting from the day on which the lump sum payment is paid or payable and payable for the claimant's lifetime, as calculated each year in accordance with the following formula and effective on January 1 of the year following its calculation:

$$B = \left[\sum_{t=0} \text{to infinity of } ({}_tP_x / (1+i)^t) - 0.5 \right] \times 52$$

where

P_x is the probability that the claimant will survive for "t" years from the claimant's age "x" using the latest Canadian mortality rates used in the valuation of the Canada Pension Plan prorated in equal parts between males and females,

i is the annualized long-term Government of Canada benchmark bond yields averaged over the 12-month period beginning on the September 1 and ending on the August 30 before the January 1 on which the estimated actuarial present values are effective, expressed as a percentage and rounded to the nearest one tenth of a percentage, and

t is the number of years that the claimant survives according to the claimant's age for which the probability of survival is estimated by *P_x*.

*Note: The estimated actuarial present values are published annually on the Service Canada website.

(18) Earnings that are payable to a claimant under a government program intended to encourage re-employment and that are payable to the claimant as a supplement to earnings arising from a contract of employment shall be allocated to the period for which they are payable.

(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.

(20) For the purposes of this section, a fraction of a dollar that is equal to or greater than one half shall be taken as a dollar and a fraction that is less than one half shall be disregarded.