



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *G. N. v Canada Employment Insurance Commission*, 2019 SST 279

Tribunal File Number: GE-19-782

BETWEEN:

G. N.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Glen Johnson

HEARD ON: March 12, 2019

DATE OF DECISION: March 12, 2019

DECISION

[1] The appeal is allowed.

[2] The Tribunal finds that a lump sum paid to the Appellant by his employer to settle a claim for damages for a wrongful dismissal claim is not earnings arising from employment and are not to be allocated against his claim for employment insurance (EI) benefits.

OVERVIEW

[3] The Appellant was dismissed from his employment and commenced wrongful dismissal proceedings against his employer with the help of a lawyer. He claimed that his dismissal was a form of reprisal under the *Occupational Health and Safety Act (OHSA)* of Ontario. The parties settled for a lump sum amount plus legal fee reimbursement. He claims that his receipt of settlement monies should not be allocated against his EI benefit claim because a Service Canada representative told him that it would not be.

[4] The Appellant and his employer settled the wrongful dismissal claim and they signed a Release. Among other things, the Release states that the settlement monies were paid in consideration of any claims that he had for wages, sick pay, vacation pay, severance pay, notice of termination, wrongful dismissal damages, any statutory right of reinstatement, human rights damages, or any other matter arising from his employment including his treatment during his employment.

[5] The Respondent allocated \$13,151.50 as earnings arising out of the Appellant's employment against his claim for EI benefits.

ISSUE

- [6] Issue 1: Is the payment of \$13,151.50 to the Appellant earnings arising from employment?
- [7] Issue 2: If so, did the Respondent properly allocate the earnings to the Appellant's EI claim?

ANALYSIS

- [8] Amounts payable to a claimant by an employer for wages are considered in determining whether there has been an interruption in earnings so as to qualify for EI benefits (subsection 35(2)(a) of the *Employment Insurance Regulations (EI Regulations)*).
- [9] Income received from an employer by reason of a separation from employment are presumed to be earnings and must be allocated to the claimant's EI claim (subsection 36(9), *Employment Insurance Regulations (EI Regulations)*).
- [10] The entire income of a claimant, if it arises out of employment, must be taken into account for the allocation (subsection 35 (2), *EI Regulations*). Income is defined in the *EI Regulations* in a very general manner as any pecuniary or non-pecuniary income that is received by a claimant (subsection 35(1)) so reference must be made to case law.
- [11] If a claimant claims that the amounts received from his employer were paid out for reasons other than the loss of revenue arising from employment, in the case of a settlement or agreement based upon a lawsuit, a complaint or a claim because of a dismissal, it is up to the claimant to show that due to "*special circumstances*" some portion of it should be regarded as compensation for some other expense or loss (*Canada (A.G.) v. Radigan*, A-567-99; *Bourgeois v. Canada (A.G.)*, 2004 FCA 117).

Issue 1: Is the payment of \$13,151.50 to the Appellant earnings arising from employment?

[12] The Tribunal finds that \$16,000 paid to the Appellant by his employer to settle his wrongful dismissal claim is not earnings arising from employment to be allocated to his EI claim.

[13] The Tribunal finds that the Appellant has shown “*special circumstances*” exist to establish that only a portion of the settlement monies were earnings arising from employment.

[14] The Appellant and his employer signed Minutes of Settlement. The Minutes state that he receives \$16,000 comprised of \$13,151.50 as a lump sum payment and \$2848.49 toward reimbursement of his legal fees. The Minutes provide that the monies were paid to settle legal proceedings commenced by the Appellant alleging that his termination was a form of reprisal under the OHSA.

[15] The Tribunal finds that the settlement amount of \$16,000 is in consideration of, among other things, the Appellant’s withdrawal of his action for wages, sick pay, vacation pay, severance pay, notice of termination, wrongful dismissal damages, any statutory right of reinstatement, human rights damages, or any other matter arising from his employment including his treatment during his employment, and legal fees as stated in a Full and Final Release and Indemnity (Release).

[16] The Tribunal accepts the Appellant’s testimony that upon settlement of his wrongful dismissal claim, his employer paid \$16,000 to his lawyer and he received \$10,521.20 after deduction of legal fees on a contingency basis.

[17] The Tribunal finds that the Appellant has established that the balance of \$10,521.20 received by the Appellant are not earnings arising out of employment and instead are funds paid to settle all his legal claims arising from his wrongful dismissal from employment and the mistreatment by his employer.

[18] The Appellant testified that he was dismissed from employment. He said that the reason for his dismissal was a reprisal from his OSHA complaint arising from physical health issues following exposure to chemicals while working and from the employer's insistence that he lift heavy items by himself.

Issue 2: If so, did the Respondent properly allocate the earnings to the Appellant's EI claim?

[19] The Tribunal finds that the Respondent did not properly allocate \$13,151.50 as earnings arising out of employment against the Appellant's EI claim.

[20] The Respondent allocated \$13,151.50 of \$16,000 total funds paid by the employer to his claim for EI benefits, which resulted in an overpayment of \$4247.

[21] The Respondent determined that the lump sum payment the Appellant received from his employer constituted earnings arising from employment because the payment was made to compensate him for lost income due to his termination from employment. However, the Minutes of Settlement do not state the specific head of claim for which the lump sum payment provides compensation. It does not state that \$13,151.50 is paid as income, which does not support the Respondent's claim.

[22] The Tribunal finds that the settlement reached between the Appellant and his employer is not a sham to circumvent the EI scheme by disguising compensation for lost wages as something else (*Canada (A.G.) v. Vernon* (1995), 189 308 (FCA)).

[23] The Release describes that consideration for the lump sum payment includes heads of claim which are not earnings from employment, including expenses, wrongful dismissal damages, relinquishment of a statutory right to reinstatement, human rights damages and other matters arising from his employment including his mistreatment during his employment.

CONCLUSION

[24] The appeal is allowed. The lump sum of \$16,000 paid to the Appellant by his employer to settle a claim for damages for a wrongful dismissal claim is not earnings arising from employment and are not to be allocated against his claim for employment insurance (EI) benefits.

Glen Johnson
Member, General Division - Employment Insurance Section

HEARD ON:	March 12, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	G. N., Appellant