



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *Y. M. v Canada Employment Insurance Commission*, 2018 SST 1355

Tribunal File Number: GE-18-1990

BETWEEN:

Y. M.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Paul Dusome

HEARD ON: August 21, 2018

DATE OF DECISION: September 5, 2018

DECISION

[1] The appeal is allowed in part. The \$21,500.00 settlement amount for general damages was not earnings. The proper allocation of the \$2,500.00 settlement amount for pay in lieu, and of the \$5,971.43 vacation pay, resulted in an overpayment of \$125.00.

OVERVIEW

[2] The Appellant was dismissed for alleged gross misconduct. He sued the employer for wrongful dismissal for loss of salary and benefits for a notice period of nine months, for aggravated damages for breach of good faith in the manner of terminating his employment, for damages for intentional infliction of mental suffering, and for punitive damages. He received employment insurance (EI) benefits prior to settling the lawsuit. The settlement provided for payment of \$44,000.00 to the Appellant. At issue in this appeal is the Respondent's decision to treat as earnings \$21,500.00 of that payment, which was identified in the settlement document as general damages. The allocation of those, and other, earnings resulted in an overpayment of \$4,785.00.

ISSUES

[3] 1. What portion of the \$44,000.00 settlement payment was earnings for EI purposes? 2. What was the proper allocation period for correctly identified earnings? 3. What was the proper amount of the overpayment?

ANALYSIS

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

[5] The word "earnings" is defined as "the entire income of a claimant arising out of any employment" (subsection 35(2) of the *Employment Insurance Regulations* (Regulations)). These earnings are to be taken into account for the purpose of determining earnings to be deducted from benefits. The income must be linked to employment, either as amounts earned by labour or given for work, or there is a sufficient connection between the employment and the money received (*Canada (A.G.) v. Roch*, 2003 FCA 356). Severance pay is earnings within subsection 35(2) of the Regulations, (*Canada (A.G.) v. Boucher Dancause*, 2010 FCA 270). A settlement

payment for wrongful dismissal is “income arising out of employment,” unless the claimant can establish that due to special circumstances some portion of the money should be regarded as compensation for some other expense or loss (*Canada (A.G.) v. Radigan*, A-567-99). The onus then shifts to the claimant to show that the money received as a result of his dismissal was for something other than earnings (*Bourgeois v. Canada (A.G.)*, 2004 FCA 117).

[6] The rule for applying those earnings to a time period (referred to as allocation) is set out in section 36(9) of the *Regulations*. The rule states that the earnings paid or payable by reason of a separation from employment, regardless of the period in respect of which the earnings are purported to be paid or payable, are to be applied to the weeks starting with the week of termination of the employment, at the person’s normal weekly earnings, until the money has been used up. This will eliminate or reduce the EI benefits for those weeks.

Issue 1: What portion of the \$44,000.00 settlement payment was earnings for EI purposes?

[7] A settlement payment for wrongful dismissal is “income arising out of employment,” and thus earnings, unless the claimant can establish that due to special circumstances some portion of the money should be regarded as compensation for some other expense or loss (*Regulations*, subsection 35(2); *Roch*; *Radigan*; *Bourgeois*)

[8] The only portion of the settlement that was earnings was the \$2,500.00 for pay in lieu.

[9] The Appellant was dismissed on February 3, 2017. There had been a fire in the employer’s plant which did not result in injury or damage, but for which the Appellant was blamed. He received some vacation pay on termination. The allocation of the vacation pay delayed the payment of EI benefits until February 26, 2017. The Appellant returned to employment on May 21, 2017, so that his EI benefits ended on May 20, 2017.

[10] On October 25, 2017, the Appellant settled his lawsuit against the employer in Minutes of Settlement (Minutes). Under the Minutes, the employer was to pay \$44,000.00 to the Appellant, broken down as follows: (a) \$2,500.00 as pay in lieu of notice; (b) \$21,500.00 as general damages; and (c) \$20,000.00 for the Appellant’s legal fees. The Minutes also stated that the amount of \$2,500.00 for pay in lieu of notice was not to be paid to the Appellant until he

obtained written confirmation from the Respondent regarding any repayment obligation for EI benefits he had received.

[11] The Appellant's lawyer in the lawsuit sent the Respondent a copy of the Minutes, the claim and defence documents in the lawsuit, and the employer's termination letter. The lawyer's letter, dated November 27, 2017, stated that the claim for general damages was to compensate the Appellant for being fired without being given an opportunity to know what had been said against him and without being given the opportunity to respond. As a result of being fired, the Appellant suffered from depression, insomnia and anxiety. He was under a doctor's care throughout 2017, the lawyer listing 10 appointments during 2017. He had been prescribed Paxil, and had been to a psychiatrist for an assessment. He suffered from physical symptoms as well. The settlement was largely for the aggravated damages claim, and for reimbursement of the legal fees. The \$2,500.00 for pay in lieu was nominal, approximating one week's wages.

[12] On the basis of the above information, the Respondent determined that \$24,000.00 of the settlement funds, being the \$2,500.00 for pay in lieu, and \$21,500.00 for general damages, was earnings. The \$20,000.00 for legal fees was not classified as earnings.

[13] The Appellant filed with his notice of appeal a doctor's note dated May 19, 2017. The note diagnosed a major depressive episode related to job termination in February 2017. Since the termination, the Appellant had depressive symptoms with decreased sleep, motivation, concentration, appetite and energy, accompanied by increased irritability and social isolation. The doctor prescribed CipraleX and Mirtazepine to replace the Paxil, and recommended that medications be continued for one year. A note dated June 19, 2017, from the same doctor stated, "please excuse from work duties x 1 week for medical reasons." The Appellant confirmed the depression and treatments in his testimony. He also testified that the \$21,500.00 general damages were for his personal damages related to his health and stress, and that the only compensation he received for loss of pay and benefits was the \$2,500.00 pay in lieu, which he still had not received from the employer.

[14] In its Representations, with reference to the lawyer's letter dated November 27, 2017, the Minutes, the claim and defence documents in the lawsuit, the employer's termination letter and other documents, the Respondent stated, "...this documentation is deemed as not being relevant

to the issue at hand...”. The list of documents deemed not to be relevant did not include the medical documents filed with the notice of appeal. The Respondent submitted that “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...the payment was made to compensate the claimant as settlement pay for the loss of his employment...the payment was made by reason of his separation from employment...there is no outline of the payment being for anything other than general damages and pay in lieu of notice, which under subsection 36(9) of the Regulations is considered to be earnings.”

[15] The Respondent has misstated and misapplied the proper test respecting payments for wrongful dismissal with respect to the general damages, though not with respect to legal fees or pay in lieu. In the second quotation from the Representations in the previous paragraph, the Respondent has made the following errors. It misstated the proper test for the exception as “the amount falls within an exception in subsection 35(7) or the Regulations or does not arise from employment”. The proper test is that “due to special circumstances some portion of the money should be regarded as compensation for some other expense or loss.” The misstatement of the test and the presumption that money received from an employer is earnings, coupled with the phrases “arise from employment”, “compensate the claimant as settlement pay for the loss of his employment”, “the payment was made by reason of his separation from employment” and equating “general damages and pay in lieu of notice” come close to meaning that all money received from an employer is earnings, unless excepted under subsection 35(7) of the Regulations. The effect of that is to severely restrict or to eliminate the exception for permitting the claimant to show that “due to special circumstances some portion of the money should be regarded as compensation for some other expense or loss”, as set out in the *Radigan* decision.

[16] The Respondent appeared to apply the exception for “compensation for some other expense or loss” in the phrase “there is no outline of the payment being for anything other than general damages and pay in lieu of notice”. The Respondent then avoided the exception by ignoring relevant evidence. It relied solely on the wording in the Minutes, the categorization of the \$21,500.00 as general damages in that document, and the assumption that “general damages” is always earnings. In conflict with that reliance on the wording in the Minutes, it then deemed

the Minutes and other documents as not relevant. It cited the *Radigan* decision in support of the general rule. It then ignored the Appellant's lawyer's letter of November 27, 2017, setting out that the \$21,500.00 general damages was compensation for an improper termination process that caused the Appellant to suffer from depression, insomnia and anxiety. That sum was to compensate for the health consequences of the firing, not for the loss of employment or the loss of income or benefits. In the *Radigan* decision, on the strength of the claimant's lawyer's letter setting out the breakdown of the total amount paid to the claimant, the court held that mental distress damages, job search expenses, job training expenses and legal fees were not earnings. In this case, the Respondent deemed the Appellant's lawyer's letter to be irrelevant, and ignored the medical documents filed with the notice of appeal. The Respondent failed to properly consider whether the \$21,500.00 for general damages fell within the exception "due to special circumstances some portion of the money compensation for some other expense or loss" and whether the Appellant had proven that he came within the exception.

[17] On the evidence before the Tribunal, the amount of \$21,500.00 general damages in the Minutes is not earnings for the purposes of section 35 of the Regulations. The Minutes do not expressly state what that sum is for, simply calling the amount "general damages". The lawyer's letter, which is proper evidence pursuant to the *Radigan* decision, is clear that this sum was for compensation for the mental distress the Appellant suffered as a result of the manner of his dismissal. That mental distress is confirmed by the doctor's evidence filed with the notice of appeal. The lawyer's letter is also clear that this claim was separate from the claim for notice damages for loss of income and benefits. That evidence is sufficient to meet the onus on the Appellant to show that the \$21,500.00 was, due to special circumstances, compensation for some other expense or loss, and was therefore not earnings with section 35 of the Regulations.

[18] The amount of \$2,500.00 for pay in lieu was clearly earnings, as it was compensation for lost wages. The Appellant did not contest that this amount was earnings.

Issue 2: What was the proper allocation period for correctly identified earnings?

[19] The allocation rule applicable in this case requires that the earnings arising from separation from employment be applied to the weeks starting with the week of termination of the

employment, at the person's normal weekly earnings, until the money has been used up (Regulations, subsection 36(9)).

[20] The proper period of allocation is to the weeks beginning from February 5 to February 26, 2017.

[21] Based on the conclusion respecting earnings, the proper amount of earnings from the settlement money paid under the Minutes is the pay in lieu, \$2,500.00. The \$20,000.00 for legal fees, and the \$21,500.00 for general damages are not earnings, and therefore not subject to allocation. In addition, the Appellant did receive \$5,971.43 in vacation pay upon termination of his employment. That amount must be allocated as well under subsection 36(9) of the Regulations, as it was paid by reason of the separation from employment. The total amount to be allocated is \$8,471.00.

[22] The Appellant's normal weekly earnings were \$2,283.00. The allocation will be to the three weeks beginning from February 5, 2017, to February 19, 2017, with \$1,622.00 remaining to be applied to the week beginning February 26, 2017.

Issue 3: What was the proper amount of the overpayment?

[23] An overpayment consists of the amount of benefits received by a claimant which he was not entitled to receive (Act, section 43).

[24] The proper amount of the overpayment is \$125.00.

[25] The \$4,785.00 overpayment represents almost 100% of the EI benefits paid to the Appellant, with the exception of the week of May 14, 2017, the week before he returned to employment. The findings with respect to earnings and the proper allocation period will reduce that overpayment significantly, as set out in the following table, adapted from the Respondent's Overpayment Breakdown document in the Reconsideration File.

Date (week beginning)	Earnings declared	Benefits paid	Earnings (Allocation/ Correction)	Benefits payable	Overpayment amount	Comments
Feb. 5/17	0	0	2,283.00	0		
Feb. 12/17	0	0	2,283.00	0		
Feb. 19/17	0	0	2,283.00	0		Original date for waiting period (after allocation of vacation pay)
Feb. 26/17	0	6	1,622.00	0	6	
March 5/17	0	109	0	0	109	After settlement allocation – waiting period
Total benefits paid		125	Total overpayment		125	

[26] The Appellant asked in his notice of appeal that the Tribunal excuse him from paying \$4,785.00 which the Respondent was trying to collect from him. With respect to reducing or cancelling the overpayment, the Tribunal has no jurisdiction to do that. Only the Respondent can make such a decision. In the language of the legislation, reducing or eliminating money owing to the Respondent is referred to as a “write-off”. The Tribunal’s jurisdiction to review decisions made by the Respondent is limited to decisions that have been reconsidered by the Respondent (Act, section 113). There is no right to have a reconsideration of a decision by the Respondent respecting write-off of a debt (Act, section 112.1). Without a reconsideration of a write-off decision, there is no right to appeal to the Tribunal on that issue, and no authority in the Tribunal to decide on that issue.

[27] Finally, the Appellant testified he has not received the \$2,500.00 for pay in lieu from the employer. The withholding of that amount by the employer was authorized by paragraph 4 of the Minutes. The Tribunal has no authority to order the employer to pay that amount (less the \$125.00 overpayment) to the Appellant. Under the terms of paragraph 4, the Appellant will have to provide the employer with written confirmation from the Respondent of the amount of the repayment obligation.

CONCLUSION

[28] The appeal is allowed in part.

Paul Dusome
Member, General Division - Employment Insurance Section

HEARD ON:	August 21, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	Y. M., Appellant

ANNEX

THE LAW

Employment Insurance Act

43 A claimant is liable to repay an amount paid by the Commission to the claimant as benefits

- (a) for any period for which the claimant is disqualified; or
- (b) to which the claimant is not entitled.

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.

(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*.

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.

(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.

(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.