



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *L. J. v Canada Employment Insurance Commission*, 2019 SST 1680

Tribunal File Number: GE-18-3187

BETWEEN:

L. J.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Amanda Pezzutto

HEARD ON: January 30, 2019

DATE OF DECISION: February 26, 2019

DECISION

[1] The appeal is allowed in part. I find that only a small portion of the payment was meant to compensate the Appellant for lost income, and so I find that only that portion of the payment is earnings.

OVERVIEW

[2] The Appellant's supervisor made a sexual advance towards her and the Appellant turned him down. As the situation progressed, the supervisor's wife and the supervisor sent the Appellant threatening messages. Ultimately, the employer dismissed the Appellant. The Appellant sought legal advice and demanded compensation from the employer. Nearly six months later, the employer paid the Appellant \$30,000. The Canada Employment Insurance Commission (Commission) determined that the entire sum, less the Appellant's legal fees, was income arising from employment and allocated the money from separation. Because the Appellant had already received employment insurance benefits, this resulted in an overpayment. The Appellant requested a reconsideration, and the Commission maintained its initial decisions. The Appellant appealed to the Social Security Tribunal (Tribunal).

[3] I find that the Appellant has demonstrated, on a balance of probabilities, that \$25,000 of the total sum was meant to compensate her for the harassment. I find that \$4768 of the total sum was legal fees. I find that these portions of the total sum are not income arising from employment, and so I find that they are not earnings for employment insurance purposes. I find that the remaining balance – \$232 – is earnings because it was meant to compensate the Appellant for lost income, and so I find that this sum must be allocated from the week of separation.

ISSUES

- Issue 1 – Is the money the Appellant received from her former employer earnings?
- Issue 2 – If it is earnings, how should it be allocated?

ANALYSIS

[4] A benefit period is the window of time in which an employment insurance claimant may receive benefits. If a claimant receives earnings during the benefit period, those earnings must be deducted from any benefits payable (section 19 of the *Employment Insurance Act* (EI Act)). This is because the purpose of the employment insurance program is to protect individuals from a loss of income due to unemployment; if a claimant receives earnings from an employer, then there is no loss of income (*Canada (Attorney General) v. Walford*, A-263-78).

[5] For the purposes of determining the amount to be deducted from the benefits payable, earnings are the entire income arising from employment (subsection 35(2) of the *Employment Insurance Regulations* (EI Regulations)). Once a sum is determined to be earnings, it must be allocated, or applied, to a given week. When earnings are allocated to a given week, that sum of money is considered earnings during that week. The reason for the payment determines how the earnings will be allocated (subsection 36(1) of the EI Regulations).

[6] All earnings paid because of a lay-off or separation from employment are to be allocated at the rate of the Appellant's normal weekly earnings beginning with the week of the separation (subsection 36(9) of the EI Regulations). A payment is made by reason of the separation from employment when the payment is "triggered" by the end of the employment (*Canada (Attorney General) v. Savarie*, A-704-95). The claimant bears the burden of proving that any money received on separation from employment is not income arising from employment; in other words, a payment made upon separation from employment is assumed to be earnings, unless the claimant can prove that the payment was meant to compensate for some other loss or expense (*Canada (Attorney General) v. Radigan*, A-567-99).

Issue 1: Is the money the Appellant received from her former employer earnings?

[7] I find that, of the \$30,000 payment, only \$232 is earnings for the purposes of employment insurance benefits. I find that the Appellant received \$25,000 as compensation for harassment, and \$4768 was legal fees – I find that these portions of the payment are not income arising from employment and so they are not earnings.

[8] The Appellant has consistently stated that her supervisor sexually harassed her, and that the supervisor's wife sent her threatening messages because she believed the Appellant was having an affair with the supervisor. She stated that the employer terminated her as a result of these events.

[9] The Appellant submitted evidence of harassment from her supervisor and her supervisor's wife. She submitted an email from her supervisor, where he described his romantic feelings for the Appellant; she also submitted a copy of her reply, where she told her supervisor that she did not want an intimate relationship with him. The Appellant also submitted copies of text messages she received from her supervisor's wife. In these messages, the supervisor's wife calls the Appellant vulgar names, threatens her job, and threatens to post things about the Appellant on social media. The Appellant also submitted text messages from her supervisor where he threatens to contact the Appellant's family members.

[10] The Commission does not dispute the Appellant's description of the harassment. Given the nature and content of the emails and text messages the Appellant submitted, I find, on a balance of probabilities, that the Appellant was the victim of sexual harassment and harassment from her supervisor.

[11] The Appellant submitted a copy of her lawyer's initial demand letter to the employer, and a copy of the draft version of the same letter. In both letters, the lawyer asks the employer for compensation for both lost income and harassment. In response, the employer noted that the Appellant had already received one week of pay in lieu of notice. The employer initially offered \$25,000 as an "all-inclusive settlement of all issues in dispute," and then finally increased the offer to \$30,000.

[12] According to the release signed by the Appellant, the sum was a "settlement" fund. In particular, I note that, in a distinct section of the release, the Appellant agreed not to pursue any complaints under the provincial human rights legislation or any other legal action about her treatment from other employees.

[13] I am satisfied that the Appellant's supervisor and the supervisor's wife harassed the Appellant. As a result, I find that it is credible that the employer paid a sum of money to the

Appellant to settle her harassment claim. I find that the Appellant has demonstrated, on a balance of probabilities, that purpose of the payment was not simply to compensate her for lost income. I find that a portion of the sum the Appellant received from her employer was intended to compensate her for the harassment.

[14] However, I acknowledge that none of the documents explicitly set out how much of the sum was meant to compensate for lost income, and how much was meant to compensate the Appellant for harassment. As a result, I must consider the evidence to determine how much of the total payment should be considered compensation for the harassment, and how much was meant to represent lost income.

[15] In her email discussion with the Appellant, the Appellant's lawyer suggests that the Appellant combine the lack of notice issue and the harassment issue and ask for at least \$25,000. In her draft of the demand letter, the Appellant's lawyer suggests \$20,880 for pay in lieu of notice and \$25,000 for damages related to harassment.

[16] I note that the release signed by the Appellant includes a section where the Appellant explicitly agreed not to pursue any further human rights actions. I also note that the employer had already paid a sum of money to the Appellant as pay in lieu of notice. Given these factors, I find, on a balance of probabilities, that the majority of the settlement money was meant to compensate the Appellant for the harassment. Given that there are several references in the Appellant's discussions with her lawyer to \$25,000 as a sum appropriate for settlement of the harassment issue, I find, on a balance of probabilities, that \$25,000 of the total sum was meant to compensate the Appellant for the harassment. I find that this portion of the payment is not income arising from employment.

[17] The Commission has already determined that \$4768 of the sum was legal fees and determined that this portion was not earnings as well. I accept this determination. Considering that the employer paid \$30,000 to the Appellant, I find that \$29,768 – \$25,000 to compensate for harassment and \$4768 for legal fees – is not income arising from employment, and so it is not earnings. This leaves a balance of \$232, and so I find that this remaining portion of the payment was intended to compensate the Appellant for lost income. As a result, I find that this portion of the payment is earnings.

Issue 2: How should the earnings be allocated?

[18] At the hearing, the Appellant acknowledged that she received the payment because of her separation from employment. As a result, I am satisfied that the payment was triggered by the Appellant's separation. I find that the portion of the payment that is earnings – \$232 – was paid because of separation and so it should be allocated from the week of the Appellant's separation, at the rate of her normal weekly earnings.

CONCLUSION

[19] The appeal is allowed in part.

Amanda Pezzutto
Member, General Division - Employment Insurance Section

HEARD ON:	January 30, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	L. J., Appellant