

[TRANSLATION]

Citation: *M. M. v. Canada Employment Insurance Commission*, 2015 SSTAD 1301

Date: November 9, 2015

File number: AD-13-166

APPEAL DIVISION

Between:

M. M.

Appellant

and

Canada Employment Insurance Commission

Respondent

Decision by: Pierre Lafontaine, Member, Appeal Division

In-person hearing on September 10, 2015, at Chicoutimi, Quebec

REASONS AND DECISION

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] On April 26, 2013, a Board of Referees found that:

- The Appellant's earnings were allocated in accordance with sections 35 and 36 of the *Employment Insurance Regulations* (the Regulations).

[3] On May 30, 2013, the Appellant filed an application for leave to appeal with the Appeal Division. The application for leave to appeal was granted on January 7, 2015.

[4] On April 9, 2015, the Appeal Division agreed to join files AD13-166, 13-264, 13-265, 13-277, 13-1097, 13-1098, 13-1099, 13-1100, 13-1101 and 13-1102 for the appeal hearing.

[5] The Tribunal held a pre-hearing conference on June 19, 2015, to identify the issues, settle all preliminary questions, decide on the length of the hearing and set a hearing date.

TYPE OF HEARING

[6] The Tribunal determined that an in-person hearing of this appeal would be conducted for the following reasons:

- the complexity of the issue(s);
- the fact that more than one party will attend the hearing;
- the information on record, including the kind of information that is missing, and the need for clarification;
- the fact that the parties are represented.

[7] The Appellant and her representative, Sylvain Bergeron, attended the hearing. The Respondent was represented by Me Lauren Heyer.

THE LAW

[8] In accordance with subsection 58(1) of the *Department of Employment and Social Development Act*, the only grounds of appeal are that:

- (a) the Board of Referees failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
- (b) the Board of Referees erred in law in making its decision or order, whether or not the error appears on the face of the record; or
- (c) the Board of Referees based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

ISSUES

[9] The issues submitted to the Tribunal by the parties are as follows:

- (a) Is the Board of Referees' decision to require repayment under section 45 of the *Employment Insurance Act* (the Act) correct?
- (b) Did the Board of Referees render the correct decision on the applicable limitation period in this case?
- (c) In light of the facts and the applicable law, did the Board of Referees render a reasonable decision in this case?

SUBMISSIONS

[10] The Appellant submits the following in support of her appeal:

- The Board of Referees erred in its findings of fact and application of the Act when it wrote that section 45 falls within sections 42 to 47 and that the provision

does not have a limitation period. The Board therefore treated section 46.01 as if it were not included in the Act;

- The Board continued in that regard by stating that the Respondent correctly applied section 45 and by ignoring the time limits under section 52 of the Regulations;
- Therefore, the Board of Referees applied the time limits for a false representation to the limitation period in cases of termination or dismissal, which is a denial of natural justice;
- Section 46.01 of the Act consists of two parts. First is the 36-month limitation period. In this case, the employment had ended more than 36 months earlier;
- The Appellant's last day of work was January 9, 2009, and the Respondent's claim is dated December 19, 2012, for a total of over 36 months;
- With regard to the second part of section 46.01 of the Act, the Tribunal has the authority to render the decision by assessing the situation. To do so, it can assess all the costs associated with the definition of administrative costs;
- The Board of Referees erred in law and committed a denial of natural justice.

[11] The Respondent submits the following reasons against the Appellant's appeal:

- The application of section 45 of the Act in the Appellant's case was justified and the limitation period was respected;
- The Board of Referees did not err in its interpretation and application of sections 45 and 46.01 of the Act;
- The Appellant received \$2,007.00 in May 2012 as payment in lieu of notice and vacation pay. This money is considered earnings under section 35(2) of the Regulations and consequently results in an allocation of earnings for benefit purposes under section 36 of the Regulations;

- The money distributed to employees as a result of a settlement agreement regarding a grievance constitutes earnings under subsection 35(2) of the Regulations if the money is directly connected to their employment;
- Since the Appellant had already been receiving Employment Insurance benefits, the money paid to settle the grievance created a double payment for the period of January 25 to March 8, 2009, thus creating an overpayment of \$856. Section 45 of the Act indicates that, in this situation, the claimant must repay the overpayment;
- The *Chartier* decision deals with, among other matters, the limitation periods that are applicable to the repayment of benefits by a claimant under section 45 of the Act, which is precisely the issue here;
- In this decision, the Federal Court of Appeal confirmed that the limitation period in section 52 of the Act does not apply to sections 45 and 46 of the Act because the sections in question cover different situations;
- As for the issue of the limitation period, the applicable limitation period is six years and not three years as the Appellant argued;
- Subsections 47(1) and (3) of the Act specify that amounts payable under section 45 of the Act, as in this case, may not be recovered more than 72 months (six years) after the day on which the liability arose;
- The liability arose in May 2012, when the money that gave rise to the overpayment was paid. The Respondent informed the Appellant by letter on December 19, 2012, which was seven months after the money had been paid, that there was an overpayment in this case. Therefore, the liability was not time barred under the Act;
- The appeal filed on January 18, 2013, stopped the limitation period in accordance with subsection 47(4) of the Act;
- Section 46.01 of the Act applies only as of January 6, 2013, and only for the

earnings received by a claimant for which the Commission has not yet determined whether there was “an overpayment of benefits that would not have been paid if the earnings had been paid or payable at the time the benefits were paid;”

- In this case, the determination was made in December 2012, even before section 46.01 of the Act existed;
- If, however, the Tribunal concludes that section 46.01 of the Act applies in this case, the Respondent submits that, although the 36-month (three-year) time period specified in section 46.01 of the Act had run out, the Tribunal should return the case to the Respondent to have it rule on the second criterion, namely, the administrative cost, since according to the terms used, the two criteria are cumulative and the Respondent has the discretionary authority to assess the administrative cost;
- In light of the facts and the applicable law in this case, the Board of Referees rendered a reasonable decision based on the evidence submitted and the relevant legislation. The Respondent submits that the Appellant failed to show that the Board of Referees, a specialized Tribunal in its area, based its decision on an erroneous finding of fact.

STANDARDS OF REVIEW

[12] The Appellant did not make any submissions regarding the applicable standard of review.

[13] The Respondent submits that the Federal Court of Appeal ruled that the applicable standard of review for a decision of a Board of Referees and an Umpire on questions of law is correctness – *Martens v. Canada (AG)*.

[14] The Tribunal notes that the Federal Court of Appeal ruled that the applicable standard of review for a decision of a Board of Referees and an Umpire on questions of law is correctness – *Martens v. Canada (AG)*, 2008 FCA 240, and that the applicable standard of

review for questions of mixed fact and law is reasonableness – *Canada (AG) v. Hallée*, 2008 FCA 159.

ANALYSIS

[15] The Appellant is appealing from the Board of Referees' decision dated April 26, 2013, which upheld the Respondent's allocation of the earnings under sections 35 and 36 of the Regulations.

[16] The facts in the file are simple and uncontested.

[17] The Respondent established an initial Employment Insurance benefit period effective January 11, 2009. The Appellant's last day of work with Bechtel was January 9, 2009. The Respondent was informed that the Appellant had received \$2,007.00 from the labour standards board following the settlement of a grievance involving the employer, BPR Bechtel. This amount was for pay in lieu of notice and vacation pay. Since the Appellant had been receiving benefits, an overpayment was created after this money was paid. On December 19, 2012, the Respondent informed the Appellant that the amount received in May 2012 constituted earnings and that, as the result of a new calculation, the amount of \$2,007.00 had been allocated to the period of January 25 to March 8, 2009, thereby creating an overpayment of \$856.

[18] On appeal before the Tribunal, the Appellant does not dispute the Respondent's allocation of the earnings, but strongly objects to the fact that the Respondent can go back more than 36 months to claim an overpayment from her even though she made no false representations.

[19] More specifically, the Appellant maintains that the Board of Referees erred in law in ignoring the 36-month limitation period set out in section 52 of the Act, which applies when there is no false representation.

[20] The legislative provisions that are relevant to this case are as follows:

45. If a claimant receives benefits for a period and, under a labour arbitration award or court judgment, or for any other reason, an employer, a trustee in bankruptcy or

any other person subsequently becomes liable to pay earnings, including damages for wrongful dismissal or proceeds realized from the property of a bankrupt, to the claimant for the same period and pays the earnings, the claimant shall pay to the Receiver General as repayment of an overpayment of benefits an amount equal to the benefits that would not have been paid if the earnings had been paid or payable at the time the benefits were paid.

46.01 No amount is payable under section 45, or deductible under subsection 46(1), as a repayment of an overpayment of benefits if more than 36 months have elapsed since the lay-off or separation from the employment in relation to which the earnings are paid or payable and, in the opinion of the Commission, the administrative costs of determining the repayment would likely equal or exceed the amount of the repayment.

47. (1) All amounts payable under section 38, 39, 43, 45, 46 or 46.1 are debts due to Her Majesty and are recoverable in the Federal Court or any other court of competent jurisdiction or in any other manner provided by this Act.

Limitation

(3) No amount due under this section may be recovered more than 72 months after the day on which the liability arose.

Appeals

(4) A limitation period established by subsection (3) does not run when there is pending an appeal or other review of a decision establishing the liability.

52. (1) Despite section 111, but subject to subsection (5), the Commission may reconsider a claim for benefits within 36 months after the benefits have been paid or would have been payable.

(2) If the Commission decides that a person has received money by way of benefits for which the person was not qualified or to which the person was not entitled, or has not received money for which the person was qualified and to which the person was entitled, the Commission must calculate the amount of the money and notify the claimant of its decision.

(3) If the Commission decides that a person has received money by way of benefits for which the person was not qualified or to which the person was not entitled,

(a) the amount calculated is repayable under section 43; and

(b) the day that the Commission notifies the person of the amount is, for the purposes of subsection 47(3), the day on which the liability arises.

(4) If the Commission decides that a person was qualified and entitled to receive money by way of benefits, and the money was not paid, the amount calculated is payable to the claimant.

(5) If, in the opinion of the Commission, a false or misleading statement or representation has been made in connection with a claim, the Commission has 72 months within which to reconsider the claim.

[21] Did the Board of Referees err in refusing to apply the 36-month limitation period set out in section 52 of the Act, given that the Appellant did not make a false representation?

[22] The Tribunal takes into consideration the Federal Court of Appeal decision in *Chartier v. Canada (AG)*, 2010 FCA 150, which states as follows on the issue of the limitation period.

[29] Section 46 involves a situation that is quite different from that of section 52. It allows the Commission to meet the immediate needs of claimants who have lost their employment because of their company's precarious financial situation, among other reasons, even if it knows that, in the bankruptcy or the arrangement proposal with creditors, the claimants will eventually be paid the amounts owing to them. It is well known that bankruptcy proceedings or the drafting of a proposal may take a long time and that claimants have a pressing need to support their family or themselves.

[30] That is why section 46 states that, so long as the claimant qualifies for benefits (see for example section 7 of the Act) and is not disentitled to be paid benefits (see for example section 18 of the Act), which was true in the applicants' case, the Commission will pay benefits, knowing that it will be able to recover the overpayments when the earnings that were payable, but deferred, will be paid.

[31] Sections 45, 46 and 47 respect the goal and objectives of the Act: to offer material support to those affected by the loss of their employment. The Act provides for a contributory insurance plan. It does not seek to, allow, or encourage the receiving or withholding of overpayments of benefits. It must be kept in mind that workers and employers bear the cost of the employment insurance system. The program is neither intended to nor administered in such a manner as to enrich certain claimants to the detriment of other claimants and the workers and employers financing it. It is appropriate to quote from this Court's decision in *Attorney General of Canada v. Walford*, A-263-78, December 5, 1978. At page 4 of the reasons, Justice Pratte writes the following:

The *Unemployment Insurance Act, 1971* sets up an insurance scheme under which the beneficiaries are protected against the loss of income resulting from unemployment. The purpose of the scheme is obviously to compensate unemployed persons for a loss; it is not to pay benefits to those who have not suffered any loss.

Now, in my view, the unemployed person who has been compensated by his former employer for the loss of his wages cannot be said to suffer any 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.

[32] If, to achieve the objectives of the Act, the Commission should be authorized to pay benefits to claimants in need, knowing that the claimants will be paid earnings later and that an allocation would then be made for the purposes of the Act, these claimants should also repay any overpayments that they may have received. That was Parliament's goal in enacting section 46 and its reason for stipulating a 72-month limitation period for the recovery of debts, knowing that there are often long delays in court proceedings, negotiations of agreements in court or out of court, and bankruptcy compromises and proposals.

[33] However, section 52 of the Act adopts a whole other premise, perspective and purpose altogether. As was already mentioned, it authorizes the Commission to reconsider a claim for benefits, whereas sections 45 and 46 involve only the recovery of overpayments.

...

[37] An analysis of the criteria at section 52 reveals its true purpose and distinguishes its scope from that of section 46. Section 52 involves a situation of fact and law unlike that of section 46. It is useful to recall that the obligation at section 46, imposed on an employer or any other person, arises whenever a duly qualified claimant is paid benefits that later turn out to be over and above those to which the claimant was unequivocally entitled.

[38] However, the section 52 power to reconsider is exercised whenever the claimant did not qualify or was not entitled to receive benefits. Recovering benefits paid to a claimant who was disentitled to them differs legally and factually from recovering overpayments of benefits made to a claimant who was entitled to them. The first case refers not to overpayments of due and payable benefits but, rather, to undue appropriations, made in good or bad faith, depending on the circumstances.

[39] Again in the first case, the Commission is unaware that the benefits were not owed, otherwise it would not have paid them. In the second case, that of section 46, the Commission is acting in anticipation or knows that it is paying more than what is owed, but it does so in order to help the claimant, knowing that the employer must eventually remit to the Receiver General the earnings owed to the claimant, so that an allocation of the amounts may then be made according to the Act.

[40] In one case involving the application of section 52, a claimant may have acted and received benefits in good faith, but it is later determined that he or she did not qualify under the Act or was disentitled to receive those benefits. In the public interest, Parliament has provided for the reconsideration of benefit claims. However,

in the interest of making fair and final decisions, it required that the reconsideration occur within 36 months of the time the benefits were paid or became payable. Nevertheless, in cases of bad faith manifested by false or misleading statements, Parliament extended the period to 72 months.

[41] There is no mention of good or bad faith in section 46, which must be read together with section 45, which refers to a claimant's obligation to repay overpayments of benefits upon receiving deferred earnings.

[42] Lastly, unlike section 52, section 46 does not provide for the reconsideration of initial claims for benefits. Initial claims remain as they were made by the claimant, and received and accepted by the Commission. The application of sections 45 and 46 merely gives rise to the allocation of amounts paid, and payments to the claimant or recovery of overpayments, as the case may be. To quote Umpire Cullen in CUB 37418, Pogue, June 3, 1996, and replacing the section numbers, section 45 "is not addressed to the claimant who is disentitled or disqualified from receiving benefits". It "speaks to the claimant who is in good standing with the Commission, but simply has received too many benefits". Section 45 "serves no adjudicative function comparable" to section 52. "To the contrary, it is more of an administrative provision, that allows for corrections in calculations of benefits to be made. For this reason, [subsection 52(1) is not] necessary to invoke section [45]". This is also the case for section 46.

...

[49] I agree with Umpire Cullen in *Pogue*, above, that the section 45 and 46 calculations can be made at any time when justified by one of the reasons listed in those sections: see page 3 of the reasons for decision. "Calculations" must also be taken to mean the allocation on which they are based.

[50] Overall, the Umpire did not err in concluding that the section 52 limitation period does not apply to the recovery of debts under section 46.

(emphasis added by the undersigned)

[23] The Tribunal must apply these teachings of the Federal Court of Appeal to the facts in this case.

[24] The Respondent was informed that a grievance settlement agreement had been reached between the Appellant and her employer and that she had received an amount of money for pay in lieu of notice and vacation pay. This is specifically one of the reasons listed in sections 45 and 46 of the Act for correcting the calculation of benefits to be paid.

[25] In these circumstances, the Act provides for a limitation period of 72 months to recover overpayments, knowing that legal proceedings and the negotiation of legal out-of-court agreements often take a long time, even if the claimant acted in good faith.

[26] The Tribunal therefore finds that the Board of Referees did not err in determining that the 36-month limitation period set out in section 52 of the Act did not apply to the recovery of debts under section 45.

[27] The Appellant also maintains that the Board of Referees erred in law in refusing to apply the 36-month limitation period set out in the new section 46.01 of the Act. The Appellant argues that the section has been in force since June 29, 2012, and must therefore apply in this case. The Appellant states that an order of the Governor in Council cannot override the implementation of the *Jobs, Growth and Long-term Prosperity Act*, which received royal assent on June 29, 2012.

[28] The Respondent is of the view that section 46.01 of the Act applies only as of January 6, 2013, under the *Jobs, Growth and Long-term Prosperity Act* and by the order of the Governor in Council SI/2012-98.

[29] Subsection 5(2) of the *Interpretation Act* (R.S.C. (1985), c. I-21) states that if no date of commencement is provided for in an Act, the date of commencement of that Act is the date of royal assent to the Act.

[30] In this case, the *Jobs, Growth and Long-term Prosperity Act* received royal assent on June 29, 2012. However, section 691 of the *Jobs, Growth and Long-term Prosperity Act* specifically states that sections 605 and 607, which cover the application of section 46.01 of the Act, come into force only on a day to be fixed by the order of the Governor in Council.

[31] On November 29, 2012, the Governor General in Council fixed January 6, 2013, to be the day when sections 605 and 607 of the *Jobs, Growth and Long-term Prosperity Act* come into force. Section 46.01 of the Act therefore applies as of January 6, 2013, under the *Jobs, Growth and Long-term Prosperity Act* and by the order of the Governor in Council SI/2012-98.

[32] Subsection 5(4) of the aforementioned *Interpretation Act* specifically states that it may be possible to delay the coming into force of a provision even though the legislation has received royal assent.

[33] The Tribunal therefore finds that the Board of Referees did not err in law in refusing to apply section 46.01 of the Act since the provision was not in force when the Respondent made its decision on December 19, 2012, to claim the overpayment of benefits from the Appellant.

Responses to the issues

[34] The Board of Referees did not err in requiring repayment under section 45 of the Act. It rendered a correct decision regarding the applicable limitation period in this case. In light of the facts on file, the Board of Referees' decision is reasonable and consistent with the legislation and the case law.

CONCLUSION

[35] The appeal is dismissed.

Pierre Lafontaine
Member, Appeal Division