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

Citation: *K. L. v. Canada Employment Insurance Commission*, 2018 SST 552

Tribunal File Number: AD-17-615

BETWEEN:

K. L.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: May 18, 2018

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant, K. L.(Claimant), entered into an agreement with his employer in which the Claimant and the employer settled outstanding claims in respect of the Claimant's employment. The agreement established the employer's liability to pay a certain sum to the Claimant. The Respondent, the Canada Employment Insurance Commission (Commission), informed the Claimant that it considered the settlement to be earnings and that it would be applying those earnings against the Claimant's Employment Insurance claim. The Commission declared an overpayment amount, and a Notice of Debt was sent to the Claimant on March 19, 2016. The Claimant delivered the Notice of Debt to the employer, who had withheld the proceeds of settlement. The employer remitted a repayment of the overpayment to the Commission on behalf of the Claimant, out of the amount that it had held back from the Claimant.

[3] The Claimant sought reconsideration of the overpayment decision in respect of the characterization of the settlement proceeds as earnings. The Commission maintained its earlier decision and the Claimant appealed to the General Division of the Social Security Tribunal, arguing again that the settlement was not earnings and should not have been allocated. He also argued that the Commission was barred from collecting by the limitation in s. 46.01 of the *Employment Insurance Act* (Act). The General Division dismissed the appeal on August 4, 2017.

[4] The Claimant sought leave to appeal on the basis that the General Division had erred in interpreting the limitation, and leave to appeal was granted. The Claimant agreed that the only issue on appeal was that the General Division had erred in law by finding that the limitation period in s. 46.01 of the Act did not apply. At the Appeal Division hearing, the Claimant also argued that the Commission was estopped from arguing that the limitation period should be considered in connection with s. 46(1) because it had not argued this before the General Division.

[5] The appeal is dismissed. I find that the Commission is not estopped from arguing the application of s. 46(1) of the Act and that this appeal should properly be determined with regard to the intersection of s. 46.01 and s. 46(1). I also find that the General Division was correct in its interpretation of s. 46.01 as it relates to s. 46(1): the event triggering the limitation period is the employer or other person's liability to pay.

PRELIMINARY MATTER

Is the Commission estopped from arguing that the limitation period should be determined with reference to s. 46(1) of the Act?

[6] The Commission is not estopped. One of the requirements for issue estoppel to apply is that the judicial decision that is said to create the estoppel is a final decision.[1] The issue before the General Division was whether the limitation provision of s. 46.01 applies. This is not a separate action or a parallel proceeding. The same General Division decision in which the issue was determined is now properly before me at the Appeal Division. Therefore, the General Division decision cannot be said to be a final decision.

[7] The Claimant further argued that issue estoppel may also operate to prevent the re-litigation of an issue that was not properly raised when it should have been raised. According to the Claimant, the Commission did not identify or argue that s. 46(1) is the provision against which the s. 46.01 limitation should be assessed.

[8] However, neither the Commission's original decision of March 17, 2016, nor its June 10, 2016, reconsideration decision specified whether its claim of overpayment was pursuant to s. 45 or s. 46, nor is it apparent that the General Division decision turns on this distinction. It was the Claimant who characterized the Commission's claim of overpayment as having been "pursuant to section 45"[2], and the Claimant argued that no amount was payable under s. 45[3].

[9] Section 46.01 provides that no amount is payable under s. 45 or deductible under s. 46(1) if more than 36 months have lapsed since the lay-off or separation. Both s. 45 and s. 46 require that someone become liable to pay the claimant before the claimant can be required to make a

---

[1] *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44
[2] GD3-29
[3] GD3-32, paragraph 16.

repayment or before the employer can deduct and remit the amount that would otherwise be repayable by the claimant. It is not incumbent on the Commission to argue that the General Division should rely on either s. 45 or s. 46 specifically, particularly when the distinction between the sections does not materially alter its position. The basis for the General Division decision, and for the Commission's support of that decision, is that the liability to pay is the triggering event, rather than one of the other circumstances that would depend on whether the earnings had been paid to the claimant under s. 45, or withheld by the employer under s. 46(1).

[10] The Claimant has taken the position that some additional circumstance or circumstances must occur to trigger the obligation to repay Employment Insurance benefits and that this will vary depending on whether s. 45 or s. 46 is engaged. It is open to the Claimant to argue, as he has, that one or the other section applies and that some other factor or factors found in the applicable section ought to be the triggering event.

[11] However, there is no dispute on the facts that the employer withheld and remitted to the Receiver General a payment on account of the amount that would be repayable to the Commission for an overpayment. Therefore, it should be clear to all parties that s. 46(1) applies and that s. 45 does not. Both the Claimant's oral submissions to the Appeal Division and the Commission's written submissions (paragraphs 33 and 34, AD6-12) now acknowledge that s. 46(1) is applicable.

[12] It would appear that the Claimant is asking that I ignore the clear and obvious applicability of s. 46(1) on undisputed facts because the Commission did not argue the application of s. 46(1) before the General Division, and that he is asking that I presume the General Division to have considered only s. 45 and determine whether it erred on that basis, or to make my decision employing a fiction that s. 45 is the applicable section. However, since s. 46(1) is the provision that addresses the facts, I am required to apply s. 46(1) irrespective of whether the Commission's submissions were to s.46(1).

[13] The Commission's submissions to the Appeal Division gave notice that the Commission was supporting the General Division decision in relation to s. 46(1), and the Claimant has had an opportunity to address the limitation period as it relates to s. 46(1) in this proceeding. I do not accept that the Claimant is now prejudiced in his ability to argue that the limitation period shall

apply in the case that s. 46(1) applies, and I do not accept that the Commission is estopped from arguing that s. 46.01 should be considered in conjunction with s. 46(1).

ISSUES:

[14] Did the General Division err in law in finding that the limitation period in s. 46.01 did not apply by:

a) determining the limitation period with reference to s. 45 of the Act, as opposed to s. 46(1) of the Act?
b) determining that the obligation to return Employment Insurance benefits arises on the date that the employer or other person becomes liable to pay earnings to the claimant?

ANALYSIS

Standard of Review

[15] The grounds of appeal set out in s. 58(1) of the *Department of Employment and Social Development Act* (DESD Act) are similar to the usual grounds for judicial review, suggesting that the same kind of standards of review analysis might also be applicable at the Appeal Division. However, there has been some relatively recent case law from the Federal Court of Appeal that has not insisted on the application of standards of review analysis, and I do not consider it to be necessary.

[16] In *Canada (Attorney General) v. Jean*,[4] the Federal Court of Appeal stated that it was not required to rule on the standard of review to be applied by the Appeal Division, but it indicated in *obiter* that it was not convinced that Appeal Division decisions should be subjected to a standard of review analysis. The Court observed that the Appeal Division has as much expertise as the General Division and is therefore not required to show deference.

[17] Furthermore, the Court noted that an administrative appeal tribunal does not have the review and superintending powers that are exercised by the Federal Court and the Federal Court of Appeal on judicial review.

---

[4] *Canada (Attorney General) v. Jean*, 2015 FCA 242

[18] In the recent matter of *Canada (Citizenship and Immigration) v. Huruglica*,[5] the Federal Court of Appeal directly engaged the appropriate standard of review, but it did so in the context of a decision rendered by the Immigration and Refugee Board. In that case, the Court found that the principles that guided the role of courts on judicial review of administrative decisions have no application in a multilevel administrative framework, and that the standards of review should be applied only if the enabling statute provides for it.

[19] The enabling statute for administrative appeals of Employment Insurance decisions is the DESDA, which does not provide that a review should be conducted in accordance with the standards of review.

[20] I recognize that the Federal Court of Appeal may not be of one mind on the applicability of such an analysis within an administrative appeal process: certain other decisions of the Federal Court of Appeal appear to approve of the application of the standards of review.[6]

[21] Nonetheless, I am persuaded by the reasoning of the Court in *Jean*, where it referred to one of the grounds of appeal set out in s. 58(1) of the DESD Act and noted, "There is no need to add to this wording the case law that has developed on judicial review." I will therefore consider this appeal by referring to the grounds of appeal set out in the DESD Act only, and without reference to "reasonableness" or the standards of review.

General Principles

[22] The Appeal Division's task is more restricted than that of the General Division. The General Division is empowered to consider and weigh the evidence that is before it and to make findings of fact. The General Division then applies the law to these facts in order to reach conclusions on the substantive issues raised by the appeal.

---

[5] *Canada (Citizenship and Immigration) v. Huruglica*, 2016 FCA 93
[6] *Hurtubise v. Canada (Attorney General)*, 2016 FCA 147; *Thibodeau v. Canada (Attorney General)*, 2015 FCA 167

[23] By way of contrast, the Appeal Division cannot intervene in a decision of the General Division unless it can find that the General Division has made one of the types of errors described by the "grounds of appeal" in s. 58(1) of the DESD Act, which are set out below:

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.

Did the General Division err in law by determining the limitation period with reference to s. 45 of the Act, as opposed to s. 46(1) of the Act?

[24] As I discussed as a preliminary matter, it is uncontroversial that the Claimant's circumstances are addressed in s. 46(1) and not s. 45. I acknowledge the Claimant's suggestion that the only issue on appeal is whether the General Division erred in interpreting and applying s. 45 and s. 46.01 of the Act.[7] However, I do not accept that the General Division determined the limitation period with reference only to the application of s. 45 of the Act, without regard for s. 46(1) of the Act. Section 46.01 refers to both s. 45 and s. 46(1), and s. 46(1) requires that the amount that would be repayable under s. 45 be ascertained. The General Division clearly stated that s. 46.01 must be read in conjunction with s. 45 and s. 46(1)[8]. Although the Claimant framed his leave to appeal application to address the conjunction of s. 46.01 and s. 45, at no point did the General Division frame the issue, or determine the issue on appeal, in such a way as to exclude consideration of s. 46(1).

[25] The General Division understood the issue to be whether the limitation period described in s. 46.01 operated to preclude the Commission from recovering the overpayment. The decision that the limitation period in s. 46.01 did not preclude recovery was based on the General Division's interpretation of both s. 45 and s. 46(1) as giving rise to the obligation to return

[7] AD3-11, paragraph 33
[8] General Division decision, paragraph 76

benefits when, "someone becomes liable to pay earnings to a claimant".[9] Its conclusion that the triggering event should be the date that the liability to pay earnings arises[10] applies just as much to s. 46(1) as it does to s. 45.

[26] It is clear on the face of the decision that the General Division was mindful of the wording of both s. 45 and s. 46(1). Simply put, the General Division did not apply s. 45. There is no argument that the General Division erred in law by doing something that it did not do. Furthermore, given the basis on which the General Division decided as it did, there was no obligation for it to distinguish between the manner in which s. 46.01 applied to s. 46(1) and s. 45.

Did the General Division err in law by determining that the obligation to return Employment Insurance benefits arises on the date that the employer or other person becomes liable to pay earnings to the claimant?

[27] The Claimant argued that the General Division erred in its interpretation of s. 46.01. Section 46.01 states that "no amount is payable" under s. 45 or "deductible" under s. 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 employer in relation to which the earnings are paid or payable. The General Division understood that the final event (referred to below as the "triggering event"), which must occur within the 36-month period, is that the employer or other person becomes liable to pay. According to the General Division, if the liability to pay is established within 36 months of the lay-off or separation, the limitation period in s. 46.01 is not engaged. It found, on the facts, that the employer became liable to pay when the Minutes of Settlement were executed on January 11, 2016. Since this was within 36 months of the Claimant's February 14, 2013, termination date, the limitation period did not prevent the Commission from recovering the overpayment.

[28] The Claimant submited that the appropriate triggering event is the date that the employer or other person pays the earnings to the claimant (if s. 45 is applicable) or the date that the employer or other person ascertains the amount that would be repayable under s. 45 (if s. 46(1) applies). In either case, the triggering event would have been beyond the 36 months, and the Commission should therefore have had to form an opinion that the administrative costs of

[9] Ibid. paragraph 77
[10] Supra Note 8, paragraph 78

determining the repayment did not likely equal or exceed the amount of the repayment, before it could seek recovery.

[29] In relation to the application of s. 46(1), the Claimant argued that s. 46(1) has three conditions that must be satisfied within the limitation period, and that the "liability to pay" is just the first one. The second condition is that the employer must have reason to believe that benefits have been paid to the claimant for the period out of which the employer's liability to pay arose. The third condition is that the employer has ascertained the amount that would be repayable under s. 45. The Claimant argues that the limitation period is engaged only once this third and final requirement is satisfied. His written argument primarily addressed the intersection of s. 45 and s. 46.01 and stated that, in its acceptance of the "liability to pay" as the triggering event, the General Division effectively read out the additional requirements of s. 45. I understand that the Claimant is making the same argument in respect of s. 46(1).

[30] Supposing s. 45 to be applicable, the Claimant stated that the limitation period applied because he was not paid the settlement funds until May 10, 2016, which is beyond 36 months from the date of separation (February 14, 2013). With reference to s. 46(1), the Claimant argued that he could ascertain that an amount was repayable only when he received the Notice of Debt and that the employer could not ascertain that an amount was repayable until the Claimant gave the employer a copy of the Notice of Debt. The Claimant received the Notice of Debt on March 19, 2016, and the employer withheld and remitted on March 20, 2016.

[31] I acknowledge that both s. 45 and s. 46(1) refer to payments owing by the employer or "other person", and that the Claimant described himself as the "other person" where he argued that the triggering event should be the date on which he ascertained the amount repayable. However, I fail to see how this distinction is significant, on these facts, except perhaps that the date the Claimant received the Notice of Debt may be more certain than the date it was delivered to the employer.

[32] In any event, the language of s. 46(1) does not support such a construction. Subsection 46(1) reads in part, "…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…." It is apparent that the

"other person" is intended to be someone other than the employer who is liable to pay earnings to a claimant. I do not accept that s. 46(1) addresses the circumstance where the claimant owes money to themself. Therefore, I will not be further considering whether the Claimant is the other person described in s. 46(1). I will proceed on the basis that the Claimant's argument is that the triggering event is when the employer ascertained that an amount would be repayable.

[33] I will also not be considering s. 45 further, except to the extent that it aids in the interpretation of s. 46.01 and s. 46(1). In my consideration of the preliminary matter, I have already found that the General Division decision took s. 46(1) into account and that s. 46(1) is the applicable section to be considered in conjunction with the limitation in s. 46.01.

Legislative Intent and the Purpose of the Limitation

[34] To assist with the task of interpreting the Act, the Claimant cited s. 12 of the federal *Interpretation Act*, which reads: "Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."

[35] He also referred me to the Supreme Court of Canada decision in *Rizzo & Rizzo Shoes*[11] as follows:

> [T]he words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> […]
>
> As [benefits-conferring legislation], according to several decisions of this Court, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant.

[36] However, s. 46(1) governs the recovery of an overpayment of benefits. These are benefits to which a claimant should not have been entitled because they had other earnings that were not taken into account. Section 46.01 is a limitation provision that governs both s. 46(1) and s. 45.

[1111] *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 (SCC)

[37] *Rizzo* requires a broad and generous interpretation of benefit-conferring legislation such as the *Employment Insurance Act*. I do not take this to mean that I must interpret an overpayment recovery section coupled with a limitation provision in such a manner as to permit the Claimant to retain benefits to which he is not entitled. Nor do I accept that such an interpretation best attains the objects of the Act as required by the *Interpretation Act*.

[38] I agree with the Federal Court of Appeal in *Walford*,[12] where it stated with reference to the former Unemployment Insurance Act and attendant Regulations:

> 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.

[39] I accept that the Act is a benefit-conferring scheme overall, but neither s. 46.01 nor s. 46(1) are benefit-conferring provisions. They do not purport to define or limit the boundaries of benefit entitlement in any way. Subsection 46(1) requires an employer to remit amounts payable by a claimant to the Commission as repayment of an overpayment. Section 46.01 stipulates that an overpayment will not be recovered outside of the limitation period if, "in the opinion of the Commission, the administrative costs of determining the repayment would likely equal or exceed the amount of the repayment". The coupling of the limitation with the Commission's assessment of "the administrative costs of determining the repayment" suggests that the potential prejudice to the claimant that might result from delayed recovery is not the principal concern to which the provision is addressed.

[40] In my view, s. 46.01 concerns a matter of administrative efficiency. It permits the Commission to decline to enforce recovery from the employer (s. 46(1)) or the claimant (s. 45) where it is in the Commission's economic interest. In my view, s. 46.01 must be interpreted in a manner consistent with this purpose. Other entitlement provisions of the Act should not be

---

[12] *Re Attorney-General of Canada and Walford*, 1978 CanLII 2033 (FCA)

subordinated to a provision whose purpose is administrative efficiency. "Fair, large and liberal" and "broad and generous" do not extend to the subversion of the legislative purpose.

Satisfaction of All Conditions as "Triggering Event"

[41] Having determined that the purpose of s. 46.01 is one of administrative efficiency for the benefit of the Commission, I must consider how to interpret s. 46.01 to best accord with that purpose. The Claimant's position in relation to s. 46(1) is that all the conditions of s. 46(1) need to be met to trigger the limitation, and he argues that the final condition is that the employer has to ascertain the amount owing by a claimant to the Commission.

[42] If the entire s. 46(1) procedure for the return of benefits must be satisfied, then the requirement that the employer ascertain the amount repayable would not be the final requirement. There is a further requirement that the employer deduct the amount from earnings payable to the claimant—which presupposes that it has ascertained the actual amount owing and not just that some amount is owing—and that it remit that amount to the Receiver General.

[43] Despite his basic argument that all the conditions of s. 46(1) must be met, the Claimant did not argue that the triggering event should be the date that the employer ascertains *and* deducts and remits to the Receiver General the entire amount of the claimant's overpayment. There would not be any additional administrative costs to determine what is repayable as at the trigger dated because this determination would already have been completed. If the administrative costs of determining the amount owing at the time that the limitation is engaged are essentially zero, then those costs would never exceed the amount of the repayment, whatever that might be. The limitation in s. 46.01 would be inoperative to inhibit recovery of any overpayment.

[44] If deducting and remitting is taken as the final condition that must be satisfied before the limitation is triggered, then the Commission would have to first determine the amount repayable by a claimant. In this case, the limitation in s. 46.01 could more simply have specified that the Commission obtain everything owing to it within the 36-month limitation.

[45] Furthermore, an interpretation of s. 46.01 in which the final condition of s. 46(1) - that the employer ascertain and remit in accordance - must be satisfied to trigger the limitation

period, would permit an employer to escape its obligation to deduct and remit, by refusing to do that very thing. This cannot have been the intention of Parliament.

[46] I am not persuaded that the final precondition for the limitation to be triggered is the employer ascertaining that an amount would be repayable, and I cannot accept that each and every step in the s. 46(1) process must be completed before the limitation period can be triggered.

Practical Application of Limitation

[47] The Claimant also argued that the limitation should be determined by the date the employer ascertains that an amount would be repayable, on the basis that it is the most workable from a practical standpoint. He argued that it is a more difficult interpretive exercise to determine the date that the employer becomes liable to pay than it is to determine the date that it gets the notice of debt. The Claimant is correct that the determination of when an employer becomes liable to pay could be difficult. The liability to pay earnings may arise out of some undocumented agreement, or a poorly drafted agreement, or one in which the liability to pay is associated with conditions precedent, as the Claimant argued here. However, the difficulty in determining this circumstance cannot just be contrasted with the ease of referring to a Notice of Debt.

[48] Nothing in the Act suggests that the employer or other person should ascertain that an amount is repayable with reference to a Notice of Debt. The triggering event suggested by the Claimant's reading of s. 46(1) (from his oral argument) is the date "when the employer or other person ascertains the amount that would be repayable under s. 45". This is actually a conflation of two requirements: that the employer or other person ascertain whether an amount is repayable, and that the employer or other person deduct and remit the amount. However, neither requirement stipulates that this be determined with reference to a Notice of Debt, and I cannot read this in. The employer may well first ascertain that an amount is repayable on receipt of a Notice of Debt, but it does not follow that an employer cannot ascertain that an amount would be repayable without it.

[49] In my view, the interpretive exercise involved in determining the date a liability to pay arises is at least an objective one. The date of the "liability to pay" can often be established with reference to an order, award, or settlement agreement. Because the "liability to pay" date is typically agreed upon, there is less opportunity for dispute as to whether the limitation period is engaged, and all parties can calculate and know with certainty whether the liability to pay falls within the 36 months. Certainty and ease of calculation are consistent with a provision that is intended to promote administrative efficiency.

[50] The determination of when the employer ascertained an amount is repayable is subjective, and therefore more difficult. I do not accept that the practical application of the section is less difficult if the triggering event is when the employer "ascertain[s] whether an amount would be repayable".

[51] The General Division's use of "liability to pay" as the triggering event also has the advantage of allowing the Commission to assess the administrative costs of determining the repayment at the earliest opportunity. The Commission can decide whether it should recover the amount owing without having to track further developments, i.e. irrespective of whether it can confirm that the employer has withheld the claimant's earnings or has paid them out to the claimant. The Commission can consider or initiate the appropriate steps in recovering amounts owing earlier.

Consistency in Application of Limitation

[52] I consider that the use of "liability to pay" as the triggering event also allows for more consistency in the application of the limitation period.

[53] With reference to s. 45, the Claimant argued that the event that should trigger an assessment against the limitation period is when the employer pays the claimant but that, under s. 46(1), the triggering event should be when the employer ascertains the amount owing. However, there is no reason, in principle, that the manner in which the limitation period applies should depend on which of these sections describes the claimant's circumstances.

[54] In fact, it is unlikely that the date a claimant is paid under s. 45 would be the same as the date that an employer would otherwise ascertain the amount owing. I expect that an employer

generally would not even attempt to ascertain the amount owing by a claimant to the Commission, if it intended to pay the claimant's earnings out to the claimant regardless of its own obligation to withhold and remit under s. 46(1).

[55] However, "liability to pay" is a precondition to recovery under both s. 46(1) and s. 45. If "liability to pay" is the triggering event, this event will occur on the same date irrespective of whether s. 45 or s. 46(1) applies. "Liability to pay," allows for a more consistent approach to the application of the limitation period.

Giving Effect to the Purpose of the Limitation

[56] Given my finding that the purpose of the limitation in s. 46.01 is one of administrative efficiency, the next question that arises in interpreting s. 46.01 as it relates to s. 46(1) is whether there is any economic or administrative advantage to the Commission to waiting for the occurrence of some event other than the liability to pay, in order for the limitation period to apply.

[57] The Act does not require the Commission to determine the actual costs of *recovering* the overpayment. It only requires that the Commission consider the administrative costs of *determining* the repayment, relative to the amount of the repayment. Therefore, the Commission needs to know only two things before it can determine whether the costs of determining the repayment will exceed the repayment: It needs to know how much is owed to the Claimant as earnings, and how much the Claimant was overpaid.

[58] Supposing that the limitation period is triggered by the "liability to pay" and that 36 months lapse without an admitted liability to pay, the Commission would need to assess the cost of determining the repayment to compare it to the amount owing as a repayment. The Commission may suspect or be convinced that there is, or was, or should be a liability to pay, but it may nonetheless form the opinion that, after a lapse of three years, it will be too expensive to have that liability acknowledged legally or otherwise. It decides not to seek recovery. In this case, the fact that the triggering event did not occur within the limitation period is relevant to the Commission's decision.

[59] But let us suppose that the employer still has not ascertained what is owing thirty-six months since the lay-off or separation and, as the Claimant has argued, the limitation period is to trigger at the point that the employer ascertains the amount owing. In such a case, the Commission would already know what is owing. Whether the employer has ascertained what is owing by the Claimant at any time within the three years is irrelevant to the Commission's assessment of what is in fact owing by the Claimant.

[60] There is no suggestion or evidence that the Commission can assess the administrative costs of determining the repayment more easily, quickly, or competently if it waits until the employer ascertains the amount owing. Section 46.01 is directed towards cost-effective recovery, and there is no apparent economic or administrative utility in pushing the s. 46(1) triggering event beyond the liability to pay.

[61] On balance, I find that the interpretation that is most harmonious with the scheme, object, and purpose of the Act is the interpretation employed by the General Division. The determination of "liability to pay" is relevant to the determination that the Commission must make on whether or not to seek recovery. Taking "liability to pay" as the triggering event allows the Commission to determine relatively easily and predictably whether the limitation period applies, and to determine whether to pursue recovery at the earliest opportunity, without having to discriminate between s. 46(1) and s. 45 circumstances.

[62] I do not find that the General Division erred in law in its interpretation of s. 46.01 as it relates to s. 45 and s. 46(1). I find that the General Division was correct in finding that the triggering event is the date that the employer becomes liable to pay.

CONCLUSION

[63] The appeal is dismissed.

Stephen Bergen
Member, Appeal Division

HEARD ON:	February 27, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	K. L., Appellant Kristjan Surko, Representative for the Appellant Matthew Vens, Representative for the Respondent