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

[TRANSLATION]

Citation: N. A. v Canada Employment Insurance Commission, 2019 SST 815

Tribunal File Number: GE-19-621

BETWEEN:

N. A.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Lucie Leduc

HEARD ON: February 26, 2019

DATE OF DECISION: February 27, 2019

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] The Appellant started working as an administrative officer at the health and social services centre, X, on May 2, 2016. She was dismissed, and her employment ended on May 8, 2018. Following her dismissal, the Appellant filed complaints with Québec's labour standards commission, Commission des normes, de l'équité et de la santé et de la sécurité au travail (CNESST). Following a CNESST mediation process, the Appellant and her employer reached an agreement and the employer was required to pay the Appellant $3,080. The Appellant informed the Employment Insurance Commission (Commission) of the agreement that was reached. On reading the agreement, the Commission determined that the sums paid to the Appellant constituted earnings within the meaning of the *Employment Insurance Act* (Act) and had to be allocated. The Appellant argues, however, that the amount received does not constitute earnings because it was paid as compensation for relinquishing her right to reinstatement.

ISSUE

[3] The Social Security Tribunal must decide whether the $3,080 paid to the Appellant constitutes earnings within the meaning of the Act.

ANALYSIS

[4] On termination of employment, a person typically receives various sums of money. Section 35 of the *Employment Insurance Regulations* (Regulations) specifically states which types of payments constitute earnings. Generally, unless specified as an exception, the entire income of a person arising out of any employment constitutes earnings (*McLaughlin v Canada (Attorney General)*, 2009 FCA 365).

Issue: Does the $3,080 paid to the Appellant constitute earnings within the meaning of the Act?

[5] The Federal Court of Appeal has determined that the burden is on the claimant to establish that all or part of the sums received as a result of their dismissal constituted something other than earnings (*Bourgeois v Canada (Attorney General)*, 2004 FCA117).

[6] To determine whether an amount constitutes earnings, the Tribunal must decide on the nature of the sum received. Case law has established that a sum paid for relinquishing the right to reinstatement does not constitute earnings and therefore should not be allocated.

[7] In this case, the Tribunal finds that the sum received by the Appellant does not constitute earnings for the following reasons.

[8] The Federal Court of Appeal has recognized that sums received from the relinquishment of a right to reinstatement constitute an exception and must not be considered earnings within the meaning of the Act (*Canada (Attorney General) v Warren*, 2012 FCA 74; *Canada v Plasse*, A-693-99; *Meechan v Canada (Attorney General)*, 2003 FCA 368; *Canada (Attorney General) v Cantin*, 2008 FCA 192). In *Meechan*, the Court clearly defines the criteria to apply when dealing with this type of income:

1) The right to reinstatement must exist under a law or contract.
2) The claimant must have asked to be reinstated.
3) The settlement agreement must show that the amount was paid as compensation for relinquishing the right to reinstatement.

[9] In this case, the Tribunal notes from the evidence that, following her dismissal, the Appellant filed three complaints with CNESST against her ex-employer. This was followed by a mediation process with CNESST, which resulted in an agreement between the parties. The agreement submitted into evidence clearly indicates that the first two criteria were met. In other words, the Appellant did have the right to reinstatement and her complaints explicitly included her request to be reinstated. The Commission accepted these findings of fact.

[10] Rather, the issue is regarding the third criterion: The agreement must show that the amount was paid as compensation for relinquishing the right to reinstatement. The Commission submits that based on the wording of the written agreement, the amount paid to the Appellant was to compensate for her loss of income and not for relinquishing her right to be reinstated.

[11] However, the Appellant argues that the amount does in fact represent compensation for the relinquishment of her right to be reinstated to her employment.

[12] On reading the agreement, the Tribunal finds that its preamble makes several references to the relinquishment of the right to reinstatement. For example:

> [Translation]
>
> Whereas the right to reinstatement exists based on sections 123.4 and 128 of the *Act respecting labour standards* and section 15 of the *Labour Code*;
>
> Whereas by filing complaints, the employee wanted to obtain the right to be reinstated to her employment;
>
> Whereas after a discussion between the parties, the employee relinquishes her right to reinstatement.

[13] Despite these points, the Commission defers to the fact that the agreement also indicates that [translation] "[t]he employer agrees to pay the employee, as compensation for loss of employment, a gross sum of $3,080, less the applicable tax deductions, representing four (4) weeks' notice of termination of unworked employment…." The Commission argues that, based on this sentence in the agreement, the amount paid to the Appellant was compensation for loss of employment representing four weeks' notice of termination of unworked employment and not compensation for relinquishing her right to be reinstated.

[14] The Tribunal finds that, to analyze the nature of a sum of money, it is important to look at the evidence as a whole, considering the circumstances, rather than focusing only on the wording of one sentence in the agreement, as the Commission did.

[15] The Tribunal notes from the evidence that the agreement clearly indicates that the preamble forms an integral part of the agreement. Ignoring it would therefore be a mistake. The Tribunal acknowledges that it is written in the agreement that the amount was to be paid as

compensation for loss of employment, but it gives more weight to the evidence that the amount was paid to the Appellant for relinquishing her right to reinstatement. The Tribunal also gives significant weight to the Appellant's testimony that it had always been clear to her that the amount she received was for that reason. She is the only witness in the file related to the discussions with the mediator, and her testimony establishes context around the mediation process and the agreement that was reached. Neither the author of the agreement nor the other party to the agreement has come forward to contradict the Appellant's statements. She argues that these discussions with the mediator were clearly to the effect that she would be compensated in exchange for relinquishing her right to reinstatement. The Tribunal finds that the fact that the Appellant immediately informed the Commission of the agreement supports her testimony and her certainty about the nature of the amount negotiated. The Tribunal accepts that, for her, it had always been understood that the amount was compensation for relinquishing her right to reinstatement. The Tribunal finds that the agreement's preamble clearly reflects these discussions and the spirit of the agreement regarding the relinquishment of the right to reinstatement.

[16] The Tribunal questions the author's choice of wording in the agreement because it seems inconsistent with the preamble and the Appellant's version even though the Appellant was directly involved in the mediation process. The Tribunal also remains puzzled about the following wording: [translation] "four (4) weeks' notice of termination of unworked employment." It is unclear what these terms mean. However, it is not up to the Tribunal to comment on the accuracy of terms used by CNESST in its agreement or on possible inconsistencies, but rather to determine on a balance of probabilities the nature of the $3,080.

[17] In this case, based on the evidence on file, it appears more likely that the amount was paid to the Appellant as compensation for relinquishing her right to be reinstated. It is possible that the $3,080 represents the equivalent of four weeks' wages for the Appellant. However, that does not determine its nature. The Tribunal finds that the preamble leaves no doubt as to the discussions about the parties' rights and the Appellant's relinquishment of her right to reinstatement. Add to this the Appellant's oral evidence that the discussions with the mediator had always been about compensation for relinquishing her right to reinstatement, and the Tribunal is satisfied that the Appellant has met her burden of proving that the income of $3,080

constituted something other than earnings within the meaning of the Act. On the balance of probabilities, the Tribunal finds that the amount in question was paid to the Appellant as compensation for relinquishing her right to be reinstated. As a result, this amount does not constitute earnings within the meaning of the Act.

CONCLUSION

[18] The appeal is allowed.

Lucie Leduc
Member, General Division – Employment Insurance Section

HEARD ON:	February 26, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	N. A., Appellant Denis Poudrier, Representative for the Appellant