



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *K. D. v. Canada Employment Insurance Commission*, 2018 SST 104

Tribunal File Number: GE-17-2821

BETWEEN:

**K. D.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**General Division – Employment Insurance Section**

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DECISION BY: Teresa Jaenen

HEARD ON: February 23, 2018

DATE OF DECISION: March 9, 2018

## **DECISION AND REASONS**

### **OVERVIEW**

[1] The Appellant established a claim for employment insurance benefits and while on claim an investigation by the Commission revealed the Appellant was employed during the benefit period and failed to declare her earnings for the period from June 21, 2015, to July 4, 2015. The Appellant had the opportunity to explain the discrepancy to the Commission but failed to do so by not responding to their request. The Commission notified the Appellant that the money she had received from her employer was considered earnings and were applied against her claim that resulted in an overpayment. The Commission notified the Appellant that she had made a false misrepresentation when she failed to report that she has worked and earned money and the Commission had issued a penalty. The Appellant argued that there must have been a glitch in the system and that she did not make the amounts claimed.

### **DECISION**

[2] The appeal is dismissed. The Tribunal finds the money the Appellant received is earnings and it was correctly allocated to the period in which the work/training was performed. The Tribunal also finds the Commission properly imposed a penalty of \$174.00 because the Appellant knowingly made a false or misleading statement when she filed her Teledec reports and failed to report her earnings.

### **ISSUES**

[3] The issues that the Tribunal must decide are:

- 1) Did the money the Appellant receive from her employer for training/working constitute earnings? If so, how should the earnings be allocated?

2) Should a penalty be imposed on the Appellant?

a) Did the Appellant make a false or misleading statement? If so, was it made knowingly; and

b) Did the Commission exercise its discretion properly with respect to the penalty amount?

## **ANALYSIS**

[4] The relevant legislative provisions are reproduced in the Annex to this decision.

### **Issue #1: Did the money the Appellant receive from her employer for training/working constitute earnings?**

[5] For income to be considered earnings pursuant to subsection 35(2), the income must be earned by labour or given in return for work or there is a sufficient connection between the claimant's employment and the sum received (*Canada (A.G.) v. Roch* 2003 FCA 356)

[6] The Tribunal finds the money the Appellant received were earnings because the employer paid the Appellant for work/training for the period of June 21, 2015, to July 4, 2015.

[7] The Appellant has the onus of proof to show that the wages/training pay is not money derived from employment and should not be allocated.

[8] The Appellant has failed to prove the wages/training pay she received is not earnings and should not be allocated.

[9] The Appellant initially argued that she did not make the money claimed by the Commission but she conceded when she saw the copy of her pay stub and the e-report questions and answers for the two-week period that was in the package she received from the Tribunal. The Appellant agreed it was in black and white and she just needed to be proved wrong.

### **How the earnings should be allocated?**

[10] When wages are payable to the Appellant in respect for services performed they shall be allocated to the period in which the services were performed pursuant to section 36(4) of the Regulations (*Bourdeau A-99-86; Boone 2002 FCA 257*)

[11] The Appellant conceded the money was paid to her for training/wages for the period of June 21, 2015, to July 4, 2015.

[12] The Tribunal finds the Appellant received the money for two-week period of June 21, 2015, to July 4, 2015, because she trained and worked for the employer.

[13] The Tribunal finds the earnings must be allocated pursuant to subsection 36(4) because the money was paid to the Appellant for wages/training under an employment contract for the two-week period of June 21, 2015, to July 4, 2015. The money must be allocated to the same period in which the services were performed.

### **Issue #2: Should a penalty be imposed on the Appellant?**

[14] Penalties may be imposed for false statements made "knowingly". "Knowingly" is determined on the balance of probabilities based on the circumstances of each case or the evidence of each case (*Gates A-600-94*).

#### **a) Did the Appellant make a false or misleading statement and was it made knowingly?**

[15] It is not enough for the representation to be false or misleading; for a penalty to apply it must be made by the claimant with the knowledge that it is false or misleading (*Mootoo A-438-02*). There is no requirement to show that there was a mental element, such as the intention to deceive, when concluding that a false statement was knowingly made (*Gates A-600-94*).

[16] The onus of proof is on the Commission to show that the Appellant knowingly made a false or misleading statement or representation.

[17] The Commission submitted evidence of the Teledec reporting system questions asked and the answers made by the Appellant proving that the Appellant knowingly made a false or misleading statement (*Lavoie A-83-04*); (*Caverly A-211-0*.)

[18] The Tribunal finds the Commission met the onus because it proved the Appellant made a false statement when she completed her report for the two-week period from June 21, 2015, to July 4, 2015. She was asked the simple question: “Did you work or earn wages during the period from June 21 to July 4?” to which she responded: “NO”. She was then presented with the statement: “You said you did not work or earn wages. Is this right?” to which she answered: “YES”.

[19] The burden of proof now shifts to the Appellant to prove the statements were not made knowingly and provide a reasonable explanation for the incorrect information.

[20] The Appellant argued that she does not lie but she does not know why she would not have answered the questions correctly.

[21] The Appellant was not able to provide any reasonable explanation to explain why she didn't answer the questions correctly. The Appellant said that she would never have compromised her integrity and she must have simply made a mistake, unfortunately this does not prove she did not knowingly make a false statement.

[22] The Tribunal finds on the balance of probabilities the Appellant knew she was not reporting correctly because she conceded that she was very familiar with the employment insurance program and she understood the questions asked on the reports. The Appellant conceded she did work and earn money and that she knew she was to report that she worked and earned wages.

[23] The Tribunal finds the Teledec reports prove the Appellant knowingly made a false and misleading statement when she reported she did not work and did not earn any money; therefore a penalty must be imposed.

**b) Did the Commission exercise its discretion properly in determining the amount of the penalty?**

[24] The penalty amount was calculated as follows:

\$347.00 (overpayment) x 50% (first offence, no known mitigating circumstances) =  
\$173.50, rounded to \$174.00.

[25] If the Tribunal maintains that a penalty is warranted, it must then determine whether the Commission exercised its discretion in a judicial manner when it determined the quantum of the penalty.

[26] The amount of a penalty is a discretionary decision within the exclusive authority of the Commission (*Uppal* 2008 FCA 388; *Gill* 2010 FCA 182).

[27] The Commission submits that it rendered its decision in this case in a judicial manner, as all the pertinent circumstances were considered when assessing the penalty amount (*Canada (AG) v. Uppal*, 2008 FCA 388; *Canada (AG) v. Tong*, 2003 FCA 28).

[28] There is no authority to interfere with discretionary decisions of the Commission unless it can be shown the Commission exercised its discretionary power in a non-judicial manner or acted in a perverse or capricious manner without regard to the material before it (*Uppal* 2008 FCA 388; *Mclean* 2001 FCA 5; *Rumbolt* A-387-99).

[29] The Tribunal finds the Commission exercised its discretion in a judicial manner because it considered the Appellant reasons that existed at the time that was relevant to determining the amount of the penalty (*Morin* A-681-96).

[30] The Tribunal finds the Commission considered the Appellant's reasons that she believed there was a glitch in the system with her Social Insurance Number and she had nothing to gain by not declaring her earnings. The Appellant was given the opportunity to provide the Commission with mitigating circumstances but she did not respond to their request.

[31] The Appellant was not able to provide the Tribunal with any new information or mitigating circumstances that the Commission would not have considered at the time they imposed the penalty or they acted in a non-judicial manner.

[32] The Tribunal finds the Commission correctly determined the penalty of \$174.00 (50% of the overpayment \$347.00) because this was the Appellant's first offence and there were no known mitigating circumstances.

### **CONCLUSION**

[33] The appeal is dismissed.

Teresa Jaenen

Member, General Division - Employment Insurance Section

Method of Proceeding: In-Person

Appearances: Ms. K. D., the Appellant

## ANNEX

### THE LAW

#### Employment Insurance Act

**38 (1)** The Commission may impose on a claimant, or any other person acting for a claimant, a penalty for each of the following acts or omissions if the Commission becomes aware of facts that in its opinion establish that the claimant or other person has

- (a) in relation to a claim for benefits, made a representation that the claimant or other person knew was false or misleading;
- (b) being required under this Act or the regulations to provide information, provided information or made a representation that the claimant or other person knew was false or misleading;
- (c) knowingly failed to declare to the Commission all or some of the claimant's earnings for a period determined under the regulations for which the claimant claimed benefits;
- (d) made a claim or declaration that the claimant or other person knew was false or misleading because of the non-disclosure of facts;
- (e) being the payee of a special warrant, knowingly negotiated or attempted to negotiate it for benefits to which the claimant was not entitled;
- (f) knowingly failed to return a special warrant or the amount of the warrant or any excess amount, as required by section 44;
- (g) imported or exported a document issued by the Commission, or had it imported or exported, for the purpose of defrauding or deceiving the Commission; or
- (h) participated in, assented to or acquiesced in an act or omission mentioned in paragraphs (a) to (g).

**(2)** The Commission may set the amount of the penalty for each act or omission at not more than

- (a) three times the claimant's rate of weekly benefits;
- (b) if the penalty is imposed under paragraph (1)(c),
  - (i) three times the amount of the deduction from the claimant's benefits under subsection 19(3), and
  - (ii) three times the benefits that would have been paid to the claimant for the period mentioned in that paragraph if the deduction had not been made under subsection 19(3) or the claimant had not been disentitled or disqualified from



receiving benefits; or

(c) three times the maximum rate of weekly benefits in effect when the act or omission occurred, if no benefit period was established.

(3) For greater certainty, weeks of regular benefits that are repaid as a result of an act or omission mentioned in subsection (1) are deemed to be weeks of regular benefits paid for the purposes of the application of subsection 145(2).

### **Employment Insurance Regulations**

**35 (1)** The definitions in this subsection apply in this section.

*employment* means

(a) any employment, whether insurable, not insurable or excluded employment, under any express or implied contract of service or other contract of employment,

(i) whether or not services are or will be provided by a claimant to any other person, and

(ii) whether or not income received by the claimant is from a person other than the person to whom services are or will be provided;

(b) any self-employment, whether on the claimant's own account or in partnership or co-adventure; and

(c) the tenure of an office as defined in subsection 2(1) of the *Canada Pension Plan*. (*emploi*)

*income* means any pecuniary or non-pecuniary income that is or will be received by a claimant from an employer or any other person, including a trustee in bankruptcy. (*revenu*)

*pension* means a retirement pension

(a) arising out of employment or out of service in any armed forces or in a police force;

(b) under the *Canada Pension Plan*; or

(c) under a provincial pension plan. (*pension*)

*self-employed person* has the same meaning as in subsection 30(5). (*travailleur indépendant*)

(2) Subject to the other provisions of this section, the earnings to be taken into account for the purpose of determining whether an interruption of earnings under section 14 has occurred and the amount to be deducted from benefits payable under section 19, subsection 21(3), 22(5), 152.03(3) or 152.04(4) or section 152.18 of the Act, and to be taken into account for the purposes of sections 45 and 46 of the Act, are the entire income of a claimant arising out of any employment, including

(a) amounts payable to a claimant in respect of wages, benefits or other remuneration from the proceeds realized from the property of a bankrupt employer;

**36 (1)** Subject to subsection (2), the earnings of a claimant as determined under section 35 shall be allocated to weeks in the manner described in this section and, for the purposes referred to in subsection 35(2), shall be the earnings of the claimant for those weeks.

(4) Earnings that are payable to a claimant under a contract of employment for the performance of services shall be allocated to the period in which the services were performed.