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

[TRANSLATION]

Citation: *A. B. v Canada Employment Insurance Commission*, 2019 SST 226

Tribunal File Number: GE-18-3559

BETWEEN:

A. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Normand Morin

HEARD ON: January 3, 2019

DATE OF DECISION: January 25, 2019

DECISION

[1] The appeal is dismissed. The Tribunal finds that the money that the Appellant, A. B., received as severance pay constitutes earnings under section 35 of the *Employment Insurance Regulations* (Regulations) and that the allocation of those earnings was made in accordance with the provisions set out in section 36 of the Regulations.

OVERVIEW

[2] The Appellant received Employment Insurance benefits after working for the employer X (employer) from January 22, 2018, to July 30, 2018, inclusively. After she stopped working, the Appellant received severance pay from the employer. The Respondent, the Canada Employment Insurance Commission (Commission), determined that the money that the Appellant received as severance pay was earnings and had to be allocated. As a result, those earnings were deducted from the benefits paid to the Appellant. This led to the Commission asking her for the amounts that were overpaid to her (overpayment). The Appellant explained that she did not receive the full amount to which she was entitled as severance pay. She stated that the Record of Employment issued by the employer was not clear. The Appellant argued that the overpayment amount that she is being asked to repay was not calculated properly. On November 27, 2018, the Appellant disputed the decision following the Commission's reconsideration of it.

PRELIMINARY MATTERS

[3] The Appellant was not present at the teleconference hearing on January 3, 2019. A notice of hearing was emailed to the Appellant on December 17, 2018, to inform her of the January 3, 2019, hearing. On November 27, 2018, the Appellant authorized the Tribunal to communicate with her by email.

[4] On December 17, 2018, the Appellant sent the Tribunal an email confirming that she had received the email message that it had sent her earlier the same day to give her notice of the January 3, 2019, hearing.

[5] Satisfied that the Appellant had received notice of the January 3, 2019, hearing, the Tribunal proceeded in her absence, as permitted in such situations under section 12 of the *Social Security Tribunal Regulations*. The Tribunal waited for more than 45 minutes after the start of the hearing on January 3, 2019, to make sure that the Appellant would be present. Despite that waiting period, the Appellant did not show up. The Tribunal had not received notice from the Appellant before the hearing that she would not be able to be present.

ISSUES

[6] The Tribunal must determine whether the money the Appellant received or to which she was entitled as severance pay constitutes earnings under section 35 of the Regulations and, if so, whether the allocation of those earnings was made in accordance with the provisions set out in section 36 of the Regulations.

[7] To make this finding, the Tribunal must answer the following questions:

a) Does the money the Appellant received or to which she was entitled as severance pay constitute earnings?

b) If so, how should those earnings be allocated?

ANALYSIS

[8] The provisions on the determination and 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 employment and specifies what types of income must be considered earnings, while section 36 states how earnings must be allocated.

[9] Under section 35 of the Regulations, earnings are a claimant’s entire income arising out of any employment. An amount received will not be considered earnings if it falls under the exceptions set out in section 35(7) of the Regulations or if it does not arise from employment.

Does the money the Appellant received or to which she was entitled as severance pay constitute earnings?

[10] Yes. The Tribunal finds that the money that the Appellant received or to which she was entitled as severance pay constitutes earnings under section 35 of the Regulations because that amount is income that was owed to her after working for the employer.

[11] For an amount to be considered earnings, the income must be connected to employment. According to the Federal Court of Appeal (Court), the amounts will be considered earnings if an employee earns them as a result of their work, or in return for their work, or if a "sufficient connection" exists between the claimant's employment and the amount received (*Roch*, 2003 FCA 356).

[12] It is necessary to establish the genuine nature of the amounts and review the facts, rather than relying solely on how the parties characterize those amounts. It is up to the claimant to show that the amounts received do not constitute earnings. The Court has reaffirmed the principle that it is up to the claimant to establish that all or part of the amounts received following their dismissal amounted to something other than earnings within the meaning of the Act (*Bourgeois*, 2004 FCA 117).

[13] The amended or replaced Record of Employment (record serial number W59934694) that the employer issued on August 10, 2018, states that the Appellant received $1,923.08 as severance pay and $961.54 as pay in lieu of notice after she was dismissed (GD2-12 and GD3-17).

[14] Those two amounts indicate that the Appellant received a lump sum of $2,884.62 ($1,923.08 + $961.54 = $2,884.62) as severance pay after she stopped working for the employer.

[15] On October 15, 2018, the Commission informed the Appellant that, after reviewing the new Record of Employment from the employer, the $2,885.00 ($2,884.62 rounded to the nearest dollar) that she had received from the employer as severance pay was considered income and that it would be allocated to her benefits from July 29, 2018, to August 18, 2018, and that $210.00 would be allocated to her benefits for the week of August 19, 2018. The Commission

also informed her that the start date for her benefit period was now August 5, 2018 (GD3-19 and GD3-20).

[16] The Appellant stated that she did not receive the $2,885.00 that the employer indicated that it had paid her (GD2-1 to GD2-12 and GD3-22 to GD3-30).

[17] In her October 26, 2018, reconsideration request, the Appellant explained that the employer had paid her only a lump sum of $1,372.55 ($584.62 + $787.93 = $1,372.55) and not the total amount of $2,884.62 ($1,923.08 + $961.54 = $2,884.62) that it reported to have paid her (GD3-22 to GD3-24).

[18] In a statement made to the Commission on November 7, 2018, the Appellant also indicated that she received an amount of $452.03 and another amount of $200.01 and not the amount stated on the pay stubs (statements of earnings). The Appellant also stated that she went on vacation for three weeks, even though she was entitled to only two weeks of vacation. In response to the Appellant's comments, the Commission told her that she probably owed money to the employer and that the employer had recovered the money from the severance pay that she was owed (GD3-30).

[19] In her November 27, 2018, notice of appeal, the Appellant explained that her last statements of earnings showed that she had not received $2,885.00 (gross amount), but rather $1,372.55 (GD2-1 to GD2-12 and GD3-25 to GD3-28).

[20] The Appellant also sent the Commission or the Tribunal a copy of her statements of earnings for the July 16, 2018, to July 31, 2018, pay period (cheque issued on August 8, 2018) and a copy of her bank account statement for the August 3, 2018, to September 10, 2018, period (GD2-7 to GD2-10 and GD3-25 to GD3-29).

[21] These documents show the payments made to the Appellant by the employer, the deductions that the employer made for the July 16, 2018, to July 31, 2018, period, and the deposits the employer made into the Appellant's bank account.

[22] The employer in turn explained in a November 14, 2018, statement to the Commission that the Appellant had not received all the amounts stated on the Record of Employment issued to her because she owed the employer $1,338.46 for extra vacation that she took. The employer specified that that amount was for 6.9 days. The employer also explained that it paid the Appellant until July 31, 2018, even though she had worked only until July 30, 2018, and that it had recovered a day for this reason (GD3-32).

[23] The Commission in turn explained that the Appellant had not disputed the fact that the amount paid by her employer as severance pay was earnings (GD4-8).

[24] The Tribunal considers that, even though the employer did not pay the full amount of $2,885.00 owed to the Appellant as severance pay directly to her, the Appellant received that amount.

[25] The employer's statements, which the Appellant did not dispute, indicate that the employer did not pay the Appellant the entire amount that she was supposed to receive as severance pay, as the Record of Employment indicates, because the employer first recovered the money that the Appellant owed it. The employer explained that it deducted the money that the Appellant owed it from the amounts that it owed the Appellant as severance pay because she had taken extra vacation days (6.9 days), which, in this case, amounted to $1,338.46, and also because she had been paid until July 31, 2018, even though she had stopped working on July 30, 2018.

[26] The Tribunal notes that the Appellant did indicate that she took three weeks of vacation when she was entitled to only two weeks of vacation (GD3-30).

[27] The Record of Employment issued by the employer on August 10, 2018, indicates also that the last day paid to the Appellant was July 30, 2018 (GD2-12, GD3-17, and GD3-18). That record shows that the Appellant did not work on July 31, 2018.

[28] The Appellant's statements of earnings for the July 16, 2018, to July 31, 2018, period (cheque issued on August 8, 2018) indicate that a deduction of $1,338.46 was made from her pay

(GD2-9 and GD3-27). That amount corresponds to the deduction that the employer said it made for the extra vacation days the Appellant took.

[29] Those statements of earnings indicate also that a deduction of $173.61 was made from the $961.54 paid to the Appellant for the July 16, 2018, to July 30, 2018, period as pay in lieu of notice, which reduced the amount from $961.54 to $787.93 ($961.54 - $173.61 = $787.93) (GD2-7 and GD3-25).

[30] Therefore, by subtracting $1,338.46 and $173.61 from the lump sum of $2,884.62 owed to the Appellant as severance pay, we get $1,372.55 ($2,884.62 - $1,338.46 - $173.61 = $1,372.55). $1,372.55 corresponds to the amount the Appellant claimed she received from her employer as severance pay (GD2-1 to GD2-12 and GD3-22 to GD3-29).

[31] As for the $452.03 and $200.01 that the Appellant claimed to have received, the Tribunal finds that the Appellant has not shown that those amounts were connected to her severance pay (GD2-8, GD2-10, GD3-26, and GD3-28 to GD3-30). On this matter, the Tribunal notes that, after she claimed that she had received those amounts, the Appellant specified that the amount that she had received from the employer was $1,372.55 (GD2-1 to GD2-12).

[32] The Tribunal finds that, despite the deductions made by the employer from its payments to the Appellant, the Appellant did receive a severance package of $2,885.00 ($2,884.62).

[33] That amount constitutes earnings because it is part of the Appellant's entire income arising from her employment, as section 35(2) of the Regulations indicates. That amount is connected to the employment that she held with the employer (*Roch*, 2003 FCA 356).

[34] Furthermore, that amount does not fall under the exceptions set out in section 35(7) of the Regulations that would allow the amount not to be considered earnings.

How should those earnings be allocated?

[35] Amounts paid because of employment separation that constitute earnings under section 35 of the Regulations must be allocated according to section 36(9) of the Regulations (*Boucher Dancause*, 2010 FCA 270; *Cantin*, 2008 FCA 192).

[36] Section 36(9) of the Regulations specifies that earnings paid or payable to a claimant because of a lay-off or separation from an employment is allocated to a number of weeks that begins with the week of the lay-off or separation.

[37] Section 36(10) of the Regulations specifies that, when earnings have already been allocated following a lay-off or separation from an employment, in accordance with section 36(9) of the Regulations, and when other earnings have been paid to the claimant because of the same lay-off or separation, those earnings are added to the earnings that were already allocated and a revised allocation is made on the basis of the total obtained and to a number of weeks that begins with the week of the lay-off or separation. This is done regardless of the period for which those earnings are said to have been paid or payable.

[38] Amounts that are determined to be earnings under section 35 of the Regulations must be allocated according to section 36 of the Regulations (*Boone et al*, 2002 FCA 257).

[39] When calculating the amount to be deducted from benefits, the Tribunal must consider the entire income of a claimant arising out of any employment (*McLaughlin*, 2009 FCA 365).

[40] The Tribunal finds that the $2,885.00 must be allocated under sections 36(9) and 36(10) of the Regulations because it is earnings paid to the Appellant because of separation from her employment. According to the amended or replaced Record of Employment issued by the employer on August 10, 2018, those earnings were added to the amount that she had received earlier at her separation from employment (GD2-12, GD3-17, and GD3-18).

[41] In this case, the Tribunal finds that the Appellant's separation from employment was July 30, 2018, because the August 10, 2018, Record of Employment indicates that the Appellant's last day of work was July 30, 2018 (GD2-12, GD3-17, and GD3-18).

[42] The $2,885.00 paid to the Appellant must be allocated to a number of weeks that begins with the week of separation, as sections 36(9) and 36(10) of the Regulations state—that is, to a number of weeks that began on Sunday, July 29, 2018, because the Appellant's employment ended on July 30, 2018.

[43] The Tribunal notes that section 2 of the Act defines week as "a period of seven consecutive days beginning on and including Sunday, or any other prescribed period."

[44] The Appellant explained that she disagreed with the Commission's allocation of the amounts that the employer claimed it paid her at her separation of employment because she did not receive those amounts (GD3-30).

[45] The Appellant argued that her last statements of earnings indicate that she did not receive $2,885.00 (gross amount), but rather $1,372.55. She explained that the employer had issued two records of employment to her and that the last record, which was issued on August 10, 2018, was not clear. The Appellant indicated that she asked for a number of explanations from her employer about this but that she did not get any (GD2-1 to GD2-12).

[46] The Appellant argued that the overpayment amount that she is asked to repay was not calculated properly. She stated that a Commission agent told her that the amount that she was asked to repay was not the right amount but that the Commission did not intervene to correct that amount or to reverse the decision made in her case (GD2-3 and GD2-4).

[47] The Appellant explained that, when she filed her claim for benefits, she was unable to indicate whether she had received a lump-sum severance payment. She stated that the Commission (Service Canada) did not give her any answer regarding the fact that there was no place in her claim for benefits where she could report amounts that she had received. The Appellant also indicated that, when the decision was made in her case, she was unable to report the amounts in question (GD2-3 and GD2-4).

[48] The Commission in turn explained that it established the Appellant's normal weekly earnings based on her initial total earnings of $27,464.32, as the amended or replaced Record of Employment issued by the employer on August 10, 2018, indicates (GD2-12, GD3-17, and GD3-18).

[49] To get the Appellant's normal weekly earnings, the Commission explained that it subtracted the pay in lieu of notice amount of $961.54 from the initial total earnings because that amount was not insurable ($27,464.32 - $961.54 = $26,502.78). The Commission stated that it

then divided the result ($26,502.78) by the number of days from the Record of Employment corresponding to the January 22, 2018, to July 30, 2018, period, which is 190 days, and that it multiplied that result by seven ($26,502.32 [*sic*] [$26,502.78] ÷ 190 × 7 = $976.40 [*sic*] [$976.41]). The Commission specified that it rounded the result ($976.40 [*sic*] [$976.41]) to the nearest dollar, which is $976.00 (GD4-5 and GD4-6).

[50] The Commission explained that, in accordance with sections 36(9) and 36(10) of the Regulations, it allocated the severance pay to the following weeks: July 29, 2018, to August 4, 2018 ($723.00); August 5 to August 11, 2018 ($976.00); August 12 to August 18, 2018 ($976.00); and August 19 to August 25, 2018 ($210.00). $723.00 + $976.00 + $976.00 + $210.00 = $2,885.00 (GD3-36 and GD4-6).

[51] The Commission indicated that it checked with the employer that the severance pay amounts stated on the amended or replaced Record of Employment that it issued on August 10, 2018, were accurate (GD4-7, GD5-1, GD5-2, and GD6-1 to GD6-3).

[52] The Commission explained that it considered the amounts deposited into the Appellant's bank account to be net amounts to which she was entitled after her employer recovered the amounts that she had to repay (GD4-7).

[53] Regarding the amount that was overpaid to the Appellant, the Commission clarified that the overpayment is calculated based on the gross amount and not on the net amount (GD3-36, GD4-7, and GD4-8).

[54] The Tribunal finds that the Commission showed that it correctly calculated the overpayment amount based on the information provided by the employer, in accordance with the provisions of sections 36(9) and 36(10) of the Regulations.

[55] The Commission explained how it had allocated the Appellant's earnings to each of the weeks in question based on the $2,885.00 that she received and the overpayment that resulted from this to each of the weeks in question for her benefit period, according to her normal weekly earnings of $976.00.

[56] In a document entitled [translation] "Overpayment Explanation," the Commission used a table to show how it had allocated the earnings of $2,885.00 to the period covering the week starting on July 29, 2018, to the week starting on August 19, 2018, and how the overpayment amount of $1,573.00 had been created (GD3-36).

[57] Regarding the Appellant's comment that there was nowhere in her claim for benefits where she could report the amounts that she had received, the Tribunal points out that, in the [translation] "Rights and responsibilities" section of her application, the Appellant received the following message: [translation] "As a claimant of EI benefits, [...] you must: [...] accurately report all employment earnings before deductions, in the week(s) in which they were earned, as well as any other monies you may receive" (GD3-7 and GD3-8). A telephone number was also given to her in that application to allow her to add or change information about her claim for benefits (GD3-10).

[58] Regarding the Appellant's comment that, when the decision was made in her case, she was unable to report the amounts in question, the Tribunal points out that the evidence on record indicates that, in the claimant reports that the Appellant completed on August 10, 2018, for the July 29, 2018, to August 11, 2018, period, she answered no to the following question: [translation] "Is there any other money that you have not told us about that you received or will receive for this two-week period?" (GD3-44).

[59] The Tribunal finds that the $2,285.00 that the Appellant received as severance pay was correctly allocated under sections 36(9) and 36(10) of the Regulations (*Boucher Dancause*, 2010 FCA 270; *Cantin*, 2008 FCA 192; *Boone et al*, 2002 FCA 257; *McLaughlin*, 2009 FCA 365).

CONCLUSION

[60] The Tribunal finds that the $2,885.00 that the Appellant received as severance pay constitutes earnings under section 35(2) of the Regulations and must be allocated in accordance with sections 36(9) and 36(10) of the Regulations effective the week of separation, which is the week starting July 29, 2018, because the Appellant's employment ended on July 30, 2018.

[61] The Tribunal finds that the allocation of those earnings was made in accordance with the provisions set out in sections 35 and 36 of the Regulations.

[62] The appeal is dismissed.

Normand Morin
Member, General Division – Employment Insurance Section

HEARD ON:	January 3, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCE:	The parties were absent from the hearing