



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *M. S. v Canada Employment Insurance Commission*, 2019 SST 888

Tribunal File Number: GE-19-1914

BETWEEN:

M. S.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Amanda Pezzutto

DATE OF DECISION: May 31, 2019

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] The Claimant's employer dismissed her. The Claimant applied for employment insurance benefits and received benefits. She also brought a complaint to her province's human rights tribunal, claiming that her employer discriminated against her. The Claimant and her employer eventually settled before the matter went before the human rights tribunal and the employer paid the Claimant \$12,000. The Canada Employment Insurance Commission (Commission) determined that the entire sum of money was earnings, paid because of her separation from employment, and applied the money to the weeks for which the Claimant had already received employment insurance benefits. The Commission's decision led to an overpayment. The Claimant requested a reconsideration, arguing that the settlement money was not earnings because it was compensation for injury to her dignity. The Commission maintained its initial decisions and the Claimant appealed to the Social Security Tribunal (Tribunal).

[3] I find that the Claimant has proven, on a balance of probabilities, that the money is compensation for injury to her dignity. I find that the money is not earnings for the purposes of employment insurance benefits, and so I find that the Commission should not allocate the money.

ISSUE

- Issue 1 – Is the settlement payment earnings to be deducted from the Claimant's employment insurance benefits?

ANALYSIS

[4] When a claimant receives money while also receiving employment insurance benefits, the Commission must decide whether the sum of money is earnings. Any income arising from

employment is earnings.¹ If the Commission decides that the money is earnings, then the Commission must allocate, or apply, the money to the proper weeks. The reason for the payment determines the weeks of allocation.²

[5] The Commission allocates any earnings paid because of a lay-off or separation from employment at the rate of the claimant's normal weekly earnings beginning with the week of the separation.³ For instance, if a claimant receives three weeks of pay in lieu of notice after they stop working, the Commission allocates those earnings to the first three weeks beginning with the claimant's last week of work. A payment is made by reason of the separation from employment when the payment is "triggered" by the end of the employment.⁴

[6] 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.⁵

Issue 1: Is the settlement payment earnings?

[7] I find that the settlement payment is not earnings because I find that the money is not income arising from employment. I find, on a balance of probabilities, that the payment was meant to compensate the Claimant for injury to her dignity.

[8] The Claimant and the Commission agree about the basic facts. The Claimant worked for the employer for about six years when the employer dismissed her. The employer paid the Claimant pay in lieu of notice – the Claimant noted that the amount represented six weeks of salary.

[9] The Claimant brought a complaint to her province's human rights tribunal. She argued that her employer discriminated against her on the basis of a disability and asked the human rights tribunal for compensation for lost wages and compensation for injury to her dignity,

¹ Section 35 of the *Employment Insurance Regulations* describes this principle.

² Section 36 of the *Employment Insurance Regulations* describes this principle.

³ Section 36(9) of the *Employment Insurance Regulations* describes this principle.

⁴ The Federal Court of Appeal says this in its decision *Canada (Attorney General) v. Savarie*, A-704-95.

⁵ The Federal Court of Appeal says this in its decision *Canada (Attorney General) v. Radigan*, A-567-99.

feelings, and self-respect. At an early settlement meeting, the Claimant and her employer agreed on a payment of \$12,000, and the Claimant withdrew her human rights complaint.

[10] The settlement agreement simply refers to the sum of money as “settlement funds.” The employer described the money as a retirement allowance, but did not provide any more details about how they calculated the amount or why they described it as a retirement allowance.

[11] The Claimant argues that the entire sum is compensation for injury to her dignity. She argues that she already received pay in lieu of notice, so the employer already paid her for lost wages; she also argues that she is unable to work due to a disability, and so she does not have much future earning potential that would require further compensation from the employer. The Claimant argues that \$12,000 is comparable to amounts awarded by the provincial human rights tribunal for injury to dignity, and provides an example of a 2017 decision where the human rights tribunal ordered an employer to pay a former employee \$15,000 for injury to the former employee’s dignity.

[12] The Commission argues that an amount of money paid as settlement money is presumed to be earnings. The Commission notes that the settlement agreement does not explicitly state that the money is for anything other than lost wages, and so the Commission argues that the entire sum is earnings.

[13] I acknowledge that there is a presumption that any sum of money paid by an employer is earnings. However, the Claimant can rebut this presumption if she provides enough evidence to prove, on a balance of probabilities, that there are special circumstances and that the money is compensation for something other than lost wages.⁶

[14] I find that, by arguing that the settlement agreement must explicitly describe the nature of the payment, the Commission imposes too stringent a standard of proof. In order to meet her

⁶ The Federal Court of Appeal says that the Commission can assume any separation money is earnings in its decision *Canada (Attorney General) v. Walford*, A-263-78. However, in the same decision, the Federal Court of Appeal also says that a sum of money is not earnings if the claimant can prove that there are special circumstances excluding the money as earnings.

burden of proof – a balance of probabilities⁷ – the Claimant simply has to show that it is more likely than not that the money was compensation for injury to her dignity.

[15] I acknowledge that the employer calls the money a retirement allowance. However, I give this little weight since neither the employer nor the Commission have provided any more evidence explaining how the employer calculated the sum of money or why it calls the money a retirement allowance.

[16] I give weight to the fact that the Claimant had already received six weeks of pay in lieu of notice. I find that this suggests that the Claimant had already received some compensation for lost future earnings.

[17] I also give weight to the fact that the Claimant brought a complaint to the human rights tribunal. If the Claimant's primary concern was with inadequate severance pay, lost wages, or a wrongful dismissal, there are other venues more suited to those issues. For instance, the Claimant could have pursued a complaint through her province's employment standards branch. I find that the fact that the Claimant pursued the matter with the human rights tribunal, rather than another venue, demonstrates that the Claimant felt that the employer owed her compensation for injury to her dignity. Furthermore, the Claimant withdrew her human rights complaint when the employer offered her a settlement.

[18] Finally, I accept that the amount the employer paid – \$12,000 – is consistent with other human rights tribunal decisions awarding compensation for injury to dignity.

[19] Considering these factors together, I am satisfied, on a balance of probabilities, that the money is compensation for injury to the Claimant's dignity. As a result, I find that the money is not compensation for lost earnings, and so I find that the money is not earnings for employment insurance benefit purposes. I find that the money should not be allocated.

⁷ The Federal Court of Appeal says that the standard of proof for employment insurance matters is the balance of probabilities in its decision *Canada (Attorney General) v. Corner*, A-18-93.

CONCLUSION

[20] The appeal is allowed.

Amanda Pezzutto

Member, General Division - Employment Insurance Section

HEARD ON:	
METHOD OF PROCEEDING:	Questions and answers