Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

[TRANSLATION]

Citation: *M. V. v. Canada Employment Insurance Commission,* 2017 SSTGDEI 1

Tribunal File Number: GE-15-4026

BETWEEN:

M. V.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Charline Bourque

HEARD ON: October 13, 2016

DATE OF DECISION: January 4, 2017

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

[1] P. B., M. B., J. L., R. K., M. V., claimants attended the in-person hearing at the Service Canada Centre in X.

[2] Following a prehearing on July 14, 2016, the Tribunal joined the appeals, and a collective hearing was held. Mr. P. B. was chosen as the Appellants' representative. The Tribunal offered all the Appellants in attendance the opportunity to add their comments or arguments.

[3] Although the appeals were joined and a joint hearing was held, the Tribunal opted to render an individual decision for each Appellant.

INTRODUCTION

[4] The Appellant, M. V., had filed an Employment Insurance claim on September 20, 2009.

[5] On October 14, 2015, the Employment Insurance Commission of Canada (Commission) advised the Claimant that salary payments, following the settlement of a grievance with the City of Quebec, before deductions, are considered an income and will be allocated from his Employment Insurance benefits from April 1 to 3, 2010, in the amount of $150.81 and from April 4 to August 14, 2010, in the amount of $351.88 per week (GD3-32).

[6] On November 13, 2015, in response to his request for reconsideration, the Commission informed the Claimant that it had not amended the decision pertaining to earnings. The Commission added that [translation] "the settlement of a grievance won by an employee in light of applicable salary does not constitute a new work agreement but a clarification of the existing contract. In these situations, earnings received are considered a retroactive readjustment. It completes the employee's salary at the level established when the work was carried out and that was not paid to him because of, among other things, an understood condition that must be met before the higher rate is paid out. These retroactive salary adjustments are considered earnings

arising out of an employment, and they must be allocated to the period in which the services were provided." (GD3-41).

[7] This appeal was held in the form of an in-person hearing for the following reasons:

a) the complexity of the issue or issues

b) the fact that more than one party will be in attendance

c) the information in the file, including the need for additional information

ISSUES

[8] The claimants are appealing the decision on the reimbursement of benefits under section 45 of the *Employment Insurance Act* (Act) and the timeline of more than 36 months under section 46.01 of the Act.

[9] The claimants are appealing the decision specifying that the sums received constitute earnings and in line with the allocation of this earning pursuant to sections 35 and 36 of the *Employment Insurance Regulations* (Regulations).

EVIDENCE

[10] The evidence in the file is as follows:

a) arbitration tribunal decision dated June 17, 2013 (GD3-15 to GD3-24);

b) approach to calculating the reimbursement. Subcontracting grievance claimant received $7,861.79 on June 25, 2015 (GD3-25 to GD3-29);

c) On October 14, 2015, the Commission indicated that the Union of Manual Workers of the City of Quebec (SCFP Local 1638 Cols Bleus de la Ville de Québec) had informed it that an allowance equal to lost salary, plus interests provided for in the *Labour Code*, had been paid out. Salaries lost cover the period from April 1, 2010, to May 31, 2011. The Claimant received the sum of $6,836.84, namely a daily amount of $50.27 (GD3-30).

d) Section 5.12.11.2 of the Digest of Benefit Entitlement Principals (GD10-4).

e) Arguments made at the hearing and sent to the Tribunal.

[11] The evidence submitted at the hearing through the Appellants' testimony revealed the following:

a) A group of five people have brought the appeal and they are claiming a debt of approximately $16,000. They must be considered a collective and, consequently, the amount given by the Commission for the administrative cost should be higher.

b) The fact that a Commission representative was not present to answer their questions casts doubt on the veracity of its calculation and creates an injustice.

c) If there are 56 people to check at $329 per person, the administrative cost is $18,256 altogether; they owe $16,000, therefore, the administrative cost exceeds their debt.

d) The ruling rendered by the Umpire is to compensate the damages suffered (p. 2. par. 4). It is not about retroactivity.

e) They have been members of six witnesses who have testified before the Umpire when there was a hearing to testify that they experienced 14 months tied to this loss of hours that resulted in several issues.

f) The Umpire considered all the damages that they had experienced. The agreement is explained in paragraphs 46–47.

g) The grievance follows a loss of work hours but, to stay employed, they had to contend with all sorts of problems. They were casual and found themselves without work hours, without getting to be relocated. They had no guaranteed hours and found themselves jobless while, the previous year, they had been full-time from April to November. They had no more hours, but they had to remain at the City's disposal.

h) This is not about earnings paid to compensate a lost salary. It is the union, not the Umpire, who decided to pay in this form. The union had to arrange to compensate the employees as fairly as possible. They took a waiting period on the previous year when there were no guaranteed hours.

i) The union had the burden to rule on the allowances. They proceeded by a mathematical formula instead of a compensatory formula, according to the experienced issues. Grievances against the union are filed contrarily to the way union calculations are carried out.

j) The way in which calculation is done cannot be considered as an earning. It is the offer that the union has made for the allocation of the allowance, and this method was accepted. It is therefore not a salary since it was based on a loss. This does not coordinate with the lost hours that should have been made.

k) The claimants present are not contesting the manner in which the union made the allocation.

l) They indicate the ruling is clear on the fact that it is about compensation to offset the problems suffered and not to compensate an earning. The union paid the money in the form of a salary, but it was not the employer.

m) The Umpire specified that it is to compensate the damage suffered by paying as an allowance equivalent to the lost salary, plus interest, as it was claimed in the grievance. The union will ensure its allocation according to the individual damages suffered by the employees (paragraphs 46–47 of the ruling). This is not considered salary, but rather an allowance for damages suffered.

n) The time taken by the Commission to speak to each one of them, plus the fact that a major recount project for 56 people is higher than $329. Furthermore, if you calculate the 56 people, the administrative cost is higher than the sum of the amounts owning.

o) The timeframe is long since that took five years before the ruling was rendered, plus a delay of 6 months by the Commission before it gave its decision. The Commission's delay was too long; they were not expecting this decision and could no longer reimburse this amount. The union should have paid this amount before giving them this amount to the claimants.

p) On the amounts owing, there are deductions at source. Furthermore, an amount at source was deducted on the amounts owing, before Service Canada was reimbursed.

q) The union advised them to phone Service Canada to inform them of the receipt of the amount owing.

r) Mr. M. V. claims to have received a notice of debt of $4,070. Following a review, the amount is $4,422 while the total amount he received is $4,268.63 (net). It is therefore more than he received. The damage rule thereby resulted in more damages.

s) In the amount received, the weeks of sickness for which he was not available to work. The unemployment sickness benefits were allocated when he was not available for work. These weeks did not have to be in the total of the overpayment, because he was not available for work. The situation applies for Mr. M. V. and Mr. P. B. These amounts for these weeks should not have to be reimbursed.

t) They had to declare the amounts in 2015 (year in which the amount was received), which created other damages while Service Canada claimed the sum for the years 2010–11. This affects their tax rate, which is higher in 2015 than in 2010 and even has an effect on the spousal support to be reimbursed. It is not actually about compensation, since almost everything had to be paid back; this caused a big burden for the citizens. They needed their Employment Insurance benefits when they requested them.

u) They have no other documents pertaining to the grievance.

v) According to the decision, the Umpire orders the City to comply with the collective agreement and to compensate the union and the employees for the damages suffered. It is not only about monetary issues, but also family, stress and moral issues.

w) The union had the burden of ruling on the allowances by a calculation of a deficit of hours in 2009 in comparison to 2010. Their way of ruling was to make a mathematical formula, since there were 56 people and a solution had to be found. They could have worked more because, by seniority, they work normally more and more from one year to the next. There was a massive layoff. They cut 50 jobs, they cut in their group and these are people who suffered injury.

x) At paragraph 7, the Umpire indicates that it is about a compensation of the injuries suffered due to the violation of the collective agreement, namely the payment of the salary that the employer should have paid, were it not violating the collective agreement, namely 231,212 hours at an average rate of $23/hour, arbitrarily and without damages suffered.

y) It is not about retroactivity calculated on earned salary, that which a claimant received. The $23/hour does not include benefits or retirement plans. The salary varied according to the position held.

z) The amount received is less than what he lost. He did more hours than the amount received. They wanted to work. The situation changed in a matter of one day when 50 positions were eliminated. The City should have compensated with other jobs elsewhere, but that is not what it did. It is a matter of compensation.

PARTIES' ARGUMENTS

[12] The Appellants pointed out that:

a) The claimants are wondering why they are not eligible for the 36 months of prescriptions stipulated in sections 45 and 46 of the Act.

b) They are inquiring about the administrative costs of the dockets and specify that the fact that were a group of 56 people caused delays. They specify that they knew the Commission's decision six months later, once the 56 people had been calculated when they had had the time to spend the amounts received. It has to do with a delay due to the Commission's administrative burden. The amount of the administrative cost is therefore higher than what the Commission is indicating.

c) The administrative cost for 56 people exceeds the debt that the Appellants have.

d) The six-month delay before the Commission rendered its decision caused an injury.

e) The fact that the "My Service Canada Account" site is not giving them access to more than 36 months has prevented them from verifying their benefits and from doing the calculations themselves. Even when calling Service Canada, the answer was to wait, and the delay was six months before having the decision.

f) It is not about compensation, but rather an allowance for damages sustained. It is not about retroactivity.

g) It is therefore not about a salary because it was based on a loss. This does not square with the loss of hours.

h) Service Canada specifies that the *Digest of Benefit Entitlement Principles* at section 5.12.11.2 indicates that compensation other than for the loss of income does not have compensation value if it is about a regulation for damage and interests for the damages sustained. It is not a matter of a loss of salary, but rather problems that they were compensated for. This can therefore not be recognized as compensation, because it is a matter of a regulation of the damages and interests for damages sustained.

i) The dockets are eligible for the 36-month limitation stipulated in sections 45 and 46 of the Act, because there was an administrative burden and the amounts that were requested are lower than the administrative cost undertaken by the Commission.

j) It is not the employer who allocated the earnings. It was not about pay, but the burden was transferred to the union to rectify the damages and not only the pay from the employer. It is not about pay, but rather about compensation.

k) The claimants indicate that they will contest the evidence provided by the Commission, because it was only an estimate and not proper accounting evidence. They doubt its legitimacy (GD10).

[13] The Respondent made the following submissions:

a) Subsection 35 of the Regulations defines "income" as any pecuniary or non-pecuniary income that is or will be received by a claimant from an employer or any other person, including a trustee in bankruptcy. It also specifies which income is considered earnings. Once this point is established, section 36 of the Regulations indicates how such income is allocated, in other words, the week in which the earnings are considered to have been earned by the Claimant.

b) Amounts received from an employer are considered earnings and must therefore be allocated unless they fall within the exceptions set out in subsection 35(7) of the Regulations or do not arise out of employment;

c) In this case, the Claimant received money from the City of Quebec and this money was paid to him as a salary. The Commission argued that that money constituted earnings under section 35(2) of the Regulations because it was remitted to the claimant as payment to compensate for lost salary. Accordingly, under section 36(5), the Commission correctly allocated those earnings from April 2010 to August 14, 2010, namely, the period covered by the agreement during which the Claimant was employed.

d) The Claimant argues that the sum received from the City of Quebec represents a bonus and not a retroactive adjustment. However, the document issued by Union of Manual Workers of the City of Quebec—Chapter 1638, indicates clearly in the approach on the reimbursement calculations - Subcontracting Grievances, that the arbitration decision covers the period from April 1, 2010, to May 31, 2011 (page GD3-25).

e) This document explains the way in which the salaries in question will be compensated for the 14-month period covering the arbitration (page GD3-26).

f) It is not a matter of a bonus but rather an allowance aiming to compensate for lost salary covering the period from April 1, 2010, to May 31, 2011. In the case of the Claimant, it is a matter of the period from April 1 to August 14, 2010: the end date of his employment.

g) The Claimant argues that the sum that he must repay to Employment Insurance exceeds the net amount he received. It is well-specified in subsection 35(2) of the Regulations that earnings that must be accounted for when calculating the amount to deduct from payable benefits is the entire income (page GD4-4). It is therefore the gross amount that he received less the interest that the Commission had to allocate to the period from April 1 to August 14, 2010.

h) J.A. W. ANDREW MACKAY (CUB 67875) explained it as follows:

> "...First of all, he argued that he should have only the net amount to repay, namely, the amount after deductions at source withheld by his employer for tax purposes on the income. The Umpires have already rejected similar cases (e.g. CUB 50639); I am therefore rejecting this argument. The money deducted for tax purposes was paid to the Canada Revenue Agency and will be transferred in the form of tax credits for the 2005 tax year. Subsections 36(4), 36(5) and 35(2) of the Regulations provide for the allocation of the earnings payable to the Claimant under the terms of the employment contract in exchange for the performance of services, from the earnings payable under the terms of the employment contract without the services provided as well as the earnings that must be considered and

that constitute the Claimant's integral earnings arising out of any employment. As a result, according to Regulations, the Claimant's integral income arising out of his employment, including the totality of the amount paid as parental leave in February and the sums paid out for the performance of services in the week of April 17, must be allocated. The Commission and the Board of Referees have not committed an error by accounting for the entire income paid to Mr. Lord by his employer, and nothing makes it possible to subtract from this amount a portion of the deductions withheld for tax purposes for the sums paid out as leave or in salary."

i) The Commission submits that the case law supports its decision. Bordeleau J. upheld the principle whereby amounts received from an employer are considered earnings and must therefore be allocated unless they are covered by the exceptions set out in subsection 35(7) of the Regulations or unless they do not arise out of an employment (CUB 79974).

j) The Federal Court of Appeal has affirmed the principle that "the entire income of a claimant arising out of any employment" is to be taken into account in calculating the amount to be deducted from benefits (*McLaughlin v. Canada (Attorney General)*, 2009 FCA 365).

k) The Federal Court of Appeal has also confirmed the principle that amounts that constitute earnings under section 35 of the Regulations must be allocated pursuant to section 36 of the Regulations (*Boone et al. v. Canada (Attorney General)*, 2002 FCA 257).

l) The Commission determined that the average administrative cost to establish the overpayment in 2016 is $329. This amount includes the costs estimated to carry out the necessary investigations and the review of the request, establishing contact with the Claimant and the collection action on the debt, as well as proceeding with the administrative review and the potential appeal.

m) In this case, the amount of the earnings was $7,861.79 in lost salary for the period from April 1 to August 14, 2010. Given the foregoing, the Commission is of the opinion that, in this case, the overpayment amount of $4,422 exceeds the administrative cost of $329. As a result, section 46.01 does not apply (GD8-1).

n) The administrative cost was based on a case study aiming to compare the amounts arising out of a wrongful dismissal or the property of a bankrupt employer and the overpayment amounts. As mentioned previously, this administrative cost includes the costs estimated for carrying out the necessary inquiries and the review of the application, establishing contact with the Claimant and the collection actions on the debt, as well as proceeding with the administrative review and the potential appeal.

o) For the cases where the appellant has more than one docket, the administrative cost is an average established for determining each overpayment (GD12).

ANALYSIS

The relevant legislative provisions are reproduced in an appendix to this decision.

Prescription of the delay and administrative cost

[14] The claimants submit that the timeframe is stipulated, since more than 36 months had passed before the Commission rendered its decision. Furthermore, they submit that the Commission's administrative delay, between the time it was informed of the receipt of the sums and the time it rendered a decision, caused them injury.

[15] Section 45 of the Act states as follows:

> 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.

[16] In *Chartier*, the Federal Court of Appeal stated as follows:

> 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.
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> 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.
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> 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, J.A. Pratte writes the following:
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> > 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."

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.

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.

[…]

It is in the analysis of the conditions of section 52 that emerges its genuine finality and that distinguishes it's application field from that of section4 46, imposed on an employer or other person, takes effect duly qualified claimant is paid benefits that later turn out to be over and above those to which the Claimant was unequivocally entitled.

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.

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.

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.

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.

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.
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> […]
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> I agree with Umpire Cullen in *Pogue*, above, that the section 45 and 46 calculations can be made at any time that 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.
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> 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. (*Chartier v. Canada (Attorney General)*, 2010 FCA 150).

[17] In this way, in the present case, the Commission was informed that a grievance settlement agreement had been reached between the Appellants and their employer on June 17, 2013.

[18] The Tribunal is of the opinion that it is specifically a matter of one of the reasons listed in section 45 of the Act that makes it possible to carry out, at any time, corrections to calculations on benefits to be paid out, including allocation, which concern them.

[19] Nevertheless, the Tribunal accounts for section 46.01 of the Act that went into effect on January 6, 2013.

[20] Section 46.01 of the Act states as follows:

> 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.

[21] The Tribunal accounts for the date of work stoppage of September 18, 2009. The decision rendered by the Commission is dated October 14, 2015. The Claimant voluntarily left his employment on August 14, 2010 (GD3-31). The Tribunal is of the opinion that more than 36 months have passed since the interruption-of-work date. Furthermore, section 46.01 of the Act was in effect at the time that the Commission rendered its decision on October 14, 2015.

[22] In the Claimant's case, the overpayment was established as $4,070. This is established in line with the claim for benefits beginning on September 20, 2009.

[23] With respect to the administrative cost, the Commission established this cost as $329 (GD-91) per docket. The Commission indicates that the [translation] "administrative cost was based on a case study aiming to compare the amounts arising from a wrongful dismissal or the property of a bankrupt employer and the overpayment amounts. As mentioned previously, this administrative cost includes the estimated costs for carrying out the necessary inquiries and the review of the application, establishing contact with the Claimant and the collection measures on the debt, as well as proceeding with the administrative review and potential appeal." This cost is an average for the establishment of each overpayment.

[24] The Tribunal is of the opinion that the determination of the administrative cost is a discretionary power of the Commission. Furthermore, section 46.01 establishes that it is up to the Commission to establish this administrative cost.

[25] A higher court may not exercise the discretionary powers conferred explicitly on the Commission under the *Employment Insurance Act*. The Commission's decision in exercising such a discretionary power may be overturned only if it contains a fundamental error demonstrating that it was not rendered judiciously (*Canada (Attorney General) v. Loken*, FCA A-464-94).

[26] Relying on the evidence and the parties' submissions, the Tribunal is of the opinion that the Commission exercised its discretionary power judiciously by establishing the administrative cost of the dockets.

[27] Furthermore, the administrative cost being established as $329 for the Claimant's docket, the overpayment of $4,070 remains greater.

[28] The claimants also pointed to the fact that the administrative costs established by the Commission should be viewed in their entirety, that is to say, they should be calculated based on the group of 56 people who were affected by the agreement reached. In this way, the actual administrative cost would be 56 x $329, for a total of $18,424. The claimants argue that this administrative cost therefore exceeds the overpayments established for the five claimants who have appealed their decisions.

[29] Section 45 of the Act reads as follows:

> 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. [my emphasis]

[30] In this way, the Tribunal is of the opinion that re-reading section 45 of the Act makes it possible to understand that the Legislator was referring to a claimant and to benefits that are paid to them. The Tribunal is of the opinion that the determination of the administrative cost is done in an individual manner and that it must be considered vis-a-vis the overpayment of each claimant.

[31] Furthermore, the Tribunal emphasizes that it is following its own decision that the claimants were heard together within the context of their appeal and this, with the goal of efficiency and simplification of the appeal process. A prehearing was held on this subject, and the claimants did not advance an argument to object to the joining of appeals.

[32] In this way, the Tribunal is of the opinion that it cannot consider the administrative cost for the entirety of the 56 individuals who were covered by the agreement with the employer.

[33] By relying on the arguments that the parties made and on the evidence, the Tribunal is of the opinion that the sums paid out following the agreement reached between the City of Quebec and the Union of the City of Manual Workers of the City of Quebec, must be considered pursuant to section 45 of the Act and that no limitation period pursuant to section 46.01 of the Act is applicable, since the administrative cost determined judiciously by the Commission is lower than the overpayment to be repaid by the Claimant.

Earnings and allocation

[34] Subsection 35(2) of the Regulations states that income arising out of any employment, whether in respect of wages, benefits or other remuneration, must be taken into account unless it falls within an exception as provided for in subsection 35(7) of the Regulations.

[35] In *McLaughlin*, the Federal Court of Appeal affirmed the principle by which "the entire income of a claimant arising out of any employment" is to be taken into account in calculating the amount to be deducted from benefits (*McLaughlin v. Canada (Attorney General)*, 2009 FCA 365).

[36] The claimants indicate that it is not a matter of earnings aiming to compensate for a salary retroactively, but rather compensation paid out in light of damages sustained. The

claimants claim to have testified about these damages before the Umpire. They specify that it is evident that the sums were paid out in compensation for damages sustained. They indicate that these sums do not correspond to a salary.

[37] For its part, the Commission specifies that the claimants received money from the City of Quebec and that this money was paid to them in the form of a salary. The Commission argues that this money constitutes earnings pursuant to subsection 35(2) of the Regulations since it was given to the claimants as payment to compensate for lost wages. As a result, under subsection 36(5), the Commission correctly allocated these earnings from April 1, 2010, to May 31, 2011, namely the period covered by the agreement.

[38] In *Mayor*, the Federal Court of Appeal stated:

> [translation]
> "Such an affirmation is erroneous. This court ruled in *The Attorney General of Canada v. Walford* that:
>
> > [translation]
> > [...] damages paid to a former employee who was unjustly dismissed without notice constitute "income…arising out of…[an] employment" pursuant to subsection 172(2)a) [now 57(2)a] of the Regulations if they are paid as compensation to an employee for incurring a loss of income from his or her unjust dismissal. (P. 773)
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> And again, in *Attorney General of Canada v. Tétreault and Joyat*:
>
> > [...] Where there are no special circumstances, any amount paid by an employer to a laid-off or dismissed employee is paid as compensation for loss of income."
>
> [translation]
> Even if, in this case, the Respondent is invoking, in support of its action against its former employer, beyond its claim for compensation for lost wages, allegations of damage to his reputation, emotional problems and expenses for searching for a job, absolutely nothing in the docket makes it possible for an Umpire with the facts acting

> judiciously to determine what possible portion of the amount actually received following the regulation corresponded to the compensation for the damages rather than the most usual form of wage compensation in lieu of notice. It was incumbent upon the Respondent to show that the payment received was not earnings. Let us quote again from the decision in *Walford*:
>
> The Respondent received an amount that, failing special circumstances, was intended only for compensation for lost wages. [...] Because the Respondent had to prove that he was eligible for benefits, he had to prove the existence of special circumstances. Otherwise, the Commission was entitled to assume that the entire amount applied to the lost income. ((p. 775)" *Canada (Minister of Employment and Immigration) v. Mayor*, A66788).

[39] The Tribunal accounts for the fact that the burden of proof rests on the Claimant, who must show that the sum paid out or payable was not earnings under the *Employment Insurance Act* and its Regulations.

[40] The Tribunal notes that the Tribunal's arbitration decision detailed in paragraph 7, the orders sought by the union in line with the present arbitration. In Paragraph 11, the Umpire specifies that [translation] "[i]t is impossible to repatriate the work of residual matters and it is not possible to order the City to carry out 231,212 hours more by the employees. It is therefore appropriate to order compensation <u>for the hours lost</u> due to the violation of the collective agreement." (GF318) [our emphasis.]

[41] Accordingly, the Tribunal finds that the Umpire favours the order sought by the union in subsection 7(3) of the arbitration decision, which reads as follows:

> [translation]
> An order to compensate the union for the injury suffered due to the violation of the collective agreement, namely by salary payment that the employer would have had to pay, had it not been for the violation of the collective agreement, namely, 231,212 hours at the average rate of $23.00 per hour.
>
> For the future, an order for the purpose of the employer taking measures to increase the work accomplished currently by blue collar workers, namely, by repatriating the work

or by increasing services to citizens so as to reach 1,445 more hours per week or 75,146 hours annually." (GD3-17) [our emphasis].

[42] The Umpire continues in Paragraph 39 by indicating that he concludes that:

> [translation]
> The answers to the three questions submitted by the parties lead me to establish the injury suffered by the union and the employees for the 14-month period from April 1, 2010, to May 31, 2011, at 11,560 hours + 75,146 hours = 86,706 hours – 20,655 hours = 66,051 work hours that represent the amount of work that was not maintained follow the outsourcing of residual materials. The parties recognize that the applicable hourly rate is $23. (GD3-22) [our emphasis].

[43] Finally, the Umpire concludes in paragraphs 46 and 47 that:

> [translation]
> In this way, the third order requested is the only one possible. It is a matter of compensating for the damage suffered by paying, as an allowance, the equivalent of the lost salary, plus the interests provided for in the *Labour Code*, as they were claimed in the grievance.
>
> I am of the opinion also that it is appropriate to order that this compensation be paid to the union for the benefit of the employees. It will see to the allocation based on an assessment of the personal injuries suffered by the employees. I believe that it is inappropriate to ask the parties to collectively review how the allowance should be distributed. This could create further litigation. The union has the authority enabling it to manage the compensatory allowance of the total injury to the benefit of the employees and, where applicable, employees who have suffered a personal injury." (GD3-23) [our emphasis].

[44] The Tribunal considers the claimants' testimonies to have revealed significant moral distress, such as monetary problems, but also family problems, stress, moral injury, etc.,

[45] In *Harnett*, the Court indicated:

> [translation]
> He also let it be understood that there could be "circumstances" in which it would clearly be a matter of proof that a portion of the damages-interests was intended to compensate for something other than lost salary and that, in that case, this portion would not likely be allocated. In the Umpire's eyes, the Respondent's loss of the right to reinstatement was sufficiently distinct from the loss of salary to be covered by the exemption from the allocation approved by J.A. Pratte. We believe that the case law prior to *Walford* and especially the judgements of this court in *Canada v. Tétreault* and *Joyal* and *Minister of Employment and Immigration v. Mayor* are clearly incompatible with the Umpire's opinion. If we are correct, the distinction applies only if the loss has no connection to the benefit arising out of the employment. In this way, a sum paid out to rectify damages caused to the health or to the reputation of an individual or, in fact, in compensation of his or her legal expenses, would not be allocated as earnings. All the benefits tied to an employment are the same with respect to the compensation for which their loss may take place (*Canada (Attorney General) v. Harnett* FCA #A-34-91).

[46] The Tribunal considers that the union's claim pertained to the compensation of work hours for the employees. Furthermore, although the Umpire refers to the personal injury suffered by the employees, the Tribunal notes that the agreement is based on the calculation of the employees' loss of hours. The Umpire specifies that the third order, the only one possible, aims to compensate for the damage suffered by paying, as compensation, the equivalent of the lost salary, plus the interest provided for by the *Labour Code*. The Umpire does not specify whether the damage suffered pertains to the loss of employment hours or whether it pertains to another type of damage. There is no indication that the agreement aims to compensate for the damages other than those suffered due to the loss of employment hours, which is the basis of the grievance and which corresponds to the compensation claims carried out by the union in this grievance.

[47] In this way, by relying on the evidence and the parties' submissions, the Tribunal is satisfied that the sums received were paid out as compensation for a salary, based on a number

of work hours for each of the claimants. The sums originate in an employment and are paid as salary. They are therefore earnings pursuant to subsection 35(2) of the Regulations.

[48] Nevertheless, the Tribunal is of the opinion that the interests paid on these sums, under the *Labour Code*, do not constitute earnings pursuant to subsection 35(2) of the Act.

[49] With respect to the calculation method chosen by the union, the Tribunal cannot rule on this issue even if that method may be disadvantageous to certain claimants. The Tribunal considers that the unionized members have accepted that the union is using that calculation method. Furthermore, the claimants have confirmed that, although some of their colleagues affected by this agreement challenged that calculation method, it did not concern them.

[50] The Federal Court of Appeal also confirmed the principle that sums constituting earnings pursuant to section 35 of the Regulations must be allocated pursuant to section 36 of the Regulations (*Boone et al v. Canada (Attorney General)*, 2002 FCA 257).

[51] Subsection 36 (5) of the Regulations specifies that :

> Earnings that are payable to a claimant under a contract of employment without the performance of services or payable by an employer to a claimant in consideration of the Claimant returning to or beginning work shall be allocated to the period for which they are payable.

[52] The Tribunal notes that the Tribunal's arbitration agreement specifies that the period covered by the decision is that of April 1, 2010, to May 31, 2011 (GD3-19). Nevertheless, the Claimant voluntarily left his job on August 14, 2010.

[53] The union's document entitled "approach for calculating reimbursement" specifies that the period covered by the Umpire's decision is from April 1, 2010, to May 31, 2011 (GD3-25).

[54] The union's table shows that the Claimant received an allowance of $7,861.79 on June 25, 2015 (GD-29).

[55] The Commission specifies that the Claimant received the amount of $6,836.84 as salary, namely, a daily amount of $50.27. The employer confirms that the lost salaries cover the included period between April 1 and August 14, 2010, the date on which the Claimant quit the City of Quebec (GD3-30).

[56] As a result, the Tribunal is of the opinion that the amount to allocate, in the present case, is $6,836.84, namely, the allowance received minus the interest paid. This allocation must be carried out from April 1 to August 13, 2010, since the Claimant had left his job and because, after that date, no employment contract existed between him and his employer.

[57] In the Claimant's case, the overpayment was established as $4,422. This is established in line with the claim for benefits beginning on September 20, 2009.

[58] The table depicted on page GD3-44 shows the calculations made by the Commission.

[59] The Tribunal verified the calculations carried out by the Commission and is in agreement with these calculations. As a result, an overpayment of $4,422 remains.

[60] The Tribunal also considers the fact that, according to the Claimant, there should not have been an income allocation for the weeks during which he received Employment Insurance sickness benefits because he was not, during those weeks, available for work.

[61] Subsection 36(5) of the Regulations specifies that earnings payable to the Claimant under the employment contract without the provision of services or remuneration payable by the employer to the Claimant for returning to work or starting a job is distributed over the period for which it is payable.

[62] Furthermore, subsection 21(3) of the Act specifies that:

> If earnings are received by a claimant for a period in a week of Unemployment during which the Claimant is incapable of work because of illness, injury or quarantine, subsection 19(2) does not apply and, subject to subsection 19(3), all those earnings shall be deducted from the benefits payable for that week.

[63] In this way, earnings are allocated over all the weeks between April 1 and August 13, 2010.

[64] The Tribunal's role is to apply the Act, and the Tribunal cannot amend it simply to please the Claimant who feels wronged. The Act establishes the specific criteria that a claimant must meet to be eligible for benefits and, for determining eligibility, it is not based on the fact that a claimant has contributed to the Employment Insurance Program for a number of years.

[65] Finally, the Claimant specifies that the amount that he has to reimburse is higher than the net amount received.

[66] Yet, pursuant to section 45 of the Act, when the employer pays out a sum to the Claimant, the latter is no longer eligible for Employment Insurance benefits that he or she has received. As specified previously, an overpayment of $4,422 was established due to an overpayment.

[67] The Appellant can contact the Canada Revenue Agency about the possibility of reimbursement for the tax on the income that was withheld on the Employment Insurance benefits, which must now be reimbursed. Doing so would enable him to recover the difference between the gross amount and the net amount of the overpayment of benefits.

[68] Not requiring the reimbursement of benefits would mean that the Claimant would have been paid twice for the same period: once by the Respondent and once by his employer. The Employment Insurance program was not conceived for that purpose. If the Appellant's benefit claim had been refused from the outset, while the grievance regulation process was taking its course, he would probably have been immediately confronted with financial difficulties, but he

would have been able to keep all the Employment Insurance benefits that he would have received after the allocation of the regulation amount.

CONCLUSION

[69] The appeal is dismissed.

Charline Bourque
Member, General Division—Employment Insurance section

ANNEX

APPLICABLE LAW

Employment Insurance Act

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 (1) If under a labour arbitration award or court judgment, or for any other reason, an employer, a trustee in bankruptcy or any other person becomes liable to pay earnings, including damages for wrongful dismissal or proceeds realized from the property of a bankrupt, to a claimant for a period and has reason to believe that benefits have been paid to the Claimant for that period, the employer or other person shall ascertain whether an amount would be repayable under section 45 if the earnings were paid to the Claimant and if so shall deduct the amount from the earnings payable to the Claimant and remit it to the Receiver General as repayment of an overpayment of benefits.

(2) If a claimant receives benefits for a period and under a labour arbitration award or court judgment, or for any other reason, the liability of an employer to pay the Claimant earnings, including damages for wrongful dismissal, for the same period is or was reduced by the amount of the benefits or by a portion of them, the employer shall remit the amount or portion to the Receiver General as repayment of an overpayment of benefits.

Employment Insurance Act [*Version from 2016-01-03 to 2016-03-31*]

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.

Employment Insurance Regulations

35 (1) The definitions in this subsection apply in this section.

employment means

> **(a)** any employment, whether insurable, not insurable or excluded employment, under any express or implied contract of service or other contract of employment,
>
> > **(i)** whether or not services are or will be provided by a claimant to any other person, and
> >
> > **(ii)** whether or not income received by the Claimant is from a person other than the person to whom services are or will be provided;
>
> **(b)** any self-employment, whether on the Claimant's own account or in partnership or co-adventure; and
>
> **(c)** the tenure of an office as defined in subsection 2(1) of the *Canada Pension Plan*. (*emploi*)

[…]

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. (*revenu*)

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, are the entire income of a claimant arising out of any employment, including:

> **(a)** amounts payable to a claimant in respect of wages, benefits or other remuneration from the proceeds realized from the property of a bankrupt employer;
>
> **(b)** workers' compensation payments received or to be received by a claimant, other than a lump sum or pension paid in full and final settlement of a claim made for workers' compensation payments;
>
> **(c)** payments a claimant has received or, on application, is entitled to receive under
>
> > **(i)** a group wage-loss allowance plan,
> >
> > **(ii)** a paid sick, maternity or adoption leave plan,

(iii) a leave plan providing payment in respect of the care of a child or children referred to in subsection 23(1) or 152.05(1) of the Act,

(iv) a leave plan providing payment in respect of the care or support of a family member referred to in subsection 23.1(2) or 152.06(1) of the Act, or

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 allowance 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) 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*.

36 (5) Earnings that are payable to a claimant under a contract of employment without the performance of services or payable by an employer to a claimant in consideration of the Claimant returning to or beginning work shall be allocated to the period for which they are payable.