Citation: *D. E. A. v. Canada Employment Insurance Commission,* 2014 SSTGDEI 86

Appeal #: GE-13-1941

BETWEEN:

D. E. A.

Appellant
Claimant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance

SOCIAL SECURITY TRIBUNAL MEMBER:	Alyssa Yufe
HEARING DATE:	February 5, 2014 and April 23, 2014
TYPE OF HEARING:	In person/Teleconference
DECISION:	Appeal allowed in part

PERSONS IN ATTENDANCE

The Appellant was the only person in attendance.

The Appellant attended the hearing on January 23, 2014 by way of telephone conference. The Appellant requested a postponement of the hearing at that time on the grounds that he was feeling unwell and could not speak.

The appeal was then heard in person on February 5, 2014. The Appellant was the only person in attendance. At the hearing, the Appellant requested an adjournment in order to make additional submissions.

The hearing continued by telephone conference on April 23, 2014.

On May 2, 2014 the Appellant wrote to the Tribunal and advised that he did not have further submissions.

DECISION

[1] The appeal is allowed in part.

Allocation:

[2] The Member of the Social Security Tribunal, General Division, Employment Insurance Section (the "Tribunal") finds that the Commission has proven on a balance of probabilities that the amounts in question should be allocated in accordance with sections 35 and 36 of the *Employment Insurance Regulations*, SOR /96-332 (the "Regulations") and the *Employment Insurance Act*, S.C. 1996, c. 23 (the "Act").

Write Off:

[3] The Tribunal finds that it does have jurisdiction to write off part of the overpayment amount and it is writing off 40% of the amount owing. It also recommends that the amount be repaid by the Appellant at the rate of $54.60 per month.

INTRODUCTION

[4] The Appellant filed an initial claim for benefits on June 28, 2012 (Exhibit GD2-13). The Appellant's claim was effective July 1, 2012 (GD2-39).

[5] The Canada Employment Insurance Commission (the "Commission") decided on September 11, 2012, that it had reviewed the new record of employment ("ROE") it received from his employer and that the new benefit rate would be $453.00 instead of $399.00 (GD2-28). It also decided the vacation pay and severance pay for a total amount of $2,551.00 would be deducted from the Appellant's normal weekly earnings of $736.00 from June 24, 2012 to July 21, 2012 and that a balance of $191.00 would be deducted from his benefits in the week of July 22, 2012. The Commission also advised that the Appellant would have to wait the two week waiting period during which no benefits could be paid to him from the date of his eligibility (GD2-12 and GD2-29 to 30).

[6] The Appellant filed an appeal to the Board of Referees on October 17, 2012.

[7] On January 15, 2013, a panel of the Board of Referees determined that an allocation of earnings was imposed in accordance with sections 35 and 36 of the Regulations.

[8] The Appellant appealed the Board of Referees' decision to the Office of the Umpire on February 13, 2013. The appeal was then transferred to the appeal division of the Social Security Tribunal pursuant to section 266 to 268 of the *Jobs, Growth and Long-Term Prosperity Act* of 2012 (GD2-3).

[9] The appeal division of the Social Security Tribunal sent the file to the Tribunal for a re-hearing on the basis that the decision of the Board of Referees did not meet the requirements of subsection 114(3) of the Act since it did not contain a sufficient statement of the Board's findings and the Board erred in law when it simply confirmed the decision of the Commission and did not proceed with its own independent determination of the facts. The Board also did not address the issues of the allocation period and the date of final termination, which had been raised by the Appellant (GD2-5 and 6).

FORM OF HEARING

[10] The hearing was heard in person and via teleconference for the reasons indicated in the Notices of Hearing dated December 17, 2013, January 27, 2014, February 7, 2014 and April 8, 2014.

ISSUES

Issue One:

[11] Whether or not the Appellant's earnings should be allocated pursuant to sections 35 and 36 of the Regulations?

Issue Two:

[12] Whether or not all or part of the alleged overpayment amount should be written off by the Tribunal?

THE LAW

Income:

[13] Income is defined in subsection 35(1) of the Regulations as follows:

> "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.

Earnings:

[14] Subsection 35(2) of the Regulations provides as follows:

> 35(2) Subject to the other provisions of this section, the earnings to be taken into account for the purpose of determining whether an interruption of earnings under section 14 has occurred and the amount to be deducted from benefits payable under section 19, subsection 21(3), 22(5), 152.03(3) or 152.04(4) or section 152.18 of the Act, and to be taken into account for the purposes of sections 45 and 46 of the Act, <u>are the entire income of a claimant arising out of any employment</u>, 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; [Emphasis added]

Exceptions:

[15] Subsection 35(7) sets out certain items which are not included as income. It provides as follows:

35(7) That portion of the income of a claimant that is derived from any of the following sources does not constitute earnings for the purposes referred to in subsection (2):

(a) disability pension or a lump sum or pension paid in full and final settlement of a claim made for workers' compensation payments;
(b) payments under a sickness or disability wage-loss indemnity plan that is not a group plan;
(c) relief grants in cash or in kind;
(d) retroactive increases in wages or salary;
(e) the moneys referred to in paragraph (2)(*e*) if
(i) in the case of a self-employed person, the moneys became payable before the beginning of the period referred to in section 152.08 of the Act, and
(ii) in the case of other claimants, the number of hours of insurable employment required by section 7 or 7.1 of the Act for the establishment of their benefit period was accumulated after the date on which those moneys became payable and during the period in respect of which they received those moneys; and
(f) employment income excluded as income pursuant to subsection 6(16) of the *Income Tax Act*.

Allocation:

[16] Subsections 36(1) and (9) of the Regulations provide as follows:

36. (1) Subject to subsection (2), the earnings of a claimant as determined under section 35 shall be allocated to weeks in the manner described in this section and, for the purposes referred to in subsection 35(2), shall be the earnings of the claimant for those weeks.

Allocation of Earnings Payable By Reason of Separation/Lay-Off:

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

EVIDENCE

[17] The Appellant worked at "MA" (the "Employer") from October 18, 2011 to June 18, 2012; He was no longer working due to a shortage of work; It was unknown whether he would return to work with the employer (June 28, 2012, Application for Benefits, GD2-14 to GD2-24).

[18] According to the record of employment from the Employer dated July 1, 2012, ("ROE 1") the Appellant was a "technical consultant" from October 24, 2011 to June 28, 2012; the reason for issuing the ROE was listed as Code "A" for "shortage of work/end of contract or season". Box 18 provides "temporary layoff" (GD2-24).

[19] A second ROE was filed dated August 10, 2012, ("ROE 2") which provides that the Appellant was paid vacation pay of $1,089.22 because he was no longer working and $1,461.54 in lieu of notice. Box 18 provides "temporary layoff" (GD2-25).

[20] A third ROE was filed on August 10, 2012, ("ROE 3") provides substantially the same information as in GD2-25 but Box 18 is empty (GD2-26).

[21] The Appellant advised that he was issued "separation monies due to a complete severance while on lay off". His average weekly earnings were $730 (Commission's notes, August 17, 2012, GD2-27).

[22] The Notice of Debt dated December 11, 2012, at GD2-31 provides that the Appellant's earnings were not deducted and that this caused an overpayment in the amount of $1,197.00.

[23] In the Notice of Appeal, dated October 17, 2012, the Appellant advised: He was first temporarily laid off and was then permanently laid off one month later when his employer telephoned him to advise of this fact; Management told him that it was laying off 25% of the employees; The Commission suspended his payments for approximately one month while deciding the allocation; His wife is a full time student; He has two young children; He would like to have the amount written off because of undue hardship (GD2-32).

[24] GD2-38 shows a "full text screen" of the payments made to the Appellant. The Appellant received no Benefits during the weeks of July 1, 2012 and July 14, 2012 (on account of the waiting period); $399.00 was received for the week of July 15, 2012 and $798.00 was received for the weeks of July 22, 2012 to August 4, 2012; Only $626 instead of $788 net/$906 gross was paid for the weeks of October 14, 2012 to October 27, 2012 (GD2-38);

[25] GD2-76, shows a text screen from the Commission with the amounts paid to the Appellant. There is a handwritten note "overpayment repaid" at the weeks of October 14, 2012 to October 27, 2012, where it shows that the Appellant received $626 instead of $788 (GD2-76).

[26] A summary of the Appellant's claim shows how the waiting period and allocation periods were applied on the assumption that July 1, 2012 was to be the first week of the allocation period (GD2-77)

[27] The Appellant submitted "Linked in" profiles of some of his colleagues and a job posting for the employer in December 2012 (GD2- 54 to 70)

Testimony at the hearing dated February 5, 2014:

[28] The Appellant attended at the hearing and advised as follows under solemn affirmation:

[29] June 28, 2012 was the effective date of his termination. He submitted case law on this point and legal articles (GD-6-7 to 11 and GD4-4 to GD4-12) and advised that the Employer knew or ought to have known when he was laid off in June that he would ultimately be dismissed in August. He argued that his payments should be allocated from this time.

[30] He found the whole manner in which he was laid off temporarily and then permanently, to have been suspicious. This included the manner in which the jobs were posted on-line. He does not know why the Employer did this or what the Employer's interest would have been in terminating his employment this way.

[31] The Appellant also advised that he made an agreement with the Commission to pay off the overpayment by deducting 50% of his benefits. He telephoned the Commission and the Canada Revenue Agency (the "CRA") and then was offered a payment plan. Despite his repeated requests, the Commission refused to reduce the amount and no explanation was given.

[32] At the end of his benefit period (from March 2013 to March 2014), he converted his Benefits into the STA program, which is a program run by Emploi-Quebec, for people who are interested in becoming self-employed and have a business plan or project that is approved. His business idea was in the area of immigration consulting.

[33] He wants the debt written off because he and his spouse are both full time students and do not have much income. He has two children who are 7 and 9 years of age.

[34] He provided GD4-1 to 4, which are 2013-2014 HEC and Vanier invoices and a letter confirming course registration.

Further Documents Filed:

[35] Their combined household income on their T4s was $23,000.00 for the year 2013. GD6-5 appears to be his spouse's T4A for the year 2013, which shows that she received $10,044.00 in revenues as a scholarship and GD6-6 appears to be the Appellant's T4A for the year 2013, which shows that he received $12,992.00 and that $776.48 income tax was deducted (GD6-6).

Testimony at the hearing, April 23, 2014:

[36] He is still a full time student and he works part time. He is making some income on a newspaper project, which he started with other people. He works as a technical person in web design. He earns roughly $750 every two weeks.

[37] He received approximately $720 net by way of STA benefits every two weeks. He does not recall what the gross amount was. He receives about $600 a month in loans and bursaries and will receive this until July until he finishes his course. Every four months, he receives $1,000.00. He will have to pay some of this back.

[38] His spouse is also a full time student and she works occasionally as a journalist. She makes several hundred dollars from time to time. Her average weekly income is, therefore, $250.00. Her hours are not guaranteed.

[39] When asked how he could explain that he has more hardship than other people in re-paying the debt, he explained that he also owes a great deal of money on credit cards and a line of credit and that he also has a mortgage.

[40] He advised by letter dated May 2, 2014, that he had no further submissions (GD-10).

SUBMISSIONS

[41] The Appellant submitted that the overpayment was not correctly allocated for the following reasons:

a) He admits that the separation monies were earnings, which had to be allocated(GD2-55);

b) The overpayment should be $726.00 and it should be written off (GD6). (He had submitted previously that it should be $23 at GD2-37 and then $130 in at GD2-56);

c) The money to be allocated was paid because of the separation from his employment, which occurred when his employment was terminated at the end of June 2012. The allocation should be from July 1, 2012, because his "temporary lay-off" should be considered a separation from his employment because of the employer's conduct and the case law on point (The employer laid off 25% of its employees worldwide; The company did not consider any work sharing programs and did not

resort or appeal to any government means or initiative to prevent massive lay-offs; he was laid off permanently one month later) (GD4-4 to 12 and GD6-3);

d) As soon as he knew about the overpayment, he made a payment settlement with the CRA or the Commission to repay the overpayment with lower deductions (GD2-55); and,

e) He had two waiting periods, which were assigned to him and this was incorrect. He had one from July 1 to July 14, 2012 and one from July 15, 2012 to August 4, 2012 (GD2-54).

Submissions Re: Write-off:

[42] The Appellant advised that the debt should be written off for the following reasons:

a) The write off should be done on the bases of subsections 56(1)(e) and 56(1)(f)(ii) of the Regulations because the overpayment does not arise from an error or false declaration on his part and because the repayment of the penalty or amount would result in undue hardship (GD6-1) ;

b) He and his spouse have a very constrained financial situation. If they have to repay the alleged overpayment, it would put them into a harder financial situation. He is unable to make or guarantee the repayment with their current family financial situation (GD6-1);

c) The Commission erred in law in denying the write-off of the overpayment by referring to subsection 56(2) of the Regulations (GD2-47). The write off should be done under subsection 56(1) of the Regulations which is sufficient and not tied to subsection 56(2) of the Regulations (GD6-2);

d) According to the Digest of Benefit Entitlement Principles (the "Digest"), the write off can be done immediately by the CRA or the Tax Court of Canada ("TCC") under Part IV of the Act by way of ruling pursuant to section 90 of the Act (GD6-2);

e) If the write off is not granted, he does not want debt collection to commence prior to an appeal being taken by him (GD6-3);

f) The Tribunal should take into account that he is unable to hire a lawyer. It is unfair that he can lose because he is not aware of the applicable laws and jurisprudence (GD6-4);

[43] The Respondent submitted as follows:

a) Sums received from an employer are presumed earnings and must therefore be allocated unless the amount falls within an exception in subsection 35(7) of the Regulations or does not arise from employment (GD2-42);

b) The Appellant received vacation pay of $1,089.22 and pay in lieu of notice of $1,461.54 by reason of separation. Pursuant to section 36(9) it had to be allocated at normal weekly earnings of $736.00 from the date of the lay-off or separation, depending on which gave right to the money (GD2-42);

c) The Notice of Decision dated September 11, 2012 should have said that the money was allocated from "July 1, 2012" instead of from June 24, 2012". The Commission submits that this error did not cause prejudice to the Appellant and was not fatal to the decision under appeal (CUB 16233/A-128-99) (GD2-40);

d) The Commission changed its position and now submits that the allocation of the separation monies should take place in the week starting July 30, 2012, which is where the separation occurred instead of on July 1, 2012 and this is advantageous for the Appellant because it results in a lower amount of an overpayment (GD2- 40);

e) According to Pilot Project No. 18, which took place on August 5, 2012, pursuant to Section 77.95 of the *Regulations*, once the waiting period has been served, benefits will be reduced at a rate of 50% of a claimant's earnings each week if the claimant's earnings are equal to or less than 90% of his weekly insurable

earnings. (the "Earnings Threshold"). The Earnings Threshold is used to calculate a claimant's benefit rate (The "Pilot Project") (GD2-43);

f) If the claimant's earnings exceed the earnings threshold of 90%, 50% of his earnings up to the earnings threshold will be deducted from his Benefits, plus each dollar earned over the earnings threshold amount until benefits are exhausted (GD2-43);

g) The weekly insured earnings are determined by taking the total insured earnings used to calculate the claimant's benefit rate divided by the divisor. The total insured earnings were $21,427 divide by 26 (the divisor). The Weekly insured earnings were $824. The earnings threshold was established at $742.00 = 90% of the weekly insured earnings (GD2-43);

h) If the allocation of $2,550.76 starts on July 29, 2012 and is allocated according to the normal weekly pay of $736.00, his total overpayment would be $1,116.00 - $108.00 (for the weeks of July 15 and July 22) = $1,008.00 instead of $1,197.00. This would amount to $189.00 less (GD2-45 to 46).

[The Commission's submissions with respect to Write off are discussed below]

ANALYSIS

ISSUE ONE: OVERPAYM ENT:

[44] The Tribunal finds that the Regulations dealing with earnings and allocation have been drafted and interpreted broadly, to include the "entire income of a claimant arising out of any employment" (*McLaughlin* 2009 FCA 365).

[45] It is a long standing principle and consistent with the Act and Regulations that sums received from an employer are presumed to be earnings and must be allocated unless the amount falls within an exception in subsection 35(7) of the Regulations or the sums do not arise from employment (*Ledzy Lam* Cub 51191)(Cub 27140).

[46] The rationale for the allocation of the earnings, which a claimant received while on benefits is the avoidance of double-compensation. In *Attorney General of Canada v. Walford* , A-263-78, December 5, 1978, Mr. Justice Pratte stated:

> "The purpose of the scheme is obviously to compensate unemployed persons for a loss[…] A loss which has been compensated no longer exists. The Act and Regulations must, therefore, in so far as possible, be interpreted so as to prevent those who have not suffered any loss of income from claiming benefits under the Act."

[47] These dicta were repeated and relied upon in subsequent decisions, including, in *Chartier* 2010 FCA 150.

[48] With respect to the burden of proof, it is the Appellant who must prove, on a balance of probabilities that the amount paid or payable is not earnings within the meaning of the Act. The Appellant is also obligated to disclose all of the amounts received (*Ledzy Lam* CUB 51191, CUB 27140, *Déry* 2008 FCA 291, Cub 70735, Cub 11077, *Romero*, 1997 CanLII 6067 (FCA) (A-815-96).

[49] The same is true in the context of termination of employment or dismissal. The onus is on the claimant to establish that all of part of the sums received as a result of his or her dismissal amounted to something other than "earnings" within the meaning of the Act and Regulations (*Bourgeois* 2004 FCA 117).

[50] The Tribunal finds that the amounts in question were paid or were payable by the Employer to the Appellant and do not fit within any of the exceptions in subsection 35(7) of the Regulations.

[51] On this basis, the Tribunal finds that any amounts, which the Appellant received from the Employer as vacation pay, payment in lieu of notice, and severance pay are earnings for the purpose of section 35 and must be allocated in accordance with Section 36 of the Regulations.

[52] The Appellant does not appear to dispute this (GD2-55, August 17, 2012). Rather, the Appellant takes issue with how the amount was allocated.

Allocation Commencement Date

[53] Section 36 of the Regulations describes how earnings are to be allocated and in which weeks they will be considered to have been earned by the claimant *(Boone* 2002 FCA 257).

[54] The jurisprudence has held that, in deciding which subsection of section 36 should be resorted to in determining the method for the allocation, it is the reason or motive for the payment and not the date of the payment, which determines the date from which the allocation must begin (*Sarrazin* 2006 FCA 313, CUB 74461, 2010; CUB 77407, 2011; CUB 49309, 2000).

[55] Section 36(9) explains how earnings paid or payable by reason of separation or lay off are allocated and it provides that the allocation begins with the week of the lay-off or separation.

[56] The Tribunal agrees with the Commission that the allocation should commence on July 30, 2012 because the money was paid by reason of separation from employment and that the permanent separation from his employment occurred only when his employer called to advise him of this fact at the end of July. This finding was also made in part because the Commission conceded that it was advantageous to the Appellant to start on this date. The Tribunal also does not accept the Appellant's contention that when he was laid off in June 2012, it amounted to a separation at law. The Tribunal was not convinced that there was a sufficient factual basis to support his argument (ROES 1, 2, and 3 (GD2-24, 25, and 26, GD4-4 and GD6-7). For example, the Appellant was not able to explain what the employer's motivation would have been to have represented that his employment was terminated at the end of July 2012 if it had really occurred a month earlier.

[57] Until the hearing of April 23, 2014, the Appellant thought that he had endured 2 waiting periods. By GD6-3, the Appellant appeared to have understood the Commission's original calculation, and appeared to be arguing that the allocation should have started in the week of June 24, 2012 instead of July 1, 2012. This is not possible because his benefit period was only effective July 1, 2012 and Subsection 13(1) of the Act provides that the waiting period begins after the benefit period and that a waiting period is two weeks of unemployment for which benefits would otherwise be payable.

[58] The Appellant also does not appear to understand that if he uses a July 1, 2012, allocation start date, during the week to which $191 is allocated, he would not be able to receive any benefits, because the Commission would start his waiting period during that week, because unlike the other weeks, to which $736.00 was allocated, he would still have been entitled to benefits during this week (but for his waiting period) (subsection 13(1) of the Act). This is likely why the Appellant does not appear to appreciate that an allocation commencing July 1, 2012, works to his disadvantage because it results in an overpayment amount, which is approximately $189 more than if the allocation is done as of July 30, 2012 (GD6).

Calculation of the Overpayment Amount

[59] The Tribunal also accepts the Commission's increase to the Appellant's benefit rate from $399.00 to $453.00 (GD2-44). The Tribunal also accepts the Commission's finding that the Appellant's normal weekly earnings were $736.00.

[60] The Tribunal finds that the total amount to be allocated was $2,550.76. The Tribunal finds that when the allocation amount of $2,550.76 is divided by the Appellant's normal weekly earnings of $736.00, the number 3.47 is arrived at and that this represents the number of weeks of benefits, which would be affected if the total amount were divided pursuant to subsection 36(9). The Tribunal finds, therefore, that the Commission's conclusion was sound that $736.00 in earnings would be allocated for each of the weeks of July 29, 2012, August 5, 2012, August 12, 2012, with a remaining amount of $343.00 to be allocated to the week of August 19, 2012 (GD2-46).

[61] The Tribunal finds that the Commission was also correct in its conclusion that the benefit period began on July 1, 2012 and that the waiting period would be served during the weeks of July 1, 2012 and July 8, 2012. The first payments due to the Appellant were therefore, $453.00 for each of the weeks of July 15, 2012 and July 22, 2012. As the Appellant only received a benefit rate of $399.00 for these weeks (GD2-76), he is owed $108.00 for those weeks (54 x 2) for this underpayment.

[62] For the week of July 29, 2012, the Appellant had an allowable limit of earnings of $181.00 ($453.00 x 40% (former pilot project 17, Section 77.94 of the Regulations). There were no benefits to be paid to the Appellant for this week because his earnings allocation of $736.00 was higher than the benefit rate + the allowable amount. This resulted in an overpayment amount of $399.00.

[63] For the weeks of August 5, 2012 and August 12, 2012, the Pilot Project was in effect. The amount to be allocated was $736.00 for each of the weeks. The earnings threshold was now $742.00, which represented 90% of the Appellant's weekly insurable earnings of $824.00 (GD2- 43)(Section 77.95 to 77.96 of the Regulations). Pursuant to the Regulations, 50% of the earnings had to be deducted ($368.00). The Appellant, should, therefore, have been paid the difference between his benefit rate of $453.00 and $368.00 for these weeks. That would have amounted to an entitlement to $85.00 for these weeks. He received $262.00 for the week of August 5, 2012 and $453.00 for the week of August 12, 2012 (GD2-46). This created an overpayment of $177.00 + $368.00.

[64] For the week of August 19, 2012, the amount to be allocated was the remaining amount of $343.00. Fifty percent of the earnings was $172.00. The Appellant was therefore only entitled to have received $281.00 for this week instead of $453.00 ($453.00-$172.00). There was, therefore, an overpayment of $172.00.

[65] The Tribunal, therefore, agrees that the overpayment amount is $1,008.00 because ($399.00 +$177.00 + $368.00 + $172.00) – (108.00)=

[66] $1,116.00 - $108.00 = $1,008.00.

[67] Since only one week was not payable to the Appellant, the benefit period was to be extended by one week. The Tribunal notes parenthetically that the Appellant advised that he would not be affected by the extension of the benefit period in either case if the allocation at (GD2-43 to 45) had been done as originally proposed by the Commission because the Appellant converted his benefits to STA benefits prior to the termination of his benefit period.

The Alleged Partial Repayment

[68] The Tribunal finds as a fact that GD2-76 shows that the Appellant repaid $280.00 of the overpayment amount through his benefits during the weeks of October 14, 2012 to October 27, 2012, because the amount of the payment was $626.00 instead of the more regular amount received $788.00 and (regular gross amount was $906.00) (GD2-38 and 76). The Tribunal finds that this reduces the overpayment by $280.00 for a total amount owing of $728.00.

[69] The Tribunal accepts the Appellant's evidence and submissions on this point. It is logical and consistent with the Appellant's explanation that he paid back part of the overpayment amount through his benefits. The Tribunal finds that the Appellant has proven this fact on a balance of probabilities. The Tribunal notes that the Commission's submissions were dated December 12, 2012 and that it omitted to include this information or to explain why the Appellant only received $626.00 for these weeks despite its conclusions that he was entitled to $906.00 (GD2-39 to 49). The Tribunal also notes that the Commission has not provided any response or additional submissions to the Appellant's documents, which contradict this finding.

ISSUE TWO : THE TRIBUNAL'S WRITE OFF DECISION

LAW

[70] Section 54(k) of the Act provides the Commission may, with the approval of the Governor in Council, make regulations, "for the ratification of amounts paid to persons while they are not entitled to them and for writing off those amounts and any penalties under section 38, 39 or 65.1 and amounts owing under section 43, 45, 46, 46.1 or 65 and any costs recovered against those persons".

[71] Section 56 of the Regulations (current to December 2012, the time that the Commission made its original decision) provides:

> **56.** (1) A penalty owing under section 38, 39 or 65.1 of the Act or an amount payable under section 43, 45, 46, 46.1 or 65 of the Act, or the interest accrued on the penalty or amount, may be written off by the Commission if

- (*a*) the total of the penalties and amounts, including the interest accrued on those penalties and amounts, owing by the debtor to Her Majesty under any program administered by the Department of Human Resources Development does not exceed $20, a benefit period is not currently running in respect of the debtor and the debtor is not currently making regular payments on a repayment plan;
- (*b*) the debtor is deceased;
- (*c*) the debtor is a discharged bankrupt;
- (*d*) the debtor is an undischarged bankrupt in respect of whom the final dividend has been paid and the trustee has been discharged;
- (*e*) the overpayment does not arise from an error made by the debtor or as a result of a false or misleading declaration or representation made by the debtor, whether the debtor knew it to be false or misleading or not, but arises from
  - (i) a retrospective decision or ruling made under Part IV of the Act, or
  - (ii) a retrospective decision made under Part I or IV of the Act in relation to benefits paid under section 25 of the Act; or
- (*f*) the Commission considers that, having regard to all the circumstances,
  - (i) the penalty or amount, or the interest accrued on it, is uncollectable, or
  - (ii) the repayment of the penalty or amount, or the interest accrued on it, would result in undue hardship to the debtor.

(2) The portion of an amount owing under section 47 or 65 of the Act in respect of benefits received more than 12 months before the Commission notifies the debtor of the overpayment, including the interest accrued on it, may be written off by the Commission if

- (*a*) the overpayment does not arise from an error made by the debtor or as a result of a false or misleading declaration or representation made by the debtor, whether the debtor knew it to be false or misleading or not; and
- (*b*) the overpayment arises as a result of
  - (i) a delay or error made by the Commission in processing a claim for benefits,
  - (ii) retrospective control procedures or a retrospective review initiated by the Commission,
  - (iii) an error made on the record of employment by the employer,
  - (iv) an incorrect calculation by the employer of the debtor's insurable earnings or hours of insurable employment, or
  - (v) an error in insuring the employment or other activity of the debtor.

[72] The word "may" in subsection 56 of the Regulations denotes that the power conferred on the Commission to write off an amount owing is a discretionary power.

[73] Since the Supreme Court of Canada's decision in *Cornish Hardy* 1980 1 SCR 1218 ("Cornish Hardy") and the Federal Court of Appeal's decision in *Filiatrault*, 1998 CANLII 8522 (FCA) ("Filiatrault"), however, the jurisprudence/case law has held consistently that the Board of Referees and the Umpire do not have the jurisdiction to write off amounts owing to the Commission.

[74] The rationale for maintaining that the Commission had exclusive jurisdiction and direction for the write off decisions and that only the Federal Court of Canada could review the decision by way of an application by a claimant, was that when the claimant made the request for a write off, the claimant was no longer acting as a "claimant" but was acting as a "debtor" and that rights of appeal to the Board of Referees and umpire were granted only to "claimants"

and not "debtors". (Indeed, this is consistent with the Commission's representations at GD2-47. It is also consistent with section 56 of the Regulations, which uses the word "debtor" as opposed to claimant).

[75] This argument was tenable in *Cornish Hardy* and *Filiatrault,* when subsections 79(1) and 80 of the *Unemployment Insurance Act,* R.S.C. 1985, c-U-1 only allowed a "claimant", "employer of the claimant", "the Commission", or "an employer of an association of which the claimant or employer [was] a member" to appeal from a decision of the Board of Referees to the Umpire.

[76] The 1996 reforms to the *Employment Insurance Act* created broader provisions and allowed an "other person" to appeal. Despite this change, the Federal Court of Appeal, continued, to follow *Cornish-Hardy* and *Filiatrault*: *Buffone v. Canada (Minister of Human Resources Development),* 2001 CanLII 22143 (FCA), 2001 CanLII 22143 (F.C.A.) *Canada (Attorney General) v. Mosher*, 2002 FCA 355 (CanLII), 2002 FCA 355; *Canada (Attorney General) v. Villeneuve*, 2005 FCA 440 (CanLII), 2005 FCA 440.

[77] In the recent decision of *Steel* 2011 FCA 153 ("Steel"), the applicant sought judicial review of the umpire's decision, *inter alia*, that he did not have jurisdiction to review a decision of the Commission with respect to a request for a write-off.

[78] The majority of the Federal Court of Appeal dismissed the part of the application, which related to the write off decision on the basis that it found that the applicant had not made a sufficient request for a write off to the Commission in that case.

[79] In his concurring reasons, Mr. Justice Stratas agreed with the applicant's submissions that *Cornish-Hardy* and *Filiatrault* and the jurisprudence which followed, ought to have no effect and should not be followed, given the changes to the Act since they had been decided. Mr. Justice Stratas explained that, "in each of *Buffone, Mosher* and *Villeneuve*, this court regarded the jurisdictional issue as settled. The reasons of each case suggest that the Court had not received any submissions on the relevant statutory provisions. In each case, the Court had before it a benefits recipient without legal representation."

[80] Mr. Justice Stratas reasoned that these decisions were decided *per incuriam* or did not reflect the "considered opinion" of the panels that decided them.

[81] Mr. Justice Stratas then went further and opined as follows: "Parliament's decision to add the words "other person" to subsection 114(1) and section 115 of the current Act was intended to allow persons, such as Mr. Steel to appeal rulings on write-off requests to the Board of Referees and the Umpire, and then to proceed to this Court. Were it not so, it would be very difficult to see what Parliament had in mind when it added those words." In his opinion, the applicant was also "an other person" as contemplated by the Act.

[82] The Tribunal finds that Mr. Justice Stratas comments are concurring *obiter dicta*, which have not been adopted by the Federal Court of Appeal. This was indeed, what the Federal Court Trial Division held in *Bernatchez* 2013 FC 111 ("Bernatchez"). It follows then, that the Tribunal is bound by the decisions of the Federal Court of Appeal unless and until the Federal Court of Appeal "adopts Justice Stratas' opinion and explicitly disregards the numerous decisions it has issued (before and after the statutory amendment enacted in 1996) to the effect that a decision by the Commission refusing to write off an overpayment cannot be appealed to the Board of Referees: see, *inter alia*, *Cornish-Hardy v Canada (Board of Referees)* (1979), [1979] 2 FC 437 (available on QL) (CA), aff'd by 1980 CanLII 187 (SCC), [1980] 1 SCR 1218; *Canada (Attorney General) v Idemudia*, 236 NR 359 at para 1, 86 ACWS (3d) 253; *Buffone v Canada (Minister of Human Resources Development)*, [2001] FCJ No. 38 at para 3 (QL); *Canada (Attorney General) v Mosher*, 2002 FCA 355 (CanLII), 2002 FCA 355 at para 2, 117 ACWS (3d) 650; *Canada (Attorney General) v Villeneuve*, 2005 FCA 440 (CanLII), 2005 FCA 440 at para 16, 352 NR 60" (Bernatchez).

[83] It is arguable that a lower court or tribunal could decide that it is not bound by the foregoing decisions, on an exceptional basis and as an exception to the rule of *stare decisis*, because they were decided *per incuriam* and specifically, without reference to the changes in legislation and the Act, and do not represent the considered opinion of the Federal Court of Appeal (*David Polowin Real Estate Ltd*. v. *Dominion of Canada General Insurance Co* ., 2005 CanLII 21093 (ON CA), leave to appeal denied [2005] S.C.C.A 388; *Fernandez* 2011 FC 275;

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[84] Given the principle of vertical conventional precedent/*stare decisis*, however, if the Tribunal was a panel of the Board of Referees or an Umpire reviewing a decision of the Commission on an appeal, it would take a considerable amount of conceit for it to decide not to follow the consistent authority of the Federal Court of Appeal on the basis only of Justice Stratas' concurring *obiter* remarks.

[85] The Tribunal finds, however, that the same cannot be said of a newly constituted tribunal, which draws its powers from new legislation. Notwithstanding that it would be simpler to rely on the *Bernatchez* decision and wait a few months or years to receive more guidance from the Federal Court of Appeal, the Tribunal finds that it would be remiss if it did not undertake a proper jurisdictional analysis with respect to this issue. In this regard, the Tribunal is mindful of the comments made recently by the Federal Court of Appeal in *Picard*:

> "Without material placed in the record by those knowledgeable about the administrative regime – for example, through evidence placed before the administrative decision-makers or included in the reasons of the administrative decision-makers below – the Court is left to guess about which of several rival interpretations best furthers speed, efficiency, specialized decision-making and informality."

[86] To a certain extent, the foregoing *dicta* echo the following comments in *Dunham*, [1997] 1 F.C. 462 (F.C.A) ("*Dunham*"), which were made in the context of holding that the Board of Referees could review decisions on appeal pertaining to penalties. The Federal Court of Appeal criticized the Board for not even considering the question of its jurisdiction. It stated the following, which can be applied analogously to this Tribunal:

> "Clearly, in the instant case, the board of referees shirked this duty by refusing even to hear the respondent's testimony. Of course, the reason why the members of board of referees refused to do so was that they were not aware of all the aspects of their role, and not that they disregarded the rules of natural justice; however, the result is that they failed to completely exercise their jurisdiction."

Jurisdictional Analysis:

[87] To determine the Tribunal's jurisdiction on this issue, resort must ultimately be had to the jurisdiction conferring statutes. The Social Security Tribunal was created pursuant to section 44 of the *"Department of Employment and Social Development Act,* S.C. 2005, c. 34, (the "DESD Act").

[88] Subsection 52(1) of the DESD Act provides that an appeal from a decision made under the *Employment Insurance Act*" or "in any other case" must be brought to the General Division" within the timeframe provided.

[89] This is to be cross-referenced with the Tribunal's jurisdiction regarding appeals from Commission decisions. Section 112 of the Act provides that "a claimant or other person who is the subject of a decision of the Commission or the employer of the claimant" may apply for reconsideration of the Commission's decision. Section 113 makes it clear that parties to a Commission reconsideration decision have a right of appeal to the Tribunal.

[90] There is no question that with respect to the write off decision, the Appellant in this case is a "claimant" or "other person" and a "party" for the purposes of sections 112 and 113 of the Act. In this regard, the decisions of *Cornish Hardy, Filiatrault* and the decisions, which followed, including the decisions which were cited by the Commission at GD2-46 to 47 can be distinguished from the facts and circumstances of this case.

[91] Section 64(1) of the DESD Act provides that, "[t]he Tribunal may decide any question of law or fact that is necessary for the disposition of any application made under this Act."

[92] According to subsection 54. (1) of the DESD Act, "[t]he General Division may dismiss the appeal or confirm, rescind or vary a decision of the Minister or the Commission in whole or in part or give the decision that the Minister or the Commission should have given."

[93] The Tribunal finds that the appellate jurisdiction conferred on the Tribunal is very broad and arguably broader than the former jurisdiction of the former Board of Referees (*Conway* 2010 SCC 22; *Tétreault-Gadoury* [1991] 2 S.C.R. 22).

Objectives of the Act

[94] The Tribunal's conclusion that it is entitled to review discretionary write off decisions made pursuant to section 56 of the Regulations is also consistent with the purpose and objectives of the Act and the intention of Parliament as they have been delineated in the jurisprudence.

[95] As was held by the Supreme Court of Canada in *Rizzo and Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27, at para. 21, and more recently in *John Doe* v. *Ontario (Finance),* 2004 SCC 36 and *Canadian National Railway Co.*, 2014 SCC 40, the basic rule of statutory interpretation is that "[t]he words of the act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (See also, R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p.1 citing, E.A. Driedger, *The Construction of Statutes* (1974), at p.67).

[96] It has been held that the Act must be given "such fair, large and liberal construction and interpretation as best ensures the attainment of its objects" *Interpretation Act*, R.S.C. 1985, c. I-21, section 12 (*Picard*). It has also been held that the Act is designed to make benefits available quickly to those unemployed persons who qualify under it and so it should be liberally interpreted to achieve that end" (*Abrahams v. Attorney General of Canada*, 1983 CanLII 17 (SCC), [1983] 1 S.C.R. 2 at page 10).

[97] Furthermore, in *Picard* 2014 FCA 46 ("Picard"), the Federal Court of Appeal held regarding the Board of Referees, that the Act was "aimed at diverting issues relating to employment insurance from the court system into the more informal, specialized, efficient adjudicative mechanisms set up by Parliament" (See also Stratas J.A's concurring *obiter* remarks in *Steel*, and his dissent in *Tembec Industries Inc.*, 2012 FCA 156).

[98] There are many aspects of the Tribunal and its procedures, which promote efficiency and as a corollary, access to justice. Recently, in *Atkinson* 2014 FCA 187, the Federal Court of Appeal referred to the Social Security Tribunal's website and statements to the effect that the

Tribunal was intended to provide more efficient, simplified, and streamlined appeal processes. For example, sections 2 and 3 of the *Social Security Tribunal Regulations* (the "SST Regulations") are consistent with the foregoing delineation of the Act's objectives because they require the Tribunal to proceed in a manner, which best promotes the objectives of efficiency, fairness and natural justice. These objectives increase access to justice.[1]

[99] The Tribunal's assumption of jurisdiction should further the interests of access to justice, efficiency, and fairness. As was stated by the Federal Court of Appeal in *Filiatrault:*

> "The *Unemployment Insurance Act*, as we have repeatedly said, is perhaps the most complex of federal laws. The Commission's decisions on a claimant's eligibility are appealed to the board of referees. The Minister of National Revenue's decisions on a claimant's insurability are appealed to the Tax Court of Canada (see *Canada (Attorney General) v. D'Astoli* (1997), 223 N.R. 368). And now, the Commission's refusal to write off a debt is subject to judicial review by the Federal Court Trial Division".

[100] If the Tribunal declined jurisdiction, and the Appellant wanted to appeal the Tribunal's decision on the merits, the Appellant would have to proceed to the appeal division for an appeal on the merits (with leave) and then to the Federal Court of Appeal for a judicial review application. A review of the decision regarding the request for a write off, would still, however, have to heard by the Federal Court, Trial Division (*Steel, Bernatchez*).

[101] Given that the standard Appellant before this Tribunal is not a sophisticated litigant and is unrepresented or is a person who is otherwise not well versed in the procedural or substantive aspects of the appeal, the residual opportunity for review by the Federal Court, Trial Division may be disproportionately complex and hence, less accessible.

[102] In *Steel* Justice Stratas stated: "In a case like this, too great a devotion to judicial minimalism can ensnare benefits recipients in a frustrating game of "snakes and ladders."

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[1] The Tribunal notes that section 3 emphasizes that informal procedural requirements should be adopted to safeguard natural justice and fairness. Section 2 of the SST Regulations mirrors the language in Rule 3 of the *Federal Court Rules* and the wording of Rule 1.04 of the *Ontario Rules of Civil Procedure.* See, *Canadian Doctors for Refugee Care* 2014 FC 651 CanLII ; *Paige v. Mulcair* 2013 FC 402 CanLII: *Coote* v. *LPIC* 2013 FCA 143; *Felix Sr.* v. *Sturgeon Lake First National* 2011 FC 1139; *McFarland* v. *Spanos* 2014 ONSC 4222; *Bagus* v. *Telesford* 2014 ONSC 3512 CanLII; *Hamilton City* 2010 OJ NO. 5572 CA; and, *MDM Plastics* 2014 ONSC 710; *Habb Mucaj* 2012 ONCA 880).

[103] The comments of Mr. Justice Stratas ring true against the principles enunciated by the Supreme Court of Canada in *Hyrniak v. Mauldin* 2014 SCC 7, when it discussed the utility of summary judgment in the civil litigation context. The Tribunal finds that the following statements apply by analogy to the question of the forum for review in this case:

> "Our civil justice system is premised upon the value that the process of adjudication must be fair and just. This cannot be compromised. However, undue process and protracted trials, with unnecessary expense and delay, can prevent the fair and just resolution of disputes. If the process is disproportionate to the nature of the dispute and the interests involved, then it will not achieve a fair and just result […]
>
> A shift in culture is required. The proportionality principle is now reflected in many of the provinces' rules and can act as a touchstone for access to civil justice. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure."

[104] The Tribunal notes that it was reluctant originally to assume jurisdiction in this case because there may be a certain degree of expertise, which the Tribunal does not yet possess which the CRA and the Commission and the Federal Court may have cultivated in reviewing these discretionary decisions and similar tax assessment cases.

[105] At the same time, however, the Tribunal considered that it considers issues such as "ability to pay" regularly in the context of reviewing decisions of the Commission with respect to the penalty amount on appeal.

[106] The Tribunal is also confident that with time and more helpful submissions from the Commission on the reasons why it exercised its discretion one way or the other, the Tribunal will continue to develop expertise in this area.

[107] The Tribunal recognizes that the interests of access to justice and efficiency and finality and the intentions of Parliament outweigh any concerns, which are merely speculative and which have only been raised by the Tribunal.

Writing off is a Discretionary Decision

[108] It was once held that provisions in the Act, which confer discretionary authority on the Commission were not reviewable by either the Board of Referees or the Umpire. Since the decisions in *Purcell v. Attorney General of Canada*, [1996] 1 F.C. 644 ("Purcell") and *Dunham* and in the decisions, which followed (*Gill* 2010 FCA 182, *Campbell*, 2002 FCT 811, *Surdivall* v. *Ontario (Disability Support Program)*, 2014 ONCA 240, [analogous decision of the Ontario Court of Appeal with respect to Ontario provincial social benefits legislation, which applied Justice Stratas' reasoning in *Steel*] ("Surdivall")), the Federal Court of Appeal has consistently held that discretionary decisions of the Commission are subject to review by the Board of Referees (and now, by extension, the Tribunal) on a *de novo* basis.

[109] In *Dunham*, the Federal Court of Appeal stated regarding the appeal to the Board of Referees:

> "In principle, all decisions of the Commission are subject to appeal, and all decisions of the board of referees subject to review. Moreover, by expressly ruling out any right of appeal for certain specific decisions of the Commission, those made under sections 24, 25 and 26 — undoubtedly because they are in the nature of pure policy — Parliament left no room for any misgivings on this point.
>
> […]
> In another recent decision, *Purcell v. Attorney General of Canada*, [1996] 1 F.C. 644, this Court took on the task of clarifying the nature of these proceedings, and stressed the fact that an appeal to the board of referees is in the nature of a trial *de novo* and that such an appeal is important in terms of the spirit of the Act, as the pivot on which the system for protecting claimants' rights under the Law turns.
>
> There is no reason to think that the *Unemployment Insurance Act* is unique and that the powers it confers on the agency given the task of administering it must be analyzed in isolation, without regard for the general principles of our legal system. The discretion given to the Commission is no different from the discretionary powers given to any other lower tribunal or body of the same sort. We are quite familiar with the situations in which a tribunal hearing an appeal or review of a discretionary decision of an authority subject to such review may intervene. A discretionary decision made on the basis of irrelevant considerations, or without regard for all of the relevant considerations, must be disapproved and set aside by the appeal or review tribunal. The Court has repeatedly stated that discretionary decisions of the Commission do not fall outside that rule."

[110] The Tribunal notes that if this was said regarding the jurisdiction of the Board of Referees, which was the predecessor tribunal to the Social Security Tribunal, then the same and more can be said regarding the jurisdiction of this Tribunal.

[111] The Tribunal finds empirically that the Social Security Tribunal is different than the Board of Referees. Improved changes include, *inter alia*, the addition of a legal department and greater institutional independence. These changes have already allowed the Social Security Tribunal to develop more expertise and have enhanced its administrative integrity.

[112] It is a longstanding administrative principle, that when a statute provides an appeal from a discretionary decision, the appellate tribunal is able to exercise that discretion unless the statute specifically precludes it from so doing. (See Jones and Villars, *Principles of Administrative Law,* 6th Ed. (Toronto: Carswell, 2014), at p. 641 ("Jones and Villars"; and, *Surdivall*)

[113] The Tribunal finds that there is nothing in section 56 of the Regulations or the Act or elsewhere, which expressly limits the Tribunal's power to review a discretionary decision of the Commission regarding write off. By contrast, the legislature has expressly excluded certain Commission decisions from appeal to the Tribunal (Subsections 24(2), 25(2) and Sections 90, 91 of the Act and subsections 64(2) and (3) of the DESD Act, with respect to specific matters dealing with the *Canada Pension Plan* and jurisdiction conferred on the Canada Revenue Agency). By implication, the Tribunal concludes that if the legislature intended to insulate a decision of the Commission regarding section 56 of the Regulations from review on appeal to the Tribunal, it would have also of had done so expressly.

[114] That being said, the Tribunal finds that because the decision made by the Commission not to write off any of the amount owing was a discretionary decision, the Tribunal can only vary or intervene where it is also found that the Commission did not exercise its discretion in a judicial manner.

[115] "Judicial manner" has been defined as acting in good faith, having regard to all relevant factors and ignoring all irrelevant factors (*Sirois*, A-600-95; *Chartier*, A-42-90; *Dunham; Purcell*).

Did the Commission Exercise its Discretion in a Judicial Manner?

[116] As a preliminary matter, the Tribunal finds as a fact that the Appellant made clear and repeated requests to the Commission for a write off of the overpayment amount and it was always clear that he was appealing that decision. This was apparent from his testimony and the file and was corroborated by the documents, showing that the Commission had agreed, following his request, to only deduct a portion of his benefits payable with each benefit payment and not to write off any amount. Indeed, the Commission does not appear to dispute this fact in its submissions (GD2-39 to 49, and the Appellant's testimony). The Tribunal notes that it is necessary to make this finding, if the Tribunal is going to proceed because it operates as a condition precedent for the exercise of the Tribunal's jurisdiction (*Bernatchez*; *Allard* 2001 FCT 789; *Steel; Claveau* 2008 FC 672).

[117] The Tribunal finds that the Commission did not exercise its discretion in a judicial manner because it failed to take into account any of the Appellant's representations with respect to write off and undue hardship. Rather than provide reasons for refusing to exercise its discretion to write off all or any part of the amount owing, the Commission repeated its submission that the tribunal and the umpire did not have jurisdiction. The Commission also suggested that it only had jurisdiction to write off amounts owing under subsection 56(2) of the Regulations and that the Commission itself may not have the jurisdiction to decide requests for write off on the basis of undue hardship. The Commission's submissions with respect to write off were as follows (GD2-46 to 47):

a) "The obligation to reimburse the benefits paid is not a decision arising from the Commission and is not under the jurisdiction of the Board of Referees. Appeals on this issue must be file [sic] by the appellants to [sic] Canada Revenue Agency (CRA). CRAIB 2004-2003 (IT)";

b) The obligation to repay an overpayment is not the responsibility of the Board of Referees or the Umpire because it is not a Commission's decision and the appellant is a "debtor" rather than a "claimant". [sic] Federal Court of Canada has jurisdiction to receive an appeal against this issue; […]

c) The Commission understands that the Appellant has financial obligations, but the Regulation [sic] is clear and has to be applied in accordance with subsection 36(9);

d) Concerning the claimant's request to write-off the overpayment, the Commission cannot grant it since the requirements in section 56(2) of the [Regulations] are not all met;

e) [The Appellant was notified of any error prior to the 12 month period in subsection 56(2) of the Regulations];

f) The Commission submits that neither the Board of Referees or an Umpire is empowered to deal with issues relating to write off of an overpayment (*Muguette; Filiatrault* A-874-97; *Gladys Romero* A-815-96; *Jean Roch Gagnon* A-676- 96)(GD 2-27); and,

g) […] If repaying the debt causes the Appellant financial hardship, he can call the Debt Management Call Center (DMCC) of the Canada Revenue Agency (CRA) at 1-866-864-5823. They may be able to make other arrangements based on his personal situation (GD2-47)."

[118] The Tribunal finds that the Commission had a duty to act fairly in deciding the write off request. The Tribunal finds that it did not do so when it made submissions which represented that the Commission lacked any power or authority to write off the amounts owing.

[119] The manner in which the Commission exercised its discretion in this case is similar to the conduct, which the Federal Court of Appeal admonished in *Filiatrault* and in *Steel.* It is also substantially representative of the nature and content of the standard submissions provided to this Tribunal on appeal of decisions refusing write-off requests.

[120] This allusion that the "authority to decide questions or write off on the basis of undue hardship is not conferred on the Commission" is even contained in the *Digest of Benefit Entitlement Principles* (the "Digest"). While the Digest mentions briefly, the potential write offs in "other situations" such as "humanitarian grounds" it provides at the very outset, that it will only deal with overpayments written off under 56(1) (e) and 56 (2) of the Regulations.

[121] The Tribunal has been unable to locate any guideline, policy, or rule which supports the Commission's submission that the CRA has the jurisdiction or responsibility for write off decisions to the exclusion of the Commission. The Tribunal finds that an authority for this proposition is all the more necessary because paragraph 56(1)(f)(ii) confers explicitly this authority on the Commission.

[122] If this task has, in fact been delegated to the CRA, to validate the delegation and to avoid allegations of abdication of responsibility, or of improper or unauthorized sub-delegations/delegations (Jones and Villars, pages 30, 98, 162-168 and 206) the Commission would have to maintain a supervisory function over the CRA review and report back to the Appellant within a reasonable time with respect to its decision. To do otherwise, and to do as the Commission has done, confuses and confounds the issues for the Appellant and the Tribunal and does not meet the standard of procedural fairness, which the Appellant is entitled to expect in the review of his request for a write off (*Mavi* 2011 SCC 20; *Surdivall*; *Cardinal v. Director of Kent Institution* 2 S.C.R. 643; *Baker* [1999] 2 S.C.R. 817; *Dunsmuir* 2008 SCC 9).

[123] In *Girard* 2005 FCA 65 ("Girard"), the Federal Court of Appeal held that in deciding write off cases for undue hardship pursuant to subsection 56(1)(f)(ii), the Commission must first consider whether the debt is collectable. Then, if the Commission considers that the debt is collectable, the issue of prejudice resulting from the repayment must be addressed. The Federal Court of Appeal quoted from the Commission's own guidelines (which were not, unfortunately shared with this Tribunal) and held that the Commission will proceed to assess the debtor's family situation, professional situation, and financial situation to establish that the repayment would cause undue hardship.

[124] When the Commission's submissions are reviewed, it is apparent that the Commission did not consider any of those factors in the Appellant's case (GD 2-47).

[125] For the foregoing reasons, the Tribunal finds that the Commission did not exercise its discretion in a judicial manner when it decided not to write off all or part of the overpayment amount.

Should All or Any Part of The Overpayment Amount be Written Off?

[126] Section 44 of the Act provides that, "[a] person who has received or obtained a benefit payment to which the person is disentitled, or a benefit payment in excess of the amount to which the person is entitled, shall without delay return the amount, the excess amount or the special warrant for payment of the amount, as the case may be. Excess payments are then recoverable by the Commission pursuant to sections 43 and 52 of the Act.

[127] The General principle that excess payment or payments made in error or benefits to which a claimant was otherwise not entitled or to which they should have been disqualified must be paid back to the Commission retroactively is a strict principle of employment insurance law. This principle can affect a claimant at times, only years after the benefit money has been received and spent and by the simple provision of notice to the Appellant (subsection 52(1) and (5) of the Act). There is no question that this principle and the Commission's near absolute power to collect in such circumstances, may be harsh and appear rather arbitrary and inequitable (*Robinson* 2013 FCA 255, leave to appeal to the SCC dismissed, 2014 Canlii 12483 SCC).

[128] This is, however, clearly what is intended by the Act and has always been intended. The Tribunal is, accordingly, bound to apply these provisions notwithstanding their effects (*Re Rizzo & Rizzo Shoe Ltd.*, [1998] 1 S.C.R. 27, at paragraph 27; *Granger*; *Alaie* 2003 FCA 416; *Hamm* 2011 FCA 205). The rationale for the legislature's intention appears to be based on the principle that "the funds belong to the public good" (*Desrosiers* 2007 FC 769) and should not be misused or misspent or otherwise distributed erroneously against the strict requirements, which the legislation sets for qualification and entitlement.

[129] The only exception, appears to be in the relief created by section 56 of the Regulations. Section 56 of the Regulations was introduced in order to relieve some of the harsh consequences of the legislation and to bring about more equitable circumstances. It does so, however, only in very limited circumstances and where specific requirements are met. As was stated in *Girard*: "There is nothing surprising about this legislative scheme. The beneficiary received public funds to which he was not entitled. The public interest requires that these funds be repaid except in the cases contemplated by paragraph 56(1)(f) of the Regulations."

[130] Paragraphs 56(1)(a)(b)(c)(d) do not apply to the Appellant's circumstances. For greater certainty, these paragraphs do not apply because the Appellant is not deceased or bankrupt and the debt exceeds $20 (2012). Paragraph 56(1)(e) does not apply to the Appellant's situation because although there are no allegations of misrepresentation on the part of the Appellant, and the Appellant's submissions that "the CRA could write off the amount pursuant to Part IV of the Act" (GD6-2), the subparagraphs provide specifically that the overpayment in the case of paragraph 56(1)(e) must only arise in cases of retrospective decisions of rulings with respect to decisions of the Commission regarding specific legislative provisions, which are not applicable in this case.

[131] Subsection 56(2) also does not apply to the Appellant's situation because the application of subsection 56(2) is limited to contexts where notice of the overpayment or interest is provided to a debtor more than 12 months after the benefits have been received. There is no question that the Appellant was notified of the overpayment and any interest accrued thereon during the time that he was still on benefits, and in any event, within 12 months of them having been received.

[132] The Tribunal agrees with the Appellant that the other paragraphs of section 56 of the Regulations are not related to paragraph 56(1) (f) and do not delineate any conditions precedent for its application. The use of the word "or" (as opposed to "and") between paragraph 56(1)(e) and (f) denote that the paragraphs are to be read disjunctively. Indeed in *Girard*, the Federal Court of Appeal held that the only condition precedent in this case is that the repayment of the

overpayment would cause undue hardship. In that regard, the Federal Court of Appeal held that in assessing the hardship that would be suffered by the debtor, the Commission only has to consider the factors relating to the repayment itself (see the foregoing paragraph 123).

[133] The Tribunal finds that the Appellant and his spouse are both students with a great deal of debt and two children to support. On the basis of the evidence and submissions provided, including, the T4s provided, the Tribunal finds that pursuant to subsection 56(1)(f)(ii) of the Regulations, paying the amount owing of $728.00, would cause the Appellant undue hardship.

[134] The Tribunal finds, however, that paying up to 60% of the amount of $728.00 would be difficult for the Appellant and would cause him and his family some hardship but that it would not amount to undue hardship.

[135] In arriving at this finding, the Tribunal considered the high threshold for a finding of undue hardship, which has been set by the Federal Court. In *Girard* 2004 FC 882, for example, the Federal Court Trial Division held that undue hardship "means that the claimant's financial situation does not allow him to repay any part of the debt, however limited, without depriving himself of the necessities of life, such as food, clothing, accommodation, medical care and utilities (such as water, electricity and heat) and being able to meet the repayment conditions of short and long term loans for such items such as car, house, furniture or household appliances."

[136] When the Tribunal considers the Appellant's family, professional, and financial situations (*Girard*), it is apparent that he can only afford to pay part of the amount owing without enduring undue hardship and that this would have to be effected in low monthly payments.

[137] The Tribunal notes that it has not considered whether the $280.00 already paid by the Appellant should be returned to the Appellant because this is not what is contemplated by the Regulations. The Tribunal finds that the amount of $280.00 was already paid and that the Regulations refer to prospective reimbursement as opposed to past reimbursement by use of the words "would result" (which is known colloquially as the "future conditional unreal" or

"present unreal conditional" tenses in grammar). The French version also employs "imposerait" which is also conditional in nature.

[138] The Tribunal also finds that it must consider the factors which existed at the time that the Commission made its decision as well as the facts and circumstances which existed at the time that the Tribunal held its hearings in order to decide whether the Appellant can prove that he meets the condition precedent in paragraph 56(1)(f)(ii). This means that if the Appellant would have suffered undue hardship before and would no longer suffer undue hardship at the time that he appears before the Tribunal or any other reviewing body, because of a change in circumstances, he will not be entitled to the write off on this basis. The opposite is also true in that the Tribunal would have to consider factors which increase the Appellant's likelihood of enduring undue hardship. To do otherwise, would ignore the clear intention of the Act and Regulations and could lead to an anomalous result. This is also consistent with the Tribunal's power to hear cases on a *de novo* basis (*Schembri* 2003 FCA 463, *Purcell*, *Dunham*, and *Campbell* 2012 FCT 811).

[139] Given the foregoing findings, the Tribunal finds that the amount which the Appellant owes on account of the overpayment should be $436.80 (60% of $728.00) (GD2-76).

[140] The Tribunal finds that the Appellant can afford to pay this amount back without undue hardship by paying the amount of $54.60 per month for a period of 8 months.

[141] The Tribunal, accordingly, writes off 40% of the amount of $728.00 owing. The Tribunal also recommends that the Commission allow the Appellant to repay the amount of $436.80 on the basis of $54.60 per month for a period of 8 months.

[142] If there is any interest owing prior to this date, which would increase the amount owing beyond the $728.00 amount calculated, the Tribunal hereby writes off the excess amount pursuant to paragraph 56.1(8)(c) of the Regulations on analogous grounds. The Appellant should contact the Commission forthwith upon receipt of this decision to begin to repay this amount.

CONCLUSION

[143] For the foregoing reasons, the appeal is allowed in part.

Alyssa Yufe
Member, General Division

DATED: August 11, 2014