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

Citation: *BC v Canada Employment Insurance Commission*, 2020 SST 1114

Tribunal File Number: GE-19-2561

BETWEEN:

B. C.

Appellant / Claimant

and

Canada Employment Insurance Commission

Respondent / Commission

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Raelene R. Thomas

HEARD ON: March 18, 2020

DATE OF DECISION: July 3, 2020

Canada

Decision

[1] The appeal is allowed in part. I find that the money received by the Claimant is earnings within the meaning of the *Employment Insurance Act*. I further find the Commission incorrectly allocated the money. The money arises from a transaction and is allocable to the week in which the transaction occurred, in this case June 29, 2018.

Overview

[2] The Claimant retired from his employment on February 28, 2006. He received a pension from his former employer from that time forward. On May 20, 2015, the Claimant's former employer sought and obtained an initial order under the *Companies' Creditors Arrangement Act*.[1] In doing so, the Claimant's former employer reduced the Claimant's pension and, effective May 30, 2015, terminated the Claimant's group health / dental insurance and life insurance coverage.

[3] The Claimant and other former salaried (non-unionized) employees filed claims arising from their employment. On June 29, 2018, the court granted an Order sanctioning an Amended and Restated Joint Plan of Compromise and Arrangement (the Plan).

[4] The Plan resulted in the Claimant receiving a lump-sum payment for the loss of his life insurance.[2] The Commission called the lump-sum a dividend, considered it to be earnings and allocated the amount against the Claimant's employment insurance (EI) benefits effective May 31, 2015. This decision created an overpayment of $3,634.00. The Claimant requested a reconsideration of the Commission's decision and the Commission upheld its original decision. The Claimant appeals to the Social Security Tribunal (Tribunal).

Preliminary Matter - Group Appeal

[5] This appeal is one of eleven appeals filed by former employees of the Claimant's employer. Initially, I thought the appeals could be joined and heard as group appeal. The Claimant was contacted to participate in a pre-hearing conference to discuss the method of

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[1] The *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 is a federal law that allows insolvent corporations to restructure their business and financial affairs or to wind down their business under the court's supervision.
[2] For ease of reading, I refer to the amount of money received as "the lump-sum."

proceeding. The pre-hearing conference was held on August 27, 2019. Three Claimants did not attend the pre-hearing conference having either not received the notice of hearing or having filed their appeals after the pre-hearing conference. They were advised of the contents of the discussion and asked to make submissions. Submissions were received from some claimants.

[6] The law allows me to join appeals if a common question of law or fact arises in the appeals, but I can do that only if it would not be unfair to the people involved in the appeals.[3]

[7] After a further review of the files, I decided to hear each appeal individually. I observed that while the facts of the appeals were similar, each claimant had different circumstances. It is the differences in each claimant's circumstances that led to my decision to hear each appeal individually. The Claimant was notified of this decision and a Notice of Hearing was issued to the Claimant.

Preliminary Matter – Post hearing documentation

[8] The Commission submitted to the Tribunal that because it considered the lump-sum to be paid upon separation of employment the Claimant was entitled to a benefit period extension. Benefit period extensions are calculated to be a number of weeks equal to the sum received divided by a claimant's normal weekly earnings.[4] In the Claimant's case, the Commission said that he would be entitled to a two-week benefit period extension. If the extension was effected and the lump-sum was deducted from the EI benefits that could be received during the extension, the Claimant's overpayment would be reduced to $2,388.00. After the hearing, I asked the Commission whether it had implemented this benefit period extension because it was not clear from the submission. The Commission replied that it had not implemented the benefit period extension. The Claimant was made aware of the Commission's reply.

Preliminary Matter – the Commission made a clerical error

[9] The Commission submitted that it made a clerical error in the reconsideration decision it sent to the Claimant. The notice indicated that the Commission's decision had been changed but it should have indicated the Commission maintained its decision that the monies received were considered to be earnings and were required to be allocated. Where an error does not cause

[3] *Social Security Tribunal Regulations*, section 13. This is how I refer to the legislation that applies to this appeal.
[4] *Employment Insurance Act*, section 10(1)(b)

prejudice or harm, it is not fatal to the decision under appeal.[5] Because the Commission's error did not prevent the Claimant from appealing the reconsideration decision, I find that the error does not cause the Claimant any prejudice or harm.

Issues

[10] First, I have to decide if the lump-sum is earnings. If I decide the lump-sum is earnings, I then have to decide if the Commission correctly deducted the lump-sum from the Claimant's EI benefits. Making deductions from EI benefits is known as allocation.

Reasons for my decision

The lump-sum is earnings

[11] The law says that earnings are the entire income of a claimant arising out of any employment.[6] The law defines both "income" and "employment." "Income" includes any income that a claimant did or will get from an employer or any other person, whether it is in the form of money or something else.[7] "Employment" includes any employment under any kind of contract of service or employment.[8] The law also says that severance pay is earnings.[9]

[12] The Claimant was paid a lump-sum of $12,181.00 in November 2018 by the Monitor (who was appointed under the *Companies' Creditors Arrangement Act* to monitor the business and financial affairs of the company) after the Amended Joint Plan of Compromise and Arrangement had been sanctioned by the Court on June 29, 2018. The Monitor told the Commission there was a settlement reached for a number of employees regarding a compensation for a medical and dental plan. He said, "Upon retirement, some employees would have received dental and medical coverage. The settlement is a compensation regarding those insurances that are no longer paid."

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[5] *Desrosiers v. Canada (AG),* A-128-89
[6] Subsection 35(2) of the *Employment Insurance Regulations*.
[7] Subsection 35(1) of the *Employment Insurance Regulations*.
[8] Subsection 35(1) of the *Employment Insurance Regulations*.
[9] *Blais v Canada (Attorney General)*, 2011 FCA 320.

[13] The Commission wrote to the Claimant on March 5, 2019. It said:

> You received $12,181.00 in Dividend from [employer name]. This income, before deductions, is considered earnings and will be applied against your Employment Insurance claim from May 31, 2015 to August 8, 2015.[10]

[14] At the same time the Commission issued a notice of debt stating the Claimant had earnings other than declared that caused an overpayment of $3,634.00.

[15] The Commission submitted that sums received from an employer are presumed to be earnings and must therefore be allocated to a period on claim unless the amount falls within an exception specified in the law. It says that earnings paid by an employer by reason of separation from employment must be allocated pursuant to subsection 36(9) of the *Employment Insurance Regulations*. The Commission argued that earnings paid by an employer as employment-related benefits that are related to, or arise from employment, including compensation for the loss of any of these benefits is income for benefit purposes and must be allocated pursuant to subsection 36(19)(b) of the *Employment Insurance Regulations*. It goes on to say when an employer pays money in lieu of employment-related benefits due to the cancellation of the benefits the monies paid must be allocated to the week in which the cancellation occurs.

[16] Although the Claimant did not receive the lump-sum until more than three years later, the Commission submitted that the lump-sum was paid due to the cancellation of benefits on May 31, 2015. Therefore, it says, if a benefit period extension was effected, the allocation would result in an overpayment of $2,388.00 being established between May 31, 2015, and July 25, 2015, for benefits during that period which the Claimant was not entitled to receive. As noted above, the benefit period extension has not yet been effected so the overpayment of $3,634.00 remains in place.

[17] The Claimant testified that he retired from his former employer on February 28, 2006. He began receiving a pension at that time. He also continued to be covered by the group health /

[10] The period for the allocation was later changed to end on July 25, 2015.

dental insurance plans and a life insurance plan. He did not pay any premiums for these plans when he was working or when he retired and began receiving his pension.

[18] The Claimant testified that while he was employed he was a member of the salaried group and not represented by a union. As an employee he did not pay premiums for the group health / dental insurance plans and a life insurance plan. The Claimant said that the money was received as payment for the loss of his life insurance only. He said that he received a letter from the lawyer who was engaged by the salaried group. The letter, provided to the Commission by the Claimant, states that the law firm confirmed with the Monitor that the lump-sum paid a portion of his life insurance benefit and the amount paid was solely for the loss of the Claimant's life insurance benefit.

[19] The Claimant submitted the money was not earnings. He said that he was relying on the salaried group lawyer's interpretation and application of section 45 of the *Employment Insurance Act*. The lawyer wrote that the September 2018 distribution should not be considered earnings owed to the Claimant "at the time the (EI) benefits were paid" to the Claimant as the life insurance benefit would be payable to the Claimant at the time of his death. The letter goes onto state that future distributions are unknown and that any future amounts paid to the Claimant would be with respect to the loss of his life insurance benefit and any amount paid over and above the Claimant's claim, will be for the loss of the Claimant's health and dental insurance.

[20] The Claimant testified that he worked seasonally for another employer and just happened to be receiving EI benefits in May 2015. He submitted that the lump-sum was not considered to be insurable earnings or taxable earnings and therefore it should not be deducted from his EI benefits.

[21] Income is defined 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.[11] Earnings include the entire income of a claimant arising out of any employment.[12]

[22] The law says that earnings include amounts payable to a claimant in respect of wages, benefits or other remuneration from the proceeds realized from the property of a bankrupt

[11] Employment Insurance Regulations, section 35(1)
[12] Employment Insurance Regulations, section 35(2)

employer.[13] The courts have determined that monies paid by an administrator, appointed under the *Companies' Creditors Arrangement Act*, are earnings.[14] The Claimant's former employer sought and was granted an initial order under the *Companies' Creditors Arrangement Act*. The lump-sum was paid to the Claimant by a Monitor once the Plan was sanctioned by the court. As a result, I find that the lump-sum paid to the Claimant is earnings in accordance with the legislation and case law set out above.

The Commission incorrectly allocated the lump-sum

[23] The Commission has submitted two characterizations and treatments for the lump-sum. First, it says that the lump-sum is compensation for the loss of benefits and as such it is income for EI benefit purposes that must be allocated to the week in which the cancellation occurs.[15] Second, it says the money is earnings paid by reason of separation from employment and it must be allocated over a number of weeks beginning with the week in which the date of separation occurred. The number of weeks is determined by dividing the lump-sum by the Claimant's weekly earnings. In both cases, the Commission submits the week of cancellation and the week of separation are the week in which May 31, 2015, falls.

[24] The Claimant testified he retired from his former employer in 2006. From that point on he received a pension. He was also a member of a group health / dental insurance plan and had a life insurance policy. There was no set duration for the payment of the pension or continued coverage under the group health / dental insurance plan and life insurance policy. The Claimant's employer ceased its operations in February 2014. On May 31, 2015, the Claimant's pension was reduced and the Claimant's group health / dental insurance plan and life insurance policy were cancelled. The Claimant continued to receive a pension, although at a reduced amount. There can only be one separation from employment. A separation from employment would require that a claimant be actively working with an employer and end that employment. In the Claimant's case, the separation from his former employment occurred in 2006 when he retired from his former employer. In the Claimant's case, his former employer sought and obtained an initial order under the *Companies' Creditors Arrangement Act* on May 20, 2015. The evidence is that the group health / dental insurance plan and life insurance plan were stopped

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[13] *Employment Insurance Regulations*, section 35(2)(a)
[14] Canada Umpire Benefits (CUB) 72863, affirmed by *Chartier v. Canada (Attorney General)*, 2010 FCA 150
[15] The Commission makes reference to section 36(19)(b) for this submission.

on May 30, 2015. The loss of the group health / dental insurance and life insurance plan, in light of the ongoing nature of the pension plan payments, does not constitute a separation from employment. It is simply a loss of benefits due to the Claimant in his retirement. As a result, I find that allocating the lump-sum as if there were a separation from employment to be incorrect.

[25] I accept the Commission's second treatment of the lump-sum under section 39(19)(b).[16] That section states that where earnings arise from a transaction the earnings are allocable to the week in which the transaction occurs.

[26] I find that the lump-sum arises from a transaction, which is the court's sanction of the Plan, and the date the transaction occurred is June 29, 2018, which is the date the court sanctioned the Plan. The Claimant's group health / dental insurance and life insurance plan was cancelled on May 31, 2015. The Commission has submitted that this is the effective date for the allocation. It is not. It is simply the date on which the group health / dental insurance and life insurance plan was cancelled. Nothing became payable on that date. Instead, the Claimant, as a member of the salaried employees group, along with other employees represented by their union, sought and were granted status by the court on November 16, 2015, to pursue their claims against their former employer. This meant the Claimant and other former employees were able to vote on the Plan once it was formulated. Again, nothing became payable on the date the Claimant was granted status. The Court sanctioned the Plan on June 29, 2018. The Plan provided for the payment of compensation for the loss of group health / dental insurance and life insurance plan. Section 6(1)(a) of the *Companies' Creditors Arrangement Act* provides that if a plan is sanctioned it is binding on all the creditors or the class of creditors and the on the company. Section 6(5) of the *Companies' Creditors Arrangement Act* states that a court may sanction a plan only if the plan provides for the payment to the former employees of the company, immediately after the court's sanction, certain specified amounts.[17] The lump-sum became payable on the date it came into existence, which is the day the Plan was sanctioned.

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[16] The Commission made this submission on page GD4-4

[17] Amounts the employees would have been qualified for under the *Bankruptcy and Insolvency Act* if the company had become bankrupt on the day in which proceedings had commenced under the *Companies' Creditors Arrangement Act* and amounts for services performed as employees after the *Companies' Creditors Arrangement Act* proceedings began.

Therefore, I find the allocation should be to the week the Plan sanction was given by the Court, June 29, 2018.[18]

Conclusion

[27] The appeal is allowed in part. The lump-sum is earnings. The lump-sum arises from a transaction and is to be allocated in the week in which transaction occurred. In this case, the transaction occurred on the date the Plan was sanctioned, June 29, 2018.

Raelene R. Thomas

Member, General Division - Employment Insurance Section

HEARD ON:	March 18, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	B. C., Appellant

[18] CUB 72863, affirmed by *Chartier v. Canada (Attorney General)*, 2010 FCA 150, adopted a similar approach in determining that monies received as sanctioned under the *Companies' Creditors Arrangement Act* for the loss or reduction of benefits arose from employment and constituted earnings and thus were allocable.