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

Citation: *T. N. v Canada Employment Insurance Commission*, 2019 SST 957

Tribunal File Number: GE-19-2249

BETWEEN:

T. N.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Paul Dusome

HEARD ON: July 30, 2019

DATE OF DECISION: August 13, 2019

Canada

DECISION

[1] The appeal is allowed in part. The Respondent overstated earnings by including general damages for the settlement of a human rights claim. The Respondent counted a nine-week salary continuance twice when the Appellant had only been paid once for this item. The Respondent did not properly allocate that part of the vacation pay paid to the Appellant in June 2017.

OVERVIEW

[2] The employer ended the employment of the Appellant on June 7, 2017. The Appellant applied for employment insurance (EI) benefits on June 5, 2018. The Appellant and the employer entered into a settlement agreement on February 21, 2018. Under the settlement, the employer paid the Appellant a lump sum for his base salary, $17,000.00 as general damages for alleged violations of the Ontario *Human Rights Code*, and provided a salary continuance for nine weeks. The employer also paid $1,000.00 towards the Appellant's legal fees. The employer issued four separate Records of Employment (ROE), with three different dates for the end of the employment, and varying amounts paid to the Appellant. The employer categorized the amounts paid as vacation pay, severance pay, pay in lieu of notice, wage loss indemnity or salary continuance. Some of the amounts varied between the ROEs.

[3] During the course of dealing with the Appellant's application for EI benefits, the Respondent obtained a ruling on March 6, 2019, from the Canada Revenue Agency (CRA) that the Appellant was an employee engaged in insurable employment in the two periods of June 12 to August 11, 2017, and March 3 to May 5, 2018. The CRA made no ruling on the amount of insurable earnings in those periods.

[4] In response to the Appellant's request for reconsideration, the Respondent changed its two initial decisions about the earnings and allocation of the amounts paid by the employer. Earnings refers to money received from an employer that must be taken into account in calculating whether a claimant for EI benefits is entitled to receive benefits, and if so, any reduction in the amount of those benefits. Allocation refers to the time period to which the earnings must be applied. The reconsideration decision dated May 9, 2019, ruled as follows.

[5] With respect to earnings, first, the amounts received by the Appellant for salary continuance, termination pay, severance pay, and vacation pay were earnings. Secondly, the $17,000.00 damages amount was earnings because the Appellant had not proven that the amount was not compensation for the loss of employment income. Thirdly, the $1,000.00 paid by the employer to the Appellant for legal costs was deducted from the total paid by the Appellant to his lawyer for legal costs. The balance of the legal costs paid by the Appellant to his lawyer was deducted from earnings, under paragraph 36(10)(a) of the *Employment Insurance Regulations* (Regulations).

[6] With respect to the allocation of the earnings, first, based on the CRA ruling, the Appellant was employed in insurable employment from June 12 to August 11, 2017, so that the earnings from separation from employment were allocated to the weeks following August 11, 2017. Secondly, the earnings, totalling $53,852.06, were allocated to the weeks beginning on August 13, 2017, and ending on March 3, 2018. Thirdly, since the Appellant was engaged in insurable employment with the employer from March 3 to May 5, 2018, the allocation of earnings was suspended for that period. Fourthly, the allocation of earnings resumed in the week beginning on May 6, 2018, and ended on October 20, 2018.

[7] While the Respondent's two initial decisions in the fall of 2018 referred to the possibility of having to pay back any EI benefits received, the reconsideration decision was silent on that issue. Based on the two initial decisions, the Appellant was notified of an overpayment of $10,393.00 that he had to repay.

ISSUES

[8] The following issues must be decided in this appeal:

1. Were the amounts paid as vacation pay, severance pay, pay in lieu of notice, salary continuance, or wage loss indemnity, earnings for EI purposes?
2. Were the general damages earnings for EI purposes?
3. Did the Respondent properly calculate the amount of the earnings?
4. Were the earnings properly allocated?

ANALYSIS

[9] The word "earnings" is defined as "the entire income of a claimant arising out of any employment" (subsection 35(2) of the Regulations). These earnings are to be taken into account for the purpose of determining earnings to be deducted from benefits. The income must be linked to employment, either as amounts earned by labour or given for work, or there is a sufficient connection between the employment and the money received (*Canada (A.G.) v. Roch*, 2003 FCA 356). Severance pay is earnings within subsection 35(2) of the Regulations (*Canada (A.G.) v. Boucher Dancause*, 2010 FCA 270; *Zadoyan v. Canada (Attorney General)*, 2019 FC 544). A settlement payment for wrongful dismissal is "income arising out of employment", unless the claimant can establish that due to special circumstances some portion of the money should be regarded as compensation for some other expense or loss (*Canada (A.G.) v. Radigan*, A-567-99; *Bourgeois v. Canada (A.G.)*, 2004 FCA 117).

[10] The rules for applying those earnings to a time period (referred to as allocation) is set out in section 36 of the Regulations. Under subsection 36(9), the rule states that the earnings paid or payable by reason of a separation from employment are to be applied to the weeks starting with the week of termination of the employment, at the person's normal weekly earnings, until the money has been used up. This will eliminate or reduce the EI benefits for those weeks. If benefits have been paid during those weeks, the claimant will have to repay all or part of those benefits.

[11] A claimant is liable to repay the amount received as EI benefits for any period for which he is disqualified; or to which he is not entitled (*Employment Insurance Act*, (Act), section 43).

Issue 1: Were the amounts paid as vacation pay, severance pay, pay in lieu of notice, salary continuance, or wage loss indemnity, earnings for EI purposes?

[12] "Earnings" is defined as "the entire income of a claimant arising out of any employment" (Regulations, subsection 35(2)). The income must be linked to employment, either as amounts earned by labour or given for work, or there is a sufficient connection between the employment and the money received (*Canada (A.G.) v. Roch*, 2003 FCA 356).

[13] All of these amounts were earnings for EI purposes.

[14] Vacation pay does constitute earnings under subsection 35(2) of the Regulations. Vacation pay is part of the compensation package the employee receives from the employer for the work done by the employee for the employer. It is calculated as a percentage of the wages paid to the employee. There is a clear and direct connection between the employment and the money received. The vacation pay is income arising out of the employment, within the meaning of subsection 35(2), and the *Roch* decision. This conclusion is reinforced by subsection 36(8) of the Regulations, which deals specifically with the allocation of vacation pay in cases not involving lay off or termination of employment. Since the allocation rules only apply to earnings, vacation pay is therefore earnings.

[15] With respect to severance pay, pay in lieu of notice and salary continuance, all have a sufficient connection with the employment. These items are compensation to the Appellant for lost income arising from the termination of his employment without proper notice, thus are directly connected to his employment income.

[16] With respect to wage loss insurance, this money is earnings. There is a specific exemption for wage loss insurance plans that are not a group plan (Regulations, paragraph 35(7)(b) and subsection (8)). The $627.36 for wage loss insurance is identified in the ROE dated June 12, 2018, as being for a group plan. There is no evidence to support that this plan was not a group plan. The Appellant therefore cannot meet the onus of showing that this money received from his employer is not earnings.

[17] All of the above amounts the Appellant received in the termination of his employment were earnings within section 35 of the Regulations.

Issue 2: Were the general damages earnings for EI purposes?

[18] A settlement payment for wrongful dismissal is “income arising out of employment”, and thus earnings, unless the claimant can establish that due to special circumstances some portion of the money should be regarded as compensation for some other expense or loss (Regulations, subsection 35(2); *Roch; Radigan; Bourgeois* decisions, above)

[19] The general damages of $17,000.00 were not earnings.

[20] The Minutes of Settlement (Minutes) between the employer and the Appellant were signed on February 21, 2018. The Minutes state that the Appellant's employment ceased effective June 9, 2017, and that he and the employer agreed to the terms, "in full and final settlement of any and all outstanding matters related in any way to [the Appellant's] employment, the cessation of his employment, and all matters arising therefrom". The Minutes provided for payments to the Appellant, as detailed below. The Minutes were conditional on the Appellant signing the Minutes and a full and final release of all claims against the employer. The Minutes stated that the employer made no admission of any liability whatsoever, and that any such admission was specifically denied. The release also gave up any further claims by the Appellant under the *Human Rights Code.*

[21] The Respondent's Representations on the issue of general damages are brief. It said that there was no evidence furnished by the Appellant "that the sole reason for this compensation was a result of his injury, human rights violation, and or personal damages, and not related to the loss of employment." The Respondent stated that it had no alternative but to apply the entire sum against the Appellant's claim. The reconsideration decision dated May 9, 2019, provided more detailed reasons in support of the decision that the general damages were earnings. The Respondent stated a two-part test to overcome the presumption that money paid by an employer was compensation for loss of wages or other employment benefits. First, the employer agreed to compensate the Appellant for injury, damage or expense. Secondly, it must be shown that the injury, damage or expense claimed actually occurred, and that the payment and amount were reasonable. The reconsideration decision went on to require a very high level of evidence to support that the general damages were not earnings. The Respondent stated that the settlement agreement giving general damages to the Appellant failed to deal with the following requirements. First, if did not define or specify what the allegations were respecting violation of the Ontario *Human Rights Code*. Secondly, it did not affirm or deny whether the allegations were substantiated. Thirdly, it did not admit liability in connection with the allegations. Fourthly, it did not award specific amounts for each category of injury, damage or expense.

[22] The Respondent's submissions in support of its position fail, for three reasons. The first reason is that the Respondent misstated the proper test to apply in stating that it must be shown that the injury, damage or expense actually occurred. That is not consistent with the ruling in the

Radigan decision that requiring proof that expenses were actually incurred may place too high a standard of proof on claimants. Similarly, requiring proof that a human rights violation actually occurred places too high a standard on claimants. Without an admission of liability by the employer, the Appellant is placed in the position of trying to prove to the Respondent that there was discrimination contrary to the Ontario *Human Rights Code*. The Respondent is a specialized body with expertise in employment insurance matters. It is wholly unequipped to make decisions respecting human rights violations. It should not undertake to make such decisions, nor require claimants to prove that discrimination occurred.

[23] The second reason is that the Respondent imposed too great a burden of proof on the Appellant to prove that the amount received did not constitute earnings. This it did in two ways. First, by requiring the Appellant to show "that the sole reason for this compensation was a result of his injury, human rights violation, and or personal damages, and not related to the loss of employment". Many of the claims for injury or human rights violations or personal damages arise in the context of the loss of employment, as in this case. The legal basis for such claims is independent of claims arising from the loss of employment, such as wrongful dismissal claims for pay in lieu of notice, or compensation for lost benefits. The fact that claims for injury, human rights violations or personal damages can be made in the context of a wrongful dismissal matter does not mean that those claims are related to the loss of employment. The "sole reason…not related to the loss of employment" is too exacting a standard. It runs the risk, as happened in this case, of confusing the settlement of a distinct human rights complaint in the context of wrongful dismissal negotiations with the loss of employment claim. Secondly, the Respondent imposed too great a burden of proof by requiring evidence of the four factors it identified in its reconsideration decision: define or specify what the allegations were respecting violation of the *Ontario Human Rights Code*; affirm or deny whether the allegations were substantiated; admit liability in connection with the allegations; and award specific amounts for each category of injury, damage or expense. If a claimant took a human rights claim to trial, and obtained a judgment in his favour, he might be able to satisfy all four factors (though if the matter went through a trial to judgment, it is doubtful that the employer would have admitted liability). The vast majority of civil law suits are settled without a trial. Settlement documents specifically state that there is no admission of liability by the employer; nor do they affirm or deny that allegations have been substantiated. So the claimant is placed in the impossible

position of never being able to prove an admission of liability by an employer, or never being able to provide substantiation of his allegations without going through a trial and getting a court decision. Similar difficulties accompany the other two factors. A claimant is put in the position of not being able to satisfy all four factors either by settlement or by trial, so cannot prove that the damages are not earnings. That is too great a burden of proof.

[24] The third way in which the Respondent's submissions in support of its position fail is on the evidence. The evidence supports the $17,000.00 damages being within the exception that "due to special circumstances some portion of the money should be regarded as compensation for some other expense or loss". The Minutes identify a global amount to be paid to the Appellant, by calculating that amount by reference to 60 weeks' base salary, less money received to date equal to 25 weeks' pay. The Minutes then apportion that amount into three categories: a lump sum of $10,456 for 10 weeks' base salary, less statutory deductions and remittances; "a lump sum payment in the amount of $17,000.00, structured as general damages in respect of Mr. N.'s allegations of violation of the Ontario *Human Rights Code* (no statutory deductions or remittances)"; and a salary continuance for a period of nine weeks, subject to statutory deductions and remittances. Only the lump sum for 10 weeks' base salary, and the salary continuance, are subject to lawful deductions. That supports an inference that the general damages, not being subject to lawful deductions, are not compensation for income or any other taxable amount. That inference is consistent with the Appellant's testimony that the $17,000.00 general damages were for the human rights violations he experienced at work following a workplace accident and WSIB claim. The employer was getting rid of an injured worker, discriminating against him on the basis of disability. The email exchange between the lawyers for the Appellant and the employer shows that they were clearly negotiating a settlement of a human rights claim. That is further supported by the terms of the Release, in which the Appellant gave up all claims against the employer, including all forms of damages, and all human rights claims arising from his employment or termination of that employment. The surrender of those claims was compensated by the $17,000.00 general damages paid to the Appellant. These three items establish that the $17,000.00 was, due to special circumstances, compensation for some other loss, namely violation of human rights, and was not therefore earnings within section 35 of the Regulations.

Issue 3: Did the Respondent properly calculate the amount of the earnings?

[25] Earnings are those amounts properly calculated under section 35 of the Regulations.

[26] The Respondent has correctly calculated the termination pay, severance pay and vacation pay, but has omitted the wage loss insurance payment, has improperly included the $17,000.00 amount of damages as earnings, and has double-counted the amount of salary continuance in its calculations.

[27] On the evidence from the ROEs, the termination pay was $8,364.80; the severance pay was $17,879.76; the vacation pay was $2,842.66 plus $836.48; and the wage loss insurance was $627.36. From the Minutes, there was further severance pay of $10,456.00. These amounts total $41,007.06. From that total the Appellant's net legal fees of $3,527.64 must be deducted. The total earnings for termination pay, severance pay, vacation pay and wage loss insurance are $37,479.42.

[28] With respect to the salary continuance that the Appellant received under the Minutes, this was for one nine-week period, and was for his regular base salary. The Appellant did not perform any work for the employer after the termination of his employment on June 9, 2017. Nor did he receive amounts from the employer in addition to the termination pay, severance pay, vacation pay, wage loss insurance and salary continuance that are outlined in this decision. The Respondent has clearly stated in its Representations that the Appellant received two periods of salary continuance, June 12 to August 11, 2017, and March 3 to May 5, 2018. The evidence does not support that statement. Both of those periods are nine weeks in duration. The Appellant received only one nine-week salary continuance. On the evidence, that money was actually paid in the period March 3 to May 5, 2018, following the signing of the Minutes.

[29] The salary continuance money received by the Appellant needs to be treated separately from the separation money set out in the previous paragraph. That is because the salary continuance has the effect of preventing the entitlement to receive EI benefits during the period to which it is allocated, as outlined below. The other separation money has the effect of delaying the start of receipt of EI benefits once entitlement to benefits begins.

[30] In order to qualify for EI benefits, a claimant must have had an interruption of earnings from employment, and have sufficient hours of insurable employment (Act, subsection 7(2)). In this case, the Appellant has sufficient hours of insurable employment to qualify for benefits. A claimant is entitled to EI benefits for each week of unemployment during his period of entitlement (Act, section 9). A week of unemployment is a week during which a claimant does not work a full working week (Act, subsection 11(1)). A week during which a claimant's contract of service continues, and during which he is paid his usual compensation for a full working week, even if he does no work, is not a week of unemployment (Act, subsection 11(2)). As a result, the nine weeks to which the salary continuance is allocated are not weeks of unemployment, and the Appellant is not entitled to EI benefits for those nine weeks.

[31] Subsection 11(2) of the Act also means by implication that if a claimant is under a contract of service, but does not receive a full week's pay, he does have a week of unemployment. This is the usual situation in cases of temporary lay-off: the contract of service continues, but there is an interruption of earnings, and the claimant is entitled to benefits if he otherwise qualifies for them. None of the exceptions in sections 29 to 33 of the Regulations applies to change the rule in subsection 11(2) in this case. The fact that a claimant is in a contract of service, that is, in insurable employment, does not by itself disentitle him to receive EI benefits. The Appellant had an interruption of earnings for one of the two nine-week periods of insurable employment found by the CRA, and is therefore entitled to EI benefits for that period. This conclusion will impact the Respondent's allocation decision, discussed below.

[32] The CRA has ruled that the Appellant was an employee and was engaged in insurable employment during two periods following the termination of employment: June 12 to August 11, 2017; and March 3, 2018, to May 5, 2018. The CRA made no ruling on the amount of any insurable earnings during those periods. Under sections 90 and 90.1 of the *Employment Insurance Act* (Act), only the CRA can make a ruling on these issues. The Tribunal has no authority to override or to ignore the CRA rulings on these issues. Section 91 of the Act provides for an appeal of a CRA ruling by any person concerned. The Appellant has appealed under this section. The appeal process is still underway. For the purposes of the appeal to the Tribunal from the Respondent's decision, I must accept the CRA ruling as it currently stands. However, in deciding this appeal I must make findings about earnings under section 35 of the

Regulations. Such findings do not involve my making decisions about the amount of insurable earnings. Such findings are therefore not a violation of the exclusive jurisdiction of the CRA on the issue of insurable earnings.

[33] Section 88 of the Regulations, prohibiting payment of EI benefits during the CRA decision and appeal process does not apply to this case, as the Appellant had sufficient hours of insurable employment to qualify to receive benefits without including the hours in the two periods following termination of employment (subsection 88(2)).

Issue 4: Were the earnings properly allocated?

[34] The rules for allocating earnings are set out in section 36 of the Regulations.

[35] The reduced earnings found previously will be allocated to a reduced period of time. That reduced period is based on two matters. First, the second period of "salary continuance", March 3 to May 5, 2018, was in fact a period of interruption of earnings during which the Appellant was entitled to EI benefits. Secondly, the reduced amount of earnings will produce a shorter allocation period.

[36] The salary continuance applies to the weeks of June 12 to August 11, 2017, the earlier nine weeks of insurable employment established by the CRA decision. It is clear that the salary continuance is money received as a result of separation from employment, as it is part of the compensation for lost employment income under the Minutes. This money must then be allocated to the weeks beginning with the separation from employment, regardless of when it was actually paid (Regulations, subsection 36(9)). The effect of this is to delay the start of entitlement to receive EI benefits to the week beginning August 13, 2017, because the Appellant did not have an interruption of earnings from employment prior to that date.

[37] Almost all of the earnings of $37,479.42 for termination pay, severance pay, vacation pay and wage loss insurance are to be allocated beginning the week of August 13, 2017, under subsection 36(9) of the Regulations. That subsection requires the allocation to begin on the date of the separation from employment. In this case, in light of the CRA ruling on insurable employment from June 12 to August 11, 2017, and the allocation of the salary continuance

during that period, the separation from employment for allocation of the earnings other than salary continuance occurred on August 11, 2017.

[38] One part of the vacation pay must be removed from the earnings for purposes of allocation in the period following the salary continuance from June 12 to August 11, 2017. The Appellant testified that the sum of $2,842.66 was paid by the employer twice a year, in June and in December, and was therefore not paid due to separation from employment. This testimony is supported by two of the employer's earnings statements. The statement for the period ending on June 24, 2017, shows vacation pay in the amount of $2,842.66. That same figure is the year-to-date amount for vacation pay. That statement shows that for the first half of 2017 the Appellant only received vacation pay once in June 2017. The statement for the period ending on July 1, 2017, shows pay in lieu of $8,364.80, and vacation pay of $836.48. This clearly separates vacation pay being paid on the basis of pay in lieu due to a separation from employment, from the vacation pay appearing on its own in the statement for the period ending on June 24, 2017. As a result, the $2,842.66 was paid not by reason of separation from employment, but for some other reason. Subsection 36(8) of the Regulations is the relevant rule applicable to this amount. Under paragraph 36(8)(b), this amount must be applied to the weeks beginning with the first week for which it is payable, at the rate of the claimant's normal weekly earnings. As the Appellant's normal weekly earnings were $1,045.60, the allocation of the $2,842.66 ends after three weeks beginning June 29, 2017, the date that amount was payable. That vacation pay will be added to the weekly amount of the salary continuance. That ends the allocation of that part of the vacation pay well before the allocation of the remaining earnings begins at the end of the salary continuance period on August 11, 2017.

[39] The result of this earlier allocation of the $2,842.66 vacation pay is that this amount must be deducted from the earnings to be allocated following the end of the salary continuance. The reduced amount to be allocated is $34,636.76. Allocated at the normal weekly earnings of $1,045.60, the delay in receiving EI benefits is 33.1 weeks beginning on August 13, 2017. The allocation applies to the weeks from August 13, 2017, to March 31, 2018, with $131.96 remaining to be applied to the week beginning April 1, 2018. EI benefits would be payable from April 1, 2018, with $131.96 being deducted from benefits for that week.

[40] The wage loss insurance paid by the employer was for the period October 16 to November 4, 2017. Under paragraph 36(12)(b) of the Regulations, this payment is to be allocated to those weeks. This will not alter the allocation period, as this payment will be added to the normal weekly earnings for those weeks, and will not extend the allocation period.

[41] If the Appellant's appeal against the CRA decision on March 6, 2019, results in a change to that decision, that change may have an impact on the Appellant's entitlement to EI benefits in this case. Any impact will have to be assessed by the Respondent, resulting in a new decision from the Commission. The Appellant will have the right to request a reconsideration of that new decision, and to further appeal if he wishes.

[42] While the overpayment is not a part of this appeal, this decision does reduce the amount of earnings, and reduces the allocation period. As a result, the overpayment previously calculated by the Respondent will need to be recalculated, and notice sent to the Appellant.

CONCLUSION

[43] The appeal is allowed in part.

Paul Dusome

Member, General Division - Employment Insurance Section

HEARD ON:	July 30, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	T. N., Appellant