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Reasons for decision

In the matter of an appeal of the Minister's decision under section 32.5 of the *Wage Earner Protection Program Act*,

Philip Mark Rhodes,

applicant.

Board File: 034523-C

Neutral Citation: 2022 CIRB 1005

January 28, 2022

The panel of the Canada Industrial Relations Board (the Board) was composed of Ms. Paula Turtle, External Adjudicator, sitting alone pursuant to section 14.1(1) of the *Wage Earner Protection Program Act (WEPP Act)*.

I. Nature of the Application

[1] On April 2, 2021, Mr. Philip Mark Rhodes (the applicant) filed an application to appeal pursuant to section 14(1) of the *WEPP Act*. Section 14(1) provides the right to appeal a review decision regarding eligibility. However, Mr. Rhodes' application rather relates to a review decision regarding overpayment (and not eligibility). Accordingly, the Board will treat it as having been filed pursuant to section 32.5(1) of the *WEPP Act*.

[2] Mr. Rhodes appeals the Minister's review decision which found that he had been paid amounts that he was not owed.

[3] Having reviewed the application, the Board has decided to rescind and vary the Minister's review decision, as set forth below.

II. Background and Facts

[4] Mr. Rhodes was employed by Cirque du Soleil Inc. (the employer or Cirque du Soleil). The employer commenced proceedings under the *Companies' Creditors Arrangement Act* on June 30, 2020, and entered into a receivership on July 24, 2020.

[5] According to a letter from the employer confirming Mr. Rhodes' employment, Mr. Rhodes was employed by Cirque du Soleil under a series of contracts for the following periods: April 15, 2006, to October 11, 2010; November 8, 2010, to August 27, 2017; and September 4, 2018, to May 29, 2020. Although the employer states that Mr. Rhodes' contract ended on May 29, 2020, Mr. Rhodes' submissions (referred to occasionally below) state that his contract ended on May 24, 2020. Regardless of the precise end date of his contract, Mr. Rhodes states that, due to the COVID-19 pandemic, he did not receive any pay after March 13, 2020.

[6] According to the record, Mr. Rhodes filed an application under the Wage Earner Protection Program (WEPP) on October 20, 2020. As set out in more detail below, Mr. Rhodes was initially found to be eligible for termination pay and was paid \$6,798.57, the maximum entitlement under the WEPP. However, this decision was reconsidered by Service Canada, which administers the WEPP on behalf of the Minister. On February 9, 2021, Service Canada issued an overpayment decision asking Mr. Rhodes to repay the full amount that he had received. Mr. Rhodes was informed that he was not entitled to the payment he had received because he had not filed a Proof of Claim (POC) and because the Trustee had determined that he was not eligible for payment.

[7] On March 10, 2021, Mr. Rhodes filed a "Request for Review by Minister" of Service Canada's overpayment decision. He submitted with his request for review a POC dated October 20, 2020. He also stated that he had been employed by Cirque du Soleil for 15 years on a "rolling contract," which would have been renewed at the expiry of its term on May 24, 2020. Therefore, his employment would have continued. He also stated that after 15 years with his employer, he would have expected "redundancy after termination of employment."

[8] By letter dated March 18, 2021, the Minister's delegate advised Mr. Rhodes that she had reviewed the overpayment decision denying him eligibility for a WEPP payment. She confirmed the overpayment decision, stating the following:

The Trustee, who is responsible for making a determination on amounts owed under the *Wage Earner Protection Program Act* (WEPPA), has confirmed that no WEPP eligible amounts are owed to you. You may contact the Trustee directly in an effort to resolve the situation. Please note that no payment can be made in the absence of this information.

[The] Trustee indicated that your employment relationship with Cirque was governed by a fixed-term agreement and your employment ended automatically as a result of the expiry of the term provided in said agreement. Pursuant to applicable law, such termination does not create any right to further notice or pay in lieu thereof.

Consequently, you are not eligible to receive a WEPP Payment.

III. Positions of the Parties

A. The Applicant

[9] Mr. Rhodes requests compensation for his 15 years of service with Cirque du Soleil. The Board understands this to be a request for termination pay.

[10] He also states that had it not been for the pandemic, he would have been paid the full amount of his contract. He asks to be compensated for his loss of earnings.

B. The Minister

[11] Although the Minister has the right to make representations to the Board pursuant to section 32.6(4) of the *WEPP Act*, the Minister declined to do so in this matter.

IV. The Board's Role on Appeal

[12] An individual who is unsatisfied with the Minister's review decision regarding overpayment may appeal that decision to the Board, but only on a question of law or jurisdiction, pursuant to section 32.5(1) of the *WEPP Act*. The appeal is limited to a review of the information that is contained on the Minister's file.

[13] The Board's only role is to consider the review decision and the information that was before the Minister's delegate to determine what facts were considered and how the legal questions were analyzed. As no new evidence is admissible, pursuant to section 32.7 of the *WEPP Act*, the Board cannot obtain or consider new evidence or documents that could clarify the facts in dispute.

[14] In this case, the applicant bases his application to appeal on a question of law.

[15] In *Au*, 2020 CIRB 931, the Board reviewed how questions of law have been defined in cases relating to statutory appeals, as follows:

[22] In summary, a question of law is a question about a legal test. In the context of an application to appeal pursuant to section 14(1) of the *WEPP Act*, the Board will have to consider:

1. whether the Minister's delegate applied the correct legal test and asked the right questions in coming to the decision;
2. whether all aspects of the legal test were applied to the facts; and
3. whether the Minister's delegate took into account all the key facts and the evidence that the law requires the delegate to take into account in the application of a test.

[16] In *Au, supra*, the Board determined an application to appeal a review decision respecting eligibility that had been filed pursuant to section 14(1) of the *WEPP Act*, whereas Mr. Rhodes' application relates to a review decision respecting overpayment and was filed pursuant to section 32.5(1) of the *WEPP Act*. However, since the Board's role and powers are the same in both types of applications, it is of the view that the comments it made in *Au, supra*, equally apply to this case.

[17] As noted above, the Board is limited to reviewing the information that was provided to the Minister's delegate when the review decision was made, and it cannot expand that record by obtaining new or additional evidence. The scheme of the *WEPP Act* is such that the Minister's delegate creates the full evidentiary record on which the Board's decision is based.

[18] That record is created with information provided by the applicant and by the trustee or receiver. One of the obligations of the trustee or receiver is to identify individuals who are owed eligible wages, calculate the amount of eligible wages and provide that information to the Minister (see section 21 of the *WEPP Act*). However, the Minister has extensive powers to investigate and obtain the information necessary to determine whether an applicant qualifies for a payment under the *WEPP Act*. For example, the Minister may provide directions to trustees or receivers, summon any person to give evidence and provide documents or information and perform inspections (see sections 23 to 27 of the *WEPP Act*).

[19] Despite the broad authority of the Minister's delegate to create the evidentiary record, the Board has the power to confirm, vary or rescind the Minister's review decision under section 32.8

of the *WEPP Act*. In exercising this power, the Board may substitute its decision for that of the Minister in appropriate circumstances.

[20] The Board will now assess the Minister's review decision with the above principles in mind.

V. The Record

A. The Summary

[21] The Review File Summary (the Summary) is a document prepared by the Minister's delegate that contains a summary of the facts considered and the reasoning behind the Minister's review decision. Below, the Board summarizes the elements of the Summary that are relevant to this application.

[22] The Summary dated March 18, 2021, reviews the following Trustee Information Forms (TIFs):

- a. The "Original TIF" dated September 17, 2020, indicates that Mr. Rhodes is owed \$22,968.71 in termination pay. Under "Employee Information," the form states that no POC was filed.
- b. A version called "Amendment to POC only" received on October 27, 2020, does not include the chart showing that Mr. Rhodes is owed termination pay. Under "Employee Information," the form states that a POC was filed.
- c. A version called "Amendment" dated January 28, 2021, indicates that Mr. Rhodes is owed no earnings. Under "Employee Information," the form states that no POC was filed.

[23] The Summary states that Mr. Rhodes' employment ended within the WEPP eligibility period.

[24] The Summary also notes that Mr. Rhodes asserted in his request for review that he had been employed by the employer in a series of contracts for 15 years and that his contract would have been extended at the end of his contract, as had been the case with earlier contracts. In addition, he filed a POC dated October 20, 2020, with his request for review.

[25] The Minister's delegate explained her fact-finding efforts as follows:

Results of fact-finding with the Trustee/receiver determined that after review of client's file, Trustee note that client's employment relationship with Cirque was governed by a fixed-term agreement and

that client's employment ended automatically as a result of the expiry of the term provided in said agreement. Pursuant to applicable law, such termination does not create any right to further notice or pay in lieu thereof. In addition, the treatment of such termination would be the same if an employee had been on temporary layoff so long as the reason of the termination of employment remains the end of his contract. As such and considering that client were not owed any amount as termination pay or severance pay following the termination of client's employment, Trustee cannot consider that client is entitled to receive a payment under the WEPP.

[sic]

[26] According to the Summary, the Minister's delegate appears to have considered the following facts:

- The TIF provides that Mr. Rhodes' employment ended on May 30, 2020, which is within the eligibility period established under the *WEPP Act*.
- The Trustee submitted an amended TIF on January 28, 2021, showing that Mr. Rhodes was owed no eligible wages.
- The Trustee concluded that no eligible wages were owed because Mr. Rhodes' employment relationship was governed by a fixed-term agreement and his employment had ended automatically as a result of the expiry of its term. The contract does not provide for termination or severance pay.
- The Trustee stated that Mr. Rhodes' termination would have been treated as if he were on temporary layoff at the end of his contract.

[27] The Summary also refers to Mr. Rhodes' claim that he did not receive any wages after March 13, 2020, even though his contract continued until May 24, 2020. However, after indicating that the issue was raised by Mr. Rhodes, the Summary does not address it further.

B. Other Documents

[28] The record includes other documents on which the Minister's delegate relied to create the Summary.

[29] The documents in the record include a letter dated March 12, 2021, from Cirque du Soleil stating that Mr. Rhodes was employed in various positions with it for the following periods: April 15,

2006, to October 11, 2010; November 8, 2010, to August 27, 2017; and September 4, 2018, to May 29, 2020. This letter was part of Mr. Rhodes' request for review of the overpayment decision.

[30] The record also contains telephone logs of calls between the Minister's delegate and the applicant and between the Minister's delegate and the Trustee. On March 12, 2021, Mr. Rhodes confirmed that he was on a contract for touring but that he was supposed to return to his regular position afterwards. He said that he would try to reach his managers to obtain a copy of his contract and a document to show that he would have returned to his regular position at the end of his contract. On March 15, 2021, Mr. Rhodes advised the Trustee that, while he had no documentation to confirm the renewal of his contract after its expiry on May 29, 2020, it was the "plan" for him to return to work to a position he formerly held under an earlier contract. On the same day, the Minister's delegate spoke to the Trustee. The Trustee explained that they had made a mistake when submitting the first TIF and that they realized that Mr. Rhodes was not entitled to termination pay because his contract had ended before the receivership. Furthermore, the contract did not have a clause for termination pay or severance pay. A few minutes later, the Minister's delegate called Mr. Rhodes to explain why he was ineligible for termination pay.

[31] An email from the Trustee to Mr. Rhodes dated March 15, 2021 (included in the telephone logs described in paragraph 30, above) stated that Mr. Rhodes was not eligible for the WEPP because he was employed pursuant to a fixed-term contract that did not provide for payment of termination or severance pay. In the email, the Trustee explained that Mr. Rhodes' employment had ended automatically as a result of the expiry of the contract and that, according to the applicable law, this situation did not create a right to termination notice or termination pay. The email further stated that, in addition to this, the treatment of Mr. Rhodes' termination in these circumstances would be the same as if an employee was on temporary layoff at the end of their contract.

[32] Mr. Rhodes' employment contract was not included in the documents provided to the Board, and there is no evidence that either the Trustee or the Minister's delegate further enquired about the renewal of Mr. Rhodes' contract.

VI. Analysis and Decision

A. Mr. Rhodes' Claim for Termination Pay

[33] Regarding the effect of the expiry of his contract, Mr. Rhodes takes the position that his employment would not have ended with the expiry of the last contract and that, therefore, he is entitled to termination pay and eligible for the WEPP payments. The Minister's delegate relies on the Trustee's conclusion that Mr. Rhodes did not qualify for eligible wages since his employment would have ended on May 30, 2020, because the contract expired on May 29, 2020, and did not provide for termination or severance pay.

[34] However, the Minister's delegate did not take into account Mr. Rhodes' explanation that he was on a "rolling contract" and did not evaluate the likelihood of Mr. Rhodes' employment continuing past May 24 (or May 29), 2020. For example, she did not comment on the effect of Mr. Rhodes' lengthy history of employment with the employer or his statement that the plan was for him to continue to be employed by the employer. In short, the file contains no explanation for her acceptance of the Trustee's assertion that Mr. Rhodes' employment would have ended on May 30, 2020, despite the contrary facts provided by Mr. Rhodes. Rather, the Minister's delegate simply stopped investigating after speaking to the Trustee.

[35] The failure of the Minister's delegate to investigate the effect of Mr. Rhodes' assertions is an issue, since a succession of fixed-term contracts can indicate the existence of a continuous employment relationship, which would give rise to a right of reasonable notice of termination or termination pay. This principle exists in common law jurisdictions (see Ball, Stacey Reginald, *Canadian Employment Law: Fixed Term Contracts and Task Employment* (Aurora: Canada Law Book, 2003)) and has also been recognized in Quebec civil law (see, for example, *Commission des normes du travail c. IEC Holden inc.*, 2014 QCCA 1538 (CanLII)). While a succession of fixed-term contracts does not always establish the existence of a continuous employment relationship, that issue can only be determined after an analysis of the employment relationship.

[36] It is an error of law for a decision-maker to fail to take into account relevant facts or to explain their reasoning.

[37] In this case, there is no evidence that the Minister's delegate took into account Mr. Rhodes' statements in support of his argument that his employment would have continued. She did not take into account Mr. Rhodes' work history. In addition, there is no explanation for her reasoning in support of her finding that his contract would have ended on May 30, 2020.

[38] The Minister's delegate essentially adopted the Trustee's view of the duration of Mr. Rhodes' employment, without conducting her own investigation and arriving at her own conclusion. This is apparent from the fact-finding efforts section of the Summary, in which the Minister's delegate only takes into account the Trustee's conclusion regarding Mr. Rhodes' situation. Furthermore, the telephone logs show that the Minister's delegate stopped investigating after she spoke to the Trustee about Mr. Rhodes' contract. In addition, the explanation she gave in the review decision summarizes the Trustee's explanation as to why Mr. Rhodes was not entitled to a WEPP payment.

[39] It is the Minister who decides whether an individual is eligible to receive a WEPP payment (section 9 of the *WEPP Act*) or whether an individual received an amount greater than the amount they were eligible to receive (section 32(1) of the *WEPP Act*). Even though the trustee has an obligation pursuant to the *WEPP Act* to determine the amount of eligible wages owing to an individual, the power to decide remains with the Minister (see *Gouda*, 2020 CIRB 935). When the amount of eligible wages is not disputed by the applicant, it likely is sufficient for the Minister to rely on the trustee's information. However, if—as in this case—the applicant disputes the amount of eligible wages determined by the trustee, the Minister has a duty to investigate and come to their own conclusion. This explains why the Minister was given extensive investigative powers, as mentioned above.

[40] For all of the foregoing reasons, because the Minister's delegate did not investigate Mr. Rhodes' assertion that he was employed pursuant to a rolling contract and therefore that his employment would have continued past May 30, 2020, she failed to consider relevant facts and therefore committed an error of law.

B. Mr. Rhodes' Claim for Loss of Earnings After March 13, 2020

[41] In addition to his claim for termination pay, Mr. Rhodes made a claim for "loss of earnings," which the Board understands to be a claim for wages he was unable to earn because the pandemic

prevented him from completing his contract (i.e., from his last day of pay on March 13, 2020, to the end of his contract on May 24, 2020).

[42] The Minister's delegate refers to the issue raised by Mr. Rhodes in the Summary but does not address it further. In fact, there is no indication that the Minister's delegate analyzed this claim at all.

[43] The purpose of the *WEPP Act* is to compensate workers for eligible wages that were earned but not paid. In *Gouda, supra*, the Board held that the WEPP enables individuals to claim wages owed to them by employers who are bankrupt or subject to a receivership and that, to be eligible, an employee must be owed wages as defined in the *WEPP Act*.

[44] The *WEPP Act* provides that workers are eligible to receive payment if they are owed "eligible wages" by a former employer (see section 5(1)(c)). "[E]ligible wages" are wages earned during periods defined with reference to the date of bankruptcy or receivership. "[W]ages" are defined in the *WEPP Act* as including "compensation for services rendered." Therefore, the legal test that applies to the claim is whether, during the eligibility period, Mr. Rhodes rendered services for the wages he is seeking.

[45] The Minister's delegate referred to this claim in the Summary but did not apply the relevant legal test to it. By failing to do so, the Minister's delegate committed an error of law.

[46] However, as explained above, Mr. Rhodes claims payment for loss of earnings given that the pandemic prevented him from completing his contract. Since Mr. Rhodes was unable to perform his work, the wages claimed therefore do not amount to "compensation for services rendered." As such, Mr. Rhodes' claim is not eligible for payment under the WEPP.

[47] For this reason, the Board finds it appropriate to vary the Minister's decision and finds that Mr. Rhodes' claim for loss of earnings is not eligible for payment under the WEPP.

VII. Conclusion

[48] Having found that the Minister's delegate made an error of law in connection with Mr. Rhodes' claim for termination pay, the Board may vary or rescind the Minister's review decision.

[49] In this case, the Board is of the view that it would not be appropriate for it to vary the decision of the Minister's delegate in connection with Mr. Rhodes' claim for termination pay. Doing so would require the Board to make further inquiries to determine whether the nature of Mr. Rhodes' employment relationship with Cirque du Soleil was such that he is entitled to termination pay. **As explained above, it is not the Board's role on appeal to conduct further fact-finding and to draw conclusions of fact. The Minister is in a better position to conduct additional fact-finding, if necessary, and to assess the information.**

[50] Accordingly, the Board rescinds the part of the Minister's review decision that dealt with Mr. Rhodes' claim for termination pay and remits it back to the Minister so that the Minister may review that part of the review decision in accordance with this decision.

[51] Regarding the claim for loss of earnings, for the reasons explained above, the Board finds it appropriate to vary the decision of the Minister's delegate and concludes that this claim is not eligible for payment under the WEPP.

Paula Turtle
External Adjudicator