



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *A. B. v Canada Employment Insurance Commission*, 2019 SST 1265

Tribunal File Number: AD-19-312

BETWEEN:

A. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

DATE OF DECISION: October 22, 2019

DECISION AND REASONS

DECISION

[1] The Tribunal allows the appeal.

OVERVIEW

[2] The Appellant, A.B. (Claimant), lost his employment and he applied for Employment Insurance benefits. The Canada Employment Insurance Commission (Commission), approved the Claimant's application, and he received benefits. Afterwards, the Commission discovered that the Claimant received the sum of \$50,000 from his former employer. The employer stated that the sum was paid to the Claimant as severance pay.

[3] The Commission informed the Claimant that the sum of \$50,000.00 constituted earnings and had to be allocated pursuant to the *Employment Insurance Regulations* (EI Regulations) The Claimant sought reconsideration of that decision, but the Commission maintained its decision. The Claimant filed an appeal before the General Division.

[4] The General Division concluded that the Claimant had earnings pursuant to subsection 35(2) of the EI Regulations and these earnings were correctly allocated pursuant to subsection 36(9) of the EI Regulations because the earnings were paid because of a separation from employment.

[5] The Claimant was granted leave to appeal. He argues that the General Division ignored the date of payment and reasons why he received the payment from the employer.

[6] The Tribunal must decide whether the General Division erred in law in its interpretation of sections 35 and 36 of the EI Regulations.

[7] The Tribunal allows the Claimant's appeal.

ISSUE

Did the General Division err when it concluded that the Claimant had earnings pursuant to subsection 35(2) of the EI Regulations?

ANALYSIS

Appeal Division's mandate

[8] The Federal Court of Appeal has determined that when the Appeal Division hears appeals pursuant to subsection 58(1) of the *Department of Employment and Social Development Act* (DESD Act), the mandate of the Appeal Division is conferred to it by sections 55 to 69 of that Act.¹

[9] The Appeal Division acts as an administrative appeal tribunal for decisions rendered by the General Division and does not exercise a superintending power similar to that exercised by a higher court.²

[10] Therefore, unless the General Division failed to observe a principle of natural justice, erred in law, based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it, the Tribunal must dismiss the appeal.

Issue: Did the General Division err when it concluded that the Claimant had earnings pursuant to subsection 35(2) of the EI Regulations?

[11] The Claimant argues that the amount of \$50,000 he received was for relinquishing his right to be reinstated and as compensation for psychological harassment. He submits that the amount received is not earnings within the meaning of section 35 of the EI Regulations and that, for this reason, it does not have to be allocated under section 36 of the EI Regulations.

¹ *Canada (Attorney General) v Jean*, 2015 FCA 242; *Maunder v Canada (Attorney General)*, 2015 FCA 274.

² *Idem*.

[12] Case law is abundant to the effect that if a claimant claims that the amounts received from his employer or former employer were paid out for reasons other than the loss of revenue arising from employment, in the case of a settlement or agreement based upon a lawsuit, a complaint or a claim because of a dismissal, it is up to the claimant to demonstrate that due to "special circumstances" some portion of it should be regarded as compensation for some other expense or loss.

[13] An amount received in consideration for relinquishing the right to be reinstated is not considered earnings for EI purposes and is not allocated. However, three conditions must be met, namely, the right to reinstatement exists, reinstatement has been sought, and the amount is paid to compensate for relinquishment of that right.

[14] The General Division concluded that the facts supported the conclusion that the sum of \$50,000 was to compensate the Claimant for the loss of wages arising from his unemployment. The General Division found that:

- The preamble of the settlement agreement specified that the parties wished to resolve the grievance that the Claimant had filed against his employer;
- The employer agreed to replace the termination letter, with a resignation letter, and to provide the Claimant with a reference letter;
- The employer agreed to pay the Claimant the sum of \$50,000 less any statutory deductions;
- The record of employment indicates the \$50,000 as severance pay;
- The employer confirmed that the sum paid was to compensate the Claimant for the loss of his employment.

[15] The Tribunal is of the opinion that the General Division based its decision without regard for the material before it. Oral and documentary evidence support the Claimant's position that he received the amount as compensation for something other than the loss of wages or other employment benefits. The Tribunal will therefore give the decision that the General Division should have given pursuant to section 59 (1) of the DESD Act.

[16] On September 23, 2017, the Claimant filed a grievance (17-E-00907) against his employer. In this grievance, the Claimant specifically requested that he be reinstated to his employment, that the records and documents related to the matter be destroyed, that all disciplinary actions be annulled and that his salary and benefits be restored.³

[17] It is worth quoting an excerpt from the settlement agreement reached between the parties:

WHEREAS the Employer and the Union are parties to a Collective Agreement;

AND WHEREAS the Grievor filed Grievance 17-E-00907;

AND WHEREAS the Parties wish to resolve the above noted grievances upon the basis set out hereafter;

NOW THEREFORE' THE PARTIES AGREE TO THE FOLLOWING:

1. The recitals shall form part of these Minutes of Settlement.
2. The Employer shall pay to the Grievor the sum of \$50,000.00, subject to the usual and necessary federal and territorial statutory deductions. Payment shall be made within (30) days of the signing of these Minutes of Settlement.

(...)
5. The Union and the Grievor hereby irrevocably withdraw the above-referenced Grievance 17-E-00907 within fourteen (14) days of payment by the Employer to the Grievor.
6. The Grievor agrees to irrevocably withdraw any and all outstanding complaints against the Employer and any employee(s) of the Employer that he has the legal power to withdraw. This includes, without limitation, complaints made to:
 - a. X , Departement of Finance, Employee Relations division – Harassment Complaint;
(...)
18. Except as specifically provided for herein, the Grievor acknowledges and agrees that effective on the date of execution of these Minutes of

³ GD3-41.

Settlement, he is waiving any and all entitlements under the Collective Agreement, including but not limited to the right to reinstatement.

[18] It is true that the settlement agreement does not specifically mention why the amount of 50,000.00\$ was paid to the Claimant. However, it does clearly mention that:

- The parties wish to settle Grievance 17-E-00907 that specifically refers to the Claimant's request to be reinstated;
- The Claimant withdraws Grievance 17-E-00907;
- The Claimant waives his right to reinstatement;
- The Claimant withdraws his complaint for harassment.

[19] The Claimant declared to the Commission that he asked for a larger amount because he wanted to reintegrate his position but that the employer was contesting his request.⁴ The Claimant's representative declared to the Commission that he had accepted the amount in exchange for not pursuing his grievance. The Commission then requested a copy of the Claimant's grievance. The Claimant's grievance clearly mentions that he is requesting to be reinstated to his employment. Furthermore, the Claimant provided the Commission with a copy of his detailed harassment complaint against the employer.

[20] The Tribunal listened attentively to the hearing before the General Division, particularly the Claimant's testimony. The General Division never put his credibility in doubt.

[21] The Claimant testified that the settlement was compensation for the harassment he suffered for revealing the employer's security breaches and to withdraw his grievance. The Claimant testified that the amount he received was not for unpaid wages.

⁴ GD3-39.

[22] The Claimant’s description of the events leading to the agreement support his position that the amount was paid to compensate him for damages unrelated to him employment and in exchange for the withdrawal of his grievance requesting to be reinstated.

[23] The Claimant had the burden of proving before the General Division, on a balance of probabilities, not beyond all reasonable doubt, that the settlement amount constituted something other than compensation for the loss of wages or other employment benefits.

[24] Applying the instructions of the Federal Court of Appeal to the facts of this case, the Tribunal finds that the Claimant met the burden of providing that due to “special circumstances,” the amount of \$50,000 is to be regarded as compensation for some other expense of loss and not as compensation for the loss of wages or other employment benefits.

CONCLUSION

[25] The appeal is allowed.

Pierre Lafontaine
Member, Appeal Division

HEARD ON:	October 10, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCE:	A. B., appellant