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

[TRANSLATION]

Citation: D. B. v Canada Employment Insurance Commission, 2019 SST 566

Tribunal File Number: GE-19-1726

BETWEEN:

D. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Charline Bourque

HEARD ON: May 14, 2019

DATE OF DECISION: May 14, 2019

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] The Appellant worked as X for X starting January 12, 2015. He was dismissed, and his employment ended on December 20, 2018, following a negotiated settlement with the city. That settlement provides for the payment of $22,600 by the employer to the Appellant. The Appellant also received $900 as a salary advance. After reading the settlement, the Commission determined that the amounts paid to the Appellant were earnings and had to be allocated. The Appellant, in turn, argues that the amount received does not constitute earnings because it was paid for relinquishing his right to reinstatement.

PRELIMINARY MATTERS

[3] The Appellant states that the $900 received as a salary advance is not in dispute in this appeal. The Appellant disputes the allocation of $22,600 in earnings received from his employer after the settlement was established.

ISSUES

[4] The Tribunal must determine whether the $22,600 paid to the Appellant constitutes earnings within the meaning of the *Employment Insurance Regulations*.

[5] If so, the Tribunal must determine how that amount has to be allocated.

ANALYSIS

[6] Earnings are defined as the entire income arising from any employment, subject to the exceptions set out in section 35(7) of the *Employment Insurance Regulations* (EI Regulations) (EI Regulations, section 35(2)).

[7] Generally speaking, unless specified by an exception, a person's entire income arising from any employment constitutes earnings (*McLaughlin v Canada (Attorney General)*, 2009 FCA 365).

Issue 1: Does the $22,600 paid to the Appellant constitute earnings within the meaning of the *Employment Insurance Regulations*?

[8] It is up to the claimant to establish that all or part of the amounts received as a result of their dismissal amounted to something other than earnings (*Bourgeois v Canada (Attorney General)*, 2004 FCA 117).

[9] To determine whether an amount constitutes earnings, the Tribunal must decide on the nature of the amount received. Case law has established that an amount paid as compensation for relinquishing the right to be reinstated to one's employment does not constitute earnings and that, as a result, it should not be allocated.

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

[11] The Federal Court of Appeal has recognized that amounts received related to renouncing a person's right to reinstatement constitute an exception and that the amounts should not be considered earnings under the Act (*Canada (Attorney General) v Warren*, 2012 FCA 74; *Plasse v Canada (Attorney General)*, A-693-99; *Canada (Attorney General) v Meechan*, 2003 FCA 368; *Canada (Attorney General) v Cantin*, 2008 FCA 192). Furthermore, the Court has clearly defined in *Meechan* the parameters to apply in the case of this type of income:

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

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

[13] In this context, the Appellant must prove on a balance of probabilities that, due to special circumstances, the $22,600 is not earnings within the meaning of section 35 of the Regulations. In this case, the Appellant submits that the $22,600 was paid in exchange for relinquishing his right to be reinstated to his employment.

[14] The Tribunal notes that the negotiated settlement with the Appellant states that [translation] "the Municipality will pay the Employee $22,600 in the manner determined by the Employee (GD3-22).

[15] The municipality's mayor states that [translation] "it is a settlement amount to stop the client from returning to work for the municipality, as well as a separation allowance" (GD3-25).

[16] Section 267.0.4 of the *Municipal Code of Québec* states that the Administrative Labour Tribunal may order the municipality to reinstate the officer or employee (GD3-43).

[17] Despite the fact that the Appellant stated that it was severance pay in recognition of his years of service (GD3-92), he testified at the hearing that the issue of his right to reinstatement had been discussed as early as the negotiations leading up to the settlement. He adds that he had asked the attorney for the municipality to specify in the settlement that he was relinquishing his right but that the attorney had not wanted to and preferred to use generic terms. The Appellant stated that he was self-represented because he had already been through a similar situation in 2009.

[18] A sworn statement from the lawyer for the municipality states that the Appellant [translation] "had the right to ask that he be reinstated, in accordance with section 267.0.1 of the *Municipal Code of Québec*, by seeking recourse to the Administrative Labour Tribunal." Furthermore, the lawyer adds that he led the negotiations on behalf of the municipality and indicates that the municipality agreed to pay [translation] "compensation solely so that D. B. would relinquish his reinstatement to his employment, which he wanted" (GD2-9).

[19] The Commission states that it acknowledges that [translation] “the client’s right to reinstatement existed under section 267.0.4 of the *Municipal Code of Québec*. However, the evidence was not conclusive that the client asked that he be reinstated or that the amount paid to him was specifically to compensate him for relinquishing his right to be reinstated.” Regarding the lawyer’s sworn statement, the Commission argues that, despite the sworn statement from his lawyer signed on April 16, 2019, the Claimant clearly said on April 2, 2019, that he had not asked to be reinstated. Furthermore, a lawyer may draft the terms of settlement in any way that benefits their client. In this case, nowhere in the out-of-court settlement does it mention that a right to relinquishment exists, that D. B. asked to be reinstated, and that the amounts granted to him were for relinquishing that right (GD4-7).

[20] The Tribunal notes that, contrary to the Commission’s position, the sworn statement is not from the Appellant’s lawyer, but actually from the employer’s lawyer who participated in the negotiations on behalf of the municipality. Using language supporting the Appellant was of no benefit to that lawyer because the Appellant was not his client. Therefore, based on the Appellant’s testimony and the sworn statement from the employer’s lawyer, the Tribunal is of the view that the Appellant’s right to reinstatement existed, that the Appellant asked to be reinstated, and that the amount received was paid in exchange for relinquishing that right to be reinstated (*Meechan*).

[21] In this context, the Tribunal finds that the Appellant has proven on a balance of probabilities that the $22,600 was paid in exchange for relinquishing his right to reinstatement.

[22] As a result, the $22,600 does not constitute earnings within the meaning of section 35 of the Regulations. Therefore, they should not be allocated under section 36 of the Regulations.

CONCLUSION

[23] The appeal is allowed.

Charline Bourque
Member, General Division – Employment Insurance Section

HEARD ON:	May 14, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	D. B., Appellant