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

[TRANSLATION]

Citation: *D. C. v. Canada Employment Insurance Commission*, 2018 SST 995

Tribunal File Number: GE-18-1742

BETWEEN:

D. C.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Yoan Marier

HEARD ON: September 13, 2018

DATE OF DECISION: September 21, 2018

Canada

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant lost his job at X on May 5, 2017. After he lost his job, he sent his former employer a formal notice and demanded that he be reinstated in his job and given financial compensation. This led to discussions between the parties, and he and his employer reached an out-of-court settlement that includes a payment of a total gross amount of $25,000 to the Appellant.

[3] The Canada Employment Insurance Commission (Commission) determined that $20,000 of that amount constituted earnings. It then allocated this amount, which created an overpayment that the former employer repaid to the Commission out of the amount due to the Appellant.

ISSUES

[4] Does the $20,000 paid to the Appellant after his termination constitute earnings?

[5] If so, were these earnings allocated in accordance with the regulatory requirements?

ANALYSIS

[6] The relevant statutory provisions are appended to this decision.

[7] The provisions on determination of earnings for benefit purposes and on allocation of earnings for benefit purposes are set out in sections 35 and 36 of the Regulations respectively. Section 35 defines what constitutes income and specifies what types of income must be considered earnings. Section 36 states how earnings must be allocated.

[8] Under section 35 of the Regulations, amounts received from an employer are considered earnings and must be allocated unless they fall under the exceptions set out in section 35(7) of the Regulations or are not from employment.

[9] Earnings include any gain or consideration received for the work performed. To be considered earnings, the income must arise out of any employment or there must be a [translation] “sufficient connection” between the claimant’s employment and the sum received (*Canada (Attorney General) v Roch*, 2003 FCA 356).

Does the $20,000 paid to the Appellant after his termination constitute earnings?

[10] The Tribunal considers the $20,000 amount in question to constitute earnings for the following reasons.

[11] The out-of-court settlement between the Appellant and his former employer establishes that the following amounts, totalling $25,000, were payable to the Appellant (GD3-31 to 34):

1- $2,000 for job search fees

2- $3,000 for legal fees

3- $20,000 as damages for [translation] “relinquishing his right to reinstatement”

[12] Of these amounts, the Commission allocated only the $20,000 to earnings. It is the only amount in question in this file. The Appellant submits that this sum is not earnings because it was a lump-sum payment intended to compensate him for the relinquishment of his right to reinstatement and to pay him for the psychological harassment he submits his employer subjected him to.

[13] The Commission submits that the amount cannot be considered compensation for the relinquishment of the right to reinstatement because the Appellant had not shown that that right existed. The Commission therefore considers the $20,000 to have been paid to the Appellant to compensate him for the loss of his employment.

[14] It should be noted that the settlement agreement between the parties (GD3-31 to 34) stipulates that the amount in issue [translation] “is not compensation within the meaning of the *Employment Insurance Act* and sections 35 and 36 of the Regulations....” On this point, the Tribunal finds that it is not bound by the qualifiers used by the parties in their agreement

(*Meechan v Canada (Attorney General)*, 2003 FCA 368). To render a decision, the Tribunal must assess all of the evidence and cannot settle only on the qualifiers used in a settlement agreement stating that the amounts paid to the Appellant do not constitute earnings. This paragraph inserted in the agreement does not replace the regulatory provisions and case law decisions on earnings.

[15] Furthermore, the Federal Court of Appeal confirmed the principle that the appellant must prove to the Tribunal that all or part of the sums received as a result of their dismissal amounts to something other than earnings within the meaning of the Act (*Bourgeois v Canada (Attorney General)*, 2004 FCA 117). It was also established that a settlement payment made in relation to an action for wrongful dismissal is income arising out of employment unless the claimant can demonstrate that, due to "special circumstances," some portion of it should be excluded from the earnings calculation (*Canada (Attorney General) v Radigan*, A-567-99).

Relinquishment of the right to reinstatement

[16] The Federal Court of Appeal has considered the issue of payments for relinquishment of the right to reinstatement on a number of occasions. It also established through various decisions that an amount received for the relinquishment of a right to reinstatement does not constitute earnings within the meaning of the *Employment Insurance Regulations* when the following conditions are met:

1- The dismissal was wrongful, and the claimant has asked to be reinstated in their job.

2- The right to be reinstated exists under a federal, provincial, or territorial law; a contract; or a collective agreement.

3- The settlement agreement shows that the amount was paid as compensation for relinquishing the right to be reinstated.

The claimant is responsible for providing documentation establishing that these conditions have been met (*Meechan v Canada (Attorney General)*, 2003 FCA 368; *Canada (Attorney General) v*

Warren, 2012 FCA 74; *Canada (Attorney General) v Cantin*, 2008 FCA 192, *Canada v Plasse*, A-693-99).

[17] For the first criterion, the evidence shows that the Appellant asked to be reinstated in his job (GD3-18). He considers himself the victim of wrongful dismissal; however, he submits that he was not able to lodge a complaint against the employer with the provincial labour standards board (CNESST) because he was considered a manager within his organization.

[18] It is not for the Tribunal to determine whether the Appellant was the victim of wrongful dismissal; this concept does not appear in the *Employment Insurance Act*. Rather, it is the responsibility of organizations whose mandate is to apply the *Act respecting labour standards* or to settle disputes between employers and employees (for example, CNESST, TAT, grievance settlement process). Yet, because none of these organizations considered the Appellant's case and the employer does not acknowledge having wrongfully dismissed the Appellant, the Tribunal is unable to say that the Appellant was wrongfully dismissed. As a result, the Appellant does not satisfy the first criterion.

[19] For the second criterion, the Appellant confirmed that he could not lodge a complaint with the labour standards board because of his managerial position and that he had not initiated any action against the employer before a court. Moreover, the Appellant was not covered by a collective agreement or a contract of employment. In summary, since no organization likely to order the Appellant's reinstatement considered his case, the Appellant did not have the "right" to be reinstated in his job under a federal, provincial, or territorial law; a contract; or a collective agreement. The Appellant does not satisfy the second criterion.

[20] The Appellant does satisfy the third criterion, however, because the agreement mentions that the amount in question was paid as compensation for relinquishing the right to be reinstated.

[21] The fact remains that the Appellant does not satisfy two of the three criteria established by case law for determining whether an amount can be considered compensation for the relinquishment of the right to be reinstated. Thus, the $20,000 amount is not considered compensation for relinquishing the right to be reinstated according to the sense the case law gives the expression.

Psychological harassment/special circumstances

[22] During the hearing, the Appellant placed considerable emphasis on the argument that the $20,000 in question was paid to him to compensate him for relinquishing his right to reinstatement **and** for the psychological harassment he submits his employer subjected him to. In effect, the Appellant submits that, despite what the agreement says, the employer paid him this amount, in whole or in part, to compensate him for psychological harassment he experienced before and after his termination.

[23] In the eyes of the Tribunal, it is nonetheless very curious that the issue of psychological harassment was not mentioned in:

1- The agreement between the parties (GD3-18 to 18)

2- The request for reconsideration the Appellant filed (GD3-26 to 27)

3- The three conversations the Appellant had with the Commission (GD3-35, 36, 52)

4- The two conversations the employer had with the Commission (GD3-50 and 51)

5- The abundant correspondence between the Appellant's representative and the employer's representative before the agreement (GD3-38 to 49)

6- The notice of appeal filed with the Tribunal (GD2)

[24] At the hearing, the Tribunal asked the Appellant to provide more information on this issue and to clarify the events that came before and after his dismissal and that he considers harassment. The Appellant submitted that the employer was putting considerable pressure on him at work, that there was a desire to change how he did things, and that he was threatened about his employment. He also stated that he felt like he had the sword of Damocles hanging over his head because of instances of misbehaviour that had occurred years earlier. For these reasons, he submits that he had difficulty performing his managerial duties. Furthermore, after his dismissal, the Appellant stated that he had financial and marital problems, in addition to

having considerable difficulty finding a new job. He submits that he had to see a doctor for depression.

[25] In the Tribunal's view, it is possible that the Appellant worked in a stressful or demanding workplace. It is also possible that, because of past misbehaviour, he felt like the employer was more closely monitoring him. However, the Appellant's description of the events he considers harassment was tentative and lacked detail. He did not convince the Tribunal that the alleged situation existed. In addition, the Appellant asked that he be reinstated in his job, which seems to show that he wanted to stay in his position despite these negative aspects.

[26] Concerning the Appellant's difficult situation after his dismissal, it goes without saying that any dismissal includes an element of stress and a certain level of inconvenience; it is therefore not, in the Appellant's case, a special circumstance that would justify considering part of the amount received after the termination of his employment something other than earnings. What is more, the employer agreed to pay the Appellant $2,000 (not in question) to help him with his job search after the dismissal.

[27] In summary, there is no evidence on record supporting the Appellant's allegations concerning harassment, and his testimony at the hearing did not satisfy the Tribunal.

[28] Furthermore, even if the Tribunal considers that the Appellant experienced harassment before being dismissed, nothing indicates that the employer agreed to pay him any amount for it. This issue came up for the first time at the hearing, and there is nothing in the evidence on record that enables the Tribunal to establish that the employer and the Appellant discussed harassment before signing the agreement.

[29] The Tribunal finds that the $20,000 the Appellant received after his dismissal under an agreement with his former employer constitutes earnings. It was established that this amount was not paid to him to compensate for the relinquishment of the right to reinstatement or to compensate him because of psychological harassment. Furthermore, the Appellant did not show that there were special circumstances justifying that amount being excluded, in part or in whole, from the earnings calculations (*Radigan, supra*). Therefore, in the absence of other evidence, the

amount in question must be considered earnings that were paid to the Appellant to compensate him for the loss of his employment.

Were these earnings allocated in accordance with the regulatory requirements?

[30] The Federal Court of Appeal has confirmed the principle that any sums that constitute earnings under section 35 of the Regulations must be allocated under section 36 of the Regulations (*Boone v Canada (Employment Insurance Commission)*, 2002 FCA 257).

[31] Section 36(9) of the Regulations states that all earnings paid or payable to a claimant by reason of a lay-off or separation from an employment will 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.

[32] The evidence on record shows that the amount in question (along with $5,815.84 in vacation pay, which is not in question) was allocated beginning with the week the Appellant lost his employment, that is the week of April 30, 2017, so that the amount applied each week except the last was equal to the Appellant's normal weekly earnings, set at $1,517. An amount of $1,319 was applied to the week of August 27, 2017, which was the last week of allocation.

[33] The Tribunal verified the Commission's allocation and found no error. The Tribunal finds that this allocation was completed in accordance with the regulatory requirements.

CONCLUSION

[34] The appeal is dismissed.

Yoan Marier
Member, General Division – Employment Insurance Section

HEARD ON:	September 13, 2018
METHOD OF PROCEEDING:	Teleconference
PERSONS IN ATTENDANCE:	D. C., Appellant Isabelle Roy, Representative for the Appellant

ANNEX

THE LAW

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.

(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.

(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.