



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *M. G. v. Canada Employment Insurance Commission*, 2018 SST 324

Tribunal File Number: GE-17-2016

BETWEEN:

**M. G.**

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: March 15, 2018

DATE OF DECISION: March 29, 2018

## **REASONS AND DECISION**

### **DECISION**

[1] 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 was performed. The Tribunal finds the Respondent properly imposed a non-monetary penalty because the Appellant knowingly made a false or misleading statement when he filed his Teledec reports and failed to report his earnings.

### **OVERVIEW**

[2] The Appellant established a claim for employment insurance benefits and while on claim an investigation by the Canada Employment Insurance Commission (Respondent) revealed the Appellant was employed during the benefit period and failed to declare his earnings from two separate employers for weeks starting on April 21, 2013, to December 8, 2013. The Respondent notified the Appellant that the money he had received from his employers was considered earnings and were applied against his claim that resulted in an overpayment. The Respondent notified the Appellant that a penalty was imposed because he had made a false misrepresentation when he failed to report that he had worked and earned money. The Appellant argued that he believed he was eligible to make up to 80% of his former income before he needed to report it.

### **PRELIMINARY ISSUES**

[3] At the hearing, the Appellant withdrew his appeal (GE-17-2534) as he confirmed he had submitted it twice. The hearing proceeded with the original appeal submitted (GE-17-2016).

### **ISSUES**

[4] The issues the Tribunal must decide are:

- 1) Did the money the Appellant receive from his employer for wages constitute earnings and if so;
- 2) How should the earnings be allocated?

- 3) Should a penalty be imposed on the Appellant?
- 4) Did the Appellant make a false or misleading statement? If so, was it made knowingly?
- 5) Did the Respondent exercise its direction properly with respect to the penalty amount?

## **ANALYSIS**

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

### **Issue #1: Did the money the Appellant receive from his employer for wages constitute earnings?**

[6] 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).

[7] The Tribunal finds the money the Appellant received were earnings because the employers paid the Appellant for work for a period of weeks starting on April 21, 2013, to December 8, 2013.

[8] The Appellant has the onus of proof to show that the wages he received is not money derived from employment and should not be allocated.

[9] The Appellant has failed to prove the wages he received is not earnings and should not be allocated.

[10] The Appellant conceded that the money was for wages he received from his employers, Fountain Tire and Precision Drilling for weeks starting on April 21, 2013, to December 8, 2013, and he did not dispute the amount of money declared by his employer.

### **Issue #2: How the earning should be allocated?**

[11] 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).

[12] The Appellant conceded he received the money from his employers for working for weeks starting on April 21, 2013, to December 8, 2013.

[13] The Tribunal finds the earnings must be allocated pursuant to subsection 36(4) of the Regulations because the money was paid to the Appellant for wages under an employment contract for the period of weeks starting on April 21, 2013, to December 8, 2013. The money must be allocated to the same period in which the services were performed.

**Issue #3: 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*).

[15] The Tribunal finds a penalty is warranted because on the balance of probabilities the Appellant knowingly made false or misleading statements to the Respondent.

**Issue #4: Did the Appellant make a false or misleading statement and was it made knowingly?**

[16] 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*).

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

[18] The Respondent 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.*)

[19] The Tribunal finds the Respondent met the onus because it proved the Appellant made a false statement when he completed his reports for weeks starting on April 21, 2013, to December 8, 2013. He was asked the simple question: "Did you work or earn wages during each of these

periods from the week's starting April 21, 2013, to December 8, 2013," to which he responded: "NO". He was then presented with the statement: "You said you did not work or earn wages. Is this right?" to which he answered: "YES".

[20] 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.

[21] The Appellant argues that this was his first time on employment insurance and a Service Canada agent told him he was allowed to make 80% of his previous income before he had to include it on his reports. He believed he was doing it right but he now sees there was a misunderstanding and he has no problem repaying the money.

[22] The Tribunal considered the Appellant's argument that he was misinformed by the Service Canada agent; however it has been established in *Granger (A-684-85)* "It is equally certain that any commitment which the Commission or its representatives may make, whether in good or bad faith, to act in a way other than that prescribed by the Act would be absolutely void and contrary to public order."

[23] The Tribunal must make a decision based on the facts presented in relation to the issue before it and finds the Appellant was not able to provide any reasonable explanation as to why he did not answer the questions correctly when it simply asked "Did you work or earning money," during the period of this report? Or why he didn't contact Service Canada when he returned to work at Precision Drilling.

[24] The Tribunal finds on the balance of probabilities the Appellant knew he was not reporting correctly because he conceded that he knew he worked and earned money and it now makes sense to him. He conceded that he should have informed Service Canada when he returned to work for Precision Drilling and stopped his claim at that time but he needed the extra money to pay his bills.

[25] The Tribunal finds the Teledec reports prove the Appellant knowingly made a false and misleading statement when he reported he did not work and did not earn any money when he knew he did.

**Issue #5: Did the Commission exercise its discretion properly in determining the amount of the penalty?**

[26] The Respondent initially imposed a monetary penalty amount calculated as follows:

Overpayment of \$14,022.00 - \$2,505.00 (portion of overpayment resulting beyond 36 months) = \$11,517.00 X (50%-15% mitigating circumstances) = \$4,031.00. It is noted there is an error in the calculation of the portion that falls beyond the 36 months resulting in a penalty amount of \$4,033.00. Upon reconsideration the penalty amount was further reduced to \$1,202.00. Subsequently the Appellant provided new facts and under Section 111 of the Act, the Respondent reconsidered the decision based on new information and reduced the penalty to a warning.

[27] 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.

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

[29] 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).

[30] 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).

[31] The Tribunal finds the Commission exercised its discretion in a judicial manner because it considered the Appellant reasons that existed at the time and subsequently the new mitigating health and financial circumstances that were relevant to determining the amount of the penalty be further reduced to a warning (*Morin* A-681-96).

[32] 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 warning or they acted in a non-judicial manner.

[33] The Tribunal finds the Commission correctly determined that a penalty be imposed in accordance to section 38 of the *Employment Insurance Act* (Act) and that the monetary penalty is replaced with a warning in accordance with section 41.1 of the Act because the Appellant provided new facts as it related to his health and financial situation.

**CONCLUSION**

[34] The appeal is dismissed.

Teresa Jaenen  
Member, General Division - Employment Insurance Section

METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	M. G., 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).

**41 (1)** The Commission may rescind the imposition of a penalty under section 38 or 39 or reduce the penalty, on the presentation of new facts or on being satisfied that the penalty was imposed without knowledge of, or on the basis of a mistake as to, some material fact.

#### 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;

*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*)

(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.