



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Tribunal File Number: GE-18-3424

BETWEEN:

Esther Lewis-Anderson

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Charlotte McQuade

HEARD ON: March 13, 2019

DATE OF DECISION: April 14, 2019

DECISION

[1] The appeal is allowed. The \$10,000.00 general damages payment made to Ester Lewis-Anderson (the “Appellant”) is not earnings under section 35 of the *Employment Insurance Regulations* (EI Regulations). As it is not earnings, this sum should not be allocated under section 36 of the EI Regulations.

OVERVIEW

[2] The Appellant had worked at an insurance company since 1988. Her employer dismissed her on October 21, 2015 without notice or pay in lieu of notice for alleged misappropriation of employer funds. The Appellant applied for regular Employment Insurance (EI) benefits on October 30, 2015 and she received benefits from October 25, 2015 to August 20, 2016. The Appellant filed a wrongful dismissal claim against her employer seeking a total sum of \$100,000.00 in damages for wrongful dismissal and punitive, aggravated and exemplary damages. The Appellant entered into a Minutes of Settlement (“Minutes”) after mediation with her employer on February 12, 2018. The Minutes provided that, in exchange for a full and final release to the employer, the employer would pay the Appellant a sum of \$50,000.00 “retiring allowance” less legal costs and less an amount set out in a Notice of Debt from Service Canada representing the EI benefits received by the Appellant and also less income tax withheld at rate of 30%. The Minutes also provided for a payment of \$10,000.00 as general damages and payment \$27,426.29 in legal costs.

[3] The Canada Employment Insurance Commission (the “Respondent”) considered the entire \$60,000.00 in settlement funds less legal costs to be earnings and allocated this sum to the Appellant’s claim based on her normal weekly earnings from the date of separation from her employment. The Appellant does not dispute that the \$50,000.00 retiring allowance is earnings. However, she argues the \$10,000.00 general damages payment is not earnings and should not be allocated to her claim. Her position is that the general damages payment represents pain and suffering damages for the “bad faith” nature of the termination.

ISSUES

[4] Issue 1: Is the \$10,000.00 general damages payment “earnings” under section 35 of the *Employment Insurance Regulations* (EI Regulations)?

[5] Issue 2: If so, how should this payment be allocated under section 36 of the EI Regulations?

ANALYSIS

[6] The *Employment Insurance Act* (Act) sets up an insurance scheme to protect against the loss of income resulting from unemployment. Therefore, the purpose is to compensate for a loss and not to pay benefits to those who have not suffered any loss (*Canada (Attorney General) v. Walford*, A-263-78).

[7] Earnings are defined in subsection 35(2) of the EI Regulations as the “entire income of a claimant arising out of any employment” unless the income comes within one of the exceptions set out in subsection 35(7) of the EI Regulations. “Income” is defined in subsection 35(1) of the EI Regulations 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.”

[8] In order to be considered earnings, the income must be arising out of any employment or there must be a “sufficient connection” between the claimant’s employment and the sums received (*Canada (Attorney General) v. Roch*, 2003 FCA 356).

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

[10] Amounts that are determined to be earnings under section 35 of the EI Regulations must be allocated according to section 36 of the EI Regulations (*Boone et al. v. Canada (Attorney General)*, 2002 FCA 257).

Issue 1: Is the \$10,000.00 general damages payment “earnings” under section 35 of the EI Regulations?

[11] No. The Appellant has proven that due to special circumstances the \$10,000.00 general damages payment is not earnings. This payment represents pain and suffering for the bad faith manner in which the Appellant was terminated.

[12] If an individual claims that the amounts received from his or her employer or former employer were paid out for reasons other than the loss of revenue arising from employment, in the case of a settlement or agreement based upon a lawsuit, a complaint or a claim because of a dismissal, it is up to the individual to demonstrate that due to "special circumstances" some portion of it should be regarded as compensation for some other expense or loss other than the loss of revenue arising from employment (*Canada (A.G.) v. Radigan*, A-567-99; *Bourgeois v. Canada (A.G.)*, 2004 FCA 117).

[13] “Special circumstances” could potentially include settlement monies paid to address injury to one's health or reputation or to address one's legal fees, or for the relinquishment of a right to reinstatement, or potentially damages relating to breach of a Human Rights code.

[14] The Respondent argues the general damages payment of \$10,000.00 is earnings pursuant to subsection 35(2) of the EI Regulations because the payment was made to compensate the claimant for the loss of wages. The Respondent submits that to exclude money from the category of earnings paid to compensate for the loss of employment income, the Appellant must establish the payment was requested for other reasons and that the employer agreed to compensate the claimant for the injury, damage or expense. As the \$10,000.00 is not identified other than for general damages in the Minutes, it is deemed payment for lost income and considered earnings per section 35(2)(a) of the EI Regulations.

[15] The Respondent argues further that if the Appellant alleges the general damages was paid out for great mental stress, then it would reasonably expect the Appellant sought professional help to deal with the distress. If this was done, and the employer agreed to pay for the expenses incurred due to this mental distress, it would be identified as such in the Minutes of Settlement.

[16] The Appellant’s position is the general damages portion of the payment is not “earnings”.

She submits that the payment represents pain and suffering damages for the “bad faith” nature of the termination. She argues that the general damages are not for the dismissal itself but for pain and suffering resulting from the “manner” of the dismissal and that the Minutes reflect that was the intention of the parties.

[17] The Appellant testified that she had been employed at an insurance company for 27 years. She was terminated on October 21, 2015. She had started a new position with her employer shortly before her termination. She had been promoted to executive assistant working for three executives. Her duties included booking flights, dealing with corporate accounting, handling expense accounts, creating expense reports and reimbursing funds to executives. The Appellant mistakenly reimbursed funds into her personal account rather than a corporate account. The employer terminated her for reason that they thought she had misappropriated funds. The Appellant testified that she had also mistakenly reimbursed one of the executive’s personal account rather than the corporate account and the employer simply did a transaction to reverse this mistake. The Appellant testified that she was new to the job and had requested training and had simply made a mistake.

[18] The Appellant testified that the termination was devastating to her. Her employer did not do a proper investigation of what happened. The employer treated her in an invasive and embarrassing manner. She was told to go to the Human Resources Department where she was interviewed. She was then walked out without even being allowed to get her things. The Appellant testified that the employer did not investigate what she told them about what happened. The employer did not take into consideration that it was a new role she was doing and that she did not have adequate training or the situation where funds mistakenly went into an executive’s personal account and the transaction was simply reversed. The Appellant testified that her reputation was affected. She had worked for this employer for 27 years and felt it did not count for anything. She had good performance appraisals all along but none of that seemed to count or be taken into consideration. The situation had an impact on her mental health. She was not able to sleep or eat. Her hair was falling out. She was anxious and worried about how she would get paid and take care of her family. She told the employer she was a single mother and was struggling with finances due to missing child support payments but she was still terminated. Her health insurance was cancelled so she could not see a psychologist. She did, however, seek

help from her family doctor and her pastor.

[19] The Appellant testified that she sought legal counsel and a lawsuit was filed. In the claim, she sought damages for pay in lieu of notice, severance and damages for mental suffering. She entered into a settlement in mediation on February 12, 2018. The Appellant testified the terms in the Minutes properly represented the intention of her and her employer. The employer drafted the Minutes and she accepted the terms.

[20] The Appellant testified the \$10,000.00 general damages was not meant to be compensation for income or lost or wages. The intent was that general damages was for pain and suffering. She was present at the mediation and there were two representatives of her employer also present at the mediation when the Minutes were negotiated and signed. One of the employer's representatives was the one who had terminated her and walked her out. It turned out that it was that person's first investigation. In the negotiation, the employer said the \$10,000.00 was for general damages for them being so tough on her. She thinks they realized they did not do their due diligence in investigating in more detail and getting to the root cause of what happened.

[21] The Appellant's counsel in this matter had also represented the Appellant in the wrongful dismissal lawsuit and explained how the figures in the settlement for the retiring allowance and the general damages were reached. She explained that she and the other counsel were going back and forth as to whether severance monies were to be paid on top of common law notice or whether they were to be paid on top of *Employment Standards Act* notice. Because they could not agree, they decided they would call the figure, which represented pay in lieu of notice, common law notice, a sum for her benefits and severance a "retirement allowance". She noted the claim was for \$100,000.00 in total as that was the limit under the Simplified Rules of Procedure. The Appellant's counsel explained that the claim for aggravated and exemplary damages was for the Appellant's pain and suffering and the punitive damages were to represent punishment for the employer's actions.

[22] The Appellant's counsel submitted that there was a very specific way the sums agreed to were decided on. She had determined, based on the Appellant's years of service and salary, that a payment for pay in lieu of notice under the ESA plus severance would have amounted to about

\$50,000.00. However, if the claim was based on common law notice and severance, the claim would amount to \$110,000.00. After the Appellant and the employer had attended discovery, the employer's counsel advised the employer was prepared to settle with the Appellant. The amount agreed to was a compromise between the \$50,000.00 and \$110,000.00 higher and lower amount of what the Appellant might expect in terms of pay in lieu of notice, severance and her benefits package. The Appellant agreed to accept the minimum amount. The Appellant's counsel advised that the \$50,000.00 did not include the pain and suffering damages. She related that the amount of \$10,000.00 was reached based on a review of prior decisions and what seemed reasonable in the circumstances. The Appellant testified that the information provided by her counsel as to how these figures were reached was correct.

[23] The Statement of Claim seeks damages for wrongful dismissal and punitive, aggravated and exemplary damages including in the sum of \$100,000.00. The allegations in the claim are that the Appellant's employment position was terminated by the employer without just cause and without any notice. The employer alleged that the Appellant had breached the employer's Global Expenses Policy and serious expense submission misconduct. It was alleged that the dismissal without just cause and without adequate notice or adequate payment in lieu thereof, and the failure by the Defendant to meet its common law obligations constituted a breach of the Appellant's employment agreement. It was claimed that the Appellant was entitled from the date of her dismissal to certain benefits including but not limited to medical benefits, dental benefits, life insurance benefits, and RRSP benefits and bonuses as well as various out-of-pocket expenses due to the employer's wrongful termination of her employment. There was also a claim for mental distress relating to the manner of termination. In that regard, paragraph 15 of the claim provides: "The Plaintiff has suffered mental distress as a result of the wanton and reckless breach of her contract by terminating her employment without adequate notice or adequate payment in lieu thereof, which mental distress was foreseeable by [employer's name]."

[24] The Appellant and her employer entered into a Minutes of Settlement on February 12, 2018 providing for the following payments in full settlement of the claim:

1. The Defendant shall pay to the Plaintiff the sum of \$50,000 as a retiring allowance less the sum allocated to legal costs including fees, disbursements and HST as per paragraph

3 below and less the sum to be paid in accordance with the Notice of Debt from Service Canada in respect of Employment Insurance as per paragraph 4 below less withholding for income tax at the flat rate of 30% on the balance.

2. The Defendant shall pay to the Plaintiff the sum of \$10,000.00 in general damages.

3. The Defendant shall pay to the Plaintiff's lawyers the sum of \$27,426.29 as legal costs inclusive of fees, disbursements and HST which sum will be paid directly to (name of law firm) and which sum will be confirmed in writing to the Defendant by (name of law firm) as owing by the Plaintiff.

4. The Plaintiff shall obtain a Notice of Debt from Service Canada in respect of Employment and the monies described in paragraph 1 above shall be subject to the repayment obligation described in the Notice of Debt from Service Canada.

5. All of the amounts to be paid herein shall include any and all claims, benefits, damages, costs, HST, disbursements and any other relief of any kind.

6. The Plaintiff shall execute the full and final release of the Defendant.

7. The Defendant shall pay all the mediation costs of (mediator's name).

8. The parties shall consent to a dismissal of this action and the counterclaim on a without costs basis which order the Defendant shall obtain.

[25] In consideration for the payments, the Appellant signed a full and final release on February 12, 2018. The release provides that the Appellant "fully and finally release and forever discharge completely (the employer) of and from all actions, causes of actions, contracts and claims whatsoever which I ever had, now have or may hereafter have for or by reason of any cause, matter or thing whatsoever, including without limiting the generality of the foregoing any actions, causes of action or claims arising out of my employment with the (the employer) termination of that employment, including, without limitation, any claims for unpaid salary, unpaid compensation, unpaid bonus, severance pay, notice of termination, payment in lieu of notice, wrongful dismissal, benefits including disability benefits, pension, incentive plan payments or entitlements and any claims under the applicable employment standards legislation,

human rights legislation and/or pension standards legislation. I acknowledge that included in the settlement evidenced by this Full and Final Release is any sum to which I may be entitled pursuant to the provisions of the applicable human rights legislation and I acknowledge that I will not and cannot pursue any claims I may have had under the applicable human rights legislation.” The release also contained a term that “the consideration provided by the (employer) to me is not an admission of liability, and in fact such liability is denied.

[26] The components of the settlement must be considered against the evidence specific to each case (*Attorney General of Canada v. Dunn*, A-231-95). In that regard, I must consider the entirety of the evidence in determining whether the general damages payment is earnings.

[27] I find the Minutes of Settlement, executed by both parties, suggests the general damages payment was to compensate the Appellant for something other than loss of earnings. In this regard, the Minutes of Settlement apportion the payment into two categories: a retirement allowance, and general damages. The Minutes provide that only the retirement allowance is subject to repayment of income tax. The general damages are not. This supports an inference that the general damages are not compensation for income or any other taxable amount. Further, the EI repayment is specified to be made entirely out of the retirement payment, also suggesting the intention of the parties was that only the retirement payment was to represent loss of earnings.

[28] The Full and Final release is broadly drafted to release any and all possible claims against the employer arising out of the Appellant’s employment and the termination of her employment. While it includes a release of specific claims for: unpaid salary, unpaid compensation, unpaid bonus, severance pay, notice of termination, payment in lieu of notice, wrongful dismissal, benefits including disability benefits, pension, incentive plan payments or entitlements and any claims under the applicable employment standards legislation, human rights legislation and/or pension standards legislation, the release notes that those claims are included, “without limitation” to other possible claims. The release, in its broad form, provides for release of claims for sums that could be considered both earnings related and also claims that could be considered non-earnings related. It therefore does not add to the analysis.

[29] I find the Statement of Claim to be consistent with the Appellant’s position that the

general damages payment represents something other than loss earnings. The claim itself was for damages for wrongful dismissal and punitive, aggravated and exemplary damages included in the sum of \$100,000.00. Thus, it is clear that the Appellant was seeking damages in addition to those related only to the wrongful dismissal. She was also seeking punitive, aggravated and exemplary damages.

[30] The allegations in the Statement of Claim make reference to the termination without just cause and without any notice or payment in lieu of notice. In that regard, the claim notes that the Appellant is entitled to as of the date of her dismissal to certain benefits including but not limited to medical benefits, dental benefits, life insurance benefits, and RRSP benefits and bonuses and that she had incurred and will continue to incur numerous and various out-of-pocket expenses due to the Defendant's wrongful termination of her employment. All of these allegations would potentially result in "earnings" related payments as they are meant to compensate for the loss of employment income or benefits.

[31] However, the Statement of Claim also alleges that the Appellant's dismissal and subsequent treatment by the employer was in bad faith and that the employer acted in a high-handed and egregious manner at a time when the employer knew or ought to have known that the Appellant was in a vulnerable psychological state. The Statement of Claim also notes that the Appellant suffered mental distress as a result of the wanton and reckless breach of her contract by terminating her employment without adequate notice or adequate payment in lieu thereof, which mental distress was foreseeable by the employer. This allegation would potentially result in compensation that is not for loss of earnings because the bad faith manner of termination is a separate actionable wrong, aside from that of the termination itself.

[32] Thus, I find the Statement of Claim supports a finding that there were two categories of compensation being sought, that being compensation related to the termination itself, and compensation specifically for the bad faith manner of the termination. The different types of damages sought in the Statement of Claim are consistent with the division of the payments in the Minutes of Settlement between the retiring allowance and the general damages. The facts alleged in the Statement of Claim provide the basis for a claim for pain and suffering related to the bad faith termination. These facts are specifically pleaded in paragraph 15 of the Statement of

Claim.

[33] The Appellant's testimony as to the circumstances that led up to her termination is consistent with the fact she was seeking compensation for damages for pain in suffering along with the compensation she was seeking for loss of earnings and employer related benefits. She describe the devastation she felt at being walked out of the building without any proper investigation into the facts, not even being allowed to retrieve her belongings. She explained how this impacted her mental health given her 27 years of service to her employer. She testified she was not able to sleep or eat. Her hair was falling out. She was anxious and worried and sought help from her doctor and her pastor. I acknowledge the Respondent's argument if the general damages was paid out for great mental stress, it would reasonably expect the Appellant sought professional help to deal with the distress. She did so. She sought out help from both her family doctor and pastor.

[34] I also accept the Appellant's credible evidence that she understood the general damages payment to represent pain and suffering damages. This was uncontracted evidence and such a characterization is consistent with the Appellant's description of the facts surrounding her termination. There is no direct evidence from the employer as to what the employer's intention was concerning the general damages payment and what it was meant to compensate. However, the Appellant testified that the employer had drafted the agreement and that she had been told at the mediation by the employer that the general damages payment was to compensate her for how tough they had been on her.

[35] Finally, I have considered the Appellant's counsel's information as to how the sums were reached, which information. The Appellant attended the mediation with her counsel and testified this was correct. I accept that the figure for the "retirement allowance" was based on calculations as to the range of what the Appellant could expect to receive for pay in lieu of notice, severance and other work related benefits. I also accept that the general damages figure was based on a review of caselaw and what was reasonable in the circumstances.

[36] Having considered the entirety of the evidence, I am satisfied that the general damages payment was intended to compensate the Appellant for pain and suffering damages relating to the bad faith manner in which she was terminated by her employer. The Minutes provide for

payment of the general damages without deduction for taxes or EI repayment, suggesting it was the parties' intention that the general damages was to compensate for a loss other than loss of income or earnings. The Statement of Claim includes a claim for exemplary and aggravated damages related to the bad faith manner in which the Appellant was terminated and articulates the Appellant's mental stress as a result of the manner of termination. The Appellant's testimony concerning the manner in which she was terminated supports the allegations in the claim. The Appellant also testified that it was her understanding that the general damages was to represent compensation for pain and suffering and this evidence was not contradicted.

[37] The Appellant has proven that the general damages payment, due to special circumstances, was compensation for some other expense or loss, and was therefore not earnings with section 35 of the EI Regulations. The general damages payment was to compensate the Appellant for pain and suffering related to the bad faith manner in which she was terminated.

[38] As the general damages payment in the amount of \$10,000.00 is not earnings, it is not to be allocated to the Appellant's claim.

CONCLUSION

[39] The appeal is allowed.

Charlotte McQuade
Member, General Division - Employment Insurance Section

HEARD ON:	March 13, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	Esther Lewis-Anderson, Appellant Zeitoon Vaezzadeh, Representative for the Appellant