



Citation: *SB v Canada Employment Insurance Commission*, 2022 SST 178

## Social Security Tribunal of Canada General Division – Employment Insurance Section

# Decision

**Claimant:** S. B.  
**Representative:** Jesse Valkenier

**Commission:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (417865) dated March 31, 2021 (issued by Service Canada)

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**Tribunal member:** Audrey Mitchell

**Type of hearing:** Teleconference

**Hearing date:** February 24, 2022

**Hearing participants:** Claimant  
Claimant's representative

**Decision date:** February 28, 2022

**File number:** GE-21-2185

## Decision

[1] The appeal is dismissed.

## Overview

[2] The Claimant's employer fired him. He applied for employment insurance (EI) benefits. The Claimant's employer paid him money as part of an agreement they signed with the Claimant approximately six months after they fired him. The Commission decided that the settlement money was earnings. They allocated the money, which created an overpayment of \$2,654.

[3] The General Division of the Tribunal allowed the Claimant's appeal of the Commission's decision. They found that the Commission did not reconsider the Claimant's claim within the time allowed to do so and for this reason, the overpayment is invalid.

[4] The Appeal Division allowed the Commission's appeal of the General Division decision. They found that the section in the law the General Division had used to identify the time limit does not apply. The Appeal Division returned the appeal to the General Division to address the applicability of a different section of the law.

## Matter I have to consider first

[5] After the Appeal Division decision, the Tribunal gave the Claimant's representative an opportunity to address the Commission's submissions on the applicability of section 46.01 of the *Employment Insurance Act* (Act). The deadline for his submissions was January 14, 2022. The Claimant's representative asked for more time to reply. The Tribunal gave the representative until January 21, 2022 to reply.

[6] The Claimant's representative said that he had sent only a one-page document concerning a \$300 overpayment the Claimant received. At the hearing, he said that he would not re-send the document since it is not relevant.

## Issue

[7] Did the Commission exercise their discretion in a judicial manner when they decided that the Claimant had to repay the \$2,654 overpayment?

## Analysis

[8] Discretionary decisions of the Commission should not be disturbed unless the Commission failed to act in a judicial manner. This means acting in good faith, having regard to all the relevant factors and ignoring any irrelevant factors.<sup>1</sup>

[9] A claimant who gets earnings including settlement money from their employer and EI benefits for the same period has to repay the overpayment.<sup>2</sup> An employer who pays a claimant earnings, including as part of a settlement, and believes the claimant was paid EI benefits for the same period, has to deduct the benefits from the settlement money and repay the overpayment.<sup>3</sup>

[10] The law specifies where a claimant doesn't have to repay an overpayment like the one referred to above. This is where more than 36 months have passed since the separation from employment for which settlement money was paid, and where the Commission is of the opinion that the administrative costs of determining the repayment would likely equal or be more than the amount of the repayment.<sup>4</sup>

[11] The law gives a general time limit for overpayments related to earnings from the payment of settlement money. It says that these overpayments can be recovered no more than 72 months after the overpayment arose.<sup>5</sup>

[12] The Claimant's representative made submissions at the hearing. They centred on the procedures that the Commission has followed. Concerning section 46.01 of the Act, he said that it applies since the Claimant has never made a false or misleading statement. He stated that the Commission can reconsider a claim within 72 months

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<sup>1</sup> *Canada (AG) v. Purcell* [1996] 1 FC 644.

<sup>2</sup> Section 45 of the *Employment Insurance Act* (Act).

<sup>3</sup> Section 46 of the Act.

<sup>4</sup> Section 46.01 of the Act (2012, c. 19, s. 607).

<sup>5</sup> Section 47 of the Act.

only there is misrepresentation. He added that sections 45, 46 and 46.01 of the Act do not refer to any discretion.

[13] In their submissions, the Commission refers to the obligation for claimants and employers to repay EI benefits paid to claimants for the same period earnings are paid. They argue that two conditions must be met for section 46.01 of the Act to apply. The first is that 36 months have elapsed since the separation from employment. They state that the second condition is discretionary. In this condition, the administrative cost of determining the repayment has to be equal to or more than the amount of the repayment.

[14] The Commission's submissions go on to explain how they arrived at administrative costs referred to in the law. They analyzed data in 2013 from their regional operations that was collected as part of a time and motion study. The data included human resources costs. From this, they determined an average administrative cost for establishing a repayment resulting from bankruptcy or grievance settlement.

[15] The Commission attached a table to their submissions that shows the administrative costs and threshold amounts for the years 2013 to 2020.

[16] I find that section 46.01 of the Act gives the Commission discretion concerning the repayment of an overpayment. I also find from the language of the section that both conditions must apply. The second condition in the section requires that the Commission evaluate and compare administrative costs to the repayment amount.

[17] The Claimant's representative said that he doesn't understand how the Commission decided the administrative cost amount. However, I find from the Commission's submissions referred to above that they considered relevant factors, and determined administrative and threshold amounts in a systematic way. I see no evidence of the Commission acting in bad faith.

[18] The amount of the overpayment to be repaid is \$2,654. The Commission established the overpayment in 2021. Although the table does not include administrative cost and threshold amounts for 2021, I find it unlikely, given the rate

increase percentages, that the administrative cost of determining the repayment is equal to or exceeds the repayment amount.

[19] For the reasons noted above, I find that the Commission exercised their discretion judicially when they formed the opinion that the cost of determining the repayment does not equal or exceed the repayment.

[20] The Claimant's representative said that the Claimant has not received a notice of debt for the \$2,654 overpayment. The Claimant testified that he had only received a notice of account balance showing the amount he owed and the minimum payment. However, it appears that he included the notice of debt the Commission sent him along with other documents in support of his request for reconsideration.<sup>6</sup> In view of this, I find that the Claimant was aware of the overpayment.

[21] The Claimant's representative also referred to the employer's settlement with the Claimant. The employer held back \$1,756 for repayment of any overpayment of EI benefits. The Claimant's representative referred to a section from the Commission's digest that says that the employer has the responsibility first to find out about an overpayment and repay it.<sup>7</sup>

[22] Evidence on the Commission's file confirms that the employer told the Commission about money they withheld. It's not clear what follow-up, if any, the Commission has done with the employer concerning the money they have to cover a portion of the overpayment to be repaid. Given the notice of debt issued to him, the Claimant may wish to contact the Commission to resolve this and confirm how much of the \$2,654 overpayment he must repay.

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<sup>6</sup> See GD3-39 to GD3-51.

<sup>7</sup> See section 17.5.4 of Digest of Benefit Entitlement Principles.

## **Conclusion**

[23] The appeal is dismissed.

Audrey Mitchell

Member, General Division – Employment Insurance Section