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

Citation: *Canada Employment Insurance Commission v. E. R.*, 2018 SST 1199

Tribunal File Number: AD-18-301

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

E. R.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: November 26, 2018

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

[2] I have given the decision the General Division should have given.

OVERVIEW

[3] The Respondent, E. R. (Claimant), was dismissed from her employment and applied for Employment Insurance benefits from the Appellant, the Canada Employment Insurance Commission (Commission). The Commission considered certain payments associated with her separation from employment to be earnings and allocated them accordingly. However, the Claimant continued to negotiate with the employer and reached a settlement under which she was paid an additional amount of $11,846.17. The Commission allocated the approximate amounts of $11,846.00 from the settlement, $3,385.00 for the payment in lieu of notice, and $2,281.00 of vacation pay, for a total allocation of $17,512.00.

[4] After the Claimant requested a reconsideration, the Commission changed its previous decision to allocate the severance (including the settlement proceeds) and vacation pay over the weeks from April 24, 2016, to June 26, 2016. However, the total amount allocated did not change. The Claimant appealed the decision to the General Division of the Social Security Tribunal, which found that the $3,384.62 payment in lieu of notice and the $11,846.17 settlement proceeds, both of which were included in the terms of a settlement agreement, were for something other than loss of wages and therefore not allocable. The Commission is appealing this decision to the Appeal Division.

[5] The appeal is allowed. By considering only whether the payments were for lost wages, the General Division applied the wrong test for earnings and thereby erred in law under section 58(2)(b) of the *Department of Employment and Social Development Act* (DESD Act). I have given the decision the General Division should have given. The payment in lieu of notice, the vacation pay, and the settlement proceeds less legal expenses are all sufficiently connected to the Claimant’s employment and comparable to earnings. They are therefore earnings within the

meaning of section 35(2) of the *Employment Insurance Regulations* (Regulations) and subject to allocation under sections 36(9) and 36(10) of the Regulations.

ISSUE

[6] Did the General Division err in law by finding that the payment in lieu of notice and the settlement proceeds were not earnings?

ANALYSIS

General Principles

[7] The Appeal Division's task is more restricted than that of the General Division. The General Division is required to consider and weigh the evidence that is before it and to make findings of fact. In doing so, the General Division applies the law to the facts and reaches conclusions on the substantive issues raised by the appeal.

[8] However, the Appeal Division may intervene in a decision of the General Division only if it can find that the General Division has made one of the types of errors described by the "grounds of appeal" in section 58(1) of the DESD Act.

[9] The only grounds of appeal are stated below:

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.

Did the General Division err in law by finding that the payment in lieu of notice and the settlement proceeds were not earnings?

[10] The General Division erred in law by considering only whether the severance and settlement payments were for something other than loss of wages. The General Division did not determine whether there is a sufficient connection between the sums in question and the Claimant's employment.

[11] The first instance in which the language of "loss of wages" appears in the General Division decision is where the General Division quotes from *Canada (Attorney General) v Walford*.[1] From that point forward, the analysis addressed whether the amounts paid can be attributed to something other than loss of wages. However, *Walford* does not support this principle. *Walford* concerned the appeal of a decision in which the Umpire refused to attribute any portion of a settlement to loss of wages, and thus to "income", because it could not determine the value of the "loss of wages" portion. It was in this context that the Court in *Walford* referred to the need to evaluate the portion attributable to "loss of wages", where justified by the facts. Nothing in the decision in *Walford* suggests that compensation for "loss of wages" is the only portion of a settlement that may be considered earnings.

[12] The correct legal test for earnings is outlined in the Federal Court of Appeal decision of *Canada (Attorney General) v. Roch*.[2] *Roch* reviewed the case law concerning the characterization of payments as earnings and determined that amounts that were not in consideration of work done may still be considered earnings, provided that there is a "sufficient connection" between the claimant's employment and the sums received and that the sums are comparable to earnings.[3] Lost wages may be earnings, but earnings are not limited to lost wages.

[13] The General Division applied the wrong test for earnings and erred in law under section 58(1)(b) of the DESD Act.

---

[1] *Canada (Attorney General) v Walford*, A-263-78.
[2] *Canada (Attorney General) v Roch*, 2003 FCA 356.
[3] *Ibid.* at para 41.

CONCLUSION

[14] The appeal is allowed.

REMEDY

[15] Having allowed the appeal, I have the authority under section 59 of the DESD Act to give the decision that the General Division should have given, refer the matter back to the General Division for reconsideration, or rescind or vary the decision of the General Division in whole or in part.

[16] I consider the record to be complete, and I will therefore give the decision that the General Division should have given.

[17] As noted, the correct legal test is whether there is a "sufficient connection" between the claimant's employment and the payments received, where the payments received are comparable to earnings.

[18] The Claimant agreed that she was unlikely to be successful in claiming that the $2,281.17 in vacation pay that she received was not earnings, and she appeared to abandon her argument that the vacation pay should not be allocated. The Commission argued that the amount of $3,384.62, representing pay in lieu of notice under Ontario's *Employment Standards Act*, and the seven additional weeks of severance totalling $11,846.17, which was paid out in accordance with the terms of a settlement agreement with the employer, should be considered earnings and allocated. The Claimant submitted that the characterization of payments as earnings should consider two questions: what was the money for and when was the money for?

[19] The Claimant did not advance a clear argument for why the payment in lieu of notice should not be considered earnings. These payments indisputably arose as a result of her dismissal, and the Claimant therefore bears the onus of establishing that all or part of the payment in lieu of notice is something other than earnings within the meaning of section 35(2) of

the Regulations.[4] The Claimant did not meet this onus, and I find accordingly that the payment in lieu of notice is earnings.

[20] However, the Claimant did argue that the settlement proceeds should not be allocated because the payment was a result of a lawsuit and was not a severance package offered on lay-off.[5] As noted by the Commission, a settlement payment made regarding an action for wrongful dismissal is "income arising out of employment" unless the claimant can demonstrate that, due to "special circumstances", some part of it should be regarded as compensation for some other expense or loss.[6] In this case, the Commission has accepted that the Claimant's legal fees of $3,145.00 are compensation for the expense of obtaining the settlement and therefore should not be considered earnings or allocated. However, the Commission maintains that there is no special circumstance under which the payment in lieu of notice or the balance of the settlement proceeds may be excluded from earnings.

[21] I see no legal distinction under the *Employment Insurance Act* (EI Act) or Regulations between a severance package offered by an employer to a dismissed employee and severance payments that are offered through the settlement of an action between a claimant and an employer. Although the General Division found some significance in the agreement's reference to "mitigation of damages", the terms of the agreement state that the Claimant may mitigate the amount of severance payable to her under the settlement agreement (meaning the Claimant may mitigate **the employer's damages**) by obtaining employment. There is no suggestion that any of the damages owed to the Claimant are not connected to her employment or not comparable to earnings.

[22] The General Division also stated that the Claimant had claimed, "stress and anxiety due to termination." I note that each reference to stress and anxiety is associated with a claim of sleeping problems. The terms of the settlement agreement specifically reject any claim for damages related to sleep problems, and, regardless of the damages claimed by the Claimant in negotiating the settlement, the actual settlement allocates no portion of the payment to "stress and anxiety" or even to "other damages". The agreement acknowledges only that the Claimant is

---

[4] *Bourgeois v Canada (Attorney General)*, 2004 FCA 117.
[5] GD3-27.
[6] *Canada (Attorney General) v Radigan*, A-567-99.

entitled to the two weeks of termination pay per Ontario's *Employment Standards Act*, a performance bonus (which was not considered earnings or allocated), and an amount equal to her regular base salary for up to four months.

[23] Regardless of when they were made, if the payments were sufficiently connected to the Claimant's employment and comparable to earnings, they will be earnings for the purpose of section 35(2) of the Regulations, as per the legal test for earnings in *Roch*. In this case, the payments were made by the employer to the Claimant as compensation for the Claimant's premature or unwarranted dismissal and were calculated in terms of weeks of regular salary, and were intended to compensate the Claimant for her loss of employment. I find that the payments had a sufficient connection to the employment. I also find that the payments, which were calculated in months of salary to offset months of unemployment, are comparable to earnings. Finally, the Claimant has not identified any "special circumstances" by which I might find the payments to be something other than earnings.

[24] I therefore find that the payment in lieu of notice of $3,384.62 and the settlement payment of $11,846.17 (less legal fees of $3,145.00) are earnings.

[25] The Claimant also submitted that the severance payments should not be allocated because she did not receive them while she was still receiving Employment Insurance benefits.[7] However, the date the severance payments were received does not determine the issue. The question here is to what period do the severance payments apply?

[26] Sections 36(9) and 36(10) of the Regulations state as follows:

> **(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.

[7] GD3-27.

> **(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**. [Emphasis added]

[27] Section 36(9) of the Regulations requires that the Claimant's earnings be allocated because they would be earnings arising out of her employment under s. 35(2). Section 36(10) says that, even when an allocation has already taken place, if additional earnings come to light that arose out of the separation from employment, they must still be allocated. In both cases, the period for which the earnings are paid or payable is irrelevant.

[28] The Claimant submitted that her settlement with the employer provided for the lesser of four months of the Claimant's regular salary or the Claimant's regular salary until she obtained replacement employment, but that, if she obtained replacement employment before four months had elapsed, she would still be entitled to her salary for the remaining time at the rate of 50%. She notes that the agreement did not come into effect until June 23, 2016, well after her April 19, 2016, termination. The Claimant obtained work within about seven weeks, and she received $11,846.17 representing seven weeks' earnings for the period starting on June 23, 2016, a period during which she was no longer receiving Employment Insurance benefits.

[29] She also states, however, that; had the agreement with her employer been made effective as of the date of her termination (and therefore including the period in which she was on claim), she would have been entitled to the entire four months of severance, which she stated would have been $27,076.96.[8] The Claimant considers it unfair that, at the same time that she was restricted from receiving the full four months of severance in accordance with the terms of the settlement, the already-reduced severance amount was allocated with the result that she had to repay Employment Insurance benefits that she received.

[8] I am unsure how this figure was derived. I calculate four months from April 24, 2016, at $1,692.00 per week to be approximately $29,450.00.

[30] I appreciate that the effective date of the settlement worked to her disadvantage. Because she obtained employment within seven weeks, she would have been better off if the settlement had been made effective as of the date of her separation from employment (so that she might have been paid severance for the weeks between her separation and the settlement). However, the unfairness she perceives is in the terms of her settlement agreement and the application of the formula by which she was paid under the settlement. It does not lie in the application of the EI Act or Regulations. I have no power to alter the terms of a private contract and no jurisdiction to modify the application of the EI Act or Regulations to accommodate her settlement terms.

[31] I find that both the payment in lieu of notice of $3,384.62 and the settlement payment of $11,846.17 are earnings, as is the vacation pay in the amount of $2,281.43. I confirm that the bonus payment of $4,950.00 is not earnings. I also find that the $3,145.00 in legal expenses associated with negotiating the settlement should be deducted from the settlement proceeds. The total earnings subject to allocation in accordance with sections 36(9) and 36(10) of the Regulations, including payments in lieu of notice, vacation pay, and settlement proceeds (after deduction of legal expenses), is $14,367.22.

Stephen Bergen
Member, Appeal Division

HEARD ON:	November 8, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	E. R., Respondent Rachel Paquette, Representative for the Appellant