



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

[TRANSLATION]

Citation: *D. A. v Canada Employment Insurance Commission*, 2019 SST 1307

Tribunal File Number: GE-19-2996

BETWEEN:

**D. A.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**General Division – Employment Insurance Section**

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DECISION BY: Catherine Frenette

DATE OF DECISION: October 7, 2019

## **DECISION**

[1] The appeal is dismissed.

## **OVERVIEW**

[2] The Appellant was dismissed on November 1, 2017. The Appellant contested the dismissal through a grievance and asked to be reinstated to his position. On December 16, 2017, the Appellant filed an initial claim for regular benefits.

[3] On May 11, 2018, an agreement was reached, and the employer agreed to pay \$9,500.

[4] The Canada Employment Insurance Commission<sup>1</sup> did not consider the \$9,500 to be solely for the relinquishment of the right to reinstatement but also for notice. The Commission calculated that the Appellant was entitled to \$4,299 as notice of termination and that \$5,201 had been paid for the relinquishment of the right to reinstatement. As a result, the Commission found that the \$4,299 was earnings and allocated that amount to seven weeks after October 29, 2017.

[5] The Appellant is of the view that the entire \$9,500 was paid in exchange for his right to reinstatement.

[6] The Tribunal must therefore determine whether the \$9,500 paid by the employer constitutes earnings within the meaning of section 35(2) of the *Employment Insurance Regulations*.<sup>2</sup> If so, the Tribunal must determine how the amount should be allocated.

## **ISSUES**

[7] Does the \$9,500 paid by the employer constitute earnings according to section 35(2) of the Regulations?

[8] If so, over what period should that amount be allocated?

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<sup>1</sup> (Commission).

<sup>2</sup> (Regulations).

## ANALYSIS

### **Does the \$9,500 paid by the employer constitute earnings according to section 35(2) of the Regulations?**

[9] The concept of earnings is defined as “the entire income of a claimant arising out of any employment.”<sup>3</sup>

[10] Income is “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.” Therefore, earnings corresponds to “what is earned by labour.”<sup>4</sup>

[11] Specifically, the Federal Court of Appeal expanded that concept to include sums that are not obtained in return for work but which may be comparable to earnings if there is a “certain connection” or a “sufficient connection” between the claimant’s employment and the sum received.<sup>5</sup>

[12] To determine whether the \$9,500 received by the Appellant is earnings within the meaning of section 35 of the Regulations, the Tribunal must determine its true nature. The Tribunal must analyze all of the evidence to establish the real reasons for the \$9,500 payment.

[13] An agreement was reached between the Appellant and the employer. As part of that agreement, the employer agreed to pay the Appellant \$9,500. The Tribunal has reproduced the relevant paragraphs from the agreement:

[Translation]

5. In return, the Employer agrees to pay D. A., a gross amount of nine thousand five hundred dollars (\$9,500.00), subject to the applicable source deductions under the applicable laws. This compensation will be paid directly into D. A.’s bank account during the week of November 4, 2018.

6. D. A. accepts that the payment mentioned in paragraph 5 represents any sum, for any reason, that could ostensibly be owed by the Employer to D. A. as wages, vacation, compensatory leave, damages, contributions, severance pay, notice, retiring allowance, or any other payment or

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<sup>3</sup> Section 35(2) of the Regulations.

<sup>4</sup> *Côté v Canada (Employment and Immigration Commission)*, [1986] F.C.J. No. 447.

<sup>5</sup> *Canada (Attorney General) v Roch*, 2003 FCA 136.

obligation directly or indirectly connected to his employment or the termination of his employment with the Employer.

7. The parties acknowledge that the sum mentioned in paragraph 5 is paid for the relinquishment of D. A.'s right to reinstatement, that it is not given in return for work completed, and that it does not arise out of employment. As a result, this sum should not be subject to an allocation of earnings in accordance with sections 35 and 36 of the *Employment Insurance Regulations*.<sup>6</sup>

[14] The right to reinstatement “is an employee’s right to resume his or her position following a wrongful dismissal.”<sup>7</sup> For an amount to be qualified as being for the relinquishment of a right to reinstatement, the right must have existed and be negotiable.<sup>8</sup> If that is the case, the compensation for the right to reinstatement is not earnings within the meaning of the Regulations.<sup>9</sup>

[15] Furthermore, settlement payments made in respect of an action for wrongful dismissal is “income arising out of employment” unless the claimant demonstrates that, due to “special circumstances,” some portion of it should be regarded as compensation for some other expense or loss.<sup>10</sup>

[16] The claimant has the burden of showing, on a balance of probabilities, that the amount received does not constitute earnings.<sup>11</sup>

[17] The Tribunal is of the view that the Appellant has not shown that the entire \$9,500 was paid in exchange for the relinquishment of his right to reinstatement.

[18] The Appellant argued that paragraph 7 of the agreement showed that the entire amount was for the relinquishment of his right to reinstatement and that it was not earnings. The Appellant explained that paragraph 6 is the standard wording used in that type of out-of-court settlement so the employer can ensure that the employee will not claim other amounts after

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<sup>6</sup> GD2-3.

<sup>7</sup> *Canada (Attorney General) v Cantin*, 2008 FCA 192.

<sup>8</sup> *Canada (Attorney General) v Warren*, 2012 FCA 74.

<sup>9</sup> *Plasse*, A-693-99; *Meechan v Canada (Attorney General)*, 2003 FCA 368; *Roch*, *supra* note 5.

<sup>10</sup> *Canada (Attorney General) v Radigan*, A-567-99; *Canada (Attorney General) v Walford*, A-263-78.

<sup>11</sup> *Meechan*, *supra* note 9; *Bourgeois v Canada (Attorney General)*, 2004 FCA 117; *Radigan*, *supra* note 10.

signing. According to the Appellant, paragraph 6 cannot be used to classify the amount differently than it is in paragraph 7.

[19] The Tribunal agrees that the employer wanted to avoid other legal remedies relating to the termination of employment. The employer's desire is clear in several places in the agreement. However, contrary to the Appellant's claim, the employer's desire to end potential remedies shows that the \$9,500 cannot apply entirely to the relinquishment of the right to reinstatement, because it is also intended to end other potential remedies.

[20] As a result, all of the evidence presented shows that the \$9,500 was paid because of the relinquishment of the right to reinstatement and to compensate the Appellant for the termination of his employment.

[21] What is more, the Tribunal accepts the Commission's evidence because it considers all of the evidence submitted. The Commission acknowledged that the Appellant had a right to reinstatement when he signed the agreement, but the Commission is of the view that the \$9,500 was not paid solely for that reason. In the Commission's view, paragraphs 5, 6, and 7 of the agreement show that the amount was paid for the relinquishment of the right to reinstatement and for any other sum owed by the employer to the Appellant, including severance pay.

[22] The Commission contacted the employer for more information about the agreement. It confirmed that, when the Appellant signed the agreement, the Appellant was entitled to reinstatement. The employer also acknowledged that the Appellant was entitled to four weeks' notice and that the Appellant's weekly salary was \$1,074.75

[23] After the employer provided information, the Commission calculated that the Appellant was entitled to \$4,299 ( $\$1,074.75 \times 4$ ) in notice. As such, the Commission determined that the actual amount received for the relinquishment of the right to reinstatement corresponded to the total amount of \$9,500 less the notice of \$4,299, therefore \$5,201.

[24] The Appellant disputed that calculation, and he is of the view that the Commission did not show that the \$4,299 was severance pay, and that therefore the claim is based on

assumptions.<sup>12</sup> However, the Appellant did not submit any evidence to show that the \$9,500 was solely for the relinquishment of his right to reinstatement.

[25] As a result, the \$4,299 represents pay in lieu of notice and the \$5,201 is for the relinquishment of the right to reinstatement.

[26] Therefore, the \$5,201 paid for the relinquishment of the right to reinstatement does not constitute earnings within the meaning of section 35 of the Regulations.<sup>13</sup>

[27] The Tribunal is of the view that the \$4,299 is earnings because it was paid to the Appellant because of his separation from employment, namely as severance pay. This amount must be allocated.

[28] Furthermore, the Tribunal noted that the \$4,299 was not subject to an exclusion in the Regulations.

**If so, over what period should that amount be allocated?**

[29] When an amount paid is considered earnings, it is allocated to a certain period based on the reasons justifying its payment.<sup>14</sup>

[30] The \$4,299 is earnings that were paid because of the separation from employment and should be allocated according to the conditions of section 36(9) of the Regulations.<sup>15</sup>

[31] As a result, the amount is allocated to a number of weeks beginning with the week of the separation from employment until the total amount of the earnings has been allocated.<sup>16</sup>

[32] The Tribunal finds that the Commission's allocation complies with the Regulations.

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<sup>12</sup> GD5-2.

<sup>13</sup> *Plasse, supra* note 9; *Meechan, supra* note 9.

<sup>14</sup> Regulations, s 36.

<sup>15</sup> *Cantin, supra* note 7.

<sup>16</sup> Regulations, s 36(9).

[33] First, the Commission allocated \$6,841, that is the \$4,299 and the \$2,542 paid by the employer as vacation pay at the separation from employment. Furthermore, the Appellant did not challenge the allocation of the vacation pay.

[34] Next, the Commission allocated an amount equal to the Appellant's weekly salary starting from the week of his termination of employment. Therefore, \$1,075 was allocated to six weeks as of the week of October 29, 2017. For the week of December 10, 2017, the Commission allocated the remaining \$391.

[35] Since the benefit period began on December 10, 2017, the only amount to allocate is \$391 to the week of December 10, 2017.

**CONCLUSION**

[36] The appeal is dismissed.

[37] The Tribunal considers the \$5,201 to apply to the relinquishment of the right to reinstatement and to not be earnings.

[38] The Tribunal considers the \$4,299 to apply to a notice of termination and to constitute paid earnings in accordance with section 35(2) of the Regulations.

[39] The Tribunal is of the view that the \$4,299 must be allocated according to section 36(9) of the Regulations. Therefore, \$391 must be allocated to the week of December 10, 2017.

Catherine Frenette  
Member, General Division – Employment Insurance Section

HEARD ON:	
METHOD OF PROCEEDING:	Questions and answers