Date: 20030926

Docket: A-685-01
A-684-01
A-686-01
A-687-01
A-688-01
A-689-01
A-690-01
A-691-01

CORAM: **DESJARDINS J.A.**
NADON J.A.
PELLETIER J.A.

A-685-01

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

appellant

and

GASTON ROCH

respondent

A-684-01

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

appellant

and

YVAL BÉLAND

respondent

A-686-01

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

appellant

and

MARIE-CLAUDE PLANTE

respondent

A-687-01

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

appellant

and

RENÉ TARDIF

respondent

A-688-01

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

appellant

and

DANIEL JULIEN

respondent

A-689-01

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

appellant

and

THÉO DESJARDINS

respondent

A-690-01

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

appellant

and

MARTIN BELLEHUMEUR

respondent

A-691-01

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

appellant

and

ROBERT THÉBERGE

respondent

JUDGMENT

The applications for judicial review are allowed with costs, the umpire's decision is set aside and the matter is referred back to the chief umpire or to an umpire designated by him for reconsideration on the basis that the Commission's appeal from the decision of the board of referees must be allowed and that the cases must be returned to the Commission for reallocation of the amounts received in accordance with subsection 36(9) of the Regulations.

"Alice Desjardins"
J.A.

Certified true translation

Kelley A. Harvey, BA, BCL, LLB

Date: 20030925

Docket: A-685-01
A-684-01
A-686-01
A-687-01
A-688-01
A-689-01
A-690-01
A-691-01

Citation: 2003 FCA 356

CORAM: **DESJARDINS J.A.**
NADON J.A.
PELLETIER J.A.

A-685-01

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

appellant

and

GASTON ROCH

respondent

A-684-01

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

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A-686-01

BETWEEN:

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A-687-01

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

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A-688-01

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BETWEEN:

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A-690-01

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

appellant

and

MARTIN BELLEHUMEUR

respondent

A-691-01

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

appellant

and

ROBERT THÉBERGE

respondent

Hearing held at Montréal, Quebec, June 19, 2003.

Judgment delivered at Ottawa, Ontario, September 26, 2003

REASONS FOR JUDGMENT: DESJARDINS J.A.

CONCURRED IN BY: NADON J.A.
PELLETIER J.A

Date: 20030925

Docket: A-685-01
A-684-01
A-686-01
A-687-01
A-688-01
A-689-01
A-690-01
A-691-01

Citation: 2003 FCA 356

CORAM: **DESJARDINS J.A.**
NADON J.A.
PELLETIER J.A.

A-685-01

BETWEEN:

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A-691-01

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

appellant

and

ROBERT THÉBERGE

respondent

REASONS FOR JUDGMENT

DESJARDINS J.A.

[1] The concept of earnings is being considered in these applications for judicial review.

[2] This case involves seven (7) applications for judicial review of a decision by an umpire, identical in each case. The umpire dismissed the appeals of the Employment Insurance Commission (the Commission) and upheld the decision of the board of referees that the sums received by the respondents did not constitute earnings within the meaning of subsection 35(2) of the *Employment Insurance Regulations*, SOR/96-332 (the Regulations).

[3] The applications for judicial review bearing numbers A-684-01, A-686-01, 687-01, A-688-01, A-689-01, A-690-01 and A-691-01 are attached to docket number A-685-01, that of Gaston Roch, which is the master file now before the Court.

1. THE FACTS

[4] Laiterie Dallaire (a division of Les aliments Parmalat Inc.), the respondents' employer, decided in 1998 to reorganize its production and to discontinue the production of fluid milk and industrial milk.

[5] To do so, the employer implemented a downsizing program. In order to minimize the negative impact of this reorganization and with the approval of the union representing the respondents, it obtained financial assistance from Emploi-Québec as part of a program referred to as the "Plan d'aménagement et de réduction du temps du travail" ["Work Time Reduction and Distribution Plan" (ARTT plan or the plan)];

[6] As a result of their severance, the respondents received various termination benefits such as vacation pay, sick leave credits and severance pay, and the allocation itself is not disputed.

[7] The amounts involved in these applications for judicial review are those which were paid as part of the ARTT plan. In docket A-685-01, Gaston Roch (the respondent), received a total amount of $12,000 in installments over a 36-month period.

[8] On October 26, 1998, the respondent applied for employment insurance benefits, indicating that he had left his employment on October 14, 1998. A benefit period was established for him beginning October 18, 1998.

[9] In a letter dated November 20, 1998, the Commission notified the respondent that his vacation pay, his sick leave credits and his severance pay, totalling $24,177, would affect his benefits beginning October19, 1998. This total income constituted earnings which had to be deducted from the benefit calculated according to his normal weekly salary of $642.29. Thus, no benefit would be paid from October 19, 1998 to July 2, 1999. A balance of $413 would be deducted for the week of July 5, 1999. His benefit period would be extended by 37 weeks and would end on June 30, 2000 (Applicant's Appeal Book, p. 27).

[10] In a second letter dated May 25, 2000, the Commission informed the respondent that the receipt of the sum of $12,000 under the ARTT plan would modify the allocation calculated previously. The total income increased from $24,177 to $36,177 ($24,177 + $12,000). Consequently, no benefit would be paid to him from October 18, 1998 to November 13, 1999. A balance of $209 would be deducted in the week of November 14, 1999. His benefit period would be extended by 52 weeks and would end on October 14, 2000 (Applicant's Appeal Book, p. 39).

[11] The respondent contested the Commission's decision, alleging that the sum of $12,000 was not earnings because the money did not come from his employer.

[12] On November 17, 2000, the board of referees rescinded the Commission's decision. It allowed the respondent's appeal and found that the sum received was not earnings but was rather a relief grant pursuant to paragraph 35(7)*(c)* of the Regulations.

[13] The Commission appealed this decision to the umpire. The latter dismissed the finding of the board of referees to the effect that the termination benefits were a relief grant. He found that the amount received under the plan was not earnings under subsection 35(2) of the Regulations because the benefit received had no relationship to the respondents' past or present work.

2. WORK TIME ALLOCATION AND REDUCTION PLAN - ARTT PLAN

[14] I must first examine the rationale and the terms of this plan.

(a) the rationale for the reorganization

[15] In order to obtain a medium-term contract from Nestlé, the employer had to keep 80% of the personnel that were already working in the frozen food manufacturing division. This division was a more recent addition and, unlike the milk division, had not been in operation 12 months of the year. There were also employees there who had fewer years of service.

[16] If the collective agreement had been given full effect, the personnel assigned to the production of fluid milk would have been transferred to the frozen food division. In that case the business could not have complied with Nestlé's requirements and could not have obtained the desired contract. This would have resulted in a massive lay-off.

[17] The employer therefore had to convince the union either to amend the collective agreement or to consent to a special agreement for the purposes of the reorganization. It is in this context that Emploi-Québec proposed the ARTT plan.

(b) the ARTT plan

[18] A memorandum of agreement was signed between Emploi-Québec, the employer and the union, in order to retain the employees threatened by layoff. This agreement also made voluntary separation more attractive by offering the employees who chose to end their employment additional earnings of $12,000 over a 36-month period. Thus, the ARTT plan subsidy, combined with the departure benefit equivalent to two weeks of salary per year of service (maximum 52 weeks) and, for some, with a pension plan, was an incentive accepted by many employees.

[19] The memorandum of agreement included provisions for the identification of specially designated positions and the implementation of a selection process designed to choose employees to fill each of the available positions.

[20] The memorandum of agreement included in particular the following clauses:

[Translation]

. . .

THE PARTIES AGREE AS FOLLOWS:

1. DEFINITIONS

In the present agreement, the terms used are defined as follows:

Work Time Allocation and Reduction Plan (ARTT plan)

This expression refers to the strategy adopted by the COMPANY to reduce employee work time in order to reallocate freed up hours to the benefit of employees threatened by layoffs who will continue their employment with the COMPANY or persons who might be hired as a result of the plan. This strategy must be the subject matter of an agreement between the COMPANY and the UNION. It is set out in a document signed by the representatives of both parties.

Full-Time Equivalent (FTE)

Full-Time Equivalent (FTE) corresponds to the annual amount of work time of full-time employees of the COMPANY who participate in the ARTT plan based on the normal work week of the persons who effectively reduce their work time and on the number of weeks normally paid, including annual paid vacations. The calculation is based on regular employees working 40 or 35 hours/week, depending on the category of work, for 52 weeks.
FTE=2,073 calculated as follows: (38 X 40 X 52) + (1 X 35 X 52) = 80,860 hours + 39

Full-Time Employees

Full-time employees are those who are considered as such under the collective agreement or under the management practices in effect in THE COMPANIES.

Normal work week

This term refers to the usual work week of full-time employees of the COMPANIES participating in the ARTT plan, excluding overtime.

Manpower Committee

The manpower committee is made up of the employers' and the employees' representatives. Its duty is to develop and implement the ARTT plan.

2. PURPOSE OF AGREEMENT

This agreement provides for the payment of financial assistance by EMPLOI-QUÉBEC to the COMPANIES for the implementation of an ARTT plan as described in Schedule 9.

This 36-month plan falls within the framework of discontinuing production of fluid and industrial milk products. It is intended to continue the employment of people who are threatened by lay-offs and reduce the impact of the loss of employment on the individuals laid off. The list of persons affected by the measures under the various terms and conditions of the plan is attached to this agreement (schedule 5), as is the list of persons who will continue their employment or who will be hired as a result of the plan (schedule 6).

The total FTE freed up and reallocated under this plan amounts to 48.961 over the three years of the plan.

3. DESCRIPTION OF ASSISTANCE PROVIDED

EMPLOI-QUÉBEC will pay $4,000 annually for each full-time equivalent (FTE) released and reallocated as part of the Company's ARTT plan.

The payment of financial assistance is calculated pro rata to the FTEs that are released by the employees of the COMPANIES effectively reducing their work time and reallocated to the benefit of persons continuing to work or hired as a result of the plan. In the event of the departure or death of persons continuing to work or hired as a result of the plan, financial aid may be paid if new employees are hired to replace the persons who are no longer working.

EMPLOI-QUÉBEC will also provide financial assistance for the manpower committee's operating costs during the implementation of the plan.

. . .

5. TERMS OF PAYMENT

After verification, EMPLOI-QUÉBEC, will pay the amounts owing to the COMPANIES on the basis of 13 annual installments, pursuant to the COMPANIES' claims which shall be accompanied, at the end of each year or upon the request of EMPLOI-QUEBEC, by the time sheets of employees participating in the ARTT plan. These reports shall contain the following information:

(a) Name and social insurance number of every employee whose working time was reduced, with the number of hours freed up during the claim period.

(b) Name and social insurance number of every employee continued in employment or hired as a result of the ARTT plan, along with the number of hours worked during the claim period.

The COMPANIES will immediately notify Emploi-Québec whenever a name on either of the preceding lists is changed.
EMPLOI-QUÉBEC will not pay any amount to the COMPANIES if the employees' work hours do not correspond to the terms of this agreement, for example as the result a strike or a lockout.

6. TERM OF THE AGREEMENT

The present agreement comes into effect on October 18, 1998, and ends on April 29, 2002.

. . .

10. PAYMENT

EMPLOI-QUÉBEC will remit the amounts owed to the COMPANIES to the attention of Joceline Bergeron, 3477924 Canada Inc. at 700 Dallaire Street, Rouyn-Noranda, subject to clause 11 hereunder.

EMPLOI-QUÉBEC reserves the right to conduct a subsequent audit of payments previously made.

. . .

14. LIABILITY

The COMPANIES undertake to use the amounts of financial assistance for the sole purposes for which they were granted.

The COMPANIES shall reimburse any amount used for purposes other than those provided for in the present agreement, as well as any unused amounts.

EMPLOI-QUÉBEC undertakes to respect the confidentiality of the documents and information of the COMPANIES in accordance with the *Act respecting access to documents held by public bodies and the protection of personal information,* R.S.Q. c. A-2.1.

THE COMPANIES shall assume all the rights, obligations, and liabilities herein.

. . .

16. TERMINATION

EMPLOI-QUÉBEC reserves the right to terminate this agreement without indemnity or compensation on any of the following grounds:

(a) The COMPANIES fail to fulfill any of the terms, conditions or obligations for which they are responsible;

(b) The COMPANIES cease their operations for any reason, including bankruptcy, liquidation or assignment of their property;

(c) The COMPANIES have made false statements or have falsified documents pertaining to their application for assistance;

(d) The financial credits allocated by the government are insufficient to carry out the undertakings in this agreement;

(e) Any other reason.

To terminate this agreement, EMPLOI-QUÉBEC shall send a written notice of termination to the COMPANIES indicating the reason for termination. The notice is not applicable to the grounds referred to in subsections *(b)*, *(c)*and (*d)*.

On any of the grounds referred to in subsection *(a)* or *(e)*, the COMPANIES will have 20 business days to remedy it, where possible, failing which the agreement shall be terminated automatically, the termination being effective as of right upon the expiration of this period.

In the event of termination, the COMPANIES will be paid only for the activities accomplished thereunder as of the date of termination of the agreement, without other compensation or indemnity.

The COMPANIES may terminate this agreement upon 60 days' written notice and any payment to be effected pursuant to this agreement shall be adjusted to that date.

. . .

18. AMENDMENT TO THE AGREEMENT

> EMPLOI-QUÉBEC reserves the right to unilaterally amend, through written notice, the amount of the subsidy or the percentage of the contribution as well as the agreed terms of payment.

. . .

[21] Accordingly, in order to reduce the employees' work time, the parties developed a ("Full-Time Equivalent" or "FTE") reporting system for time that could be freed up. The freed-up hours were then allocated to the benefit of other employees who continued their employment or who were hired as a result of the ARTT plan. The total FTEs freed up and allocated under this plan was 48.961 for the three years of the plan (see clause 2 of the memorandum of agreement).

[22] Emploi-Québec undertook to pay $4,000 annually for each full-time equivalent for a three-year period. These sums were paid to the employer in 13 annual installments. The employer had to make a claim for them by filling out a report that was to include, *inter alia*, the name and social insurance number of each employee who agreed to reduce his work hours. The employer undertook to use the money received for the purposes of the program. Emploi-Québec reserved the right to conduct audits of the payments already made.

3. ISSUES

[23] There are three principal issues in this case:

(a) Is the amount received by the respondent under the ARTT plan earnings within the meaning of the Act and the Regulations?

(b) If it is not earnings, is the amount received a relief grant ?

(c) If it is earnings, which of the allocation measures is applicable?

4. ANALYSIS

(a) Is the amount received by the respondent under the ARTT plan earnings within the meaning of the Act and the Regulations?

[24] It is necessary to determine, first, whether the sum received by the respondent is "earnings" within the meaning of section 19 and paragraph 54(*s*) of the *Employment Insurance Act*, S.C. 1996, c. 23 (the "Act"), and section 35 of the Regulations.

[25] Section 19 of the Act provides that if the claimant receives earnings during a period for which benefits are claimed, an amount must be deducted from these benefits.

[26] Paragraph 54(*s*) of the Act reads as follows:

54. The Commission may, with the approval of the Governor in Council, make regulations	54. La Commission peut, avec l'agrément du gouverneur en conseil, prendre des règlements:
. . .	[...]
(*s*) defining and determining earnings for benefit purposes, determining the amount of those earnings and providing for the	*s*) définissant et déterminant la rémunération aux fins du bénéfice des prestations, déterminant le montant de cette rémunération

allocation of those earnings to weeks or other periods;

[emphasis added]

et prévoyant sa répartition par semaine ou autre période;

[je souligne]

[27] Subsections 35(1) and 35(2) of the Regulations provide as follows:

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;

[...]

"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

(2) Subject to he other provisions of this section, the earnings to be taken into account for the purpose of determining whether an interruption of earnings has occurred and the amount to be deducted from benefits payable under section 19 or subsection 21(3) or 22(5) of

35. (1) Les définitions qui suivent s'appliquent au présent article.

« **emploi** »
a) Tout emploi, assurable, non assurable ou exclu, faisant l'objet d'un contrat de louage de services exprès ou tacite ou de tout autre contrat de travail, abstraction faite des considérations suivantes:
(i) des services sont ou seront fournis ou non par le prestataire à une autre personne,
(ii) le revenu du prestataire provient ou non d'une personne autre que celle à laquelle il fournit ou doit fournir des services;

[...]
« **revenu** » Tout revenu en espèces ou non que le prestataire reçoit ou recevra d'un employeur ou d'une autre personne, notamment un syndic de faillite. (income)

(2) Sous réserve des autres dispositions du présent article, la rémunération qu'il faut prendre en compte pour déterminer s'il y a eu un arrêt de rémunération et fixer le montant à déduire des prestations à payer en vertu de l'article 19 ou des paragraphes 21(3) ou 22(5) de la Loi, ainsi que pour l'application des articles 45 et 46 de la Loi, est le revenu intégral du prestataire provenant de tout emploi, notamment:

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, or

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

[...]

[emphasis added]

a) les montants payables au prestataire, à titre de salaire, d'avantages ou autre rétribution, sur les montants réalisés provenant des biens de son employeur failli;

b) les indemnités que le prestataire a reçues ou recevra pour un accident du travail ou une maladie professionnelle, autres qu'une somme forfaitaire ou une pension versées par suite du règlement définitif d'une réclamation;

c) les indemnités que le prestataire a reçues ou a le droit de recevoir, sur demande, aux termes:

(i) soit d'un régime collectif d'assurance-salaire,

(ii) soit d'un régime de congés payés de maladie, de maternité ou d'adoption,

(iii) soit d'un régime de congés payés pour soins à donner à un ou plusieurs enfants visés au paragraphe 23(1) de la Loi;

[...]

[je souligne]

[28] The umpire began with an analysis of the Plan:

> It is important to note that the payment of benefits under the terms of this plan requires that the working hours freed up by the worker benefiting from the plan must be reallocated to other employees under the threat of layoff or who are hired under the plan. It is clear that if the freed up hours are not used for these purposes, the payment of benefits shall be prorated to the hours freed up and used. The amounts which could be paid had nothing to do with the nature or the duration of the work of the beneficiaries who had already received the various amounts to which they were entitled as a result of the termination of their employment.

(Applicant's Appeal Book, pages 12 and 13)

[29] He then referred to *Canada (Attorney General) v. Lawrie Vernon* (1995), 189 N.R. 308 (F.C.A.), [1995] F.C.J. No. 1394 (F.C.A.) (QL) in the following words:

> The definition of earnings in subsection 57(1) of the Regulations is very general. It says simply that it comprises the entire income of a claimant arising out of employment. Income, in turn, is defined as any pecuniary and non-pecuniary receipts from an employer or any other person. Given this generality in the wording, the specific meaning of earnings must be derived from the case law. In *Coté v. Canada Employment and Immigration Commission et al*, (1986), 69 N.R. 126, at page129 and 130; 86 C.L.L.C. 12,178, at 12,280. See also *Attorney General v. Harnett* (1992), 140 N.R. 308. Pratte J.A., (Lacombe J.A. concurring) referring to the French version of the Regulation as well as the English one, stated the following:
>
> > In what sense did the legislator use the word "rémunération" in the Act? In its ordinary meaning, the word signifies "l'argent reçu pour prix d'un service, d'un travail". The English version of the Act uses the word "earnings" which according to the *Shorter Oxford English Dictionary* means "that which is earned by labour, or invested capital". This meaning cannot be given to the French word "rémunération", which is not ordinarily used to refer to investment income. Accordingly, while it is true that use of the word "earnings" in the English version of the Act may suggest giving the French word "rémunération" a wide meaning which would, for example, cover tips, it seems to me that use of the word "rémunération" in French actually limits the meaning of the English word "earning", so that it refers only to what is earned by labour. In my opinion, it is this meaning that must be given to the word "rémunération".
>
> Later in the decision, Pratte J.A. suggested that a receipt (a pension in that case) which resembles earnings in some respects may be considered "earnings", if there is "a sufficient connection between the work done by an employee in employment and the pension arising out of that employment. . . . Ibid., at 12,281. Looked at broadly, therefore, to be considered as "earnings", a receipt must evince the character of consideration given in return for work done by the recipient. Ibid.

> In his concurring reasons, Marceau J.A. used a similar test in *Coté*, where he suggested that "earnings in the broad sense are everything the worker derives in the form of pecuniary benefits from his work present or past....". Here too is contained the idea that to be "earnings", the receipt must be as a result of work done, not merely as a consequence of one's employment status.

[30] The umpire found:

> The benefits that the claimants received as part of the ARTT plan do not constitute "earnings . . . the worker derives . . . from his work present or past". The payment of those benefits is subject to two conditions – the claimant must have given up an employment that continues to be assumed by another worker. Paragraph 5 of the memorandum states clearly that the employee who wishes to take advantage of the Plan must continue "to reduce his working time during the claim period" [trans.]. The benefit is based on a commitment to refrain from reintegrating a position. The benefit is in no way linked to any past or present work done by the recipient. Such benefits do not therefore constitute earnings as understood in subsection 35(2) of the *Regulations*.
>
> (Applicant's Appeal Book, p. 14)

[31] The respondent argues that the umpire's finding is supported by many elements in the record. For example, he states:

(a) the amount paid pursuant to the plan had no relation to the length of time worked for the company, the usual earnings, the classification or the age of the respondents;

(b) this amount, paid by the employer's intermediary, was entirely covered by government funds, unlike the other amounts paid by the employer such as the severance pay;

(c) during the period in which the payments were received, the respondents had lost their jobs; and

(d) this amount was paid under a program set up by the provincial government in part to ensure that these workers did not go back to work, subject to a periodic reevaluation of eligibility for the program.

[32] In support of his arguments, the respondent cited a number of cases where the amounts paid were not earnings: *André Giroux v. Canada Employment and Immigration Commission*, [1989] 1 F.C. 279 (F.C.A.); *Lawrie Vernon*, *supra*; *Canada v. Plasse*, [2000] F.C.A. No. 1671 (F.C.J.) (QL); *Canada (Attorney General) v. Radigan*, [2001] F.C.J. No. 153 (F.C.A.) (QL); and *Canada (Attorney General) v. Tousignant*, 2002 F.C.A. 248, [2002] F.C.J No. 890 (F.C.A.) (QL).

[33] In this case, it must be determined if the amount of $12,000 is earnings within the meaning of section 35 of the Regulations.

[34] In order to do so, I must go back to the basic principles to answer the following question: what is meant by the term "earnings"?

The answer is dependant upon the Act, the Regulations and the caselaw.

[35] *Côté v. Canada (Employment and Immigration Commission)*; (1986), 69 N.R. 126 (F.C.A.); [1986] F.C.J. No. 447 (F.C.A.) (QL); motion for leave to appeal to the Supreme Court of Canada dismissed, (1987), 76 N.R. 79 (n) involved the validity of an amendment made by the Commission to section 57 of the Regulations (later section 35 of the Regulations), which provided that pension received by the claimant would be included in the term "earnings". The debate was centred on the Commission's authority to define the term "earnings" (did it exceed its jurisdiction in amending the Regulations to include pension payments?) In his reasons (concurred in by Lacombe J.A.), Pratte J.A. stated that the power that paragraph 58(*q*) of the Act (now paragraph 54(*s*)) gives the Commission is not to define the expression "earnings" as it is used in the Act. The previous meaning of the term "earnings" is in the Act (section 19), which was a predecessor of the Regulations. In what sense, then, had Parliament used the term "earnings"? He concluded that this word "refers only to what is earned

by labour". We therefore find, in the meaning of the term earnings pursuant to the Act, the element of consideration for work performed. With regard to the Commission's regulatory powers under paragraph 58(*q*) of the Act (now paragraph 54(*s*)), Pratte J. singled out two aspects. First, the Commission had the power to specify and clarify what constitutes earnings. This power should only be exercised within the meaning of "earnings" given by Parliament in the Act (i.e., whatever it means, "earnings" will require work performed as consideration, because this is the meaning of "earnings" under the Act. The Commission, Pratte J.A continued, then had the power to complete the Act by including within "earnings" receipts that, in reality, are not earnings but resemble them in certain respects. To compensate for the lack of consideration of work done in this second category (which normally means that the sums received are not earnings), the test developed by Pratte J.A. requires the existence of a "certain connection" or a "sufficient connection" between the employee's work and the sums in question, in such a way that these sums are comparable to earnings. Thus, he added, "The employee receives his pension because he has worked, and it seems to me that in a broad sense the pension is paid to him in consideration of the work done by him." He

had remarked earlier that it appeared to him that the Commission could not decree that family allowances received by a claimant constitute earnings because there is no connection between the allowance and the work done by the claimant. However, it seemed to him that the Commission could deem, as it had done in paragraph 57(2)*(c)* of the Regulations (now paragraph 35(2)*(c)*), that sick leave or disability payments received by a claimant from a group wage-loss indemnity program constitute earnings, because of the certain connection that exists between these payments and, on the one hand, the work done (without which the claimant would not have benefited from this insurance) and, on the other hand, the salary that these payments were replacing.

[36] In reasons concurring with the majority in *Côté*, Marceau J.A. agreed with his colleagues' interpretation of the Commission's powers to define earnings. In support of this, Marceau J.A. added "[e]arnings, in the broad sense are everything the worker derives in the form of pecuniary benefits from his work present or past. . . ."

[37] In *Lawrie Vernon, supra*, Linden J.A. noted that the definition of earnings set out in the Regulations is very general and that, consequently, the exact meaning of the word "earnings" must be drawn from the caselaw. He then cited *Côté*, noting the paragraph by Pratte J.A. dealing with the meaning of the term earnings in the Act. Linden J.A. then linked the criteria developed by both the majority (Pratte and Lacombe JJ.A.), and Marceau J.A. in *Côté*, to the idea that to be considered earnings, a receipt must in a general way have the characteristics of an amount paid in consideration of work done by the claimant — the receipt must be from work done, and not merely as a consequence of a person's employment status (paragraphs 10 and 11 of his reasons). He then asked the following question: "Is the . . . subsidy in question here a receipt arising out of work done by the employees, and does it bear a sufficient connection to that work to be properly found to be consideration for the work so performed?"

[38] I understand from these two leading cases that earnings within the meaning of the Act and the Regulations correspond to whatever is earned by an employee as a result of his work, i.e. in return for his work. The "certain connection" or "sufficient connection" test, under

which receipts that are not earnings because they are not in consideration of work performed are likened to earnings is discussed by Pratte J.A. in the context of the Commission's exercising its regulatory authority. The application of this "connection" test would normally require, therefore, that the Commission exercised its regulatory authority and that it expressly included the amount as earnings in the Regulations, as it has done for pensions (*Côté*).

[39] Can an amount which is not in consideration of work done in the traditional sense and which has not been expressly included in the Regulations by the Commission, be earnings within the meaning of the Act and the Regulations?

[40] That is the issue in this case.

[41] We must, I believe, answer in the affirmative on condition that this amount is comparable to earnings and that there is a "certain connection" or a "sufficient connection" between the claimant's employment (in the absence of work done in the traditional sense) and

the sum received. These elements are inherent, in my view, to the judicial interpretation of the Act and the Regulations.

[42] Let me explain.

[43] It is true that in this case the money received came from a third party and not from the employer, although it was paid by the employer. This factor, however, does not detract from the employment relationship because subsection 35(1) of the Regulations provides that money may be received "from an employer or any other person" (definition of "income"). On this point, it must be noted that the employer that was receiving this money from Emploi-Québec was bound to make the payments in accordance with the Plan (clause 14 of the memorandum of Agreement), i.e., to those employees who agreed to free up hours of work for the benefit of other employees. Further, the union that participated in this plan was acting "[Translation] as a duly authorized representative of the workers of La Laiterie Dallaire . . . " (Applicant's Appeal Book, p. 29). The memorandum of agreement was binding on all of the parties to the employment contract, therefore.

[44] The money was received as an incentive in order to encourage those who received it to give up their work hours. Even if there is no specific equivalence between the sum received and the former salary, and even if it was received when the respondents had already left their jobs, the sum of $12,000 had all the characteristics of earnings.

[45] As stated previously, earnings include any receipt or consideration received for the work done. If, as a result of variable market conditions, a worker receives a sum of money on condition that he give up his work or that he surrender his hours of work to another employee, the amount that he receives has the effect of compensating for his diminished earnings. The amount received represents, to a certain extent, compensation for his undertaking not to work. It also mitigates the situation in which workers find themselves when they are no longer receiving a salary. This sum becomes consideration for not working. It does not necessarily correspond to the same amount as the salary, but it makes up for its absence. At the same time, this amount is one of the conditions of termination of employment because it is an incentive to put an end to the employment. It is closely connected to the employment and has all of the characteristics of earnings even if, in a sense, it is not

earnings within the traditional meaning because there is no work done in consideration of the amount received. There is no reason why the notion of earnings cannot be adapted to labour market conditions if it is determined that a sum received, even from a third party, is comparable to consideration for freeing up a position.

[46] The umpire was right to say that the sum received was a "benefit based on a commitment not to resume a given position". It was incorrect, however, for him to state that this "benefit has nothing to do with the beneficiary's past or present work."

[47] Not one of the cases referred to by the respondent is incompatible with the analysis in this case. The facts were distinct in each case.

[48] *Giroux*, *supra*, involved amounts received from the Office de la construction du Québec for annual vacation pay. After the Supreme Court of Canada's ruling in *Bryden v. Employment and Immigration Commission*, [1982] 1 S.C.R. 443, this Court had no choice but to find that the amounts received were Mr. Giroux's savings that were

repaid to him by the Office de la construction du Québec, and that they therefore could not be considered earnings.

[49] *Lawrie Vernon, supra,* involved a housing subsidy as part of severance pay paid to employees when a mine closed. It was a fixed amount in a single payment, the quantum of which was determined in accordance with the estimated loss of property value assessed by a recognized real estate agency and submitted to the employer. Linden J.A., on behalf of this Court, found that this subsidy had no connection with the work done by the employees who received it.

[50] The issue in *Plasse, supra,* involved an amount paid to an employee for the waiver of his right to resume his former position following an order for reinstatement made in the context of a complaint for wrongful dismissal by the Director of Labour Standards of Nova Scotia. Décary J.A. began by noting that the right to reinstatement did not exist in *common law*. This was a statutory right independent of the right to be compensated for wrongful dismissal (paragraph 14 of his reasons). He went on to draw a careful distinction between a settlement involving compensation for loss of salary, which is considered to be

earnings, and an amount received upon waiver of a right to reinstatement ordered by a competent authority pursuant to a statutory right. In the latter case, it could not be said that a sum paid to an employee for him to waive his right to resume his former position was "earned by labour" or that it was "given in return for work done", to use the words of Linden J.A. at paragraph 10 of his reasons in *Vernon* (see paragraph 17 of Décary J.A.'s reasons in *Plasse*).

[51] In this case, there is no statutory right at issue. The respondent waived his hours of work in favour of somebody else. He was not waiving the right to reinstatement. He was giving up his employment. It is true that in giving up his hours of work, the respondent was giving up his seniority, and that this seniority was a right recognized by the collective agreement which operates under the aegis of legislation. But I find it hard to believe that the rights in the collective agreement, which were being terminated by the parties, enjoyed, in terms of the employment, the same degree of "independence" as a statutory right to reinstatement. It cannot be argued that the amounts received conditional upon a waiver of the rights in the collective agreement are not "earned by" the respondent's employment. The collective agreement is the

product of negotiation. Thus, when a claimant waives a benefit therein, it can be said that he is waiving a right that pertains to his conditions of work, but not a right given to him by law.

[52] *Radigan, supra,* involved the characterization of sums that had been included in a settlement in the context of an action for wrongful dismissal. The sums were intended for job searches and for professional training. Strayer J.A. observed that, according to *Canada (Attorney General) v. Walford*, [1979] 1 F.C. 760 (F.C.A.), "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." The payment of the above-mentioned two amounts was considered to be due to "special circumstances" and therefore was not regarded as earnings.

[53] *Tousignant, supra*, involved an amount allocated for mental distress in the context of a court action for wrongful dismissal. This amount was subtracted from the earnings to be allocated.

[54] These decisions do not, therefore, change in any way at all my conclusion that the amount paid under the ARTT plan constitutes earnings because it has all of the characteristics of such given the variable conditions of the job market.

(b) If it is not earnings, is the amount received a relief grant ?

[55] In the alternative, the respondent, relying on *Budhai v. Canada (Attorney General)*, [2003] 2 F.C. 57 (F.C.A.), submits that the board of referees' decision to the effect that the amount received was a relief grant within the meaning of paragraph 35(7)*(c)* of the Regulations, involves a question of mixed fact and law, that the standard of review is that of reasonableness *simpliciter* and that there is nothing in this decision of the board of referees to warrant the intervention of the umpire or of this Court. He submits that the board of referees' decision was reasonable *simpliciter* and that the umpire erred in overturning it.

[56] To determine whether an amount is a relief grant this Court has held that three factors must be analyzed; (a) the circumstances giving rise to the loss, (b) the type of loss for which the compensation is being paid and (c) the nature of the compensatory scheme (*Canada (Attorney General) v. King*, [1996] 2 F.C. 940 (F.C.A.). And even if, as the respondents argue, in *King, supra*, the parties had conceded that the amounts received were earnings, this distinction between *King* and the respondents' situation does not make the tests in *King* any less relevant in determining what constitutes a relief grant in this case.

[57] With respect to the first test (the circumstances giving rise to the loss) it is true that, as the respondent argues, the definitive interruption in one part of the production of the company for which the respondent was working could constitute unusual or irregular circumstances. However, with respect to the second test (the type of loss for which the compensation is being paid), the type of loss incurred by the respondents was essentially voluntary. They consented to the reduction of their work hours and to their layoff. This was not an unexpected and sudden loss, for example. But above all, with respect to the third test (the nature of the compensatory scheme), the umpire correctly

understood from the terms of the memorandum of agreement that "The main objective of the ARTT plan was not to compensate for a loss suffered by the beneficiary but instead to ensure that the hours he was freeing up would provide employment for another worker and that the beneficiary would not attempt to resume employment with the employer." (Applicant's Appeal Book, p. 10). The reading of the memorandum of agreement was a question of law, a subject on which the board of referees had no expertise. Accordingly, the standard of review is that of the correctness of the decision.

[58] The umpire, correctly, set aside the board of referees' decision that the amounts received constituted a relief grant. It was an error in law for the board of referees to characterize the amount received as such, and the umpire's intervention was warranted.

(c) If it is earnings, which of the allocation measures is applicable?

[59] In its initial opinions, the Commission allocated the amounts according to subsection 36(9) of the Regulations (see Applicant's Appeal Book, p. 39). In other cases (docket A-690-01, p. 32, Martin Bellehumeur), the Commission initially made the allocation in accordance with subsection 36(14) of the Regulations. In its observations to the board of referees, however, the Commission submitted that the recourse in subsection 36(14) was erroneous and that the allocation had to be made pursuant to subsections 36(9) and (10) (A-690-01, p. 32). Before this Court, the applicant argued that subsection 36(9) is the one that is applicable. This subsection reads as follows:

36(9) Subject to subsections (10) and (11), all earnings paid or payable to a claimant by reason of a lay-off or separation from an employment shall, regardless of the nature of the earnings or 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	36.(9) Sous réserve des paragraphes (10) et (11), toute rémunération payée ou payable au prestataire en raison de son licenciement ou de la cessation de son Emploi est, abstraction faite de la nature de la rémunération et de la période pour laquelle elle est présentée comme étant payée ou payable, répartie sur un nombre de semaines qui commence par la semaine du licenciement ou de la cessation d'emploi, de sorte que la

employment are, in each consecutive week except the last, equal to the claimant's normal weekly earnings from that employment.	rémunération totale tirée par lui de cet emploi dans chaque semaine consécutive, sauf la dernière, soit égale à sa rémunération hebdomadaire normale provenant de cet emploi.
[emphasis added]	[je souligne]

[60] Before this Court, the respondents argued that no section was applicable. Before the umpire, the respondents suggested that if there had to be an allocation, it was instead paragraph 36(19)(*b*) that should be applied. Subsection 36(19) reads as follows:

(19) Where a claimant has earnings to which none of subsections (1) to (18) apply, those earnings shall be allocated	(19) La rémunération non visée aux paragraphes (1) à (18) est répartie:
(*a*) if they arise from the performance of services, to the period in which the services are performed; and	*a*) si elle est reçue en échange de services, sur la période où ces services ont été fournis;
(*b*) if they arise from a transaction, to the week in which the transaction occurs.	*b*) si elle résulte d'une opération, sur la semaine où l'opération a eu lieu.

[61] Given the conclusion reached by the board of referees and the umpire, their decisions are silent on the manner in which the earnings should be paid. There is therefore no reason to refer to it.

[62] It is true that the amount of $12,000 was paid to the respondent in three installments over three years. However, in light of my earlier finding that these are "earnings paid or payable . . . by reason of . . . separation from an employment", the allocation must be effected in

accordance with subsection 36(9), which applies "regardless . . . of the period in respect of which the earnings are purported to be paid or payable".

4. CONCLUSION

[63] The applications for judicial review should be allowed with costs, the umpire's decision should be set aside and the matter referred back to the chief umpire or to an umpire designated by him for reconsideration on the basis that the Commission's appeal from the decision of the board of referees must be allowed and that the cases must be returned to the Commission for reallocation of the amounts received in accordance with subsection 36(9) of the Regulations.

"Alice Desjardins"
J.A.

"I concur."
"M. Nadon, J.A."

"I concur."
"J.D. Denis Pelletier, J.A."

Certified true translation

Kelley A. Harvey, BA, BCL, LLB

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

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Between:

ATTORNEY GENERAL OF CANADA v. GASTON ROCH

REASONS FOR JUDGMENT