



[TRANSLATION]

Citation: *LL v Canada Employment Insurance Commission*, 2023 SST 331

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

Decision

Appellant: L. L.
Representative: Serge Bouchard

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (567728) dated March 8, 2023
(issued by Service Canada)

Tribunal member: Manon Sauvé

Type of hearing: Videoconference
Hearing date: May 23, 2023
Hearing participants: Appellant
Representative

Decision date: June 28, 2023
File number: GE-23-812

Decision

[1] The Commission can't ask the Appellant to pay back the benefits she was paid because more than 36 months have passed since she was let go.¹ The government's temporary changes in response to the COVID-19 pandemic apply to the Appellant.

[2] The appeal is allowed.

Overview

[3] For several years, the Appellant has worked as secretary-treasurer for a municipality. In February 2019, she was suspended until June 2019. On June 22, 2019, the city terminated her employment.

[4] The Appellant filed a complaint with the Tribunal administratif du travail [Administrative Labour Tribunal]. On September 21, 2022, the parties came to an agreement about the Appellant's complaint.

[5] The city paid her \$500,000, allocated as follows: \$226,588.38 as compensation for lost wages; \$106,126.24 for moral damages; \$7,285.38 for reimbursement of professional fees; and \$160,000 for the action brought by the Appellant's counsel.

[6] On September 22, 2022, the Appellant sent the Commission the agreement between the parties. On December 16, 2022, the Commission decided that the compensation for lost wages was earnings within the meaning of the Act. This amount must be allocated to the weeks of benefits from June 23, 2019, to August 8, 2020. The Commission is asking the Appellant to repay \$21,918.

[7] The Commission considered legislation that was in effect when making its decision on December 16, 2022. The law says that the money isn't repayable if more than 36 months have passed since the lay-off **and** that the administrative cost to

¹ See section 46.01 as changed by Parliament because of the pandemic for the period from September 26, 2021, to September 24, 2022.

determine the repayment is equal to or greater than the amount owing. The Commission estimates a cost of \$386. As a result, it is asking her to repay \$21,918.

[8] The Appellant disagrees with the Commission. According to the provisions in effect at the time of the agreement and when it was sent to the Commission, the amount isn't repayable if more than 36 months have passed since the lay-off, **only**. The second condition was temporarily suspended. The Act was temporarily changed to provide economic support to Canadians, including claimants, during the COVID-19 pandemic.

Issue

[9] Do the temporary changes to section 46.01 of the *Employment Insurance Act* (Act) apply to the Appellant?

Background

[10] Since 1986, the Appellant has worked for a municipality. In 2009, the Appellant was promoted to executive director and secretary-treasurer.

[11] On February 6, 2019, the municipality suspended the Appellant until June 22, 2019. On June 22, 2019, the city terminated the Appellant's employment.

[12] The Appellant filed a complaint with the Tribunal administratif du travail. The Tribunal ordered that the suspension and termination resolutions be rescinded and that the Appellant return to her position. The municipality appointed a mediator to work out a settlement between the parties.

[13] The parties signed a settlement agreement on September 21, 2022. It is important to note for the purposes of this dispute that the municipality made several payments to the Appellant, including the \$226,588.30 in lost wages that are the subject of this dispute.

[14] On September 22, 2022, the representative sent the Commission a copy of the agreement.

[15] On December 16, 2022, the Commission made a decision about the \$226,588.30 in lost wages. It is income within the meaning of the Act.²

[16] Under the Act, the amount paid concerning—among other things—a Tribunal order dealing with a dismissal, has to be allocated to the weeks it was awarded for. In other words, the money is allocated to the weeks of Employment Insurance (EI) benefits the Appellant received.³

[17] I note that the Appellant doesn't recognize the earnings and the allocation of the \$226,588.30.

[18] So, the Commission is asking her to repay the benefits it paid—\$21,918.

Legislative framework

[19] Under section 45 and section 46(1) of the Act, a claimant who receives an amount because of an order has to repay the benefits paid by the Commission or their employer.

[20] The usual rule is that no amount is to be repaid if more than 36 months have passed since the separation from employment **and** the Commission has determined that the administrative cost is equal to or greater than its value.⁴

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.**⁵

² Section 35(1) of the *Employment Insurance Regulations* (Regulations) and para 35(2)(a) of the Regulations.

³ See table at GD3-29 and GD3-30.

⁴ Section 46.01 of the *Employment Insurance Act* (Act).

⁵ Emphasis added.

[21] In this case, the Commission indicated that the cost of recovering the amount from the Appellant was \$355 in 2019 and \$390 in 2022, which is well below the request for repayment of \$21,918.

[22] I mention the usual rule since, because of the COVID-19 pandemic, the Parliament of Canada adopted many measures to help Canadians economically.

[23] As a result, section 46.01 was changed as part of the implementation of many measures put in place.⁶ The second condition, the administrative cost to determine whether there should be a repayment based on administrative costs, was removed. In other words, the only criterion for not having to repay the overpayment is if a period of more than 36 months has passed.

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 payable⁷

Analysis

[24] So, I have to decide whether the change to section 46.01, which was in effect between September 26, 2021, and September 24, 2022, applies to the Appellant.

[25] Before I answer this question, the evidence shows that more than 36 months passed between the end of the Appellant's employment and the settlement between the parties. The Appellant was let go on June 22, 2019, and the agreement was signed on September 21, 2022, or, if the Commission had just cause for considering its decision, on December 16, 2022.

[26] The parties made their submissions and the Appellant's representative made his arguments at the hearing.

⁶ *An Act to implement certain provisions of the budget tabled in Parliament on April 19, 2021, and other measures* extracted from the Act for the period from September 26, 2021, to September 24, 2022, GD7-9 to GD7-22.

⁷ See section 317 of the *Budget Implementation Act* GD7-19 and GD7-20.

[27] The Commission says that it has to apply the rules that were in effect when it made its decision, on December 16, 2022. On that date, both conditions were in effect again.

[28] In support of its argument, the Commission cites paragraph 20 of the Tribunal's decision in *VB v Canada Employment Insurance Commission 2020 SST 61*. The Tribunal calculated 36 months as the period between the date when the employment ended and the Commission's decision.

[29] I disagree with the Commission's interpretation of this decision. To begin with, this case resulted in four decisions: two from the General Division and two from the Appeal Division. The issue was also the Commission's power to reconsider within 36 months after benefits were payable or became payable. The Commission has 72 months to do so when it finds that false statements have been made.⁸

[30] In my view, this case doesn't support the Commission's arguments. On the contrary, it creates more confusion about the interpretation of section 46.01 of the Act. Also, the Tribunal criticized the Commission's terse explanations about the interpretation of that provision.⁹

[31] Also, I find that section 46.01 doesn't allow for the calculation of time limits like the Commission says. It doesn't say that the period is the one that corresponds to the date when the employment ended and the date of the Commission's decision, but the period between the end of employment and when the amount is paid or payable by the employer.

[32] In another Appeal Division decision,¹⁰ the Tribunal found that the period was calculated as follows: the date of separation from employment up to when the responsibility for paying earnings is established.

⁸ Sections 52(1) and (5) of the Act.

⁹ *VB v Canada Employment Insurance Commission*, 2019 SST 1306 at para 16.

¹⁰ *KL v Canada Employment Insurance Commission*, 2018 SST 552.

[33] So, in the Appellant's case, she was dismissed on June 22, 2019, and the amount was payable on September 21, 2022, which is the date the agreement was signed. The 36-month calculation is made between her two dates.

[34] The Commission also argues that Parliament didn't intend to allow claimants to receive benefits and wages at the same time.

[35] I disagree with the Commission. It hasn't shown that it wasn't actually what Parliament intended. On the contrary, during those difficult times, the government relaxed certain rules to allow Canadians to get through the problems the pandemic created.¹¹

[36] Also, without the change, the provision allows a claimant to receive benefits and their earnings, if they meet both criteria.

[37] So, I am of the view that, by removing the second condition, Parliament wanted to favour claimants during a pandemic. The Commission could no longer exercise its discretion regarding the cost of collecting the debt once the 36 months had passed. It was only required to apply the first criteria during the period from September 26, 2021, to September 24, 2022.

[38] I note that Parliament has changed several provisions of the Act to allow more Canadians to access financial assistance: an increase in hours¹² of insurable employment, and no waiting period to receive benefits.¹³

[39] Also, the Commission made it easier for claimants to apply for benefits so they could get them more quickly. Parliament gave the Commission a right to reconsider entitlement to benefits in certain situations.¹⁴

[40] When Parliament grants the Commission a discretionary power, it says so. For example, as part of the temporary measures, Parliament gave the Commission the

¹¹ See GD7-9 to GD7-22 and extracts from the debate in the House GD7-36 and GD7-39.

¹² Section 153.17 (1) of the Act.

¹³ Section 153.191 (1) of the Act.

¹⁴ See section 153.161(2) of the Act.

power to require a medical certificate.¹⁵ The changes were enacted to facilitate access to financial assistance.

[41] On this point, I find that, by removing the second criterion in section 46.01, Parliament was pursuing the same objective.

Accrued right

[42] The Appellant also argues that the Appellant had an accrued right regarding the application of the changes to the Act.

[43] This means that the law that is in effect when the application is filed must be applied, not when the Commission makes its decision. This is because the new law is deemed to respect situations without infringing accrued rights,¹⁶ when the legal situation is individualized and when the legal situation is created when the new law comes in effect.¹⁷ The Appellant meets the criteria for the recognition of acquired rights. The legal situation is individualized and concrete: the Appellant signed the agreement on September 21, 2022, and the amounts are payable. She submitted the documents to the Commission on September 22, 2022.

[44] Parliament didn't give the Commission the power to decide when the rules should be applied. This would allow it to circumvent the will of Parliament and exercise a discretion that is contrary to its will.

[45] The Commission argues that it is the late settlement of the Appellant's grievance that creates the situation in her favour. It isn't the Commission that is responsible for the delay in processing the dismissal.

[46] I agree with the Appellant. Parliament didn't want to allow the Commission to decide when the new rules should be applied. It also didn't want to allow a claimant to

¹⁵ Section 153.1921 of the Act.

¹⁶ GD2-6 (Côté, Pierre-André, *Interprétation des lois*, 4th edition, Montreal, Les Éditions Thémis, 2009, page 181.

¹⁷ Côté, Pierre-André, *Interprétation des lois*, 4th edition., Montreal, Les Éditions Thémis, 2009, page 188.

benefit from the new measures by delaying in sending the settlement agreement so that the Commission could make a decision while the new rule was being applied.

[47] As a result, I find that the calculation of the 36-month period should be made as follows: from the date she was let go, June 22, 2019, to the date the amount is payable, September 21, 2022.

[48] Otherwise, we would be engaging in an exercise contrary to Parliament's intention: to give the Commission discretion in how it handles cases. On the contrary, Parliament temporarily withdrew that power from the Commission.

Write-off

[49] The Appellant is asking the Tribunal to cancel the overpayment because section 46.01 of the Act doesn't allow for the recovery of the overpayment after three years.

[50] The Commission says that the Tribunal doesn't have the power to write off the Claimant's overpayment.¹⁸ It cites several cases in support of its arguments.¹⁹ I note that the cases cited predate the provisions in the Act establishing the Social Security Tribunal. But, the principle remains.²⁰

[51] I don't have the power to decide to write off an overpayment the Commission is asking to be repaid. But, I have the power to decide whether the Commission properly applied the provisions of the Act.

[52] With this in mind, I find that, according to the government's temporary measures in response to the pandemic, the Appellant doesn't have to pay back the benefits she received, because more than 36 months have passed between the date when she was let go, June 22, 2019, and when the amount is payable, September 21, 2022.

¹⁸ See section 112.1 of the Act; section 153.1306 *et seq.* of the Act for adaptations.

¹⁹ *Canada (AG) v Villeneuve*, 2005 FCA 440; *Canada (AG) v Mosher*, 2002 FCA 355; *Canada (AG) v Filiatrault*, A-874-97.

²⁰ *Arksey v Canada (Attorney General)*, 2019 FC 1250 (CanLII).

Conclusion

[53] The temporary provisions set out in section 46.01 of the Act apply to the Appellant.

[54] The appeal is allowed.

Manon Sauvé
Member, General Division – Employment Insurance Section