



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

[TRANSLATION]

Citation: *M. F. v Canada Employment Insurance Commission*, 2019 SST 622

Tribunal File Number: AD-18-302

BETWEEN:

M. F.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

DATE OF DECISION: July 3, 2019

DECISION AND REASONS

DECISION

[1] The Tribunal dismisses the appeal.

OVERVIEW

[2] In recent years, the Appellant, M. F. (Claimant), has submitted four initial claims for Employment Insurance benefits. After reconsidering those claims, the Canada Employment Insurance Commission (Commission) determined that amounts the Claimant received retroactively from the Commission des normes, de l'équité, de la santé et de la sécurité du travail (CNESST) constituted earnings to be allocated to his Employment Insurance benefits. That allocation caused an overpayment, which the Claimant is now asked to pay back. The Commission maintained its position on reconsideration. The Claimant appealed the Commission's decisions to the Tribunal's General Division.

[3] The General Division found that the amounts the Claimant received from the CNESST as income replacement benefits constituted earnings and that the allocation had been carried out in accordance with the *Employment Insurance Regulations* (EI Regulations).

[4] The Tribunal granted leave to appeal. The Claimant maintains that the General Division refused to exercise its jurisdiction by not deciding on the Commission's errors and inconsistencies in the calculations. Furthermore, because he was misinformed by the Commission, the Claimant could not defend himself properly before the General Division.

[5] The Tribunal dismisses the Claimant's appeal.

ISSUES

Issue 1: Did the General Division err by finding that the amounts the Claimant received from the CNESST as income replacement benefits constituted earnings under

section 35(2)(b) of the EI Regulations and that those earnings had been allocated in accordance with section 36(12)(d) of the EI Regulations?

Issue 2: Did the General Division err by failing to consider how the Commission treated the Claimant?

Issue 3: Did the General Division err by failing to consider the calculation errors in the allocation of the Claimant's earnings?

Issue 4: Did the General Division err by ignoring that the Claimant repaid benefits through a tax adjustment for the May to December 2016 period?

Issue 5: Did the General Division err by ignoring section 145(2) of the EI Act?

Issue 6: Did the General Division err by failing to apply the 36-month limitation period set out in section 52 of the EI Act or, alternatively, by failing to apply section 46.01 of the EI Act?

Issue 7: Did the General Division err by failing to write off the Claimant's debt?

ANALYSIS

Appeal Division's Mandate

[6] The Federal Court of Appeal has established that the mandate of the Appeal Division is conferred to it by sections 55 to 69 of the *Department of Employment and Social Development Act* (DESD Act).¹

[7] The Appeal Division acts as an administrative appeal tribunal for decisions rendered by the General Division and does not exercise a superintending power similar to that exercised by a higher court.

[8] Therefore, unless the General Division failed to observe a principle of natural justice, erred in law, or based its decision on an erroneous finding of fact that it made in a

¹ *Canada (Attorney General) v Jean*, 2015 FCA 242; *Maunder v Canada (Attorney General)*, 2015 FCA 274.

perverse or capricious manner or without regard for the material before it, the Tribunal must dismiss the appeal.

PRELIMINARY REMARKS

[9] The Tribunal hearing took place on October 9, 2018. During the hearing, the Claimant asked the Tribunal for permission to file further written submissions. He was granted permission to do so provided that the new arguments were joined to the old ones to ensure their consistency and to avoid repetition. The Claimant was granted an initial extension until December 7, 2018. The Claimant was granted an additional extension until February 28, 2019. In the end, the Tribunal granted the Claimant a third and final extension until April 30, 2019. The Tribunal received the Claimant's final submissions on April 30, 2019.

[10] The Tribunal reviewed the Claimant's submissions and listened carefully to the recording of the General Division hearing to understand the arguments that the Claimant raised before the General Division. The Claimant essentially argues that the Commission made errors in its calculations.

[11] The Tribunal finds that it is necessary to repeat that it was well established that an Appeal Division hearing is not a new hearing. The role of the Appeal Division is limited to what is set out in section 58(1) of the DESD Act.

[12] This decision deals with the files AD-18-302, AD-18-303, AD-18-304, and AD-18-306.

Issue 1: Did the General Division err by finding that the amounts the Claimant received from the CNESST as income replacement benefits constituted earnings under section 35(2)(b) of the EI Regulations and that those earnings had been allocated in accordance with section 36(12)(d) of the EI Regulations?

[13] The only issue submitted to the General Division had to do with the Commission's allocation of the Claimant's earnings under sections 35 and 36 of the EI Regulations.

[14] As the General Division noted, the letters CNESST issued that appear in the file clearly show that the amounts in question were paid to the Claimant retroactively as income replacement benefits.

[15] Section 35(2)(b) of the EI Regulations sets out that workers' compensation payments received or to be received by a claimant constitute earnings.

[16] Furthermore, those earnings must be allocated according to section 36(12)(d) of the EI Regulations, which states that workers' compensation payments, other than a lump sum or pension paid in full and final settlement of a claim made for workers' compensation payments, must be allocated to the weeks for which the payments are paid or payable.

[17] The General Division rightly confirmed that the Commission properly decided on the issue of the allocation of the earnings the Claimant received from the CNESST as income replacement benefits. That decision complies with the regulations and is supported by settled case law.

[18] Therefore, the Tribunal dismisses this ground of appeal.

Issue 2: Did the General Division err by failing to consider how the Commission treated the Claimant?

[19] The Commission is the subject of a wide range of criticisms from the Claimant, particularly on how it ignored his numerous requests for explanations about the overpayments and on how he was treated by its officers.

[20] The Claimant complains that the Commission officers considered him a fraudster because he did not report his benefit income at the appropriate time even though he has always been transparent and he followed the instructions he received from the Commission officers exactly.

[21] The Claimant points out that it was impossible for him to report the income replacement benefits when he applied for Employment Insurance benefits in 2013, 2014, 2015, and 2016 because receiving them was highly uncertain then. Moreover, he repeats

that the amounts received were reported to the Commission as soon as he had gathered all the information.

[22] The Tribunal notes that the Commission did not doubt that the Claimant was acting in good faith because it did not impose any penalty on him for making false or misleading statements.

[23] As the General Division noted, the Tribunal does not have the jurisdiction to address the many allegations against the Commission. It cannot offer the Claimant any remedy.

[24] The Tribunal dismisses this ground of appeal.

Issue 3: Did the General Division err by failing to consider the calculation errors in the allocation of the Claimant's earnings?

[25] The Commission accepted on appeal that the table filed with the General Division in the file AD-18-302 contained several errors.² The Commission filed a corrected table in this appeal file.³ However, the overpayment amount remains unchanged. In the other files, the amount in the CNESST column should have been rounded off to the nearest dollar, but that does not affect the overpayment.

[26] The Claimant told the Tribunal at the hearing that, after the General Division's intervention, the allocation of earnings was now much clearer to him.

[27] To help understand the tables, it is worth pointing out that, if a claimant has earnings during the earnings [*sic*] during unemployment periods, 50% of the earnings that are less than or equivalent to 90% of the claimant's weekly insurable earnings are deducted from the regular benefits payable. 100% of the earnings that are greater than 90% of the claimant's weekly insurable earnings are deducted.⁴ Therefore, it is possible for benefits to remain payable even if the claimant had earnings in a week of

² GD3-35.

³ AD2-7.

⁴ EI Act, s 19(2).

unemployment. Regarding sickness benefits, 100% of the earnings received are deducted, and no benefits may be payable if the earnings exceed the benefit rate.

[28] Furthermore, section 35(20) of the EI Regulations states that, for the purposes of section 35 of the EI Regulations, a fraction of a dollar that is equal to or greater than one half must be taken as a dollar and a fraction that is less than one half must be disregarded.

[29] The Tribunal considered the above and checked the Commission's tables that were sent to the Claimant in each of the files, and it can find no error that would have the effect of changing the amount established from the overpayment.

[30] Therefore, the Tribunal dismisses this ground of appeal.

Issue 4: Did the General Division err by ignoring that the Claimant repaid benefits through a tax adjustment for the May to December 2016 period.

[31] The Claimant argues that, despite his efforts and several requests for information from the CRA and the Commission, it is still impossible for him to understand what all of the May 2016 repayment of \$4,188.60 in Employment Insurance benefits was assigned to.

[32] The Claimant argues that he had confirmation from the CRA that \$4,188.60 was transferred to the Minister of Employment and Social Development. The Minister applied only \$3,085 to repaying the Employment Insurance benefits received, which leaves \$1,103.60 for which the Claimant has still not received any explanation of its use.

[33] Regarding the question about the CRA's transfer to the Minister of Employment and Social Development, unfortunately the Tribunal does not have the jurisdiction to address that issue.

[34] However, the Tribunal will recommend to the Commission that it provide the Claimant a clear and detailed statement of account, including the payments made to date as repayment of the total amount due. If the problem persists after this decision, the Claimant would do well to contact the Commission directly in writing.

Issue 5: Did the General Division err by ignoring section 145(2) of the EI Act?

[35] That section of the EI Act does not apply to this issue, which deals with the allocation of the Claimant's earnings.

Issue 6: Did the General Division err by failing to apply the 36-month limitation period set out in section 52 of the EI Act or, alternatively, by failing to apply section 46.01 of the EI Act?

[36] The Claimant argues that the General Division erred by refusing to apply section 52 of the EI Act, which sets out a 36-month limitation period. Failing that, he submits that section 46.01 of the EI Act must be applied and that the applicable period is still 36 months because the administrative costs of determining the repayment would likely equal or exceed the amount of the repayment.

[37] The Commission submits that, if an amount is paid to a claimant under a labour arbitration award, Court judgment, or settlement for the same period for which EI benefits are paid, section 45 of the EI Act requires the claimant to repay any overpayment that may result from the amounts received 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. According to the Commission, there is no time limit compared to section 52 of the EI Act.

[38] The Claimant's ground of appeal here is not about the period of May 19 to September 29, 2013, because the other claims focus on periods within the 36-month time limit (AD-18-303 and GE-17-3248).

[39] It appears from the General Division appeal file, the Claimant's reconsideration request, the Claimant's application to appeal to the General Division, and the recording of the General Division hearing that the Claimant has not raised this ground of appeal, but that he has instead concentrated his appeal on the Commission's calculation errors.

[40] Nevertheless, the Tribunal is of the view that the General Division did not err when it failed to apply the 36-month limitation period set out in section 52 of the EI Act.

The limitation period of 36 months set out in section 52 of the EI Act does not apply to recovering amounts due under section 45.

[41] On or around November 2, 2016, the Claimant and the CNESST came to an agreement where the CNESST recognized the Claimant's right to receive workers' compensation payments for the psychological harassment he experienced through his work. Following that decision, the CNESST issued the Claimant payments for periods covered by the benefit claims starting May 19, 2013; June 22, 2014; April 5, 2015; and May 22, 2016.

[42] This is specifically one of the reasons listed in sections 45 and 46 of the EI Act. If an amount is paid to a claimant under a labour arbitration award, Court judgment, or settlement for the same period for which EI benefits are paid, section 45 of the EI Act requires the claimant to repay any overpayment that may result from the amounts received 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. The calculations in sections 45 and 46 of the EI Act can be made at any time that is justified by one of the reasons listed in those sections.

[43] However, the EI Act sets out a 72-month limitation period for the recovery of debts after the day on which the liability arose, because there are often long delays in court proceedings and negotiations of agreements in court or out of court and even if the claimant is acting in good faith.⁵

[44] Despite a very able argument, the Claimant has not satisfied the Tribunal that it should not follow the Federal Court of Appeal's teachings that the 36-month limitation period set out in section 52 of the EI Act does not apply to the debts in section 45.⁶

[45] Regarding the application of section 46.01 of the EI Act, as noted earlier, the Claimant has raised this point for the first time on appeal. Therefore, the General Division

⁵ EI Act, ss 47(1) and 47(4).

⁶ *Chartier v Canada (Attorney General)*, 2010 FCA 150.

did not have the opportunity to determine whether the Commission had exercised its discretion judicially under section 46.01 of the EI Act.

[46] Since this ground of appeal was not raised before the General Division, the Claimant recognizes that essential information is missing from the General Division's file to decide on the application of section 46.01 of the EI Act.

[47] Therefore, the Appeal Division cannot determine whether the General Division erred because the General Division was not presented with this issue and because the Appeal Division's powers are limited by section 58(1) of the DESD Act. In fact, it is well established that an appeal before the Appeal Division is not a new hearing where a party can supplement their evidence and hope for a favourable decision.

[48] The Tribunal dismisses this ground of appeal.

Issue 7: Did the General Division err by failing to write off the Claimant's debt?

[49] Regarding the Claimant's application for a write-off, the Federal Court of Appeal has confirmed several times that only the Commission has the power to write off an overpayment, in accordance with section 56(1) of the EI Regulations. The Tribunal's Appeal Division has also found on several occasions that the Tribunal does not have the jurisdiction to determine issues related to writing off an overpayment.

[50] The Tribunal dismisses this ground of appeal.

CONCLUSION

[51] The Tribunal dismisses the appeal for the reasons mentioned above.

[52] The Tribunal recommends that the Commission provide the Claimant with a clear and detailed statement of account, including the payments already made as repayment of the total amount the Claimant owes, within thirty (30) days following the receipt of this decision.

Pierre Lafontaine
Member, Appeal Division

HEARD ON:	October 9, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	M. F., Appellant