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

[TRANSLATION]

Citation: *S. G. v Canada Employment Insurance Commission*, 2019 SST 929

Tribunal File Number: GE-19-1590

BETWEEN:

S. G.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Bernadette Syverin

HEARD ON: July 18, 2019

DATE OF DECISION: August 14, 2019

DECISION

[1] The appeal is allowed because the Appellant showed that the sum received from her former employer is compensation for moral damage. As a result, this sum is not earnings and should not be subject to an allocation.

OVERVIEW

[2] The Appellant worked as an administrative assistant for a municipality until she was dismissed. The Appellant filed a grievance for wrongful dismissal, and, according to a settlement agreement, the former employer decided to pay her certain sums, including $20,000 for moral damage. The Canada Employment Insurance Commission (Commission) considered this sum earnings and allocated it, which resulted in an overpayment. The Appellant requested a reconsideration of this decision, but the Commission upheld its decision. The Appellant is appealing the decision to the General Division of the Social Security Tribunal (Tribunal).

ISSUES

[3] I must determine whether the $20,000 is earnings and whether it must be allocated. I must therefore decide on the following issues:

a) What are the special circumstances that led to the agreement?

b) Is the $20,000 earnings? If so, was this sum allocated properly?

ANALYSIS

[4] The purpose of the Employment Insurance program is to compensate claimants who experience a loss of income resulting from unemployment. That is why the income arising out of any employment must be deducted from the benefits that would otherwise be payable. The rationale for the allocation of the earnings that a claimant received while on benefits is the avoidance of double compensation.[1]

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[1] *Canada (Attorney General) v Walford*, A-263-78.

[5] In this case, the Appellant was dismissed without notice in August 2017. She then challenged her dismissal through a grievance in which she asked for $25,000 in punitive damages because of the abusive way in which the employer terminated her employment. An agreement was reached in which the employer paid the Appellant $20,000 to [translation] "compensate [her] for the adverse effects on morale and psychological and emotional condition." The Appellant therefore argues that the $20,000 is not earnings because she was paid compensation for moral damage. The Commission is of the opposite view and claims that the $20,000 is earnings because it was paid to compensate the Appellant for the loss of her employment.

[6] The Commission claims that the Appellant did not provide any evidence of the moral damage she experienced in order to justify the $20,000 payment. In support of that position, the Commission directs my attention to the fact that the Appellant applied for regular benefits and that she stated she was available for work, but if she was ill, she should have applied for sickness benefits. This argument is not relevant because the issue is not determining the Appellant's entitlement to regular or sickness benefits, but deciding whether the $20,000 constitutes earnings.

[7] The Commission states that the Appellant must show that her moral damage could be the subject of a completely separate civil suit from the one about her dismissal. In support of that position, the Commission directs me to two Supreme Court of Canada decisions from 1989 and 1997 in which this principle was established.[2] However, as the Appellant's lawyer noted, the law has evolved since those decisions. Indeed, in a 2008 decision in the Honda matter,[3] the Supreme Court of Canada established that moral damages or mental distress may be awarded in the absence of independently actionable employer conduct if a termination is carried out in a manner that breaches the employer's duty of good faith and fair dealing. I find these principles interesting, but, in my view, they are not relevant to the issue, which is determining whether the $20,000 must be considered earnings. To answer this question, the Appellant does not have to prove that the sum paid could have been obtained as part of a stand-alone action or that the

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[2] *Vorvis v Insurance Corporation of British Columbia*, [1989] 1 SCR 1085, 1989; *Wallace v United Grain Growers Ltd.*, [1997] 3 SCR 701, 1997.
[3] *Honda Canada Inc v Keays*, 2008 SCC 39, [2008] 2 SCR 362.

former employer breached its duty of good faith. On the contrary, the case law is clear regarding the burden of the Appellant, who must only establish that the $20,000 received following her dismissal was for something other than earnings.[4]

[8] The case law teaches that a settlement payment made regarding an action for wrongful dismissal is income arising out of employment unless the claimant can demonstrate that, due to special circumstances, some part of it should be regarded as compensation for some other expense or loss.[5] In this case, the Appellant claims that the $20,000 was paid to her to offset another loss. Therefore, the special circumstances that led to this agreement must be analyzed.

a) What are the special circumstances that led to the agreement?

[9] During an emotional testimony, the Appellant explained the circumstances that led to her dismissal to me very well. I find the following passages from her testimony to be relevant to understanding the special circumstances that led to the $20,000 payment.

a) She worked for a municipality with about 1,250 inhabitants and where everyone knows each other. The municipality is governed by a municipal council made up of the mayor and six councillors.

b) The Appellant began her employment in 2011 and, in 2014, she became an administrative assistant. To continue in that position, she had to complete a training program by the end of 2016. In February 2017, the Appellant asked her boss to extend the date by which she had to finish her training, and her boss told her that she would make a request to the municipal council.

c) However, in August 2017, while the Appellant was away from the office, the mayor called the municipal council to an emergency special meeting where the council voted in favour of dismissing the Appellant. The mayor justified this dismissal by stating that the Appellant had not complied with the terms of her contract because she had not completed her training. What is more, at that same special meeting, the

[4] *Bourgeois v Canada (Attorney General)*, 2004 FCA 117.
[5] *GC v Walford*, [1979] 1 FC 760.

mayor read a letter in which he questioned the Appellant's ability to do her work and alluded to the Appellant's involvement in an incident of document falsification. The mayor read that letter in front of citizens, and a copy was added to the municipality's public record. Furthermore, the mayor's letter was explained in detail in an article in the *La Gatineau* newspaper in which the journalist wrote [translation] "the document also discusses the administrative assistant, whose position was eliminated... A resolution was adopted to terminate her contract... G. C. (the mayor) explained that it was for an inability to perform duties."[6]

d) The Appellant explained that, in winter 2016, she discovered irregularities in the invoices the mayor gave her for reimbursement of expenses. As a result, she brought those irregularities to the attention of Ministère des Affaires Municipales et de l'Occupation du Territoire [the ministry of municipal affairs and land use] and was informed that she had an obligation to inform the Sûreté du Québec [the provincial police]. In August 2017, the mayor discovered that the Sûreté du Québec was investigating him and that the Appellant had instigated it. The mayor dismissed her as a result.

e) She explained that she was humiliated because everyone in the municipality was aware of the mayor's version of events about her dismissal and she could not defend herself because she could not disclose the fact that the Sûreté du Québec was investigating. Her reputation suffered considerably because of this situation; she had difficulty finding new employment and suffered from anxiety and stress. She had financial difficulties after her employer dismissed her hastily. She found it unfair and wanted compensation for the fact that the mayor acted in bad faith and out of revenge.

[10] The Appellant's testimony is corroborated by her grievance challenging the termination of her employment, in which she indicated that the employer terminated her employment in an abusive manner because it did not comply with the collective agreement requiring a meeting with

[6] Based on GD7-7.

her to explain the reasons for her dismissal.[7] In her grievance, the Appellant therefore asked to be reinstated to her employment, for the payment of all of her pay as of the date of her dismissal, and for the payment of $25,000 as punitive damages because of her abusive termination.[8] I therefore determine that the Appellant wanted to receive damages for the way in which her former employer had terminated her employment.

[11] I was also able to weigh the testimony of the union representative who negotiated the agreement, and he stated that the parties' intention was to compensate the Appellant for the abusive manner in which her former employer terminated her employment. He testified that the Appellant's case was of particular interest to the union because the employer had terminated her employment during a special meeting and the dismissal received media attention and was purely abusive. Given that the Appellant was greatly affected by the manner in which her employer chose to terminate her employment, a claim for punitive damages of $25,000 was made, according to the jurisprudential scales in similar matters. Furthermore, he added that, to receive moral damages, the Appellant had to withdraw her claim for wages during the negotiations.

[12] The Commission maintains that the Appellant did not show special circumstances that would justify the payment of moral damages. However, I note that the Commission made its decision without speaking to the former employer. I therefore determine that the version presented by the Appellant and her union representative is not disputed, and I find that they established that the Appellant wanted to receive monetary compensation as damages for the abusive manner in which the employer terminated her employment. Finally, I find that the Appellant established "special circumstances" based on which I can determine that the $20,000 was paid for something other than earnings.

[13] Moreover, the settlement agreement explains the special circumstances that led to it very well, particularly in the following paragraphs:

> [translation]

[7] See GD3-55.
[8] See GD3-56.

"**WHEREAS**, through her grievance, Ms.... is arguing that the employer failed to comply with the procedure set out in the collective agreement for when it must impose disciplinary measures by failing, among other things, to hear her version of the facts concerning the alleged;

WHEREAS Ms.... argues that her dismissal was abusive, capricious, and without good and sufficient cause;

WHEREAS Ms.... argues that her dismissal was decided and announced during the municipal council's meeting;

WHEREAS Ms.... felt humiliated and states that her reputation was damaged because her dismissal was publicized in the local media;

WHEREAS, under article 100.12 of the *Labour Code*, the arbitrator may reinstate Ms.... to her former duties and award her moral damages for the way in which the dismissal was carried out;

(...)

3. The employer undertakes to pay Ms.... the net sum of $20,000 as moral damages to compensate for the adverse effects on the morale and the psychological and emotional condition of Ms.;

5. The parties consider that the amounts set out in paragraphs 2, 3, and 4 are not paid to Ms. ... in exchange for work completed and that they do not arise from employment. Also, these amounts should not be subject to an allocation of earnings in accordance with sections 35 and 36 of the *Employment Insurance Regulations*.[9]

[14] On reading the agreement, it is clear that the $20,000 was paid for moral damages. Now that I have determined the special circumstances leading to the payment of the $20,000 in moral

[9] Based on GD3-25 and 26.

damages, I must perform an analysis to determine whether that payment is earnings within the meaning of the Regulations.

b) Is the $20,000 earnings? If so, was this sum allocated properly?

[15] For the reasons that follow, I find that the $20,000 is not earnings.

[16] The *Employment Insurance Regulations* (Regulations) define the word "income" as "any pecuniary or non-pecuniary income that is or will be received by a claimant from an employer or any other person, including a trustee in bankruptcy."[10] Section 35(2) of the Regulations sets out that the earnings to be to be taken into account [...] are the entire income of a claimant arising out of any employment [...]." Section 35(2) of the Regulations then specifically states the amounts included in the definition of earnings, whereas section 35(7) specifically states amounts that are excluded from earnings. However, none of those exceptions applies to this situation.

[17] Sums allocated to compensate for the moral damages are not mentioned in the sums included in and excluded from the concept of earnings stated in section 35 of the Regulations. However, in *Roch*, the Court established two principles for determining what constitutes earnings.[11] First, it must be asked whether the sums in question arise from the completion of work, that is whether the notion of an exchange for completed work is present. Second, it must be seen whether the sums in questions arise from a situation where there is no exchange for completed work, but where there is a "certain connection" or a "sufficient connection" between the employee's work and the sums in question, in such a way that these sums are comparable to earnings.

[18] In accordance with the first principle established in *Roch*, *supra*, I find that the $20,000 the Appellant received was not given in return for her work. The union representative testified that the Appellant dropped her claim for wages so that she could receive moral damages. Furthermore, the Appellant received $20,000 to [translation] "compensate for the adverse effects on the morale and the psychological and emotional condition," and that that sum is not paid in

[10] Regulations, s 35(1).
[11] *Canada (Attorney General) v Roch*, 2003 FCA 356.

exchange for work completed.[12] I agree with the Commission that the Tribunal is not bound by the parties' interpretation of the Regulations. However, there is other evidence that supports the Appellant's assertion that the sum received was for moral damages and was not intended in any way to compensate for the loss of her employment. Therefore, the $20,000 is not earnings in return for work. As a result, the situation in this case is not covered by the first principle stated in *Roch, supra*.

[19] Regarding the second factor established by *Roch, supra*, in order to be earnings, there must be a sufficient connection between the income and the work. That means that the income must arise directly out of the employment relationship and not merely be a consequence of that relationship.[13] In the Appellant's case, the $20,000 does not arise from the employment relationship because, based on the union representative's testimony, that sum was determined based on the jurisprudential scales for moral damages for wrongful dismissal. I therefore deduce that the payment includes no consideration for the Appellant's years of service or her salary grade when she was dismissed. I therefore determine that there is not a sufficient connection between the Appellant's work and the amount paid because it constitutes only a consequence of the employer–employee relationship. I find therefore that the $20,000 is not covered by the second principle established in *Roch, supra*. As a result, the $20,000 paid to the Appellant as moral damages to [translation] "compensate for the adverse effects on the morale and the psychological and emotional condition" is not earnings within the meaning of section 35 of the Regulations.

[20] I note again that the test to apply in the case at issue is the one defined in *Bourgeois, supra*. The onus is on the claimant to show that all or part of the sums received as a result of their dismissal was for something other than earnings. In this case, I find that the Appellant met her onus to establish that the $20,000 paid by her former employer under the terms of the settlement agreement was to compensate for moral damages. The analysis of the circumstances that led to the agreement reveals that the parties wanted to compensate the Appellant for moral damage sustained because of the abusive manner in which her former employer chose to terminate her

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[12] See GD3-26.
[13] *Canada (Attorney General) v Lawrie Vernon* (1995), 189 NR 308 (FCA).

employment. Furthermore, the settlement agreement clearly indicates that the $20,000 was paid to compensate for moral damages; that sum was not paid in exchange for work completed, and there is not a sufficient connection between the amount paid and the Appellant's work. Therefore, the $20,000 is not earnings within the meaning of section 35 of the Regulations. As a result, this sum cannot be allocated under the Regulations.

CONCLUSION

[21] The appeal is allowed.

Bernadette Syverin
Member, General Division – Employment Insurance Section

HEARD ON:	July 18, 2019
METHOD OF PROCEEDING:	In person
APPEARANCES:	S. G., Appellant Jessie Caron (counsel), Representative for the Appellant