



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *KB v Canada Employment Insurance Commission*, 2021 SST 177

Tribunal File Number: GE-20-2357

BETWEEN:

K. B.

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: January 5, 2021

DATE OF DECISION: January 11, 2021

Decision

[1] The appeal is allowed in part.

[2] The \$19,000.00 the Claimant received for relinquishment of his right to reinstatement is not earnings and should not be allocated to the Claimant's employment insurance (EI) benefits.

[3] The \$14,076.92 received as a retiring allowance and the \$1,923.08 received as statutory termination pay are earnings and must be allocated to the Claimant's EI benefits. But, the Commission did not allocate those earnings correctly. Those earnings are to be allocated at the rate of the Claimant's weekly insurable earnings to the number of weeks that begins with the week of the Claimant's separation from employment. In this case, that is the week beginning January 6, 2019.¹

Overview

[4] The Claimant was employed by a bank when he was dismissed from his employment on January 9, 2019. He applied for regular EI benefits on March 22, 2019.

[5] The Claimant also filed a complaint of unjust dismissal under the *Canada Labour Code*. An adjudicator, appointed to hear his complaint, held one day of hearings in December 2019. Additional days of hearings could not be held due to the COVID-19 pandemic. Some time after the hearing started, the Claimant and his employer negotiated a settlement of his complaint. The settlement provided for payments for the Claimant's legal fees, statutory termination pay, a retiring allowance, loss of his pension and medical benefits and the Claimant's relinquishment of his right to reinstatement.

[6] The Commission decided that the money paid for the Claimant's statutory termination pay, retiring allowance and relinquishing his right to reinstatement were earnings paid on termination of his employment and allocated those amounts, totalling \$35,000.00, to his EI benefits beginning March 17, 2019, and ending in the week of September 22, 2019.

¹ The Claimant's employment ended on January 9, 2019, as per the Record of Employment at page GD3-18 of the appeal file.

[7] The Claimant disagrees with the Commission's decision. He says that not all of the \$35,000.00 he received is earnings. He agrees that the money received for statutory termination pay and the retiring allowance is earnings and should be allocated. However, he says, the money he received for relinquishment of his right to reinstatement is not earnings and should not be allocated. The Claimant appeals to the Social Security Tribunal.

Issues

[8] I have to decide whether the money the Claimant received is earnings, as defined by the *Employment Insurance Act*. If I decide the money is earnings, I then have to decide if the Commission allocated the earnings correctly.

Analysis

[9] The law says that earnings are the entire income of a claimant arising out of any employment.² The law defines both "employment" and "income." "Employment" includes any employment under any kind of contract of service or employment.³ "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.⁴

The money received for relinquishment of right of reinstatement is not earnings

[10] The \$19,000.00 the Claimant received for the relinquishment of his right to reinstatement is not earnings and should not be allocated to the Claimant's EI benefits. My reasons for deciding this are below.

[11] It is up to the Claimant to show that the money he received is not earnings for the purposes of EI benefits. The Claimant has to prove this on a balance of probabilities. This means that he has to show that it is more likely than not the money he received is not earnings.

[12] The Courts have decided that money received for the relinquishment of a right to reinstatement is not earnings if a claimant can meet three requirements. Those three

² *Employment Insurance Regulations*, section 35(2). This is how I refer to the legislation that applies to this appeal.

³ *Employment Insurance Regulations*, section 35(1)

⁴ *Employment Insurance Regulations*, section 35(1)

requirements are that, following a wrongful dismissal, a claimant must show that they had a right to reinstatement, sought reinstatement and, if there is a monetary settlement instead, the agreement must indicate that the monies were paid for the relinquishment of the reinstatement rights.⁵

[13] I find the Claimant has met all three of these requirements. The Claimant testified that after he was dismissed he filed a complaint under the *Canada Labour Code* for unjust dismissal. He said an adjudicator was appointed to hear his appeal. The Claimant and representatives of his former employer attended one day of hearings before an adjudicator. The Claimant testified that the Adjudicator explained he had the power to reinstate the Claimant and indicated that he felt the Claimant's case for unjust dismissal was in the Claimant's favour. The Adjudicator did not issue a decision after the first day, and additional hearing dates were not scheduled because the COVID-19 pandemic occurred. Instead, the Claimant and his former employer discussed settling his complaint and in July 2020 they reached a settlement. That settlement is in a document titled "Minutes of Settlement."

[14] The Minutes of Settlement provide that "[Employer] shall pay a lump sum in the amount of \$19,000, less deductions required by law, on account of the Employee's relinquishment of his right to reinstatement." This amount is in addition to amounts paid for statutory termination pay under the *Canada Labour Code* and a retiring allowance paid on account of the termination of the Claimant's employment.

[15] The Commission says that the termination pay, the retiring allowance and the monies paid to relinquish his rights to reinstatement (\$19,000.00) constitutes earnings pursuant to section 35(2) of the *Employment Insurance Regulations* because the payment was made to compensate the Claimant for loss of his employment. The Commission says that the facts on file do not support the Claimant's argument to exclude the \$19,000.00 paid to relinquish his right to be reinstated. It says, in fact, the information from the employer is that no such right existed. The Commission concluded that there is no evidence suggesting that the Claimant was afforded an

⁵ *Canada (Attorney General) v. Warren*, 2012 FCA 74; *Meechan vs. Attorney General of Canada*, 2003 FCA 368; *Plasse vs. Attorney General of Canada*, A-693-99. This is how I refer to decisions of the courts that I must apply to the circumstances of this appeal.

opportunity for reinstatement of his employment under any federal, provincial or territorial legislation.

[16] The Claimant's Representative argued that the Claimant did have a right to reinstatement under the *Canada Labour Code*. He noted that the Claimant is employed in a federally regulated occupation that is governed by the *Canada Labour Code*. Section 242(4)(b) of the *Canada Labour Code* gives an adjudicator the power to order reinstatement in the case of unjust dismissal. That the Claimant's former employer told the Commission, when asked, that the Claimant was not a member of a union and was not entitled to reinstatement is not relevant to the Claimant's circumstances. The Representative noted that the term "just cause" is used in collective agreements governing unionized employees and in that context an arbitrator may order reinstatement. The Representative noted that the *Canada Labour Code* contains similar provisions except that it uses the term "unjust dismissal" and provides that an adjudicator may order reinstatement of an employee. The Representative said that interpretation is consistent with the Supreme Court decision in *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29. Specifically, the Representative quoted the Court's observation at paragraph 44:

The references in this statement to the right of employees to "fundamental" protection from arbitrary dismissal and to the fact that such protection was "already a part of all collective agreements", make it difficult, with respect, to draw any inference other than that Parliament intended to expand the dismissal rights of non-unionized federal employees in a way that, if not identically, then certainly analogously matched those held by unionized employees.⁶

[17] I find that the Claimant has shown that he had a right of reinstatement. He did not have to be a member of a union to have such a right. The Claimant's employment was regulated by the *Canada Labour Code*, which allows for an adjudicator to reinstate an employee who has made a complaint of unjust dismissal. This evidence tells me the Claimant had a right of reinstatement.

⁶ *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29

[18] I find that the Claimant has shown that, by filing a complaint of unjust dismissal under the *Canada Labour Code*, he sought reinstatement.

[19] I find the Claimant has shown that the settlement agreement clearly indicates that the \$19,000.00 was paid for the relinquishment of his reinstatement rights. The Minutes of Settlement provided for, in separate clauses, a lump sum payment of \$1,923.08 for statutory termination pay under the *Canada Labour Code*, a lump sum payment of \$14,076.92 as a retiring allowance and a lump sum payment of \$19,000.00, “on account of the Employee’s relinquishment of his right to reinstatement.” The Claimant was employed for approximately 18 months. The Claimant testified the Adjudicator told him and the employer when they attended the hearing that he could be reinstated if ordered. The Minutes of Settlement signed by the employer state that \$19,000.00 would be paid “on account of the Employee’s relinquishment of his right to reinstatement.” The amount was paid in addition to the amounts paid for statutory termination pay and a retirement allowance. This evidence tells me that the \$19,000.00, was, in fact, paid for the Claimant’s relinquishment of his right to reinstatement. As a result, I find the \$19,000.00 is not earnings within the meaning of the *Employment Insurance Regulations* and should not be allocated.

The statutory termination pay and retiring allowance are earnings

[20] The Representative did not dispute that the statutory termination pay and the retiring allowances are earnings and should be allocated. I agree because those amounts were paid to the Claimant by reason of separation from his employment.

The statutory termination pay and retiring allowance were not correctly allocated

[21] In his request for reconsideration, the Claimant wrote about other bases for adjustment for the allocation of earnings. He wrote that his EI claim could have been paused because he remained unemployed until February 4, 2020, whereas his claim only paid out until November 10, 2019. The Claimant wrote that there was a period of 8.42 weeks remaining in the 52-week period since his termination for which there need not be an overpayment.

[22] The Claimant also noted that his EI claim was delayed due to his former employer erroneously reporting that he was terminated for cause, such that his claim commenced paying

on March 17, 2019, after a termination date of January 9, 2019. Therefore, some of the monies received in the settlement could be allocated to that period during which he was without earnings and without EI. The Claimant testified that although he applied for EI benefits in March 2019 he did not receive EI benefits until some months later as the Commission initially refused his claim but later, on reconsideration, allowed his claim.

[23] The law says that all earnings paid or payable to a claimant by reason of a lay-off or separation from employment shall be allocated to a number of weeks that begins with the week of the layoff or separation.⁷ The allocation starts with that week regardless of when the earnings were paid or payable.⁸

[24] The Record of Employment shows the Claimant's employment ended on January 9, 2019. He waited until March 22, 2019, to file a claim for EI benefits. The Commission noted that the Claimant's benefit period commenced in the week beginning March 17, 2019.⁹ The Commission wrote to the Claimant that the separation monies he received from his employer would be applied against his EI claim from March 17, 2019.¹⁰ However, that is not what the law requires. The law requires that monies received by reason of separation from employment are to be allocated beginning in the week of separation. In this case, the Claimant's separation from employment began on January 9, 2019, when he was dismissed, and not March 17, 2019, when his claim for EI benefits was established. The money the Claimant received on account of statutory termination pay and as a retiring allowance were paid to him by reason of separation from his employment. As a result, I find that the Commission has incorrectly allocated the earnings the Claimant received on separation from his employment. Accordingly, the \$1,923.08 received on account of statutory termination pay and the \$14,076.92 received as a retiring allowance, totalling \$16,000.00, are to be allocated at the rate of the Claimant's weekly insurable earnings, to the number of weeks beginning on January 6, 2019.¹¹

⁷ *Employment Insurance Regulations*, section 36(9)

⁸ *Employment Insurance Regulations*, section 36(9)

⁹ See pages GD3-20 and GD3-21 in the appeal file and the *Employment Insurance Act*, section 10(b)

¹⁰ The Commission cited the allocation was in accordance with *Employment Insurance Regulation 36(9)(11)*. However, no such *Regulation* exists.

¹¹ The Claimant's average weekly earnings are \$968 per week, as per the last paragraph on page GD3-48 in the appeal file

[25] The Commission is also instructed to adjust the Claimant's benefit period in light of this new period of allocation.

Other matters

[26] In his request for reconsideration, the Claimant noted that he remained unemployed after his EI benefits expired. The Commission wrote in its submission to the Tribunal that the Claimant may make a formal request, or a separate application, to demonstrate his entitlement to additional EI benefits potentially payable beyond November 16, 2019. I note that nothing in my decision prevents the Claimant from making a request or application to the Commission to see if he may be entitled to benefits beyond November 16, 2019.

Conclusion

[27] The appeal is allowed in part.

[28] The \$19,000.00 the Claimant received for relinquishment of his right to reinstatement is not earnings and should not be allocated to the Claimant's employment insurance (EI) benefits.

[29] The \$14,076.92 received as a retiring allowance and the \$1,923.08 received as statutory termination pay are earnings and must be allocated to the Claimant's EI benefits. Those earnings are to be allocated at the rate of the Claimant's weekly insurable earnings to the number of weeks that begins with the week of the Claimant's separation from employment. In this case, that is the week beginning January 6, 2019.

Raelene R. Thomas
Member, General Division - Employment Insurance Section

HEARD ON:	January 5, 2021
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	K. B., Appellant Christopher Bergs,

	Representative for the Appellant
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