



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *R. C. v Canada Employment Insurance Commission*, 2019 SST 564

Tribunal File Number: GE-19-958

BETWEEN:

R. C.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Glen Johnson

HEARD ON: March 27, 2019

DATE OF DECISION: March 27, 2019

DECISION

[1] The appeal is allowed.

[2] The Tribunal finds that \$14,831 of the lump sum of \$97,607 paid to the Appellant by his employer to settle a claim for various damages for mistreatment in a hostile and toxic work environment are earnings arising from employment and are properly allocated against his claim for employment insurance (EI) benefits. The balance of the lump sum are not earnings arising out of employment.

OVERVIEW

[3] The Appellant became separated from his employment due to illness and he claims sickness EI benefits.

[4] He became separated from employment on medical advice due to a toxic work environment which led to health issues. He reached a settlement agreement with his employer for damages. He claims that settlement funds paid by the employer are consideration for settlement of various claims for damages, but are not to be allocated against his claim for EI benefits because they are not earnings arising from employment, with the exception of \$14,831.

[5] The Appellant and his employer signed a General Release confirming settlement of his claim for \$97,607. How the settlement funds lump sum amount was calculated is not detailed in the Release; however, the employer claims that all of the lump sum relates to earnings from employment as provided for in the Appellant's Executive Contract Agreement.

[6] The Respondent determined that the entire lump sum settlement funds received by the Appellant are earnings arising out of employment and are allocated against his claim for EI benefits.

ISSUE

- [7] Issue 1: Is the payment of \$97,607 to the Appellant by his employer earnings arising from employment?
- [8] Issue 2: If so, did the Respondent properly allocate the earnings to the Appellant's EI claim?

ANALYSIS

- [9] 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)*).
- [10] 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)*).
- [11] 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)) and reference must be made to case law.
- [12] A claimant has the onus to show that the payment that he received from his employer was not earnings (*Mayor v. Minister of Employment and Immigration* (1989), 97 N.R. 353 (F.C.A.)).
- [13] 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 \$97, 607 to the Appellant by his employer earnings arising from employment?

[14] The Tribunal finds that settlement funds received by the Appellant from his employer for \$97,607 are not earnings arising from employment to be allocated to his EI claim, with the exception of \$14,831.

[15] The Tribunal finds that the Appellant has shown “*special circumstances*” exist establishing that the bulk of the settlement funds paid by his employer as consideration for his claim for various damages and not as payment for earnings arising from employment.

[16] The Appellant left work on medical advice due to mental health issues caused in a work environment where he was bullied and harassed by his employer and he claimed damages from his employer.

[17] The Appellant testified that his work environment as “*very hostile and toxic*”.

[18] In settlement of his claim for various damages for mistreatment by his employer, the Appellant and his employer signed a General Release agreement. The Release did not detail how a lump sum of \$97,607 is calculated.

[19] The Tribunal accepts the Appellant’s claim and testimony that the lump sum payment by the employer was consideration to settle the Appellant’s claim for damages to avoid an Occupational Health and Safety complaint, avoid a court case or an escalation of his Alberta Human Rights Act complaint against the employer. It was also paid in consideration of a relinquishment of his rights of reinstatement (GD2-20 and GD2A-16).

[20] The Tribunal finds that only \$14,831 of the settlement lump sum of \$97,607 is lost commission income, vacation pay and one week of severance pay; the balance of the lump sum was consideration for settling his damage claim. The Appellant acknowledged in testimony that \$14,831 are properly allocated against his claim for EI benefits as earnings arising from employment as he indicated in filed documents (GD2-21).

[21] The General Release provides that the lump sum of \$97,607 is consideration, for among other things, demands for damages for loss or injury, hurt feelings or emotional distress, and any claims arising from human rights, employment standards and occupational health and safety complaints. This does not support a characterization of the payment as earnings from employment.

[22] The Tribunal does not accept the Respondent or employer's characterization of all of the lump sum as earnings from employment, despite the Release stating settlement of claims including wages and severance pay.

[23] 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 v. Plasse*, 2000, A-693-99).

[24] The employer provided the Respondent with a breakdown of the lump sum as severance pay, lost commission income and vacation pay, but they did not provide information to support their breakdown, except to say that in their interpretation the amount is payable according to his Executive Contract Agreement. They did not provide information to suggest that the Appellant agrees with their breakdown calculation or the characterization of claims.

[25] The Appellant testified that Article 6 was only used as a basis to try to come up with a settlement amount and he does not agree with the employer's characterization that all of the settlement funds are earnings arising from employment. He said that \$14,831 of

the settlement funds of \$97,607 are comprised of unpaid commission income, vacation pay and one week of salary (GD2-20).

[26] The Tribunal finds that Article 6 of the Executive Contract Agreement provides for a calculation of claims to be characterized as earnings in a situation where the employer terminates the employment. They submit that the calculation is \$97,607 which was the amount paid as a lump sum. However, the Tribunal finds that the clause does not apply to the Appellant's claim for damages because his employment was not terminated by the employer, and his claim is for various damages for mistreatment by the employer.

[27] Appellant paid legal fees of \$1875 to reach a settlement with the employer and the Tribunal finds that it cannot be characterized as earnings from employment. The Release provides that the lump sum settles the Appellant's "costs", yet the employer did not incorporate legal costs into their breakdown of the lump sum, which does not support the employer's characterization of the breakdown of the lump sum.

[28] The Tribunal accepts the Appellant's testimony that the lump sum settlement of \$97,607 less \$14,831 is consideration for various damages due to mistreatment by his employer.

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

[29] The Tribunal finds that the Respondent did not properly allocate the lump sum of \$97,607 paid by the employer to the Appellant against his claim for EI benefits since they were not earnings arising out of employment, with the exception of \$14,831.

[30] The Respondent determined that the lump sum payment the Appellant received from his employer constituted earnings arising from employment and allocated against his EI claim because the payment was made to compensate him for his termination from employment. However, the Respondent relies upon the employer's characterization of the

lump sum and breakdown calculation, which the Tribunal finds is not supported by the information on file or the Appellant's testimony.

[31] "Earnings" are defined as consideration for present or past work (*Canada (A.G.) v. Vernon* (1995), 189 N.R. 308 (FCA)).

[32] The Tribunal finds that 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.

[33] The Tribunal accepts the testimony of the Appellant that \$14,831 are earnings from employment and the balance of the lump sum settlement of \$97,607 received from his employer are not earnings arising from employment and are not to be allocated to the Appellant's EI claim.

CONCLUSION

[34] The appeal is allowed. The amount to be allocated as earnings arising out of employment during the Appellant's EI benefit period is \$14,831 and not \$97,607 as determined by the Respondent.

Glen Johnson
Member, General Division - Employment Insurance Section

HEARD ON:	March 27, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	R. C., Appellant Juliette Fontaine, Representative for the Appellant

