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

[TRANSLATION]

Citation: *J. P. v Canada Employment Insurance Commission*, 2019 SST 803

Tribunal File Number: GE-19-2628

BETWEEN:

J. P.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Josée Langlois

HEARD ON: August 7, 2019

DATE OF DECISION: August 17, 2019

Canada

DECISION

[1] The appeal is allowed. I find that $2,000 was paid to the Appellant for the relinquishment of her right to reinstatement, that the amount does not constitute earnings, and that it should not be allocated to her benefit period.

OVERVIEW

[2] The Appellant made a claim for benefits on September 24, 2018. On July 23, 2019, the Canada Employment Insurance Commission (Commission) informed the Appellant that the $2,000 received for the relinquishment of her right to reinstatement constitutes earnings and that it would be allocated to her benefit period. The Commission argues that, since the Appellant received that amount during her probationary period, the right to reinstatement did not exist. I must determine whether the $2,000 the Appellant received constitutes earnings and whether it was allocated properly to her benefit period.

ISSUES

[3] Was the $2,000 the Appellant received paid to her for relinquishing her right to reinstatement?

[4] Does this amount constitute earnings? If so, was it allocated properly to her benefit period?

ANALYSIS

Was the $2,000 the Appellant received paid to her for relinquishing her right to reinstatement?

[5] The Commission is of the view that that amount was paid to the Appellant because she relinquished her right to reinstatement, but, because the Appellant was in her probationary period, it argues that the right to reinstatement does not exist. It states that the Appellant could not request reinstatement to her position in the event of dismissal.

[6] On September 18, 2018, the Appellant filed a grievance challenging her dismissal, because of harassment, and she asked to be reinstated to her employment. She stated that she never negotiated directly with the employer, but rather through her union representative. She explained that the employer offered to settle the case and that she accepted.

[7] The Appellant argues that the right to reinstatement exists, even during her probationary period, because the employer dismissed her wrongfully. She argues that the collective agreement does not exempt the employer from acting in good faith. She argues that the employer paid her an amount in compensation for relinquishing her right to be reinstated because it knew, rightly, that she could have the right to be reinstated if she proved it. In that regard, the Appellant argues that a co-worker harassed her daily and that she was dismissed unfairly.

[8] Whether an amount was paid to the Appellant because she was harassed is important for deciding whether, in the circumstances, the right to reinstatement could exist during her probationary period. The probationary period included in the Appellant's collective agreement does not exempt the employer from acting in good faith or respecting rights and freedoms.

[9] However, the question of the wrongful dismissal alleged by the Appellant is not before me. To establish the presence of workplace harassment, I must have sufficiently detailed evidence, and facts determinative of whether the harassment occurred must be established.

[10] The Appellant explained that the work atmosphere was difficult and that, during training, she had not had enough help to do her work. She stated that the training lasted just a day and a half, and that nobody answered her. The Appellant states that her co-worker insulted her daily and predicted that she would lose her position. She argues that she was constantly criticized and belittled. She also argues that, at least one other employee had similar problems because of that co-worker's disrespectful attitude.

[11] The Appellant provided her version of the facts, but, while I understand that she was depressed and having difficulties, there is no medical report supporting the evidence. The Appellant explained that she was taking antidepressants during that time and that her doctor wanted to give her a medical certificate for a medical leave before the dismissal, but she refused. Furthermore, the employer did not provide the Commission with its version of the facts on this

matter. The evidence is therefore not sufficiently detailed to enable me to find that there was harassment; however, given the situation and the Appellant's credible explanations at the hearing, it is more likely than not that the purpose of the agreement between the parties was to resolve the circumstances surrounding the end of the Appellant's employment. Her right to reinstatement therefore existed during her probationary period.

[12] The Supreme Court of Canada found in *Isidore Garon*[1] that the obligation to act in good faith is compatible with the collective labour relationship and that an employer bound by a collective labour duty must not, in exercising its discretion, act in a discriminatory or wrongful manner or in bad faith. This duty applies even to an employee on probation.

[13] Since the Appellant lodged a complaint challenging her dismissal because she was harassed daily, she argues that she had the right to be reinstated to her employment.

[14] I am of the same view. Despite the Appellant's probationary period, this situation does not exonerate the employer from acting in good faith. The Appellant could ask to be reinstated to her employment and assert her rights. As stated, I do not have sufficient facts to determine whether there was harassment; however, the agreement reached was intended to resolve that situation, and the employer paid the Appellant an amount for the relinquishment of her right to be reinstated to her employment. In this case, I am of the view that the Appellant's right to reinstatement existed and that, if she had asserted her rights, she would have been able to secure her reinstatement if it was determined that the employer had shown a lack of good faith. In this sense, it is established that an employer cannot negotiate clauses at the outset that would prevent an employee from using the grievance process to challenge a dismissal based on grounds prohibited by the Charter or a statute of public order,[2] even during a probationary period.

[15] The employer admits that it agreed to pay the Appellant $2,000 for the relinquishment of her right to reinstatement, which she claimed to have, and it is for that reason that the amount was paid to the Appellant. Although it wrote in a letter that, in its opinion, this right does not exist, that does not change the fact that the amount was paid for that reason. The employer

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[1] *Isidore Garon ltée v Tremblay*, [2006] 1 SCR 27.
[2] *Parry Sound (District) Social Services Administration Board*, [2003] 2 RCS 157; *R v Ferguson*, [2008] 1 SCR 96.

believed that a settlement needed to be reached. It not only agreed to pay an amount accordingly, but it also told Service Canada that this amount did not constitute earnings within the meaning of section 35 of the Regulations, which again confirms its position. The agreement also shows that this amount is paid to the Appellant as a settlement for the relinquishment of her right to reinstatement.

[16] I must establish the nature of the $2,000 paid to the Appellant, and the settlement reached is the result of the parties' intention. Based on the evidence on file, it appears that the parties' intention was to settle the challenge of the Appellant's grievance about the termination of her employment, which she found wrongful and for which she requested reinstatement to her employment. Following discussions between the union and the employer, a compensatory amount of $4,000 was agreed on, including $500 for costs related to searching for employment, $1,500 as moral damages, and $2,000 for the Appellant's relinquishment of her right to reinstatement.

[17] The Appellant was on probation, and, even though the facts are not sufficiently supported to determine on a balance of probabilities whether there was harassment, based on the facts on file and the Appellant's explanations at the hearing, I am of the view that the $2,000 was agreed to for the relinquishment of the Appellant's right to reinstatement.

[18] An amount paid after a separation from employment may be considered paid for the relinquishment of the right to reinstatement if that right exists, including under a collective agreement, contract of employment, or the Act; if the appellant asked to be reinstated; and if the settlement agreement shows that the amount was paid as compensation for relinquishing the right to reinstatement.[3]

[19] I am of the view that these criteria have been satisfied. The general principle assumes that the right to reinstatement does not exist during a probationary period. However, during a probationary period and in the presence of harassment or the absence of the employer's good faith, the right to reinstatement exists under provincial law, and the Appellant can assert her

[3] *Canada (Attorney General) v Meechan*, 2003 FCA 368.

rights.[4] The Appellant asked to be reinstated to her employment, which was the subject of a negotiation with the employer, and the agreement shows that $2,000 was paid as compensation for her relinquishment of being reinstated to her employment. It is for this reason that I am of the view that, in this particular case, all of the criteria have been satisfied.

[20] As the Appellant argued, the agreement between the parties does not indicate that she did not meet the normal requirements of the task. The Appellant argues that she was dismissed wrongfully, that she was constantly criticized and belittled, and that her co-worker told her that she would lose her employment. For obvious confidentiality reasons, the Commission's file does not show all of the negotiations between the Appellant or her union representative and the employer until the conclusion of the agreement. However, a settlement was reached, and it was agreed that a total amount of $4,000 would be given to the Appellant.

[21] Given the evidence on file, as well as the testimony and arguments the Appellant presented at the hearing, I find that the $2,000 was paid to her for the relinquishment of the right to reinstatement to her employment.

Does this amount constitute earnings? If so, was it allocated properly?

[22] Income arising out of any employment, whether in respect of wages, benefits, or other remuneration, must be taken into account unless it falls within an exception.[5]

[23] The entire income of a claimant arising out of any employment is to be taken into account in calculating the amount to be deducted from benefits.[6]

[24] An amount paid for the relinquishment of the right to reinstatement to employment does not arise from employment; it is not a wage or a benefit. In the Appellant's case, it is a compensatory amount that was paid to her following negotiations with the employer, which did not want to reinstate her to her employment.[7]

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[4] Op. cit., *Isidore Garon ltée v Tremblay*.
[5] *Employment Insurance Regulations* (Regulations), s 35.
[6] Regulations, s 35(2); *McLaughlin v Canada (Attorney General)*, 2009 FCA 365 (CanLII).
[7] *Canada (Attorney General) v Cantin*, A-392-07.

[25] I find that the $2,000 was paid to the Appellant for the relinquishment of her right to reinstatement; therefore, the amount does not constitute earnings and should not be allocated to her benefit period.

CONCLUSION

[26] The appeal is allowed.

Josée Langlois
Member, General Division – Employment Insurance Section

HEARD ON:	August 7, 2019
METHOD OF PROCEEDING:	Videoconference
APPEARANCE:	J. P., Appellant Gino Provencher, Representative for the Appellant