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

Tribunal File Number: GE-19-1018

BETWEEN:

[redacted]

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Takis Pappas

HEARD ON: March 12, 2019

DATE OF DECISION: July 10, 2019

Canada

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] The Appellant was dismissed from her employment on May 4, 2018. Through a settlement with her employer, the Appellant received $15,000 for general damages. The Respondent determined that the $9042.05 ($15,500.00 - legal fees of $6457.95) the Appellant received were considered earnings according to subsection 35(2) of the *Employment Insurance Regulations* (the Regulations) because the payment was made to compensate her for loss of employment. The Respondent allocated this money according to subsection 36(9) of the Regulations, according to her normal weekly earnings from May 4, 2018.[1]

[3] The Appellant made a request for reconsideration of the Respondent's decision to apply earnings against her claim. On January 18, 2019, the Respondent issued a reconsideration decision and upheld the initial finding.[2] The Appellant appealed this decision to the Social Security Tribunal.

ISSUES

[4] Issue #1: Did the money the Appellant receive from her employer constitute earnings? If so,

[5] Issue #2: How should the earnings be allocated?

ANALYSIS

Issue #1: Did the money the Appellant received from her employer constitute earnings?

[6] For income to be considered earnings according to subsection 35(2), the income must be earned by labour or given in return for work or there is a sufficient connection between the claimant's employment and the sum received.

---

[1] (GD4-4)
[2] (GD3-65)

[7] Sums received from an employer are presumed earnings and must therefore be allocated to a period on claim unless the amount falls within an exception in subsection 35(7) of the Regulations or do not arise from employment.

[8] The Court confirmed that amounts paid because of the severance of the employment relationship constitute earnings within the meaning of section 35 of the Regulations and must be allocated in accordance with subsection 36(9) of the Regulations.[3]

[9] I find that the $9042.05 the Appellant received as general damages do not constitute earnings.

General Damages

[10] The Respondent submitted that the $9042.05 for general damages was paid to compensate the Appellant for the loss of her job. The payment was made because of her separation from employment.

[11] The Respondent also submitted that there in order to qualify for the exception the Appellant must show that the injury, damage or expense claimed actually occurred and that the payment and the amount was paid due to the injury, damage or expense and not paid for the loss of employment caused by the human rights complaint. In the Minutes of Settlement, there is no such clear wording and the other documentation presented does not show that the injury, damage or expense claimed actually occurred and the payment was in light of the injury, damage or expense.

[12] The Appellant provided that based on a balance of probabilities and an open rather than a restrictive analysis of the facts and evidence, it is clear that the money received constituted something other than compensation for the loss of wages or other employment benefits.

[13] The Appellant explained that she told the employer that she was pregnant. The employer stated that she would need to speak to the Appellant in more detail about her pregnancy. After revealing her pregnancy to the employer, she was ordered to train who would be her eventual replacement before being terminated on May 04, 2018. Prior to being terminated, the Appellant

[3] (Canada (AG) v. Boucher Dancause, 2010 FCA 270; and Canada (AG) v. Cantin, 2008 FCA 192).

received no indication whatsoever that she was incompatible to work for the employer as is the criteria for probationary employees. During discussions with other employees of the business upon being terminated, it was revealed to the Appellant that the employer did not like having pregnant employees. During settlement negotiations and prior to final settlement money being issued, the Appellant received all unpaid wages and other outstanding payments owing to her in the amount of $1,706.00 less statutory deductions. This proves that none of the settlement money were attributed to earnings for past services; and the filing of the second amended Record of Employment clearly shows an intention on the part of the employer to indicate that the money received from settlement were not earnings or compensation for other benefits.

[14] I considered the Respondent's position that there is no evidence in the settlement agreement to suggest that actual infringement of the Human Rights Code occurred. I however, recognize and understand that in cases where a settlement agreement has been reached, both parties make concessions. I find that the Respondent is setting an impossible standard to meet in cases such as this one. I understand that the onus is on the Appellant to demonstrate that the $9042.05 portion of the total settlement that she received, is not income arising from any employment and therefore, is not earnings according to the Regulations. The Appellant is not required to prove that she had a legitimate Human Rights claim; instead, she must show that the $9042.05 awarded to her was not for compensation for the loss of wage. Whether the employer admitted to the allegations is irrelevant. Instead, the employer and the Appellant must come to an agreement that clearly delineates what each portion of a monetary settlement represents. I accept the Appellant's submission that the employer's actions prior to her termination infringed on her rights under the Human Rights Code.

[15] I find that there is sufficient clear and cogent evidence to establish that the $9042.05 was awarded to the Appellant for reasons other than a loss of wages and that it did not arise out of her employment. Rather, this is a separate award specifically agreed to by the two parties that was awarded to the Appellant for the sole purpose of recognizing her Human Rights Code claims/allegations against her former employer.

[16] I find that the $9042.05 that the Appellant received for general damages after entering into the settlement agreement with her former employer is not considered earnings according to section 35 of the Regulations.

Issue #2: How the earnings should be allocated?

[17] Because I determined that the money the Appellant received from her employer is not earnings within the meaning of the Regulations, I find that the amount she received was incorrectly allocated against the employment insurance benefits payable to her.

CONCLUSION

[18] The money the Appellant received ($9042.05) is not earnings according to section 35 of the Regulations and it should not be allocated according to subsection 36 of the Regulations.

[19] The appeal is allowed.

Takis Pappas
Member, General Division - Employment Insurance Section

HEARD ON:	March 12, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	[redacted] Appellant Hargun Singh Kohli, Representative for the Appellant