



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

[TRANSLATION]

Citation: *V. B. v Canada Employment Insurance Commission*, 2019 SST 1306

Tribunal File Number: GE-19-2965

BETWEEN:

V. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Yoan Marier

HEARD ON: October 9, 2019

DATE OF DECISION: October 16, 2019

DECISION

[1] The appeal is dismissed. The overpaid benefits must be repaid. The following reasons explain why.

OVERVIEW

[2] The Appellant applied for Employment Insurance benefits on November 4, 2012. While he was unemployed and receiving benefits, he was pursuing a redress procedure against a former employer. The redress procedure was settled a few years later through an agreement between the parties before the Administrative Labour Tribunal, and the Appellant received money from his former employer.

[3] The Commission determined that some of the money constituted earnings. It proceeded to allocate those earnings, which generated a substantial overpayment.

[4] The Appellant appealed the Commission's decision to the Tribunal's General Division (GD). The GD dismissed the Appellant's appeal. The Appellant then filed an application to rescind or amend the GD's initial decision. That application was also refused.

[5] The Appellant then turned to the Tribunal's Appeal Division (AD). He lodged two separate appeals, one concerning the GD's initial decision and the other concerning the GD's refusal to rescind or amend its initial decision.

[6] The AD dismissed the Appellant's appeals on all issues except one. The AD determined that the GD had failed in its initial decision to decide on one argument advanced by the Appellant concerning the applicability of section 46.01 of the *Employment Insurance Act* (Act) to his case. The section sets out that overpaid benefits do not have to be repaid if certain criteria are met.

[7] As a result, the AD referred the file back to the GD so that it could consider that argument.

ISSUE

[8] Given the time that has elapsed and the amounts at stake, do the provisions of section 46.01 of the Act apply to the Appellant's file? In other words, do the Employment Insurance benefits that were overpaid to the Appellant have to be repaid?

ANALYSIS

[9] First, it is important to state that I must comply with the directives issued by the Appeal Division in its August 9, 2019, decision. As a result, this decision concerns only the applicability of section 46.01 of the Act to the Appellant's file. The other issues have already been resolved, and I cannot decide on them again. Furthermore, I cannot agree to decide on new grounds of appeal that were not raised during the first appeal before the GD or before the AD.

Concerning Section 46.01 of the Act

[10] When a dispute between a claimant and their former employer ends after a termination of employment, the claimant may receive amounts of money from their former employer years after the fact, pursuant to a labour arbitration award, a tribunal's judgement, or another form of settlement. These amounts normally constitute earnings. When such is the case, the claimant or the employer is required to repay the overpaid Employment Insurance benefits to the Commission.¹

[11] However, section 46.01 of the Act states that the surplus benefits do not have to be repaid if both the following conditions are met:

- a) More than 36 months have elapsed since the claimant's lay-off or separation from the employment for which the earnings are paid or payable.
- b) According to the Commission, the administrative costs of determining the repayment would likely equal or exceed the amount of the repayment.

¹ Act, ss 45 and 46.

[12] After the settlement of a dispute against his former employer, the Appellant received tens of thousands of dollars. It was determined that \$59,908.95 of that amount constituted earnings. That amount was allocated to the Appellant's benefits, which generated an overpayment of \$11,522.

[13] The Appellant is essentially arguing that he meets both criteria and that the value of the Commission's efforts to review his file and recover the amounts at stake have probably exceeded the value of the amounts themselves. To arrive at that conclusion, the Appellant argues that the matter has dragged on for several years and that several Commission employees have intervened in his file, which must have resulted in substantial costs. The Appellant also notes that the Commission has not cooperated much in relation to his appeal file. It did not provide an estimate of its administrative costs and did not explain the steps it took to find that the Appellant actually had to repay the amounts.

[14] The Commission argues that the value of the amount the Appellant has to pay was high enough for it to proceed with the request for repayment.

[15] Concerning the first criterion, everyone agrees that more than 36 months elapsed between the termination of employment and the Commission issuing the notice of debt. The Appellant's employment ended in May 2012, and the Commission sent the Appellant the first notice of debt in April 2017. The Appellant has therefore satisfied the first criterion of section 46.01.

[16] I acknowledge that the Commission's submissions concerning the applicability of the second criterion stated in section 46.01 are brief to say the least.²

[17] Despite that, however, I cannot accept the Appellant's arguments for the following reasons.

[18] First, section 46.01 mentions "the administrative costs of **determining** the repayment" and not the administrative costs associated with the subsequent processing of the file and the recovery of the amounts at stake. Therefore, under that section, the value of the Commission's efforts to recover the amounts or to present its decision at various stages of a recourse process is

² AD2-4.

irrelevant. The only important thing is the administrative costs of establishing what must be repaid. However, it goes without saying that these administrative costs are certainly much lower than the costs associated with all of the Commission's other actions in relation to the Appellant's file.

[19] Next, it is the Commission and not the Tribunal that must make that determination. The Act explicitly states “**in the opinion of the Commission**, the administrative costs of determining the repayment.” Therefore, it is the Commission's discretion. It is well established in case law that I do not have the power to intervene in a discretionary decision unless the Commission has failed to use its power judicially (for example, if it acted in bad faith or if it failed to consider all the relevant evidence).³

[20] Nothing leads me to think that the Commission failed to use its discretion correctly in this file. The Commission uses a relatively simple rule to determine whether an amount should be claimed: it set a threshold of \$346,⁴ which apparently corresponds to the administrative costs generally associated with determining a repayment. If the amount to recover is more than that, the Commission proceeds to ask for repayment. If not, the claimant is not asked to pay it back.

[21] In my view, the use of such a rule is justifiable. It is reasonable to think that the administrative costs of determining a repayment are about the same in each file of this type because the process is generally similar from one case to another: 1) the claimant receives Employment Insurance benefits; 2) some years later, the claimant receives money from their former employer as part of a settlement; 3) the details of the settlement are submitted to the Commission; and 4) the amount of benefits to repay is calculated based on the amount of earnings paid to the claimant.

[22] The Appellant's file followed those steps. Furthermore, the amount of the benefits overpaid to the Appellant is relatively large. Therefore, the Commission's administrative costs of determining the repayment for this file needed to be much more than the general amount for

³ I can intervene if the Commission has not used its discretion “judicially” – *Canada (Attorney General) v Purcell*, A-694-94.

⁴ See the Commission's submissions in AD2.

finding that those costs exceed the amount to be repaid. However, nothing leads me to think that that is the case.

[23] I therefore find that the Commission used its discretion judicially when it determined that the administrative costs of determining the repayment were less than the repayment amount. As a result, the Appellant has not satisfied the second criterion of section 46.01. Since the Appellant has not satisfied both criteria set out by the Act, the section does not apply, and the overpaid benefits must be repaid.

Comments on the Reconsideration of the Claim

[24] During the hearing, the appellant stressed the fact that more than 36 months had elapsed between him receiving benefits and the Commission informing him of the amounts to be repaid. He argued that the Commission exceeded the maximum 36-month period it has under section 52 of the Act to reconsider a claim. Therefore, he argues that the obligation to repay the sums due does not apply to his case.

[25] My mandate in this file is to decide on the applicability of section 46.01 of the Act, which is what I did in the previous section. However, as an observation, I think it important to respond to the Appellant's argument to come full circle in this file.

[26] The 36-month period set out by section 52 of the Act does not apply in this case, quite simply because the Commission did not reconsider the claim under that provision. Instead, it calculated the amount of benefits to be repaid according to sections 45 and 46 of the Act. The case law has clearly established that the limitation period set out in section 52 of the Act does not apply to debts resulting from the application of sections 45 and 46. On that point, I invite the Appellant to consult the Federal Court of Appeal's decision in *Chartier*,⁵ which explains very well the reasons for that distinction.

⁵ *Chartier v Canada (Attorney General)*, 2010 FCA 150.

CONCLUSION

[27] The provisions of section 46.01 of the Act do not apply to the Appellant's file. As a result, the overpaid benefits must be repaid. The appeal is dismissed.

Yoan Marier
Member, General Division – Employment Insurance Section

HEARD ON:	October 9, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	V. B., Appellant