



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

[TRANSLATION]

Citation: *Y. D. v Canada Employment Insurance Commission*, 2019 SST 251

Tribunal File Number: GE-19-219

BETWEEN:

Y. D.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Josée Langlois

HEARD ON: February 18, 2019

DATE OF DECISION: February 19, 2019

DECISION

[1] The appeal is allowed. The Tribunal finds that \$4,000 was paid to the Appellant as compensation for relinquishing his right to reinstatement, that the amount does not constitute earnings, and that it should not be allocated to his benefit period.

OVERVIEW

[2] The Appellant told the Commission that he received \$4,000 on July 7, 2018, after a settlement agreement with the employer, X. He submits that he received that amount for relinquishing his right to reinstatement. On February 27, 2018, the Commission informed the Appellant that the \$4,000 received would be allocated to his benefits. The Tribunal must determine whether the \$4,000 the Appellant received constitutes earnings and whether it was allocated properly to his benefit period.

ISSUES

[3] Was the \$4,000 the Appellant received paid to him for relinquishing his right to reinstatement?

[4] Does this amount constitute earnings? If so, was it allocated properly to his benefit period?

ANALYSIS

Was the \$4,000 the Appellant received paid to him for relinquishing his right to reinstatement?

[5] The employer told the Commission that the Appellant stopped working on December 19, 2017, because of a lack of work. The employer said that the [translation] “potential” anticipated return date of February 5, 2018, no longer [translation] “applied” because of the grievance for harassment that had been filed. The employer indicated that an [translation] “amicable” settlement had been reached and that the Appellant would not be reinstated to his position by

mutual agreement. It explained that the Appellant had therefore relinquished his right to reinstatement and that he had received an amount for that reason.

[6] The Appellant told the Commission that a settlement agreement was reached after he filed a complaint for psychological harassment. He received \$4,000. The Commission's agent indicated in the file that the Appellant received that amount as compensation.

[7] The Appellant explained that he filed a grievance for psychological harassment and that, because of that grievance, the scheduled return to work on February 5, 2018, did not take place. The Appellant explained that, after an administration change, he was feeling pressure and stress. For that reason, he felt unable to return to work on February 5, 2018, but his doctor did not advise him to leave his employment. Rather, he wanted to keep his employment.

[8] The Appellant testified that he negotiated his return to work. He indicated that he filed a grievance so that the situation would improve and not because he hoped to leave his employment. However, the employer was not open to the Appellant returning to his position and quickly offered a settlement.

[9] The Commission, in turn, submits that the Appellant did not receive the amount for relinquishing his right to be reinstated because, even though he asked to be reinstated, he confirmed to the Commission that there was no question of doing so when the agreement was reached and that the amount was paid as compensation for the psychological-harassment grievance he had filed.

[10] Furthermore, the Commission stated that it was the Appellant's choice not to resume working on February 5, 2018, not the employer's.

[11] An amount paid after a separation from employment may be considered paid for relinquishment of the right to reinstatement if that right exists, including under a collective agreement; if the appellant asked to be reinstated; and if the settlement agreement shows that the amount was paid as compensation for relinquishing the right to reinstatement (*Meechan v Canada (Attorney General)*, 2003 FCA 368).

[12] An employee has a distinct, negotiable right to be reinstated, and the right to reinstatement must have arisen and been negotiable (*Plasse*, A-693-99; *Warren*, 2012 FCA 74).

[13] The agreement reached between the parties on May 19, 2018, indicates that a compensatory wage of \$4,000 was paid to the Appellant for the relinquishment of any claim to his right to be reinstated.

[14] The Tribunal sees the flaw in the Commission's interpretation that the Appellant did not receive the \$4,000 for relinquishing his right to reinstatement because the evidence shows that he asked, through his union, to be reinstated to his teaching position. The employer did not want to reinstate the Appellant and quickly offered him a settlement. The Appellant cannot be penalized because the employer was not open to negotiating his reinstatement while he wanted the work environment to improve first.

[15] Furthermore, although the Commission submits that the Appellant chose not to go to work on February 5, 2018, the employer told the Commission on August 27, 2018, that the return date of February 5, 2018, no longer applied because of the grievance the Appellant filed.

[16] The case law requires that the right to reinstatement exists, that the appellant has negotiated it, and that an agreement is reached specifying that compensation was paid for the appellant's relinquishment of their right to reinstatement. That is exactly what the file shows. The Tribunal finds that the Appellant satisfies the criteria and that he has shown that he received the \$4,000 because he relinquished his right to be reinstated to his position.

[17] When the Appellant filed his grievance, he asked to be reinstated as a teacher in the [translation] "drilling and blasting" specialty (GD3-35). As the Appellant argued at the hearing, although the employer offered a settlement because of the grievance filed, some paragraphs in the settlement clearly show that this amount was paid to the Appellant because he relinquished his right not only to his position, but also to any position within X. The settlement states particularly that the Appellant **agrees to relinquish his right to be reinstated to employment** (GD3-38).

[18] The Tribunal must decide on a balance of probabilities and, although the contents of the agreement reached between the Appellant and his employer are confidential, it is more than likely that the Appellant negotiated a reinstatement not only to his position, but also to another position within the X, which the employer did not want.

[19] Given the Appellant's testimony and arguments during the hearing and the agreement reached that clearly states that the Appellant will receive an amount for relinquishing his right to be reinstated to his position or to any other position within X, the Tribunal finds that the \$4,000 was paid to the Appellant for relinquishing his right to be reinstated.

Does this amount constitute earnings? If so, was it allocated properly?

[20] Income arising out of any employment, whether in respect of wages, benefits, or other remuneration, must be taken into account unless it falls within an exception (section 35 of the Regulations).

[21] A claimant's entire income arising out of any employment is to be taken into account when calculating the amount to be deducted from their benefits (section 35(2) of the Regulations and *McLaughlin v Canada (Attorney General)*, 2009 FCA 365 (CanLII)).

[22] The agreement reached between the parties states that [translation] "[t]he parties acknowledge that this amount is not paid in return for work completed and that it does not arise out of employment."

[23] The Tribunal has found that the \$4,000 was paid to the Appellant for relinquishing his right to reinstatement. Therefore, this amount does not constitute earnings and should not be allocated to the Appellant's benefit period.

CONCLUSION

[24] The appeal is allowed.

Josée Langlois
Member, General Division – Employment Insurance Section

HEARD ON:	February 18, 2019
METHOD OF PROCEEDING:	In person
APPEARANCE:	Y. D., Appellant Sylvain Bergeron, Representative for the Appellant