Citation: *KW v Canada Employment Insurance Commission*, 2021 SST 380

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	K. W.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated March 26, 2021 GE-19-1090

Tribunal member:	Stephen Bergen
Type of hearing:	In person
Hearing date:	July 19, 2021
Hearing participant:	K. W. Appellant
Decision date:	**July 22, 2021**
File number:	AD-21-130

Decision

[1] I am dismissing the appeal. The Claimant has not established that the General Division process was unfair or that it made an error in how it interpreted the limitation provision in section 46.01 of the *Employment Insurance Act* (EI Act).

Overview

[2] The Appellant, K. W. (Claimant), is a teacher. He was receiving Employment Insurance benefits while working casually as a substitute teacher in the fall of 2016. When the Respondent, the Canada Employment Insurance Commission (Commission) asked him to report his earnings for that period, the Claimant reported earnings that did not match earnings the Commission obtained from his employer.

[3] The Commission decided that the Claimant had not accurately reported his earnings in the weeks from September to December 2016. It adjusted the Claimant's earnings and reallocated them to the weeks for which they were paid. As a result, it calculated that the Claimant had been overpaid benefits in the total amount of $994.00.

[4] The Claimant asked the Commission to reconsider, but it maintained that its original decision was correct. Next, the Claimant appealed to the General Division of the Social Security Tribunal. The General Division dismissed his appeal. He is now appealing to the Appeal Division, claiming that the General Division acted unfairly and that it failed to apply the limitation described in section 46.01 of the EI Act.

[5] I am dismissing the appeal. The General Division did not act unfairly and section 46.01 of the EI Act does not apply. The section 46.01 limitation is intended to limit the Commission's ability to recover an overpayment based on earnings paid after the benefits were paid—not based on the misreporting of paid earnings. Furthermore, the Commission decided that there had been an overpayment within 36 months of the Claimant's layoff.

What Grounds can I Consider for the Appeal?

[6] "Grounds of appeal" are the reasons for the appeal. To allow the appeal, I must find that the General Division made one of these types of errors:[1]

1. The General Division hearing process was not fair in some way.
2. The General Division did not decide an issue that it should have decided. Or, it decided something it did not have the power to decide.
3. The General Division based its decision on an important error of fact.
4. The General Division made an error of law when making its decision.

Issues

[7] The issues in this appeal are:

1. Did the General Division act unfairly by:

   a) Failing to disclose materials necessary for the Claimant to present his case or answer the Commission's case?

   b) Excessively delaying the hearing?

   c) Failing to allow the Claimant time to obtain an answer on his Access to Information and Privacy Request (ATIP)?

2. Did the General Division make an error of law when it found that the section 46.01 limitation did not apply?

[1] This is a plain-language version of the three grounds. The full text is in section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).

Analysis

Issue 1: Did the General Division act unfairly?

a) Disclosure by the General Division

[8] The General Division did not act unfairly by failing to disclose any evidence or submissions. The Claimant did not identify any document on which the General Division relied, that was not provided to him in advance of the hearing.

[9] Every document that the Commission shared with the General Division was shared with the Claimant.

History of shared disclosure and submissions

[10] On February 27, 2019, the Claimant filed an incomplete Notice of Appeal with the General Division. The Claimant filed supplementary materials and the General Division acknowledged the complete appeal on March 27, 2019.

[11] The General Division then requested the Commission to provide those documents in its possession and relevant to the appeal. It received these disclosure documents on or about March 29, 2019, together with the Commission's initial submissions.[2] On April 3, 2019, the General Division also asked the Commission for information about the Pilot Project 20 in effect during the time the Claimant received benefits. It copied its request to the Claimant on April 4, 2019.

[12] All of the documents from GD1 through to GD6 (the Commission's response to the General Division's April 3 question), including the Commission's disclosure of its reconsideration file,[3] were forwarded by email to the Claimant on April 5, 2019.

[13] The General Division also received additional submissions from the Commission on September 10, 2019, which were shared with the Claimant the same day.

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[2] GD4.
[3] GD3.

[14] On January 26, 2021, the General Division asked a series of questions about the Commission's calculations and Pilot Project 20.[4] The Commission provided a detailed response on February 8, 2021,[5] which was shared with the Claimant on February 15, 2021.

Claim of inaccurate or incomplete disclosure

[15] The Claimant suspects that the Commission may have selectively edited the information that it forwarded to the General Division or that it failed to provide information that could have assisted the Claimant's appeal. He has no particular basis for this suspicion but he is concerned that he would never know if this sort of editing or withholding had occurred.

General Division's Investigation

[16] The Claimant's concern with the accuracy or completeness of the Commission's disclosure to the Commission has nothing to do with the fairness of the General Division's hearing process. The General Division notified the Commission to provide all documents relevant to the appeal and the Commission has an obligation to forward those documents. However, the General Division has no duty or obligation to police this process.

[17] The General Division does have the power to refer questions to the Commission for investigation and report.[6] This is the power that allowed the General Division to require answers from the Commission to its questions of January 26, 2021.[7] However, this is a purely discretionary power. The General Division is not obligated to investigate or to ask particular questions in particular appeals.

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[4] GD18.
[5] GD20.
[6] Section 32 of the *Social Security Tribunal Regulations.*
[7] GD18.

[18] The Claimant has not shown that the General Division failed to disclose materials that were in its possession or control. The General Division disclosure process was not procedurally unfair.

b) Delay in the Hearing Process

[19] Because the Claimant could not be certain that the Commission had given the General Division complete or accurate information about his file, he filed an ATIP request on February 11, 2019. He was particularly concerned with how the Commission assessed his benefits under Pilot Project 20.[8] There was apparently a significant delay before he received anything responsive to his ATIP request.

[20] The General Division scheduled a hearing for April 24, 2019, but the Claimant requested an adjournment on April 17, 2019, because he had not received the information that he requested on his ATIP request. The General Division granted an adjournment and scheduled a pre-hearing conference for April 24, 2019, to decide how to address his concern. The General Division placed the file in abeyance and wrote the Claimant on April 26, 2019, requesting an update on his ATIP progress by June 3, 2019.

[21] On June 3, 2019, the Claimant provided an update in which he confirmed that he had his request was still pending and that he had filed a complaint on his ATIP request.[9] The General Division directed the Claimant to provide an update on his progress in obtaining information by July 3, 2019, and to request more time if necessary. The General Division held the Claimant's appeal file in abeyance.

[22] The Claimant updated the General Division on the state of his ATIP request on July 3, 2019. In response, the General Division directed the Claimant on July 4, 2019, to

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[8] "Pilot Project 20" is described in sections 77.99 and 77.991 of the *Employment Insurance Regulations*. It was designed to encourage claimants to work more while receiving benefits. Under this project, the Commission would deduct only 50% of a claimant's earnings during a week of unemployment from benefits otherwise payable to the claimant
until the earnings are greater than 90% of their weekly insurable earnings. It also allowed a claimant to elect to have his or her earnings considered under the former section 77.84(3) (Pilot Project 17).
[9] GD11.

provide an additional update on August 14, 2019. It continued to hold the file in abeyance.

[23] The Claimant updated the General Division on August 13, 2019, but had made no headway in obtaining a response to his ATIP request. His ATIP complaint had been assigned to an investigator. The Claimant asked the General Division to dismiss the case (by which he meant, allow his appeal).

[24] The Claimant's file remained in abeyance and—beyond forwarding the Commission's September 10, 2019, submission—there was no further communication between the General Division and the Claimant until January 26, 2021. On that day, the General Division informed the Claimant that it had sent the Commission some questions and was waiting for a response. It told the Claimant that it would contact the Claimant once it received a reply.

[25] The Commission responded on February 8, 2021, which the General Division shared with the Claimant on February 15, 2021. On March 2, 2021, the General Division told the Claimant that it had rescheduled his hearing for March 17, 2021. The hearing went ahead as scheduled.

[26] Just over two years have elapsed between the Claimant's original Notice of Appeal in late February 2019 and the General Division decision of March 26, 2021. This is a significant delay. However, there is no indication that the General Division can be faulted for any portion of this delay. In fact, the General Division went out of its way to give the Claimant additional time to obtain the ATIP response that he claimed he needed to prepare or present his appeal. The Claimant did not obtain that ATIP response until just before his Appeal Division hearing, and he has argued that it was unfair for the General Division to have proceeded without it.

[27] The General Division did not act unfairly by delaying the Claimant's hearing. Any delay in holding the hearing was to give the Claimant time to obtain the ATIP response that he hoped would be helpful to his appeal. The delay was either at the Claimant's request or with his acquiescence.

[28] He cannot argue that he was prejudiced by how long the General Division took to hold his appeal and, at the same time, argue that the General Division hearing was premature because he had not yet received the ATIP response.

c) Failure to Consider the Claimant's Response to his ATIP Request

[29] By the time the General Division decided to go ahead with the hearing, the Claimant had still not received the response to his ATIP request.

[30] However, the Claimant was unable to show how the appeal result could have been changed by what he expected in the ATIP response.

[31] At the hearing, the member confirmed that the Claimant did not dispute the earnings amounts. His concern was with how the Commission calculated his overpayment. He said that the Commission had said that he owed three different amounts at different times and had that he could not be confident in its calculations. He believed that he may have been prejudiced in the Commission's benefit calculations because the Commission had not given him an opportunity to make the election permitted by Pilot Project 20.

[32] The General Division pointed out to the Claimant that the Commission explained its calculations in GD3 and in GD20-4. It noted that the Commission explained how it would calculate his benefits under either of the options that he might have elected. It's calculations showed that the Claimant's overpayment would have been higher if the Commission had used the other option as the basis for its calculations. At that point, the Claimant said that this was the first time that anyone had clarified this. He stated that he was appealing because the Commission should have explained the calculations earlier.

[33] At the Appeal Division hearing, the Claimant suggested to me that he had no way to know if the earnings information from his employer was accurate. However, the General Division member specifically questioned the Claimant about the details of the November 29, 2018, decision letter.[10] The member asked him whether he received the

[10] GD3-77.

earnings amounts set out in the decision letter of November 29, 2018, whether he received them from his employer, and whether he received those amounts for performing work for his employer. The Claimant confirmed each of these facts, and confirmed that he also received benefits in each of those weeks.

[34] The member also led the Claimant through the calculation in GD3-80, which showed that he had overpayments totalling $994.00 and underpayments totalling $117.00. It explained that this meant that the Claimant's net overpayment was $877.00, as the Commission set out in its argument at GD4. The Claimant said it had no reason to dispute the calculation, after the General Division explained it to him.

[35] I understand that the Claimant hoped to discover some error in how the Commission calculated his overpayment from his ATIP response. However, the General Division member reviewed with the Claimant information that was already available to him. It reviewed the GD3-77 decision letter, the calculations in GD3-80, and the calculations of the Pilot Project 20 election options in GD20-4. The Claimant did not dispute any of that information, once the member explained it.

[36] The Claimant apparently received the ATIP response package not long before the Appeal Division hearing but said that he had not reviewed its contents. The Appeal Division cannot consider new evidence so I did not ask anything more about this.[11]

[37] The Claimant failed to demonstrate that it was unfair of the General Division to proceed without the ATIP information. Further delay to allow the Claimant to obtain a response to his ATIP request would have served no purpose. The information the Claimant was hoping to obtain about how the Commission had calculated his benefits and overpayment was already in the record, and the Claimant did not dispute any of that information.

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[11] *Hideq v. Canada (Attorney General), 2017 FC 439, Parchment v. Canada (Attorney General), 2017 FC 354.*

[38] However, the Claimant still insisted that he was dissatisfied with the Commission's disclosure and explanations. He argued that it had taken too long for the Commission to clarify its calculations and that his ATIP request had also taken too long.

[39] I accept that the Claimant did not fully understand how the Commission arrived at the amount of his overpayment and that he was not satisfied with how the Commission shared information with him. He also has good reason for being upset with the length of time it took to obtain a response to his ATIP request. However, none of this demonstrates that the General Division treated him unfairly.

[40] The General Division did not make an error of natural justice when it found that the Claimant had all the relevant evidence necessary to prepare a full "defence" against the overpayment.[12]

Issue 2: Application of the section 46.01 limitation

[41] The Claimant argues that the General Division made an error when it found that the section 46.01 limitation did not apply to his circumstances.

[42] Under section 46.01, the EI Act limits the Commission's power to recover certain overpayments. The Commission may only recover the payments captured by section 46.01 within 36 months of the layoff or separation from the employment in relation to which earnings are paid.[13]

[43] The Commission issued a decision on November 29, 2018, in which it calculated his overpayment, and it sent a Notice of Debt on March 29, 2019, to collect that overpayment. The Claimant was laid off and established a claim in June 2016. The overpayment was in relation to benefits paid from September to December of 2016.

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[12] General Division decision, para 11.
[13] Section 46.01 has one additional requirement that must be met for the limitation to apply: The Commission must also form the opinion that the administrative costs of determining the overpayment would exceed the amount of the overpayment.

[44] The General Division said that the weeks of earnings between September and December 2019 were not in relation to his employment prior to his layoff, and so section 46.01 was not applicable.

[45] I granted leave to appeal because the "employment in relation to which earnings are paid" under section 46.01 could mean employment with the same employer, and not employment at a particular time. However, it is not necessary that I interpret this particular phrase to determine whether section 46.01 should have applied. There are other reasons why the section 46.01 limitation could not operate in the Claimant's circumstances:

The limitation is for overpayments from subsequent payments

[46] Section 46.01 describes a limitation that applies to benefits under section 45 and section 46(1) specifically. Both section 45 and section 46(1) relate to earnings for some particular period that are only paid or payable to a claimant **after** the claimant has already received benefits for that period. Section 46(1) has no bearing on this appeal because it relates to an employer's obligation to deduct an amount from additional payments owed to a claimant. This deduction would be to satisfy the overpayment of benefits that the additional earnings would create.

[47] Section 45 concerns a claimant's obligation to repay benefits to the Commission. But, as noted, this concerns the situation where the claimant has been on benefits and is **later** paid (or earnings are payable) for the period that he collected benefits.

[48] In this case, the Claimant's overpayment arose from the earnings the Claimant reported he had received at he same time as he was paid benefits. It was a result of how the Claimant reported those earnings. The Claimant did not receive additional payments from his employer related to periods in which he had been on benefits, after he had received those benefits.

The limitation does not apply to benefits because they were calculated under Pilot Project 20

[49] The Claimant said that Pilot Project 20 did not come into effect until after section 46.01 was enacted. He argues that section 46.01 should be read to include overpayments of benefits under Pilot Project 20, as well as overpayments under section 45 and section 46(1).

[50] However, he did not give me any reason why I should read section 46.01 to apply to Pilot Project 20 benefits. The common factor in section 45 and section 46.01 is that the Claimant is paid earnings **after** the benefits are paid.

[51] Pilot Project 20 allowed claimants to work while receiving EI benefits and to choose the formula the Commission would use to deduct their earnings from all their EI benefits. However, Pilot Project 20 does not care whether the employer pays a claimant's income while the claimant was still working or only pays it later. If a claimant was paid or became payable by the employer for a period in which he received benefits, after he had received those benefits, then these additional earnings would be captured under section 45 or section 46(1). The section 46.01 limitation could still apply to any overpayment even if calculated under the Pilot Project.

[52] If the earnings were not paid afterwards, but were misreported (as in this case), then the Commission would be limited to reconsidering its decision within 36 months under section 52 of the EI Act and not section 46.01. However, the EI Act extends the section 52 limitation to 72 months where there was a false or misleading statement or representation made (such as misreported earnings).

The limitation period had not lapsed

[53] The section 46.01 limitation does not apply. However, even if the claimant's overpayment were subject to the limitation, the limitation period had not lapsed.

[54] The Claimant’s layoff date was in June 2016. Regardless of whether the limitation period uses the November 2018 decision or the March 2019 Notice of Debt as the “end date” for calculating the 36-month limitation period, 36 months had not lapsed.

[55] The limitation period does not continue to run because the Claimant does not agree with the Commission’s decision or with the amount of the notice of debt. It does not continue to run because the Claimant didn't get enough information from the Commission about how it calculated his overpayment, or becasue he had to file an appeal to obtain more information.

[56] The General Division did not make an error of law by finding that the section 46.01 limitation did not apply to prevent the Commission from collecting the overpayment.

Conclusion

[57] I am dismissing the Claimant’s appeal. The General Division did not act unfairly or make an error of law.

Stephen Bergen
Member, Appeal Division