



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

[TRANSLATION]

Citation: *A. M. v Canada Employment Insurance Commission*, 2019 SST 227

Tribunal File Number: GE-18-3879

BETWEEN:

A. M.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Bernadette Syverin

HEARD ON: January 21, 2019

DATE OF DECISION: January 28, 2019

DECISION

[1] The appeal is allowed because the Appellant showed that the amount received from her former employer constitutes compensation for relinquishing her right to be reinstated to her former position. As a result, this amount does not constitute earnings and should not be subject to an allocation.

OVERVIEW

[2] The Appellant lost her employment and applied for Employment Insurance benefits. The Canada Employment Insurance Commission (Commission) established a benefit period and paid the benefits. After a settlement was reached as part of a wrongful dismissal suit, the employer paid the Appellant the sum of \$43,908. The Commission decided that this amount constitutes earnings and should be allocated to the weeks of benefits. This decision generated an overpayment of Employment Insurance benefits, which the Commission asked the Appellant to repay.

[3] The Appellant maintains that the amount she received does not constitute earnings since it was paid because she relinquished her right to be reinstated to her employment.

ISSUES

[4] The Tribunal must decide on the following issues:

- a) Does the amount the Appellant received after the termination of employment constitute earnings?
- b) If so, did the Commission allocate this amount properly?

ANALYSIS

[5] The *Employment Insurance Regulations* (Regulations) state that earnings includes “the entire income of a claimant arising out of any employment” (section 35 of the Regulations). The case law teaches that the amounts that constitute earnings under section 35 of the Regulations

must be allocated according to section 36 of the Regulations (*Boone et al. v Canada (Attorney General)*, 2002 FCA 257).

[6] The onus is on the claimant to establish that all or part of the amount received as a result of their dismissal amounted to something other than earnings within the meaning of the Act (*Bourgeois v Canada (Attorney General)*, 2004 FCA 117). The Appellant submits that, based on a settlement reached between her and the employer, she received the \$43,908 because she relinquished her right to be reinstated to her employment. Therefore, the Appellant's view is that this amount does not constitute earnings.

Does the amount the Appellant received after the termination of employment constitute earnings?

[7] The Federal Court of Appeal has established conditions for when an amount paid after a termination of employment may be considered paid for the relinquishment of the right to be reinstated to an employment. Firstly, the right to be reinstated must exist under a federal or provincial law, a contract, or a collective agreement. Secondly, the claimant must ask to be reinstated, and the settlement agreement must show that the amount was paid as compensation for relinquishing the right to be reinstated (*Meechan v Canada (Attorney General)*, 2003 FCA 368).

[8] Did the right to reinstatement exist? Yes, after her dismissal, the Appellant challenged the end of her employment by lodging complaints for prohibited practice and dismissal without good and sufficient cause with the Commission des normes, de l'équité, de la santé et de la sécurité du travail (CNESST) (GD3-54 to 61). The Tribunal acknowledges that when a dismissal takes place without good and sufficient cause, the recourse under section 124 of the *Act respecting labour standards* enables the employee to be reinstated to their employment and/or compensation, and the Federal Court of Appeal established that the dismissal wrongful [*sic*]. The Tribunal therefore determines that the Appellant's right to reinstatement existed.

[9] Did the Appellant ask to be reinstated to her employment? Yes, because the Appellant testified that she asked to be reinstated in a letter dated June 15, 2017, in which her lawyer informed the employer of her intention to take the necessary steps to challenge her dismissal and

be reinstated to her employment (GD2-14). Moreover, in an attempt to settle the dispute, the Appellant informed the employer on June 6, 2018, that she would accept \$43,908 for the relinquishment of her right to be reinstated to her employment (GD2-19). Finally, the agreement between the parties clearly states that the Appellant asked to be reinstated to her employment (GD2-29). It is therefore clear that the Appellant asked to be reinstated to her position.

[10] Was the amount paid for the relinquishment of the right to reinstatement?

[11] The Commission stresses in its observations that the amount in question was not paid because the Appellant relinquished her right to be reinstated to her employment. The Commission submits that its argument is based on the fact that the CNESST had established a monetary claim in favour of the Appellant for \$6,374.32 as pay in lieu of notice and \$909.82 as vacation pay (GD3-33, 34, and 35). Therefore, in the Commission's view, these amounts were paid to compensate the Appellant for the loss of employment and not because she relinquished her right to be reinstated to her employment. This argument cannot be accepted because it appears, based on the correspondence between the parties' lawyers, that the Appellant abandoned this monetary complaint (GD3-75); therefore, the Tribunal accepts the Appellant's testimony indicating that she was not paid any amount to compensate her for vacation or severance pay.

[12] Furthermore, in the Commission's view, the \$43,908 was paid to the Appellant as severance pay. This argument cannot be accepted for the following reasons.

[13] The agreement between the Appellant and her former employer expressly states in its preamble that it was reached in return for the Appellant's relinquishment of her right to be reinstated to her employment (GD3-46). Furthermore, section 2 of the agreement states [translation] "in return for the Employee's relinquishment of her reinstatement to her employment, the Employer agrees to pay the Employee a lump-sum amount of \$43,908 allocated as follows: \$13,868 to the Appellant's RRSP account, \$24,589.72 less taxes to the Appellant, and \$5,450.73 for legal fees. The Tribunal therefore determines that the Appellant has shown that the \$43,908 was paid because she relinquished her right to be reinstated to her employment.

[14] For the reasons above, the Tribunal finds that the Appellant had a right to be reinstated to her employment, that she tried to exercise that right, and that she relinquished it in return for

financial compensation (*Meechan, supra*). Therefore, the amount of \$43,908 does not constitute earnings within the meaning of section 35 of the Regulations because the Appellant received this amount for relinquishing her right to be reinstated to her employment. As a result, this amount cannot be allocated under section 36 of the Regulations.

CONCLUSION

[15] The appeal is allowed.

Bernadette Syverin
Member, General Division – Employment Insurance Section

HEARD ON:	January 21, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	A. M., Appellant