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

Citation: *Canada Employment Insurance Commission v H. W.*, 2019 SST 57

Tribunal File Number: AD-18-328

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

H. W.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: January 25, 2019

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] The Respondent, H. W. (Claimant), was dismissed from his employment on February 6, 2013. He applied for and began receiving Employment Insurance regular benefits, effective February 10, 2013. In June 2013, the Claimant commenced legal proceedings against his employer for wrongful dismissal. He settled his claim with his employer. The Appellant, the Canada Employment Insurance Commission (Commission), determined that the settlement funds constituted earnings for the purposes of the *Employment Insurance Act*, and that, following allocation, the Claimant had received an overpayment in benefits.[1]

[3] The General Division dismissed the Claimant's appeal with a modification. It found that the settlement constituted earnings that had to be allocated to the claim from the week of June 19, 2016. Because of this allocation, the General Division determined that the Claimant did not owe an overpayment. The Commission appeals the General Division's decision on the ground that the General Division erred in law in determining when the allocation had to be applied. While the parties agree that the General Division erred in this regard, the Claimant denies that he owes any overpayment. He submits that the repayment is statute-barred under section 46.01 of the *Employment Insurance Act*.

[4] I must determine whether the General Division erred in law and, if so, whether the Claimant owes an overpayment or whether repayment is statute-barred. I am allowing the appeal because I find that the General Division erred in law. I also find that section 46.01 of the *Employment Insurance Act* does not bar recovery of the overpayment in the factual circumstances of this case.

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[1] Commission's letter dated July 19, 2016, at GD3-150 and Commission's reconsideration decision, dated August 31, 2016, at GD3-152 to GD3-153.

ISSUES

[5] There are two issues before me:

Issue 1: Did the General Division err in law when it concluded that the settlement funds had to be allocated in accordance with section 36(11) rather than section 36(9) of the *Employment Insurance Regulations*?

Issue 2: If section 36(11) of the *Employment Insurance Regulations* applies, is repayment nevertheless barred by section 46.01 of the *Employment Insurance Act*?

ANALYSIS

[6] Section 58(1) of the *Department of Employment and Social Development Act* (DESDA) sets out the grounds of appeal as being limited to the following:

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.

[7] The Commission asserts that the General Division erred under section 58(1)(b) of the DESDA by failing to appropriately allocate earnings the Claimant received as a result of a settlement with his employer. The Claimant takes no position on this particular issue; however, he argues that sections 46(1) and 46.01 of the *Employment Insurance Act* bars the Commission from recovering any overpayment of benefits. The Commission submits that it is exercising its discretionary authority in seeking recovery of the overpayment.

Issue 1: Did the General Division err in law when it concluded that the settlement funds had to be allocated in accordance with section 36(11) rather than section 36(9) of the *Employment Insurance Regulations*?

[8] In the proceedings before the General Division, the Commission argued that the Claimant's earnings had to be allocated pursuant to section 36(9) of the *Employment Insurance*

Regulations from the week of lay-off or separation, that is, from February 6, 2013. The Commission submits that the General Division failed to consider these submissions and that, as a result, it erred in law by applying section 36(11) of the *Employment Insurance Regulations* without considering the applicability of section 36(9) of the *Employment Insurance Regulations*.

[9] The Claimant did not make any submissions and took no position on this issue.[2] I note that in his notice of appeal to the General Division, the Claimant argued that section 36(11) of the *Employment Insurance Regulations* did not apply because the settlement agreement did not award the retiring allowance in connection with certain weeks.[3]

[10] Despite the parties' submissions, the General Division found that section 36(11) of the *Employment Insurance Regulations* applied. It neither referred to section 36(9) of the *Employment Insurance Regulations* nor analyzed whether the section applied. I concur with the parties' submissions that the General Division erred in law by applying section 36(11) of the *Employment Insurance Regulations* and by allocating the settlement funds from the week of June 19, 2016. Under section 36(11), allocation of earnings occurs where earnings are paid or payable pursuant to, among other things, a settlement, and the earnings are awarded or given in respect of specific weeks. Section 36(11) does not apply in this case because the Minutes of Settlement show that the settlement was not made in respect of specific weeks.[4]

[11] I agree that the General Division erred by failing to consider the Commission's argument that section 36(9) of the *Employment Insurance Regulations* applied. Section 36(9) of the *Employment Insurance Regulations* reads as follows:

[2] Claimant's written submissions, dated August 24, 2018, at AD3-2.
[3] Notice of Appeal - General Division Employment Insurance (EI) Section at GD2-18.
[4] Minutes of Settlement, GD3-36 to GD3-38 and GD3-80 to GD3-82.

> Allocation of Earnings for Benefit Purposes
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> **36 (9)** Subject to subsections (10) to (11), all earnings paid or payable to a claimant by reason of a lay-off or separation from an employment shall, regardless of the period in respect of which the earnings are purported to be paid or payable, be allocated to a number of weeks that begins with the week of the lay-off or separation in such a manner that the total earnings of the claimant from that employment are, in each consecutive week except the last, equal to the claimant's normal weekly earnings from that employment.

[12] The section requires that the earnings be allocated beginning from the week of the lay-off or separation. In this case, the Claimant was employed until February 6, 2013. In other words, under section 36(9) of the *Employment Insurance Regulations*, the General Division should have allocated the settlement funds from the week of February 6, 2013.

RELIEF SOUGHT

[13] The Commission is requesting that I allow the appeal. Under section 59 of the DESDA, I can dismiss the appeal; give the decision that the General Division should have given; refer the matter back to the General Division for reconsideration in accordance with any directions that I might consider appropriate; or confirm, rescind, or vary the decision of the General Division in whole or in part.

Issue 2: Is repayment barred by section 46.01 of the *Employment Insurance Act*?

[14] As I have noted above, the General Division should have applied section 36(9) of the *Employment Insurance Regulations*. Had it done so, this would have resulted in an overpayment.

[15] The Claimant submits that, even so, section 46.01 of the *Employment Insurance Act* operates to bar recovery of any repayment.[5] The Claimant also argues that, as a matter of natural justice, the Commission should not be allowed to recover any overpayment, having failed to produce a copy of its full study.

[16] However, the General Division found it unnecessary to address the issues of whether repayment was statute-barred under section 46.01 of the *Employment Insurance Act* and whether

[5] The overpayment has been paid, but the Claimant is seeking an order that the Commission return the settlement funds in the amount of $7,963 to him (See submissions filed August 24, 2018, at page AD3-10).

the Commission should produce a copy of its study that showed its administrative costs were likely less than the amount of the overpayment. This leaves me to determine whether the resulting overpayment is statute-barred under section 46.01 of the *Employment Insurance Act*.

[17] Section 46.01 of the *Employment Insurance Act* states:

> **Limitation**
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> **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.

[18] The parties agree that the section involves a two-step test. The first part requires that more than 36 months have elapsed since a claimant's lay-off or separation from employment in relation to which the earnings are paid or payable. The second part requires that, in the Commission's opinion, the administrative costs of determining the repayment would likely equal or be higher than the amount of the repayment. The parties agree that the Commission has discretionary authority under the second step.

[19] The parties concede that more than 36 months have elapsed since the Claimant's lay-off or separation from his employment, but the Commission maintains that the overpayment remains payable because, in its opinion, the administrative costs of determining the repayment are not likely to equal or exceed the amount of the repayment. In the proceedings before the General Division, the Commission claimed that the average administrative cost for 2016 was $329.00, far below the repayment amount of $7,963.00.[6]

[20] On multiple occasions, including as recently as August 24, 2018,[7] the Claimant has sought a copy of the Commission's study in which it determined its administrative costs. The Claimant argues that, because the Commission has not provided him with a full copy of its study,

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[6] Additional Representations of the Commission to the Social Security Tribunal-Employment Insurance Section, dated March 17, 2017, at GD8-1. Note: Commission's Administrative Cost Rationale, attached to Commission's letter dated August 21, 2017, at GD17, provides an administrative cost of establishing an overpayment related to a grievance settlement as $132.42. The threshold amount, equal to the average administrative cost, divided by the average percent of the overpayment, was calculated to be $330.00 for 2016, and $338.00 for 2017.
[7] Claimant's submissions, AD3.

he has not had an opportunity to challenge the amount of the administrative costs and that, as such, he has been denied natural justice. He argues, for instance, that he should be entitled to know the qualifications of the experts who calculated the administrative costs and any assumptions on which any experts may have based their calculations. After all, any incorrect assumptions could undermine the reliability of those calculations. He claims that he does not know the case he must meet without this information and that the General Division, therefore, did not provide him with a fair hearing.

[21] Given how much time has elapsed in which the Commission has had the chance to produce a copy of the study, the Claimant contends that I should draw an adverse inference against the Commission and find that it is withholding the study because it is unfavourable to the Commission.

[22] The Commission explained how it calculated its administrative costs in response to the General Division's request to provide a "complete and detailed account" of its calculation.[8] The Commission explained that it consulted regional and headquarters stakeholders and that a threshold amount, which would identify when administrative costs were likely to equal or exceed the amount of the overpayment, was established through a review of administrative costs and a sample analysis of data collected from the regions. It explained that it calculated its administrative costs by analyzing data provided from regional operations, collected as part of a time and motion study, which included fixed and human resource costs. The Commission further explained that administrative costs included enquiries, claim reviews, recalculations, communications with claimants, debt collection, and appeals.

[23] I also ordered that the Commission produce a copy of its study, in response to the Claimant's request, and I invited submissions from the parties on the need for a further hearing in this matter. The Commission sought an extension of time to comply with my order, citing the "complexity and quantity of data to collect for the calculation of the administrative cost rationale,"[9] as well as the holiday period. The Claimant argued that I should deny the request for an extension because the Commission had failed to explain why it needed to collect any further

[8] Administrative Cost Rationale, attached to Commission's letter dated August 21, 2017, at GD17.
[9] Commission's memorandum to the Social Security Tribunal – Appeal Division, dated December 14, 2018, at AD4.

data for the calculation of the administrative cost rationale. The Claimant argued that the Commission should produce the study in whatever form it relied on at the relevant time.

[24] Ultimately, I relieved the Commission from providing a complete copy of its study because I found it unnecessary for it to produce the underlying data. However, I specified that it would be useful to have a summary from the original report further explaining how it calculated its administrative costs, one that was more detailed than the summary explanation[10] attached to the Commission's letter of August 21, 2017. I also wondered what the sampling size was for each of the regions in 2013, when the Commission established the threshold amount.

[25] The Commission responded, explaining that it had calculated its administrative costs through costing exercises[11] and that the sampling size varied for the regions, from approximately 700 for the Atlantic region to 5,000 to 6,000 for Québec and Ontario. Apart from the information regarding the sampling size, the Commission's response was not materially different from its administrative cost rationale attached to its letter of August 21, 2017.

[26] The Claimant asserted that I should not allow the Commission to substitute its explanation for the actual study or for the production of an appropriate witness who could be tested on cross-examination. The Claimant argues that the failure to produce the study or an appropriate witness is a breach of the regulations, an infringement of the principles of natural justice, and warrants drawing an adverse inference.

[27] As I have noted above, the parties agree that section 46.01 of the *Employment Insurance Act* involves a two-step consideration and that the Commission has discretionary authority under the second step. In exercising its discretionary authority, the Commission was required to have acted judicially and not arbitrarily.[12] The Federal Court of Appeal has held that a discretionary authority has not been exercised judicially if it can be established that the decision-maker acted

[10] Commission's Administrative Cost Rationale, at GD17.
[11] Commission's memorandum to the the Social Security Tribunal – Appeal Division, dated December 19, 2018, at AD7.
[12] *Canada (Attorney General) v Uppal*, 2008 FCA 388.

in bad faith, for an improper purpose or motive, considered an irrelevant factor, ignored a relevant factor, or acted in a discriminatory manner.[13]

[28] While the Commission has not produced the full study or produced any witnesses who can speak to the study, I am satisfied that, in determining its administrative costs, it did not act in an arbitrary manner and that it acted judicially. The explanation before the General Division set out how it calculated its administrative costs. From its explanation, it appears that the Commission focused on the most salient considerations in calculating its administrative cost. I do not see that it acted in bad faith, that it acted for an improper purpose or motive, that it considered an irrelevant factor or ignored a relevant factor, or that it acted in a discriminatory manner.

[29] It was unnecessary to rigorously examine the Commission's administrative cost rationale study because that would suggest that the Commission had to correctly determine its administrative costs. Section 46.01 of the *Employment Insurance Act* affords wide latitude to the Commission where it acts judicially. The section does not demand precision from the Commission. Indeed, the Commission's methodology and its calculations could be altogether flawed but that alone would not be a basis to preclude the Commission from exercising its discretionary power, as long as it acted judicially when it determined its administrative costs. I do not find that a breach of the principles of natural justice arises from the fact that the Commission did not provide a copy of its study or any witnesses. As long as the Commission demonstrated that it acted judicially in deriving the administrative costs, there is no basis for a claimant to challenge the correctness of the calculated administrative costs or to require the Commission to provide a copy of its full study with all of the underlying data. I decline to draw any adverse inferences in this case because the Commission not only explained how it calculated its administrative costs, but also demonstrated that it sought to calculate its administrative costs in a deliberative manner.

[30] In short, given the steps that the Commission has taken to determine its administrative costs, I do not find that repayment is barred under section 46.01 of the *Employment Insurance Act*.

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[13] *Canada (Attorney General*) *v Purcell*, [1996] 1 FC 644.

CONCLUSION

[31] The appeal is allowed.

Janet Lew
Member, Appeal Division

HEARD ON:	December 4, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	Julie Villeneuve, Representative for the Appellant H. W., Respondent Kristjan Surko, Representative for the Respondent