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

Citation: *D. D. et al. v Canada Employment Insurance Commission*, 2019 SST 619

Tribunal File Number: AD-17-673

BETWEEN:

D. D. et al.

Appellants

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Decision by: Shu-Tai Cheng

Date of Decision: June 27, 2019

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] The Appellants, permanent teachers with the X, received maternity leave benefits under the *Employment Insurance Act* (EI Act). In addition, they received a lump sum payment, due to a collective agreement (Collective Agreement) with their employer, at a time that could affect their Employment Insurance (EI) benefits. The Collective Agreement consisted of two parts: Part "A" provisions on central issues (Central Terms) and Part "B" provisions on local issues (Local Terms). Part "A" was ratified four months before Part "B".

[3] The Respondent, the Canada Employment Insurance Commission, determined that the lump sum payments were earnings and allocated the payments to the week that the Appellants had ratified the Local Terms. This resulted in an overpayment of EI benefits that the Appellants were required to repay. The Appellants disputed that they had to repay any benefits. In particular, they disputed that the lump sump payments constituted earnings for the purposes of the EI Act and that the payment should be allocated to the week when they ratified the Local Terms.

[4] The Appellants appealed the Respondent's decision to the General Division of the Social Security Tribunal of Canada. The General Division dismissed the appeal, because it found that the lump sum payments were earnings, were not excluded from allocation, and should be allocated to the week that the Appellants ratified the Local Terms.

[5] The Appellants sought leave to appeal the General Division's decision. This means that they had to get permission to move on to the next stage of their appeal. They argued that the General Division made an error of law by concluding that the lump sum payment was not excluded from allocation. In the alternative, the Appellants submit that the payment should have been allocated according to a different provision of section 36 of the *Employment Insurance Regulations* (EI Regulations), which would not have resulted in the same overpayment.

[6] Leave to appeal was granted because the General Division may have erred in its interpretation or application of sections 35 and 36 of the EI Regulations or by failing to apply binding jurisprudence correctly.

[7] The appeal is allowed because the General Division committed a reviewable error. The Appeal Division renders the decision that the General Division should have rendered.

ISSUES

[8] Did the General Division make an error in law or make a serious error in its findings of fact in concluding that the lump sum payments constituted earnings and should be allocated under section 36(19)(b) of the EI Regulations?

[9] Did the General Division make an error in law by failing to apply binding jurisprudence correctly?

[10] If the General Division committed a reviewable error, should the Appeal Division refer the matter back to the General Division for reconsideration, or can the Appeal Division render the decision that the General Division should have rendered?

ANALYSIS

[11] The Appellants submit that the General Division made errors of law and made serious errors in its fact-finding.

[12] The Respondent's position is that the General Division committed no reviewable errors.

[13] The only grounds of appeal to the Appeal Division are that the General Division erred in law, failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction, or based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.[1]

[1] *Department of Employment and Social Development Act* at s 58(1).

[14] The Appeal Division does not owe any deference to the General Division on questions of natural justice, jurisdiction, and law.[2] In addition, the Appeal Division may find an error in law, whether or not it appears on the face of the record.[3] The Appeal Division should show deference to the General Division's findings of fact but has jurisdiction to intervene where the General Division bases its decision on a serious error in its findings of fact.[4] Where an error of mixed fact and law committed by the General Division discloses an extricable legal issue, the Appeal Division may intervene under section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).[5]

[15] The appeal before the Appeal Division rests on distinct questions of errors of law and serious errors in the findings of fact, each of which discloses an extricable legal issue.

[16] There is no dispute that the lump sum payments were income or that they fall within a broad definition of earnings. However, the Appellants argue that this income does not constitute earnings according to section 35(7)(d) of the EI Regulations because the payments were "retroactive increases in wages or salary" and, therefore, excluded. In addition, the Appellants submit, if the payments did constitute earnings, they should have been allocated under section 36(4) of the EI Regulations and not section 36(19)(b). The parties agree that in determining how these payments should be allocated, the dominant intention of the payments needs to be determined.

[17] The appeal before the General Division turned on the following questions:

a) Were the payments "retroactive increases in wages or salary"?

b) If they were not, what was the dominant intention of the payments?

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[2] *Canada (Attorney General) v Paradis* and *Canada (Attorney General) v Jean*, 2015 FCA 242 at para 19 and AD12: Joint Statement of Facts and Standard of Review at paras 18 and 19.
[3] *Department of Employment and Social Development Act*, s 58(1)(b).
[4] *Department of Employment and Social Development Act*, s 58(1)(c) and AD12: Joint Statement of Facts and Standard of Review at para 20.
[5] *Garvey v Canada (Attorney General)*, 2018 FCA 118 and AD12: Joint Statement of Facts and Standard of Review paras 21 and 22.

Issue 1: Did the General Division make an error in concluding that the Appellants' lump sum payments constituted earnings and should be allocated?

[18] I find that the General Division made an error relating to whether the lump sum payments constituted earnings or were exempt from the definition of earnings under section 35 of the EI Regulations. Specifically, the General Division based it decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

[19] There is no dispute that the lump sum payments were income or that they fall within a broad definition of earnings. However, the Appellants argue that this income does not constitute earnings according to section 35(7)(d) of the EI Regulations because the payments were "retroactive increases in wages or salary" and, therefore, excluded.[6]

[20] Section 35(7)(d) states that the portion of a claimant's income derived from "retroactive increases in wages or salary" does not constitute earnings. Therefore, those amounts are not to be taken into account and need not be allocated.

[21] The General Division needed to interpret the meaning of "[t]hat portion of the income of a claimant that is derived from […] retroactive increases in wages or salary" and apply it to the specific amounts and particular circumstances in this appeal.

[22] The General Division based its conclusion that the payments did not fall within the exclusion of "retroactive increase in wages or salary" on the following findings of fact:

a) There was no reference in the Central Terms to the payment being a signing bonus.

b) There was no reference in the Central Terms to the payment being a retroactive increase.

c) The payment was tied to each teacher's salary on September 1, 2015.

d) There is no recovery of the payment if a teacher was not employed (meaning they had resigned, retired, or been terminated) before the end of the 2015–2016 school year.

[6] EI Regulations, s 35(7)(d).

e) The payment was tied to ratification of the Local Terms.

f) The payment was a one-time signing bonus.

[23] It is noteworthy that the General Division found that there was no reference in the Central Terms to any retroactive increase in wages, but, in fact, there was wording that suggested a retroactive increase. On the other hand, the General Division found that there was no reference to the lump sum payment being a signing bonus, yet it found that the payment was a signing bonus.

[24] Also of note is that the General Division treated the question of whether the lump sum payment was a retroactive increase in wages or salary as answered by its finding that the payment was a signing bonus. The General Division found that the lump sum payment was a one-time singing bonus tied to the ratification of the Local Terms and "would not meet the description of a retroactive increase in wages and salary, because the lump sum payment was a one-time signing bonus."[7]

Retroactive increase

[25] The General Division found that "there was no reference in the [Central Terms] which indicated the one-time lump sum payment was a 'retroactive increase' in wages or salary."[8]

[26] This finding was incorrect. The Central Terms state: "Boards shall adjust their current salary grids wage schedules and allowances in accordance with the following schedule."[9] The schedule sets out the adjustments as at September 1, 2014; September 1, 2015; and September 1, 2016; in addition to a description of the date of the lump sum payments. As at September 1, 2014, there is no increase. As at September 1, 2015, there is a "restoration of grid movement," and all provisions of previous collective agreements that delayed movement are nullified. The lump sum payments were listed in the schedule that adjusts the salary grid, and the sequence of the adjustments shows that the intended timing of the lump sum payments was after September 1, 2015, and before September 1, 2016. Since there was a restoration of the salary grid and the removal of previous delayed movement, there was effectively an increase in wages

[7] General Division decision at para 33.
[8] *Ibid.* at para 30.
[9] Memorandum of Settlement (on central terms), dated August 25, 2015, at para 14.

or salary as at September 1, 2015. The lump sum payment was intended to occur after this salary increase. To the extent that the lump sum payment included part of the salary increase, the payment included a retroactive increase in wages or salary.

[27] Although the term "retroactive increase" was not specifically used in the Central Terms, there was wording in the Central Terms that indicated the lump sum payment may have included a retroactive increase in the Appellants' wages. Effectively, there was a retroactive increase in wages included in the Central Terms. The General Division's finding that there was no such reference in the Central Terms was erroneous.

[28] The General Division also reasoned that the lump sum payment could not be a retroactive increase in wages because it was a one-time signing bonus. However, there is no explanation of why the lump sum payment had to be either a retroactive increase or a signing bonus but could not be both.

One-time signing bonus

[29] There is no dispute that the lump sum payment was a one-time payment. The Central Terms describes the payment as "a lump sum amount" which occurs at one specified time.

[30] The General Division found that "there was no specific reference in the [Central Terms] to the lump payment being a 'signing bonus.'"[10]

[31] This finding was correct. The Central Terms do not use the words "bonus" or "signing bonus" or any word synonymous with "bonus."[11] The lump sum payment is described as "a lump sum amount equal to 1% of earned wages in effect September 1, 2015."

[32] The challenge facing the General Division was the interpretation of the Central Terms and Local Terms in order to find whether the lump sum payment (or a portion of it) was a retroactive increase in wages or salary when the terms did not expressly state it.

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[10] *Supra*, note 7.
[11] Such as "extra," "windfall," "advantage," "additional benefit," or "supplement."

[33] The General Division recognized that absence of reference to a term (whether "retroactive increase" or "signing bonus") is not determinative of the nature of the lump sum payment.

[34] In this case, although the General Division noted that the Central Terms did not expressly state that the lump sum payment was a signing bonus, it was prepared to accept that there was a signing bonus under the Central Terms.

[35] The General Division emphasized the importance of the wording "in the event that a teacher in the employ of a board resigned, retired, or was terminated prior to the end of the 2015-2016 school year there shall be no recovery of any of the lump sum payment."[12] It also pointed to the importance of the lump sum payment being payable within 30 days of the ratification of the Local Terms.[13] These factors led the General Division to conclude that the lump sum payment was a one-time signing bonus.

Erroneous finding of fact

[36] The parties agree that if the General Division made a factual finding that squarely contradicts or is unsupported by the evidence, or overlooks or misconstrues key evidence, its determination may be said to be made in a perverse or capricious manner or without regard to the evidence.[14]

[37] The Appellants' counsel submitted that the General Division's findings—that the lump sum payment was a signing bonus and not a retroactive increase—were made in a perverse or capricious manner or without regard for the material before it.

[38] Regarding the finding, that there was no reference in the Central Terms that indicated the lump sum payment was a retroactive increase in salary or wages, I concluded earlier that this was incorrect. There was wording in the Central Terms that indicated the lump sum payment may have included a retroactive increase in the Appellants' wages. The schedule of adjustments in the Central Terms effectively included a retroactive increase in wages that went into effect before

[12] General Division decision at para 31
[13] *Ibid.* at para 30.
[14] AD12: Joint Statement of Facts and Standard of Review at para 22 and *Garvey*, *supra* note 5 at para 6.

the lump sum payment. The General Division misconstrued the Central Terms in arriving at its finding. In addition, the General Division failed to take into account that there was an increase in wages or salary as at September 1, 2015, and thereby overlooked key information.

[39] Further, the General Division concluded that because the lump sum payment was a one-time signing bonus, it could not be a retroactive increase of wages or salary. No legislative provision or case law was cited as the authority for the General Division's "either–or" analysis and conclusion.

[40] As for the finding that the lump sum payment was a signing bonus, the reasoning of the General Division has some gaps. For example, every provision of the Central Terms was tied to ratification of the Local Terms.[15] The legislation that governs school boards bargaining in Ontario expressly states, "a memorandum of settlement of central terms has no effect until it is ratified by the parties […]" and "a memorandum of settlement of local terms has no effect until it is ratified by the parties […]."[16] In addition, a vote to ratify must take place in order to ratify a memorandum.[17] Yet, the General Division considered that the lump sum payment being tied to the ratification of the Local Terms was crucial to finding that the payment was a signing bonus.

[41] The other factor emphasized by the General Division was that if a teacher resigned, retired or was terminated before the end of the 2015–2016 school year, they would not be required to repay the lump sum payment. The General Division does not explain why this factor was important. It appears to infer that since a teacher who was employed on September 8, 2015 (the date stated in the lump sum payment clause), is entitled to the payment even if they are not later in the school year (when the lump sum is payable or paid), then the payment cannot be a retroactive increase. In my view, there is a gap in the reasoning. The General Division failed to take into account that there was an increase in wages or salary as at September 1, 2015. It also failed to explain its reasoning.

[42] Moreover, to the extent that the General Division was taking issue with the lump sum being payable even though a teacher need not have worked a certain amount of time to be

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[15] Central Terms at para 4: "The terms of this Memorandum of Settlement and appendices shall be effective on the date of the ratification of the local terms."
[16] *School Board Collective Bargaining Act*, 2014 at ss 39(1)(2) and (2.1).
[17] *Labour Relations Act*, at s 44(1).

eligible for it, the Federal Court of Appeal has held that this is not an impediment to finding that earnings were payable for the performance of services.[18]

[43] The Appeal Division should show some deference to the General Division's findings of fact but has jurisdiction to intervene where the General Division bases its decision on a serious error in its findings of fact.

[44] Did the General Division base its decision on serious errors in fact-finding?

[45] I concluded earlier that the General Division was incorrect in finding that there was nothing in the Central Terms indicating that the lump sum payment (or a portion of it) was a retroactive increase in wages. My reading of the Central Terms is that there was wording that indicated the lump sum payment may have included a retroactive increase in the Appellants' wages. The General Division misconstrued the Central Terms in arriving at its finding. It also failed to consider key evidence. I also noted gaps in the General Division's reasoning when finding that the lump sum payment was a signing bonus and, therefore, could not be a retroactive increase. Taken together, the combined finding of fact—that the lump sum payment was a signing bonus and not a retroactive increase—was made in a perverse or capricious manner or without regard to the evidence. The General Division based its decision on this erroneous finding of fact. Therefore, the Appeal Division has the jurisdiction to intervene.

[46] The General Division committed a reviewable error. Before turning to the issue of appropriate remedy, I will briefly discuss Issue 2.

Issue 2: Did the General Division make an error by failing to apply binding jurisprudence correctly?

[47] The Appellants' alternative argument is that if the lump sum payments constituted earnings, in that they are not excluded because they are not a retroactive increase in wages, they should be allocated under section 36(4) of the EI Regulations and not section 36(19)(b). They rely on the *Budhai v Canada*[19] decision of the Federal Court of Appeal.

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[18] *Budhai v Canada (Attorney General)*, 2002 FCA 298.
[19] *Ibid.*

[48] Before the General Division, each of the parties made submissions on the application of *Budhai* to the present appeal. They agree that this decision is binding and applicable jurisprudence. They also agree that the Federal Court of Appeal held that, in determining whether earnings should be allocated under section 36(4) or section 36(19) of the EI Regulations, the dominant intention of the payment needs to be determined. However, they disagree on what the dominant intention of the lump sum payments was in these specific circumstances.

[49] The Appellants argue that the lump sum was to provide for increases in past compensation. The Respondent's position is that the dominant intention was to provide an incentive to ratify a new agreement.

[50] In applying *Budhai*, the General Division found that the dominant intention for the lump sum payment was "for the ratification"[20] of the new agreement. However, it had already found as a fact that the lump sum payment was a signing bonus tied to ratification of the Local Terms.

[51] Since I concluded earlier that the General Division committed a reviewable error in its findings of fact, application of *Budhai* to the facts here is necessarily affected. For this reason, I turn to the issue of remedy.

Issue 3: If the General Division committed a reviewable error, should the Appeal Division refer the matter back to the General Division for reconsideration, or can the Appeal Division render the decision that the General Division should have rendered?

[52] The parties agreed that, if the General Division committed a reviewable error, the Appeal Division should render a decision to replace the General Division decision. Both submitted, at the appeal hearing, that the appeal record is complete. I agree.

Earnings and exclusion from allocation

[53] There is no dispute that the lump sum payments were income or that they fall within a broad definition of earnings (under section 35 of the EI Regulations).

[20] *Supra*, note 11 at para 43.

[54] To determine whether the lump sum payments are excluded from allocation, I must answer the question: Were the lump sum payments derived from retroactive increases in wages or salary? If yes, they are excluded from allocation. If no, they must be allocated.

[55] I concluded earlier that the Central Terms had wording that indicated that the lump sum payment may have included a retroactive increase in the Appellants' wages. However, to find as a fact that the lump sum payment (or a portion of it) derived from "retroactive increases in wages or salary" requires further analysis.

[56] The onus is on the Appellants to prove that the lump sum payment is derived from retroactive increases in wages or salary.

[57] The Collective Agreement was for a term of three years, from September 1, 2014, to and including August 31, 2017.[21] At the time the Central Terms were signed, the provisions are looking back (from August 2015 to September 2014) and then looking at the present and into the future (to August 31, 2017). The previous collective agreement covered the period September 1, 2012, to August 31, 2014.[22] The collective agreements included a salary grid based on a teacher's experience and qualifications.[23] As a teacher moves through the grid, their salary increases.

[58] The lump sum payment provision in the Central Terms provides the following:

a) Permanent teachers employed on September 8, 2015 shall be paid a lump sum.

b) The lump sum amount is equal to 1% of wages in effect on September 1, 2015.

c) The lump sum is payable within 30 days of ratification of the Local Terms.

d) In the event a teacher resigns, retires, or is terminated before the end of the 2015–2016 school year, there will be no recovery of the lump sum payment (in other words, that teacher is not required to repay the lump sum).

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[21] AD5-87: Agreement between the X and the X representing the secondary school teachers employed by the Board, at article 2.010. [22] *Ibid.*

[23] See for example GD5-92 – Salary Grids and Allowances, columns entitled "Years of experience" and "Level".

[59] Other provisions of the Central Terms and the surrounding circumstances are also relevant:[24]

a) The Central Terms were signed on August 25, 2015, and ratified after that.

b) The Local Terms were ratified on January 4, 2016.

c) Both the Central Terms and the Local Terms needed to be ratified for the Appellants to establish a legal right to the lump sum payment.

d) The Collective Agreement provided for increases to salaries, wages, and direct compensation, and the schedule of increases took effect on September 1, 2014; September 1, 2015; September 1, 2016; and included a lump sum payment, as follows:[25]

    a. September 1, 2014 – 0%

    b. September 1, 2015 – restoration of grid movement and previous delay of movement through salary grids no longer form part of agreement

    c. Lump sum payment – within 30 days of ratification of Local Terms (ratified January 4, 2016)

    d. September 1, 2016 – 1% increase and further 0.5% increase.

[60] As at August 2015, the signing of the Central Terms, the last salary increase or movement in the salary grid was under the previous collective agreement, and, therefore, occurred in the 2013-2014 school year or earlier. There was no increase as at September 1, 2014. As of September 1, 2015, the Appellant's previous delays or stalls in salary grid movement were removed and the Appellants were restored on the salary grid to their appropriate place. In other words, there was an increase in the Appellants' wages and salary.

[61] Therefore, when the Local Terms were ratified on January 4, 2016, and the legal right to the lump sum payment was established, there was a retroactive increase in the wages and salary

[24] AD12: Joint Statement of Facts and Standard of Review, unless otherwise specified.
[25] Central Terms at para 14.

of the Appellants. Until this ratification, the Appellants continued to receive their former rate of pay, on the 2013-2014 salary grid and under the previous collective agreement. On ratification, the increased salary is applied and is effective at an earlier date. It makes sense that payment must be made retroactively to compensate for the difference under the old contract and the increased salary under the new contract.

[62] If the lump sum payment had been described in the Collective Agreement as compensation for this difference, it would clearly be a payment derived from a retroactive increase in wages or salary. However, the description of the lump sum payment does not include a clear statement of this sort.

[63] Can we conclude from the Collective Agreement as a whole and the surrounding circumstances that the lump sum payment is derived from a retroactive increase in wages or salary?

[64] The lump sum is calculated based on a salary that was retroactively increased. In my view, to "derive from" a retroactive increase requires more.

[65] The dictionary definition of "derive" is "to take, receive, or obtain especially from a specified source" or "to take or get (something) **from** (something else)" (emphasis in the original).[26] Was the lump sum payment taken or obtained from the retroactive increase in wages?

[66] Unfortunately, it is not possible to draw this conclusion, on the balance of probabilities, from the Collective Agreement and the surrounding circumstances.

[67] I am, therefore, unable to conclude that the lump sum payment is excluded from allocation under section 35(7)(d) of the EI Regulations. As a result, the lump sum payment must be taken into account for allocation purposes.

Allocation

[68] I find that the lump sum payment should be allocated under section 36(4) of the EI Regulations and not section 36(19)(b) for the reasons that follow.

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[26] *Merriam-Webster Dictionary*.

[69] The Federal Court of Appeal has held that, concerning allocation of earnings, one must look to see whether section 36(4) applies before determining whether section 36(19) applies.[27]

[70] Section 36(4) states that earnings that are payable to a claimant under a contract of employment for the performance of services are allocated to the period in which the services are performed.[28] Section 36(19) applies only when none of sections 36(1) to (18) applies.

[71] Before the General Division, each of the parties made submissions on the application of *Budhai* to the present appeal. They agree that the Federal Court of Appeal held that, in determining whether earnings should be allocated under section 36(4) or section 36(19) of the EI Regulations, the dominant intention of the payment needs to be determined. They disagree on what the dominant intention of the lump sum payments was in these specific circumstances.

[72] The Appellants argue that the lump sum was to provide for increases in past compensation. The payment would then be allocated under section 36(4) of the EI Regulations, to the period in which the services were performed. The Respondent's position is that the dominant intention of the lump sum payment was to provide an incentive to ratify a new agreement. The payment would then be allocated under section 36(19)(b) of the EI Regulations, to the week in which the transaction occurred.

[73] In applying binding jurisprudence to the specific circumstances here, the background facts, including similarities and differences, in the present case and in *Budhai* should be noted.

Present case	*Budhai*
Collective agreement included lump sum payment and calculation (1% of earned wages on September 1, 2015) – not described as "bonus" or "signing bonus", included in schedule of salary increases	Collective agreement included $1,000 described as "signing bonus"
Collective agreement needed to be ratified	Collective agreement needed to be ratified

[27] *Budhai, supra* note 18.
[28] EI Regulations s 36(4).

Lump sum payable within 30 days of ratification of Local Terms; ratification on January 4, 2016, paid within 30 days	Payable on conclusion of collective agreement; paid after ratification
Provision on lump sum included in Central Terms, signed August 25, 2015; Local Terms were signed later; provision on lump sum payment included in the collective agreement more than four months before ratification	Provision on signing bonus added to collective agreement, in a new document, one week before ratification of the collective agreement
Conditions: Employed on September 8, 2015; Central Terms signed August 25, 2015	Conditions: Employed when agreement signed; worked within a certain period
Eligible if employed in the 2015-2016 school year (on September 8, 2015), even if not employed at end of year or on maternity or parental leave	Eligible if had worked hours in that year even if were laid off, inactive or on maternity or parental leave
Dominant intention: Appellants – provide for increases in past compensation (for services performed) Respondent – incentive to ratify new agreement General Division – signing bonus to ratify new agreement	Dominant intention: Board of Referees – for performance of services Umpire – arose from a transaction (ratification of collective agreement) FCA – restored Board of Referees (BoR) decision

[74] The circumstances in the present matter are similar to those in *Budhai*, with two marked differences: (1) in *Budhai*, the agreement described the payment as a "signing bonus" and (2) the signing bonus was added to the collective agreement (by letter) one week before the ratification vote. There is also a difference in the amount of the lump sum payment: in *Budhai*, it was the same amount for each worker; here it is 1% of the individual teacher's salary.

[75] There were more factors in *Budhai* that pointed to the dominant intention of a signing bonus and incentive to ratify a new agreement – the payment was described as such in the collective agreement and it was added in the week before the ratification vote – yet the Federal Court of Appeal endorsed the finding that the payment arose from the performance of services.

[76] The specific question here is: Was the lump sum payment payable to the Appellants under a contract of employment for the performance of services? (emphasis added).

[77] As the Federal Court of Appeal has stated, this issue is a question of mixed fact and law because it involves the application of the words "payable … for the performance of services" to the facts of the case.[29]

[78] I conclude as follows. The lump sum here was payable under a contract of employment, here a collective agreement. The lump sum provision was in the Central Terms, which was the first part of the Collective Agreement. The lump sum was agreed upon before the Local Terms and more than four months before the ratification of the Collective Agreement. The contract of employment was for the performance of services (past, present and future[30]). Therefore, the dominant purpose of the lump sum payment was earnings payable under a contract for employment for the performance of services. The *Budhai* case supports this conclusion.

[79] The specific circumstances of the Appellants having been held back on salary grid movement for a year and a half or more[31] also supports their argument that the lump sum was to provide for increases in past compensation.

[80] The Respondent's position is that the lump sum was payable not for the performance of services, but to provide an incentive to ratify a new collective agreement. I cannot agree that this was the dominant purpose. Every provision of the Central Terms and Local Terms required ratification. The provincial laws governing school board collective agreements requires two parts to collective agreements and each of the parts to be ratified. The Respondent's position would result in a conclusion that section 36(4) of the EI Regulations would not apply to collective bargaining. In addition, the facts in the *Budhai* case were much stronger to be able to draw a conclusion that the dominant purpose was an incentive to ratify a new collective agreement; yet the Federal Court of Appeal restored the BoR decision, which found that a signing bonus was payable for the performance of services.

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[29] *Budhai*, *supra* note 18 at para 35.
[30] The Central Terms referred to adjustments to compensation for three school years: 2014-2015, 2015-2016 and 2016-2017.
[31] The Appellants continued to receive their former rate of pay, on the 2013-2014 salary grid and under the previous collective agreement from August 2014 (or earlier) to January 2016.

[81] The Respondent also submits that the Federal Court of Appeal's review of the decisions made by the Umpire and the BoR in *Budhai* was conducted under a different standard of review from the one now applicable to the Appeal Division's review of General Division decisions. There is no merit in this argument, because the grounds of appeal available under section 115(2) of the EI Act in effect at the time of the *Budhai* matter are the same as the grounds of appeal under section 58(1) of the DESD Act. In addition, this argument is inconsistent with the Respondent's position that *Budhai* is binding and applicable jurisprudence.

[82] The parties did not raise as a problem with the lump sum being payable under a contract different from that under which the services had been performed. In any event, it is clear that as a matter of statutory interpretation, section 36(4) is capable of applying to an agreement to pay an additional amount for services that a person had already rendered under another agreement.[32]

[83] The lump sum payments received by the Appellants are to be allocated under section 36(4) of the EI Regulations.

CONCLUSIONS

[84] The appeal is allowed.

[85] The Appeal Division renders the decision that the General Division should have rendered.

[32] *Ostonal v Canada (Unemployment Insurance Commission)* (1991), 139 NR 75 (FCA).

[86] The lump sum payment that each of the Appellants received constitutes earnings and is to be allocated under section 36(4) of the EI Regulations.

Shu-Tai Cheng
Member, Appeal Division

HEARD ON:	March 15, 2019
METHOD OF PROCEEDING:	In person
APPEARANCES:	Bernard A. Hanson, Cavalluzzo Shilton McIntyre Cornish LLP, for the Appellants Stephanie Yung-Hing, for the Respondent

Appendix: Associated files

AD-17-673	AD-17-715	AD-17-777	AD-17-823
AD-17-675	AD-17-722	AD-17-778	AD-17-824
AD-17-676	AD-17-723	AD-17-779	AD-17-825
AD-17-678	AD-17-725	AD-17-780	AD-17-826
AD-17-680	AD-17-726	AD-17-781	AD-17-827
AD-17-681	AD-17-727	AD-17-782	AD-17-828
AD-17-682	AD-17-728	AD-17-783	AD-17-829
AD-17-683	AD-17-731	AD-17-787	AD-17-830
AD-17-685	AD-17-733	AD-17-788	AD-17-831
AD-17-686	AD-17-734	AD-17-789	AD-17-834
AD-17-687	AD-17-735	AD-17-790	AD-17-836
AD-17-688	AD-17-736	AD-17-791	AD-17-838
AD-17-689	AD-17-737	AD-17-792	AD-17-840
AD-17-690	AD-17-739	AD-17-793	AD-17-841
AD-17-691	AD-17-740	AD-17-794	AD-17-845
AD-17-692	AD-17-741	AD-17-795	AD-17-846
AD-17-693	AD-17-753	AD-17-796	AD-17-847
AD-17-694	AD-17-754	AD-17-797	AD-17-848
AD-17-695	AD-17-755	AD-17-798	AD-17-849
AD-17-696	AD-17-756	AD-17-799	AD-17-869
AD-17-698	AD-17-757	AD-17-801	AD-17-870
AD-17-699	AD-17-758	AD-17-802	AD-17-871
AD-17-700	AD-17-759	AD-17-803	AD-17-872
AD-17-701	AD-17-761	AD-17-804	AD-18-46
AD-17-702	AD-17-763	AD-17-805	AD-18-47
AD-17-703	AD-17-764	AD-17-806	AD-18-48
AD-17-704	AD-17-765	AD-17-807	AD-18-49
AD-17-705	AD-17-766	AD-17-808	
AD-17-706	AD-17-767	AD-17-810	
AD-17-707	AD-17-769	AD-17-811	
AD-17-708	AD-17-770	AD-17-812	
AD-17-709	AD-17-771	AD-17-813	
AD-17-710	AD-17-772	AD-17-814	
AD-17-711	AD-17-773	AD-17-817	
AD-17-712	AD-17-774	AD-17-818	
AD-17-713	AD-17-775	AD-17-820	
AD-17-714	AD-17-776	AD-17-822	