



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *RB v Canada Employment Insurance Commission*, 2021 SST 112

Tribunal File Number: AD-20-869

BETWEEN:

**R. B.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**Appeal Division**

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DECISION BY: Pierre Lafontaine

DATE OF DECISION: March 26, 2021

## **DECISION AND REASONS**

### **DECISION**

[1] The Claimant's appeal is dismissed.

### **OVERVIEW**

[2] When the employer dismissed the Appellant (Claimant) on April 13, 2018, it paid her vacation pay and pay in lieu of notice. The Canada Employment Insurance Commission (Commission) allocated these amounts as earnings against her benefit claim.

[3] On April 18, 2018, the employer offered the Claimant \$22,500 in return for agreeing to a settlement package and signing a release form. The Claimant refused this offer.

[4] On January 2, 2020, the Claimant brought a civil suit against her employer for \$200,000.00 in damages. The suit is ongoing. On January 23, 2020, the employer deposited \$15,750 into the Claimant's bank account. The Commission accepted the employer's explanation that the sum of \$22,500 less statutory deductions was severance pay. The Commission allocated these amounts as earnings against her benefit claim. This created an overpayment.

[5] The Claimant disputes that the \$22,500 is severance and sought reconsideration of that decision, but the Commission maintained its initial decision. The Claimant filed an appeal before the General Division of the Tribunal.

[6] The General Division concluded that the payment of \$22,500 received by the Claimant from her former employer is earnings because the payment arose from the job. It also concluded that the Commission properly allocated the earnings.

[7] The Appeal Division granted the Claimant leave to appeal. She submits that the General Division made errors in fact and in its interpretation of section 35 and 36 of the *Employment Insurance Regulations* (EI Regulations).

[8] I must decide whether the General Division erred in fact or in law in its interpretation of sections 35 and 36 of the EI Regulations.

[9] I am dismissing the Claimant's appeal.

## **ISSUE**

[10] Did the General Division make an error in fact or in law when it concluded the Claimant had earnings pursuant to section 35(2) of the EI Regulations and said earnings had to be allocated pursuant to section 36(9) of the EI Regulations?

## **ANALYSIS**

### **Appeal Division's mandate**

[11] 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*, the mandate of the Appeal Division is conferred to it by sections 55 to 69 of that Act.<sup>1</sup>

[12] 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.<sup>2</sup>

[13] 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.

## **PRELIMINARY MATTERS**

[14] The Claimant requested that I suspend her appeal until the conclusion of her lawsuit against her employer.

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

<sup>2</sup> *Idem*.

[15] Considering my obligation towards both parties to conduct proceedings as informally and quickly as the circumstances and the considerations of fairness and natural justice permit, I have decided not to allow the Claimant's request to suspend her appeal.

[16] The Claimant's lawsuit is still at a very early stage and no trial date has been set. It could take several years before the lawsuit reaches a conclusion. I do not find that delaying the present appeal would be in the interest of justice. Furthermore, the Commission has undertaken to review, upon demand, the Claimant's allocation of earnings following the final resolution of her claim against her employer.

[17] I will therefore render a decision on the Claimant's appeal.

### **The facts**

[18] On April 3, 2017, the Claimant commenced her employment with her employer. During her employment, she received a salary of \$3,461.54 every two weeks. On April 12, 2018, the employer terminated her employment without cause. It paid her vacation pay and pay in lieu of notice. On April 18, 2018, the employer offered the Claimant \$22,500 in return for agreeing to a settlement package and signing a release form. The Claimant refused this offer.

[19] On December 9, 2019, the Claimant sent a letter to her employer to encourage settlement discussions. She did not receive a reply from the employer's legal counsel.

[20] On January 2, 2020, she commenced a legal proceeding against her employer claiming \$200,000 in damages plus pre-judgement and post-judgement interest, and the costs of the proceedings. She subsequently received from her employer the Notice of Intent to Defend, dated January 22, 2020.

[21] On January 23, 2020, the employer deposited in the Claimant's bank account, without her prior approval, the amount of \$15,750 after tax (or \$22,500 before tax). The Claimant did not return the payment to her employer.

[22] The Commission accepted the employer's explanation that the sum of \$22,500 less statutory deductions was severance pay. The Commission allocated these amounts as earnings against her benefit claim. This created an overpayment.

[23] The Claimant's lawsuit for damages against her employer is still active/on-going.

#### **The General Division decision**

[24] The General Division found that the Claimant did not provide evidence that the \$22,500 is anything other than earnings, paid because she lost her job. It determined from the evidence that it is more likely than not that this money was severance, paid because her employment ended. The General Division concluded that such payments are earnings because they arise out of a former employment and they must be allocated from the termination of employment.

#### **The Claimant's position**

[25] The Claimant disputes that the payment of \$22,500 was severance pay because she was not entitled to any statutory severance pay pursuant to her Employment Agreement and the *Employment Standards Act* (ES Act).

[26] The Claimant puts forward that the employer's payment of \$22,500 is a partial payment for damages claimed in her pending lawsuit because she received payment 21 months after her permanent termination of employment. It was also received a day after the employer issued their Notice of Intent to Defend. The Claimant submits that she performed no further work for her employer since her termination.

[27] The Claimants requests that the Appeal Division allow her appeal and conclude that the lump sum payment is a partial payment for damages to allocate once a settlement is reached or a judgement is rendered in her lawsuit.

### **The Commission's position**

[28] The Commission puts forward that when a claimant receives income following the loss of employment, it must determine whether such income is considered earnings in accordance with sections 35 and 36 of the EI Regulations.

[29] The Commission submits that over and above the vacation pay and pay in lieu of notice paid immediately upon separation from employment, the Claimant received a subsequent payment of \$22,500 from the employer. The Commission determined that the amount was severance pay, which constituted earnings under section 35(2) of the EI Regulations, that were to be allocated pursuant to section 36(9) of the EI Regulations because the Claimant received the earnings due to the separation from employment.

[30] The Commission submits that to this date, the Claimant has not provided a copy of a settlement agreement or any documentation to rebut the presumption of earnings. Therefore, it was reasonable for the General Division to conclude that the Claimant had not proven that the payment is anything other than earnings, paid because her employment ended.

### **Did the General Division make an error in fact or in law when it concluded the Claimant had earnings pursuant to section 35(2) of the EI Regulations and said earnings had to be allocated pursuant to section 36(9) of the EI Regulations?**

[31] The Claimant worked for the employer from April 2017 to April 2018. While it is true that pursuant to the ES Act, she would not be entitled to severance pay because she was not employed by her employer for five years or more, her employment agreement indicates the following:

#### **7. Termination of Employment**

Employee's employment may terminate as set out below, in which event Employee's compensation and benefits shall terminate except as otherwise provided below. The Company has the right to terminate Employee's employment at any time, with or without cause or advance notice, as further detailed in this section:

(a) By Company Without Cause

If Company terminates Employee's employment when neither Cause nor permanent disability exists, Company shall provide Employee with the salary and benefit continuance described below on the following terms and conditions:

(...)

(iii) The "Notice Period" provided in this Agreement shall be a period equal to one month for each full year of service the Employee has with the Company as of the date of termination, subject to a minimum Notice period of three months and a maximum Notice Period of twelve months regardless of age or length of service.

(iv) The salary and benefit continuance during the Notice Period provided for herein is intended to be inclusive of all other notice of termination or severance entitlements to which the Employee may be entitled. The Employee acknowledges and agrees that the Notice Period constitutes a greater right and/or benefit than any statutory notice, termination pay and/or severance pay to which the Employee would otherwise be entitled to receive with respect to termination of employment...

[32] By virtue of the Employment Agreement, the employer agrees to pay more than any statutory notice, termination pay and/or severance pay to which the employee would otherwise be entitled to receive with respect to termination of employment. It agrees to pay a minimum notice period of three months regardless of age or length of service.

[33] On April 18, 2018, the employer offered the Claimant \$22,500 in return for agreeing to a settlement package and signing a release form. The Claimant refused this offer. The letter indicates that:

In recognition of your service to X, the terms of your employment contract, and to assist you in the transition to alternative employment, X is prepared to offer you a separation package which includes the following:

1. Compensation

The Company will a lump sum payment of \$22,500.01 which is equivalent to three (3) months of pay at current base pay.

[34] The evidence shows that the Claimant received during her employment a salary of \$3,461.54 per two weeks. The payment of \$22,500 is the equivalent to three (3) months of pay. The employer's offer undoubtedly follows the terms of the Employment Agreement since it offers the Claimant three (3) months pay notwithstanding that she has only one year of service with the employer.

[35] Furthermore, the termination of employment clearly triggered the payment of \$22,500 since the employer made the offer to pay the Claimant the equivalent to three (3) months of pay almost two years before she instituted her lawsuit.

[36] The Claimant argues that the \$22,500 payment is a partial payment towards damages in her pending lawsuit against her employer.

[37] As stated by the General Division, the evidence simply does not support a conclusion that the payment was made for something other than for the compensation of loss of wages or other employment benefits.

[38] The employer has persistently stated that the amount paid to the Claimant represents a severance pay. Accordingly, the Record of Employment issued by the employer on July 20, 2020, indicates that the sum of \$22,500 represents a severance pay. The evidence further shows that the Claimant contacted the Commission because she did not know why the employer had made the payment.

[39] The Claimant had the burden of proving before the General Division, on a balance of probabilities, that the amount constituted something other than compensation for the loss of wages or other employment benefits.

[40] The preponderant evidence before the General Division shows that it is more likely than not that this money was severance, paid because her employment ended. Such payments are earnings because they arise out of a former employment and must be allocated from the end of employment.



[41] The Claimant further submits that the General Division wrongfully intervened in an on-going litigation with her employer and that no allocation should be performed until a full and final settlement between the parties.

[42] The Claimant submits that, in doing so, the General Division made an error by ignoring the *Digest of Benefit Entitlement* (Digest) that indicates that if an employee refuses the employer's offer, no allocation is made until the settlement is reached and accepted by the claimant.<sup>3</sup>

[43] It is important to reiterate that the Digest is an interpretive guide that is not binding on this Tribunal.<sup>4</sup> This having been said, I find no contradictions between the General Division decision and the wording of the Digest that also indicates that if an employee refuses an employer's offer, payment may still be considered received and accepted in certain circumstances.

[44] The statement of claim filed by the Claimant against her employer is seeking compensation for approximately twelve (12) months of lost income and benefits arising from her termination (\$100,000.00) plus other personal damages. The employer offered three (3) months of pay at current base pay. It appears that the Claimant's lost income is an important part of the dispute. Furthermore, the Claimant did not return the payment to the employer.

[45] In the circumstances, the severance payment, which the Claimant was offered and refused, was clearly paid to her within the meaning of section 36(9) of the EI Regulations.

[46] For the above-mentioned reasons, I find that the General Division correctly concluded, based on the evidence before it, that the amount was severance pay which constitutes earnings under section 35(2) of the EI Regulations, and that they must be allocated pursuant to section 36(9) of the EI Regulations because received due to the separation from employment.

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<sup>3</sup> Sections 5.12.11 and 5.6.1.1.

<sup>4</sup> *Canada (Attorney general) v Greey*, 2009 FCA 296, *Canada (Attorney general) v Savard*, 2006 FCA 327.

**CONCLUSION**

[47] The Claimant's appeal is dismissed.

[48] The Tribunal takes notice of the Commission's undertaking to review, upon demand, the Claimant's allocation of earnings in the event of a settlement or a judgment of her claim for damages and legal cost against the employer.

Pierre Lafontaine  
Member, Appeal Division

HEARD ON:	March 24, 2021
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	R. B., Appellant  Suzanne Prud'Homme, Representative of the Respondent