



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *K. L. v. Canada Employment Insurance Commission*, 2017 SSTADEI 373

Tribunal File Number: AD-17-615

BETWEEN:

**K. L.**

Applicant

and

**Canada Employment Insurance Commission**

Respondent

---

**SOCIAL SECURITY TRIBUNAL DECISION**  
**Appeal Division**

---

Leave to Appeal Decision by: Stephen Bergen

Date of Decision: October 30, 2017

## **REASONS AND DECISION**

### **INTRODUCTION**

[1] The Applicant established a claim for regular Employment Insurance benefits effective February 10, 2013. On December 29, 2015, the Applicant entered into Minutes of Settlement (Settlement) in connection with a wrongful dismissal claim against his former employer. Also on December 29, 2015, he advised the Commission of the Settlement. On February 10, 2016, a letter was sent to the Applicant indicating that the Settlement was considered earnings and that it would be allocated. On March 17, 2016, the Commission issued a decision to the effect that he had been assessed an overpayment in the amount of \$18,654.00.

[2] The employer accordingly withheld \$18,654.00 from the settlement monies paid to the Applicant, and it remitted the same amount to the government.

[3] The Applicant disagreed that the \$18,654.00 was properly earnings, and he sought a reconsideration from the Commission. The Commission upheld its original decision of March 17, 2016, in a decision of June 10, 2016.

[4] The Applicant appealed, and the General Division of the Social Security Tribunal of Canada (Tribunal) dismissed his appeal on August 4, 2017, confirming that the settlement monies that the Applicant had received from his employer were earnings and that the Commission properly allocated those earnings to the Applicant's claim. This incorporated a determination that the Commission had not been precluded from recovering an overpayment under section 46.01 of the *Employment Insurance Act* (Act).

[5] The Applicant filed an application for leave to appeal (Application) with the Tribunal's Appeal Division on September 7, 2017.

### **ISSUE**

[6] The Member must decide whether the appeal has a reasonable chance of success.

## THE LAW

[7] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* (DESD Act), an appeal to the Appeal Division may be brought only if leave to appeal is granted and the Appeal Division must either grant or refuse leave to appeal.

[8] According to subsection 58(1) of the *Department of Employment and Social Development Act* (DESD Act), the following are the only grounds of appeal:

(a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

(b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or

(c) the General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

[9] Subsection 58(2) of the DESD Act provides that leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.

[10] Section 45 of the Employment Insurance Act (Act) states the following:

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.

[11] Section 46.01 of the Act reads 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.

## **SUBMISSIONS**

[12] The Applicant submits that the General Division erred in law in interpreting section 46.01 of the Act in such a way as to determine the limitation period with reference to the date on which the employer became liable to pay the Applicant.

[13] The Applicant also submits that the employer did not become liable to pay the Applicant as at the date on which the employer executed the Settlement agreement. The employer was not liable to pay until the conditions precedent stipulated in the Settlement had finally been satisfied.

[14] The Respondent did not provide submissions.

## **ANALYSIS**

[15] The General Division found that the limitation period set out in section 46.01 of the Act did not operate to preclude the Commission from seeking recovery under section 45 of the Act. Its decision was based on the manner in which it interpreted section 46.01.

[16] Section 45 provides that, where a claimant receives earnings in relation to a period in which they were paid benefits, they are required to repay, as an overpayment of benefits, an amount equal to the benefits that they should not have received. “Earnings” under section 45 would include damages for wrongful dismissal.

[17] Section 46.01 of the Act limits the time frame in which the Commission may take action to recover overpayments from the claimant under section 45, or from the employer under section 46 (in accordance with section 46 and the employer’s obligation to withhold that amount that would have been repayable by the claimant under section 45, from the earnings payable to the claimant).

[18] The General Division considered that section 46.01 must be read in conjunction with section 45 and 46 of the Act. Sections 45 and 46 both stipulate that, before any obligation can arise, someone (normally the employer) must become liable to pay earnings to the claimant, regardless of whether that obligation is the claimant's obligation to return benefits under section 45 or the employer's obligation to remit an equivalent amount under section 46. On that basis, the General Division interpreted section 46.01 in such a way that the limitation period would only operate to preclude recovery if it had lapsed before **the employer's liability to pay earnings** arose [my emphasis].

[19] The General Division further found that the employer's liability to pay earnings had arisen when the employer executed the Minutes of Settlement on January 11, 2016. The beginning of the limitation period is the date of February 14, 2013, termination date, which was unchallenged. The General Division calculated the time from February 14, 2013, to January 11, 2016, and found that the Commission was within the limitation period in seeking repayment.

[20] The General Division found it unnecessary to consider whether the Commission had exercised its discretion appropriately to consider the costs of determining the repayment.

[21] The Applicant disputes the General Division's interpretation of the limitation period, and specifically, that the "triggering" event is inception of the employer's liability to pay earnings.

[22] The Applicant contends that the termination of the limitation period is not the date on which the employer becomes liable to pay earnings but the date when the claimant is liable to repay Employment Insurance benefits under section 45. In order for section 45 to be engaged (and trigger the liability), all the conditions described in section 45 must be satisfied. The Applicant argues that these include: (i) a claimant must receive benefits for a period; (ii) an employer or another person subsequently becomes liable to pay earnings to the claimant for the same period; and (iii) the employer or another person must pay said earnings to the claimant.

[23] The Applicant argues that the date on which the earnings are actually paid is the final condition that must be satisfied before the claimant may become liable, and it is therefore the terminus of that period that must be compared to the 36-month limitation.

[24] According to paragraph 23 of the General Division decision, the portion of the settlement apportioned to legal fees was delivered in early April 2016, and the cheques for general damages and for the retiring allowance were delivered on May 10, 2016. Taking February 14, 2013, as the commencement of the calculation period, either of the April 2016 or May 2016 dates would be outside the 36-month limitation period—if the Applicant’s interpretation of section 46.01 were to be accepted.

[25] The manner in which the General Division calculated the section 46.01 limitation period factored significantly into the decision. The Applicant has proposed a viable alternate construction of section 46.01 by which the limitation period could preclude the Commission’s recovery. It is arguable that the General Division erred in law under paragraph 58(1)(b) of the DESD Act in its interpretation and application of section 46.01.

[26] The Applicant has a reasonable chance of success on this basis. It is unnecessary for me to consider the additional or alternate ground for appeal advanced by the Applicant.

## **CONCLUSION**

[27] The Application is granted.

[28] This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

Stephen Bergen  
Member, Appeal Division