



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *PL v Canada Employment Insurance Commission*, 2017 SSTGDEI 206

Tribunal File Number: GE-16-2503

BETWEEN:

P. L.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Paul Demers

HEARD ON: January 10, 2017

DATE OF DECISION: January 13, 2017

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Appellant was present and participated in the hearing.

INTRODUCTION

[1] The Appellant established a claim for employment insurance benefits effective December 7, 2014.

[2] The Record of Employment dated January 4, 2016 shows that the Appellant was paid \$22,500 in retiring allowance, and \$27,500 in settlement pay for a total amount of \$50,000.

[3] On March 15, 2016, the Respondent notified the Appellant that the total monies on separation in the amount of \$50,000 was considered earnings and would be applied against her claim from November 30, 2014 to August 29, 2015, with a balance of \$26 applied to the week of August 30, 2015 in accordance with sections 35 and 36 of the *Employment Insurance Regulations* (the Regulations).

[4] The Appellant had been paid benefits on her claim from December 7, 2015 to April 25, 2015 and therefore the decision created an overpayment in the amount of \$8,844.

[5] On March 29, 2016, the Appellant made a request for reconsideration of the Respondent's decision to allocate the earnings against her claim. In support of her request for reconsideration, the Appellant argued that the monies received were not due to loss of wages, but for moving expenses, general damages and harassment.

[6] Following the reconsideration process, the Respondent maintained the original decision on June 6, 2016, with modification to the \$5,000 issued for relocation and travel expenses as being removed from earnings in accordance with section 35(2) of the Regulations.

[7] As the Appellant had only received benefits to the week ending April 25, 2015, the modified decision had no impact on the overpayment amount.

[8] On June 27, 2016 the Appellant then appealed the matter to the *Social Security Tribunal of Canada* (the Tribunal).

[9] The hearing was held by Teleconference for the following reasons:

- a) The complexity of the issue(s) under appeal.
- b) The fact that the credibility is not anticipated to be a prevailing issue.
- c) The fact that the appellant will be the only party in attendance.
- d) The information in the file, including the need for additional information.
- e) The form of hearing respects the requirement under the Social Security Tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

ISSUE

[10] The Appellant is appealing the Respondent's decision with regards to an allocation of earnings pursuant to sections 35 and 36 of the Regulations.

EVIDENCE

[11] As a result of her job loss, the Appellant was paid \$50,000 in settlement pay from her former employer.

[12] A copy of the Memorandum of Settlement in which sections 1(a) to 1(c) states: (a) \$5,000 as reimbursement of relocation and travel expenses incurred following the termination of the Grievor's employment; (b) \$22,500 as a retiring allowance in respect of the termination of the Grievor's employment...; (c) \$22,500 in general damages in respect of the allegations of reprisal or harassment pursuant to the Occupational Health and Safety Act, which the Grievor intended to advance at arbitration.

SUBMISSIONS

[13] The Appellant submitted that the settlement received from her former employer had nothing to do with the loss of wages and that the money was for harassment, moving, and hardship. She added that she should be entitled to the benefits she received as they were to compensate her for the lack of employment regardless of what she received from her former employer.

[14] The Respondent submitted that the retiring allowance in the amount of \$22,500 and the general damages in the amount of \$22,500 the Appellant received constituted earnings pursuant to subsection 35(2) of the Regulations because the payment was made by reason of her separation from employment. Consequently the entire amount of \$45,000 was properly allocated pursuant to subsection 36(9) of the Regulations.

ANALYSIS

[15] For this case, the issue at hand is regarding an allocation of earnings pursuant to sections 35 and 36 of the Regulations.

[16] The law in this circumstance is clear, subsection 35 states what is to be considered earnings as well as the exceptions, and subsection 36 states that those earnings must be allocated.

[17] The law states that sums received from an employer are presumed earnings and must be allocated unless the amount falls within the exceptions in subsection 35(7) of the Regulations. It is further noted that the earnings which are paid by an employer by reason of a separation from employment must be allocated pursuant to subsection 36(9) of the same Regulations.

[18] The Federal Court of Appeal confirmed the principle that monies which constitute earnings under section 35 of the Regulation must be allocated pursuant to section 36 of the Regulations (*Boone et al v. Canada (AG)*, 2002 FCA 257).

[19] In this case, the facts are undisputed that the Appellant received the money after the loss of employment and it came as a result of a settlement with her former employer under a collective agreement.

[20] At the hearing it was established that there was no complaint presented to the Human Rights Tribunal as she explained she could not file a complaint as well as have her matter dealt with by final and binding arbitration under the collective agreement. She acknowledged that she could not do both and her matter was dealt under her collective agreement.

[21] It must be noted that awards do not usually contain monetary compensation for intangibles, such as, loss of prestige, injury to reputation and emotional upset, unless there is clear evidence to the contrary. Monies paid from a human rights complaint through the Human Rights Tribunal are not earnings if the money is paid only to compensate for personal injury and not solely for the loss of employment due to harassment.

[22] The Federal Court of Appeal has long held that a settlement payment made in respect of an action for wrongful dismissal is "income arising out of employment" unless the claimant can demonstrate that due to "special circumstances" some portion of it should be regarded as compensation for some other expense or loss. (Radigan, A-567-99)

[23] It is incumbent upon claimants to establish that all or part of the sums received as a result of their dismissal amounted to something other than earnings within the meaning of the Employment Insurance Act (Bourgeois v. Canada (AG), 2004 FCA 117).

[24] In this case, the evidence demonstrates that no complaint was presented to the Human Rights Tribunal. Furthermore, the Memorandum of Settlement section 1(c) indicates that the general damage amount was paid for allegations of harassment that the Grievor intended to advance at arbitration.

[25] Unfortunately, there is no evidence to demonstrate that the monies paid were for anything but the loss of employment and not for some other expense or loss.

[26] Therefore the Tribunal finds that the amount does constitute earnings under section 35(2) of the Regulations and that they were properly allocated by the Respondent under section 36(9) of the same Regulations.

[27] Those earnings paid by an employer by reason of the separation from employment must be allocated pursuant to subsection 36(9) of the Regulations. It is the reason or motive for the

payment, and not the date of payment that determines the date from which the allocation must begin (Boucher- Dancause, 2010 FCA 270; Cantin, 2008 FCA 192; Radigan, A-567-99; Meechan, 2003 FCA 368; Warren, 2012 FCA 74 and Bourgeois, 2004 FCA 117).

[28] As a result, the Tribunal must confirm the decision of the Respondent which is in accordance with sections 35 and 36 of the Regulations and is supported by case law.

CONCLUSION

[29] The appeal is dismissed.

Paul J. Demers

Member, General Division - Employment Insurance Section

The relevant legislative provisions are reproduced in the Annex to this decision.

ANNEX

THE LAW

S.35 (1) The definitions in this subsection apply in this section.

employment means

(a) any employment, whether insurable, not insurable or excluded employment, under any express or implied contract of service or other contract of employment,

(i) whether or not services are or will be provided by a claimant to any other person, and

(ii) whether or not income received by the claimant is from a person other than the person to whom services are or will be provided;

(b) any self-employment, whether on the claimant's own account or in partnership or co-adventure; and

(c) the tenure of an office as defined in subsection 2(1) of the *Canada Pension Plan*. (*emploi*)

income means 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. (*revenu*)

pension means a retirement pension

(a) arising out of employment or out of service in any armed forces or in a police force;

(b) under the *Canada Pension Plan*; or

(c) under a provincial pension plan. (*pension*)

self-employed person has the same meaning as in subsection 30(5). (*travailleur indépendant*)

(2) Subject to the other provisions of this section, the earnings to be taken into account for the purpose of determining whether an interruption of earnings under section 14 has occurred and the amount to be deducted from benefits payable under section 19, subsection 21(3), 22(5), 152.03(3) or 152.04(4) or section 152.18 of the Act, and to be taken into account for the purposes of sections 45 and 46 of the Act, are the entire income of a claimant arising out of any employment, including

(a) amounts payable to a claimant in respect of wages, benefits or other remuneration from the proceeds realized from the property of a bankrupt employer;

(b) workers' compensation payments received or to be received by a claimant, other than a lump sum or pension paid in full and final settlement of a claim made for workers' compensation payments;

(c) payments a claimant has received or, on application, is entitled to receive under

(i) a group wage-loss indemnity plan,

(ii) a paid sick, maternity or adoption leave plan,

(iii) a leave plan providing payment in respect of the care of a child or children referred to in subsection 23(1) or 152.05(1) of the Act,

(iv) a leave plan providing payment in respect of the care or support of a family member referred to in subsection 23.1(2) or 152.06(1) of the Act, or

(v) a leave plan providing payment in respect of the care or support of a critically ill child;

(d) notwithstanding paragraph (7)(b) but subject to subsections (3) and (3.1), the payments a claimant has received or, on application, is entitled to receive from a motor vehicle accident insurance plan provided under a provincial law in respect of the actual or presumed loss of income from employment due to injury, if the benefits paid or payable under the Act are not taken into account in determining the amount that the claimant receives or is entitled to receive from the plan;

(e) the moneys paid or payable to a claimant on a periodic basis or in a lump sum on account of or in lieu of a pension; and

(f) where the benefits paid or payable under the Act are not taken into account in determining the amount that a claimant receives or is entitled to receive pursuant to a provincial law in respect of an actual or presumed loss of income from employment, the indemnity payments the claimant has received or, on application, is entitled to receive pursuant to that provincial law by reason of the fact that the claimant has ceased to work for the reason that continuation of work entailed physical dangers for

(i) the claimant,

(ii) the claimant's unborn child, or

(iii) the child the claimant is breast-feeding.

(7) That portion of the income of a claimant that is derived from any of the following sources does not constitute earnings for the purposes referred to in subsection (2):

(a) disability pension or a lump sum or pension paid in full and final settlement of a claim made for workers' compensation payments;

(b) payments under a sickness or disability wage-loss indemnity plan that is not a group plan;

(c) relief grants in cash or in kind;

(d) retroactive increases in wages or salary;

(e) the moneys referred to in paragraph (2)(e) if

(i) in the case of a self-employed person, the moneys became payable before the beginning of the period referred to in section 152.08 of the Act, and

(ii) in the case of other claimants, the number of hours of insurable employment required by section 7 or 7.1 of the Act for the establishment of their benefit period was accumulated after the date on which those moneys became payable and during the period in respect of which they received those moneys; and

(f) employment income excluded as income pursuant to subsection 6(16) of the *Income Tax Act*.

S.36(9) Subject to subsections (10) to (11), all earnings paid or payable to a claimant by reason of a lay-off or separation from an employment shall, regardless of the period in respect of which the earnings are purported to be paid or payable, be allocated to a number of weeks that begins with the week of the lay-off or separation in such a manner that the total earnings of the claimant from that employment are, in each consecutive week except the last, equal to the claimant's normal weekly earnings from that employment.