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

Citation: *L. H. et al. v Canada Employment Insurance Commission*, 2019 SST 1628

Tribunal File Number: GE-18-398

BETWEEN:

L. H. *et al*

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Gerry McCarthy

HEARD ON: November 14, 2018

DATE OF DECISION: September 16, 2019

Canada

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] The Elementary Teachers Federation of Ontario (ETFO) is the bargaining agent for all public elementary teachers in Ontario. The ETFO negotiates collective agreements with the Crown and the Ontario Public School Boards' Association (OPSBA).

[3] The last complete collective agreement covered the period from September 1, 2014, to August 31, 2017. In 2017, the ETFO negotiated an extension to those agreements (the "Extension Agreement"). The Extension Agreement provided for a re-imbursement of professional expenses to all teachers who were employed or on an approved leave, paid sick leave, or statutory leave as of September 1, 2017. Specifically, the re-imbursement was a lump-sum payment in the amount of 0.5 percent of wages earned in the 2016-to-2017 school year.

[4] The Appellants were off work and receiving Employment Insurance (EI) maternity or parental benefits on September 1, 2017. During the fall of 2017, while in receipt of El benefits, the Appellants received the lump-sum payment from their school board. The Respondent determined that the lump-sum payment received by the Appellants were earnings to be allocated to the week of September 1, 2017. The allocation created overpayments for the Appellants. The Appellants requested a reconsideration of the decision and the Respondent maintained their decision. The Appellants then filed their appeals to the Social Security Tribunal (Tribunal).

PRELIMINARY MATTERS

Initial decision to join the appeals

[5] Section 13 of the *Social Security Tribunal Regulations* provides for the joining of appeals where there is a common question of law or fact that arises in the appeals and no injustice was likely to be caused to any party to the appeals. I find there was a common question of law and fact in the individual appeals from the Appellants and no injustice would be caused to any party to the appeals in joining the appeals.

[6] The parties were given the opportunity to provide written submissions on how they wished for the appeal to proceed. On July 24, 2018, the Appellants advised that they wished to proceed by way of a representative appeal, using the lead file of L. H.. They argued that the issue under appeal—the interpretation of the 0.5 percent lump-sum payment—was common to all Appellants. They also advised that, in addition to the documentary evidence from L. H.'s appeal file, they intended to call L. H.as a witness to give evidence about the nature and purpose of professional expenses incurred by teachers, including the amounts, timing and frequency, and reimbursement. The Appellants' counsel indicated that they wished to present this evidence to demonstrate the expenses that public elementary school teachers incur during their employment.

[7] The Respondent replied on July 27, 2018, stating that the parties agreed to proceed with a representative appeal. L. H.'s file was to be the representative appeal of a joined group of appeals. Each Appellant in the group was a party to the appeal, but only the evidence and submissions of the representative appeal file were before the Tribunal. The Respondent specified that it did not object to L. H. providing oral testimony on the following:

> …interpretation of the contractual language at issue; the nature and purpose of professional expenses incurred by elementary school teachers; the timing and frequency of those expenses *for all the ETFO teachers in general*; the reimbursement of such expenses *for all ETFO teachers in general*; and the factual background of the expenses incurred by public elementary school teacher in the course of their employment. (Italics in original)

[8] During a pre-hearing conference with the Respondent and the Appellants' counsel on August 15, 2018, the Tribunal decided, with the parties' agreement, that the appeals would be joined and heard as a representative appeal. The parties confirmed that L. H. would be the Representative Appellant and that at the hearing oral submissions and L. H.'s testimony would be provided. The parties also agreed that one decision, for the Representative Appellant's appeal, would be issued by the Tribunal and that it would apply to all the Appellants in the group.[1]

Respondent's request to decide appeals differently

[1] Parties confirmed during the pre-hearing conference that there were 43 Appellants in the group, including the Representative Appellant.

[9] An in-person hearing took place on November 14, 2018, and proceeded in the usual course, until the Respondent made its closing submissions. Having heard the Representative Appellant's testimony and based on the receipts that she provided at the hearing, the Respondent argued that the Representative Appellant's appeal should be granted, but this decision could not be applied to the other 42 Appellants. The Respondent submitted that the Representative Appellant's evidence was not evidence of ETFO teachers' expenses generally, but only supported that she herself incurred these expenses. The Respondent explained that additional evidence was required from the other Appellants for their appeals to be allowed. In response, the Appellants' counsel maintained that the Representative Appellant's evidence was substantially similar to the other 42 Appellants and the appeal should proceed on a representative basis. The hearing was then adjourned and I asked the parties to submit additional written submissions on how to proceed.

[10] The Appellants' counsel argued that the Representative Appellant's evidence was not subjective or specific to her, but was evidence that supported factual conclusions of general and equal application to all the teachers' appeals. The Appellants' counsel submitted that the evidence provided by L. H. was about her actual expenses, but they asked that the Tribunal consider her evidence as illustrative and general in nature, consistent with the decisions that had been made about how the representative appeal was to be heard.

[11] The Respondent argued that the Tribunal should find that the lump-sum payment was earnings unless the Appellants were able to provide evidence that expenses have effectively been made. The Respondent submitted that while the evidence and oral testimony established that it was common practice that teachers buy materials for their classrooms, this evidence only proved that L. H. effectively incurred expenses. The Respondent argued that L. H.'s receipts were not duplicative as they were specific to L. H. and were not representative of all the ETFO teachers in general. The Respondent further submitted that that specific evidence of incurred expenses by the other teachers was necessary for the remainder of the appeals in the group to be allowed. Accordingly, the Respondent argued that the Representative Appellant's appeal be allowed, but that the remainder be dismissed. The Respondent indicated that it would not object to an adjournment to allow additional evidence to be provided by the remaining Appellants in the group to show that they did in fact incur those expenses.

[12] As cited above, both parties agreed to a representative appeal where a single representative file would be chosen from a joined group of Appellants and where each Appellant was considered a party to the appeal. The parties also agreed that one decision would be issued by the Tribunal which would then apply to all the Appellants. At no time leading up to the hearing, when these procedural matters were discussed and decided, did either party object to the agreed manner of proceeding.

[13] I have considered all the oral and written submissions from the parties on how to proceed with deciding the appeal. I find that both parties agreed to join the appeals, and that the Representative Appellant's appeal would be heard, a decision rendered in relation to that appeal, and that decision would apply to all 43 Appellants. Specifically, the Respondent did not object to oral testimony from the Representative Appellant that would assist the Tribunal to better appreciate the factual background of the expenses incurred by public elementary school teachers in the course of their development. Also, the Respondent did not object to oral testimony from the Representative Appellant on the nature and purpose of professional expenses incurred by elementary school teachers.

[14] I appreciate that the Respondent was open to allowing additional evidence to be filed to support that each Appellant in the group effectively incurred expenses similar to the Representative Appellant. However, arguing at the final stage of the hearing that each individual Appellant must provide specific evidence of her or her expenses was effectively arguing that the appeal may no longer be decided as a Representative Appeal. As noted above, it was decided—and agreed—that L. H. would be the Representative Appellant, and that at the hearing only L. H.'s appeal would be heard. One decision, for the Representative Appellant's appeal, would be issued by the Tribunal and that it would apply to all the Appellants in the group.

[15] In short, the Respondent's arguments are not sufficient to convince me that the appeals should be decided differently from what had been agreed to and decided before the hearing began. The Appellants' counsel's arguments are based on the oral evidence that was provided at the hearing, which the Respondent acknowledged at the hearing was both clear and eloquent. I find that the Appellant's evidence may be considered as evidence of expenses of ETFO teachers in general, and that each individual Appellant in the group is not required to provide evidence of

actual expenses incurred. The Representative Appellant's evidence will be considered and weighed below, in making the necessary findings of fact to decide the issues under appeal. This decision will apply to all Appellants in the group.

Forms of hearing

[16] The hearing on November 14, 2018, took place in-person. As discussed above, that hearing was adjourned in light of the unexpected submission during the Respondent's closing arguments, to allow the parties to provide written submissions. The hearing was scheduled to re-convene on March 7, 2019. However, both parties asked for an administrative adjournment due to scheduling difficulties. Since April 25, 2019, was the first date both parties would be available, I decided to change the form of hearing to a "Question and Answer."[2] While I had no further questions, the parties were allowed to file any final written submissions, with a deadline of March 19, 2019. While the Appellant's counsel responded to clarify the expectations resulting from the change in the form of hearing, neither party indicated any objection to the change, nor did they provide any final submissions.

ISSUES

[17] The Tribunal must decide the following issues:

> Was the lump-sum payment the Appellants received from the employer earnings? If so, was it properly allocated?

ANALYSIS

[18] The *Employment Insurance Regulations* (EI Regulations) define 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 [subsection 35(1)]. "Employment" is also defined in that subsection, as including any employment, under any express or implied contract of service.

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[2] This decision was made in accordance with paragraph 3(1)(a) of the *Social Security Tribunal Regulations*, which states that the Tribunal "must conduct proceedings as informally and quickly as the circumstances and the considerations of fairness and natural justice permit."

Earnings are the entire income of a claimant arising out of any employment [subsection 35(2) of the EI Regulations].

[19] Sums received by a claimant from an employer are presumed to be earnings and must be allocated unless the amount falls within an exception in subsection 35(7) of the EI Regulations or the sums do not arise from employment.

Was the lump-sum payment the Appellants received from the employer earnings?

[20] The provision of the Extension Agreement in dispute states: "In recognition of potential expenses for professional development, supplies or equipment or for other professional expenses, all employees covered by this Agreement would be paid a lump sum of 0.5 percent of wages earned in the 2016-2017 school year."

[21] The Appellants' counsel argues that the lump sum payment is not earnings; rather, it is re-imbursement for expenses incurred by ETFO teachers. During the hearing, the Representative Appellant provided oral testimony about the out-of-pocket expenses she incurred while teaching. The Appellants' counsel submitted that the Representative Appellant's expenses were common to the other 42 Appellants. The Appellants' counsel further submitted that the lump-sum payment was not earnings, because the payment was not a signing bonus or payment for work performed.

[22] The Respondent's written submissions before the hearing were that the lump-sum payment was earnings, because the payment resulted from an Extension Agreement between the Representative Appellant and her employer which benefited her a result of the employment relationship. After hearing the Representative Appellant's testimony and considering the documentary evidence that she provided (including receipts of the expenses she incurred and photographs of her classroom) the Respondent agreed that the Representative Appellant had proven that, in her appeal alone, the amount was not earnings. The Respondent accepted her evidence as evidence proving that she did in fact incur the type of expenses that the lump-sum was intended to reimburse; they submitted that, based on her oral testimony and evidence, the lump-sum payment was not earnings for her.

[23] However, the Respondent did not accept the Representative Appellant's evidence as proof that teachers generally incur these expenses and that the amount was re-imbursement for expenses for all Appellants in the group. In its written submissions of January 9, 2019, the Respondent argued that the Tribunal should find that the lump-sum payment should be considered earnings unless the individual Appellants in the group were able to provide evidence that expenses have effectively been made by each of them. They submitted that, based on the Representative Appellant's oral testimony and evidence, the lump-sum payment could not be considered earnings for her.

[24] I find the Representative Appellant's evidence on the expenses she incurred is also evidence in support of what the other 42 Appellants incurred generally as teachers, because there was no reason to think the oral evidence of L. H. which concerned the nature of expenses incurred by teachers would differ in any material respect to the oral evidence that could be provided by the 42 other Appellants if each were called to provide evidence. Furthermore, I am persuaded by Appellants' counsel's argument that it was necessary for the Tribunal to have background information on teachers' professional expenses to appreciate that the Extension Agreement provided for the re-imbursement of professional expenses that were regular, legitimate, expected, and universal.

[25] I find the lump-sum payment the Appellants received from the employer were not earnings for the following reasons. First: The lump-sum payment received by the Appellants was not for work performed or compensation for services rendered. Instead, the Appellants were paid in advance a fixed amount for job-related expenses incurred or to be incurred during the life of the Extension Agreement. On this matter, I rely on the Federal Court of Appeal (*Vernon et al v. Attorney General*, A-597-94). In that decision, Justice Linden explained that to be considered as "earnings" the amount received must evince the character of consideration given in return for work done by the recipient. In the present case, the lump-sum payment was provided as a re-imbursement for expenses that ETFO teachers incurred or would incur in the classroom and was not provided for work performed.

[26] Second: The Representative Appellant (L. H.) provided credible oral testimony about out-of-pocket expenses she incurred in the classroom such as books, activity pads, paint, stationary, markers, journals, chalk, and posters. The Respondent agreed that L. H. was a credible witness,

noting it as one of the reasons they argued her particular appeal should be allowed. L. H. supported her oral testimony with detailed receipts for the period 2016-to-2017 and for 2018-to-2019. L. H. also identified examples of supplies she had purchased in specific photographs of her classroom (Exhibit GAGD9-3 to GAGD-21).

[27] The Respondent submitted that L. H.'s evidence demonstrated that the lump-sum payment she received could not be considered earnings, because she had proven that she had in fact incurred the expenses that the amount was meant to reimburse. However, the Respondent argued that while the evidence and oral testimony from L. H. established that it was common practice that teachers buy materials for their classrooms, the evidence only proved L. H. effectively incurred expenses. In the Respondent's view, it was not sufficient to show that it was common practice for teachers to buy materials for their classrooms; the Appellants must each show that the expenses were in fact incurred. I do not accept the Respondent's argument. I find the evidence presented by the Representative Appellant on the expenses she incurred in the classroom were not just specific to her as a teacher, but represented generally what the other 42 Appellants incurred as teachers because (as cited above) there was no reason to think that the oral evidence of L. H. which concerned the nature of expenses incurred by teachers would differ in any material respect to the oral evidence that could be provided by the 42 other Appellants if each was called to provide evidence.

[28] Third: The Appellants did not gain anything from the lump-sum payment they received. Specifically, the Appellants were paid in advance for out-of-pocket expenses they incurred or would be incurring in the classroom while working as teachers. While not binding, I note that, on this matter, the *Digest of Benefit Entitlement Principles* (5.3.3.1) provides some guidance by explaining that: "Whether any compensation paid by an employer is income depends on whether it is considered to be a gain or a benefit. If the expense or consideration is one that was required of the employee to perform the job, receiving compensation for that expense or consideration cannot be said to be a gain or a benefit as the employee did not profit."

[29] I recognize the Respondent argued in their written submissions that the lump-sum amount was calculated based on the Appellants 2016-to-2017 wages as a one-time award (bonus) and not to cover specific expenses. However, I find there was nothing in the Extension Agreement to

suggest the lump-sum payment was a signing bonus or a one-time award. Instead, the Appellants were paid in advance for job-related expenses incurred or to be incurred during the life of the Extension Agreement. In short, the Appellants did not gain from the lump-sum payment and the monies provided were not in consideration for work performed or to be performed.

Summary

[30] I find the lump-sum payment received by the Appellants were not earnings. As only "earnings" are allocated, it is not necessary to consider the issue of allocation. The decision applies to the Representative Appellant and to the other 42 Appellants listed by file number in the Annex below.

CONCLUSION

[31] The appeal is allowed.

Gerry McCarthy
Member, General Division - Employment Insurance Section

HEARD ON:	November 14, 2018.
METHOD OF PROCEEDING:	In-person
APPEARANCES:	L. H., Representative Appellant Howard Goldblatt and Christine Davis (from "Goldblatt Partners"), Representatives for the Appellants Canada Employment Insurance Commission, Respondent Sylvie Doire, Representative for the Respondent

ANNEX

This decision (GE-18-398) applies to the following 42 files:

GE-18-539 GE-18-449
GE-18-243
GE-18-486
GE-18-214
GE-18-1299
GE-18-535
GE-18-187
GE-18-470
GE-18-450
GE-18-866
GE-18-1585
GE-18-1662
GE-18-475
GE-18-406
GE-18-434
GE-18-436
GE-18-344
GE-18-684
GE-18-1773
GE-18-1186
GE-18-256
GE-18-332
GE-18-809
GE-18-476
GE-18-371
GE-18-442
GE-18-477
GE-18-242
GE-18-334
GE-18-1428
GE-18-263
GE-18-322
GE-18-869
GE-18-471
GE-18-524
GE-18-1456
GE-18-772
GE-18-228
GE-18-776
GE-18-536
GE-18-365