



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *T. R. v Canada Employment Insurance Commission*, 2019 SST 303

Tribunal File Number: GE-19-897

BETWEEN:

**T. R.**

Appellant/Claimant

and

**Canada Employment Insurance Commission**

Respondent/Commission

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

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DECISION BY: Candace R. Salmon

HEARD ON: March 11, 2019

DATE OF DECISION: March 28, 2019

## **DECISION**

[1] The appeal relative to earnings is dismissed because I find the monies in question were received by the Appellant and were earnings requiring allocation.

[2] The appeal relative to the penalty is allowed because I find the Appellant did not knowingly make any misrepresentation to the Canada Employment Insurance Commission.

## **OVERVIEW**

[3] The Appellant, who I will refer to as the Claimant, worked for a fishing company. She entered into a payment structure called the Club 55 plan with the employer where she was paid for 55 hours per week irrespective of how many hours she actually worked. The payment structure was designed so that at the end of the fishing season, employees either owed further time to the employer based on having been overpaid, or the employer owed money to the employees for having worked more hours than they were paid for. The Canada Employment Insurance Commission (Commission) determined the Claimant made seven misrepresentations in her biweekly claims for employment insurance (EI) benefits, because she either failed to claim her earnings, or under reported her earnings in specific periods. The Commission also issued a penalty of a warning letter. The Commission upheld its decisions on both earnings and penalty on reconsideration. The Claimant appeals both decision to the Social Security Tribunal (Tribunal), arguing she correctly claimed her hours and any discrepancy exists because the employer improperly calculated her hours based on the arrangement in the Club 55 plan.

## **PRELIMINARY MATTERS**

[4] At the hearing, the Claimant stated she did not intend to argue that the penalty was incorrect. As such, the Claimant made no representations against the penalty decision, but it remains an issue as she did not withdraw the matter at the hearing.

[5] The Claimant also sought to enter two letters at the hearing, which she believed may be relevant to her case. I accepted the documents and they were submitted post-hearing by the Claimant and copied to the Commission. The documents include two letters from the employer, dated August 25, 2016, and November 28, 2016. While I refer to the documents in the analysis, I

find that neither document is relevant to the issues of this case as they relate to a period of employment outside the period addressed in the case.

## ISSUES

[6] **Issue #1** – Did the Claimant receive monies from the employer that constituted earnings requiring allocation?

[7] **Issue #2** – Should a penalty be imposed on the Claimant?

## ANALYSIS

### Earnings and Allocation

[8] When an EI claimant gets an amount of money, it has to be decided whether or not that money is “earnings” under the law.<sup>1</sup> If it is, then the earnings need to be allocated (which means designated) to the proper weeks.<sup>2</sup> How the earnings get allocated depends on the reason why the monies were paid. Sums received from an employer are presumed to be earnings and must be allocated unless the monies fall within an exception or the sums do not arise from employment.<sup>3</sup> The burden is on the Claimant to demonstrate the amounts are not earnings.

[9] If earnings are allocated to weeks when EI is payable to a claimant, the earnings are deducted from their benefits.<sup>4</sup>

[10] The Commission allocates earnings paid as wages to the week the claimant worked and earned those wages.<sup>5</sup>

[11] When an employer pays earnings under a contract of employment, but without the performance of services, the Commission allocates the earnings to the period for which they are payable.<sup>6</sup> In other words, if an employee receives money from an employer without working to

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<sup>1</sup> *Employment Insurance Regulations*, section 35

<sup>2</sup> *Employment Insurance Regulations*, section 36

<sup>3</sup> *Employment Insurance Regulations*, section 35(7)

<sup>4</sup> *Employment Insurance Act*, section 19

<sup>5</sup> *Employment Insurance Regulations*, section 36(4)

<sup>6</sup> *Employment Insurance Regulations*, section 36(5)

earn that money, then the Commission allocates the earnings to the period of time that the money is payable.

**Issue 1: Did the Claimant receive monies from the employer that constituted earnings requiring allocation?**

[12] If the Claimant received monies from her employer as wages, this money would generally constitute earnings because the payment was made to compensate for hours worked.<sup>7</sup>

[13] The Claimant made an initial claim for regular EI benefits on July 21, 2014, effective July 20, 2014. The Claimant worked for a fishing company, and stated her employment ran from April 18, 2014, until July 18, 2014.

[14] The first Record of Employment, dated August 6, 2015, states the Claimant worked from August 3, 2014, until August 1, 2015, and left due to a shortage of work.

[15] The Commission sent a letter to the Claimant on March 3, 2016, noting a number of discrepancies between the earnings she declared in her biweekly reports and the earnings declared by her employer from August 3, 2014, until July 5, 2015. The Chart, including the Claimant's statements explaining the discrepancies, is included below:

Week Code	Dates of Week dd/mm/yy	Earnings Declared	Employer's Record of Earnings	Claimant explanation to the Commission
1937	03/08/14	0.00	828.10	Not on EI Claim
1939	17/08/14	0.00	828.10	Not on EI Claim
1945	28/09/14	0.00	910.92	Forgot to call in
1974	19/04/15	299.00	717.86	Reported the next week, worked 23 hours
1975	26/04/15	0.00	717.86	Called a week later

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<sup>7</sup> *Employment Insurance Regulations*, section 35(2)

1979	24/05/15	198.00	717.86	Pay was \$338. Called in weekly hours x rate of pay
1982	14/06/15	263.00	717.86	Reported next week
1984	28/06/15	273.00	717.86	Call in next week
1985	05/07/15	338.00	587.34	Don't believe I was still on EI at the time

[16] The Claimant submitted one page of her bank statement, for transactions from August 1, 2014, through August 22, 2014, to show she did not have employment earnings in the weeks coded 1937 and 1939. I find the single page bank statement is not proof on a balance of probabilities that the Claimant did not have employment earnings at the relevant time because the single page document may not reflect the Claimant's entire financial picture, the earnings could have been deposited elsewhere, or the earnings may not have appeared on the page provided to the Tribunal.

[17] The Commission issued a decision on November 14, 2018, stating the Claimant's earnings had been adjusted to reflect the chart above, meaning the amounts reported by the employer were determined to have been paid to the Claimant. This caused an overpayment. The Commission also found the Claimant knowingly made false representations, but issued only a warning letter and did not ascribe a financial penalty.

[18] The Claimant requested reconsideration of the Commission's November 14, 2018, decision, stating there is an error in the employer's records. The Claimant stated she reported all of her earnings, but said perhaps some of the dates were incorrect. The Claimant submitted that there was something wrong with the Commission's findings, because she has never failed to report her income.

[19] The Claimant submitted a handwritten note on February 19, 2019, stating the employer made an error in the hours she worked for the weeks of June 14, 2015, and June 28, 2015. The Claimant stated she would have been finished EI benefits for the week of July 5, 2015. She stated the reason she called late to report is that the Commission expects a Claimant to report gross earnings and because she is paid by direct deposit she did not get a paystub until the following

week. The Claimant admitted that some earnings were estimated because of a lack of paystubs. The Claimant stated there may also be a discrepancy because the employer's payroll clerks changed frequently.

[20] The Commission spoke to the employer on January 15, 2019, who confirmed the Claimant was paid the amounts noted in the chart above on the corresponding dates. At the hearing, the Claimant confirmed that she worked the number of hours listed by the employer, but stated she applied for EI benefits in July and wasn't able to start until September 2014, so she submitted she was not aware that she had to claim all of the hours because she was not on an active EI claim. The chart including the hours worked, which the Claimant agreed she worked, is reproduced below:

Week Code	Dates of Week dd/mm/yy	Hours worked	Employer's Record of Earnings
1937	03/08/14	65 Hours	828.00
1939	17/08/14	65 Hours	828.00
1945	28/09/14	71.5 hours	911.00
1974	19/04/15	55 hours	718.00
1975	26/04/15	55 hours	718.00
1979	24/05/15	55 hours	718.00
1982	14/06/15	55 hours	718.00
1984	28/06/15	55 hours	718.00
1985	05/07/15	45 hours	587.00

[21] The Claimant stated to the Commission that in some weeks, she worked only 24 hours, but the employer recorded her as having worked 55 hours. The Claimant stated that in the way she was "thinking and remembering it," she was not aware that she was on an EI claim. The Claimant was confronted with copies of biweekly reports she made over the relevant period, which are included in the docket, and she stated she does not remember making those reports. The Claimant

then stated she was not certain whether she worked the hours identified by the employer, which contradicted her prior statement that she had worked the hours. The Claimant also stated she thought she started work in mid-August 2014, because she thought she had over two weeks off before she was called back. The Claimant testified that she was unsure about the specific dates and hours because it was so long ago and she no longer had supporting documentation.

[22] I find, on a balance of probabilities, that the Claimant filed the biweekly claim reports and worked the hours as identified in the second chart. The Claimant stated that she worked the hours, and then changed her evidence. Further, the biweekly claim reports require a specific, personal code to be entered for filing and the Claimant's code was entered in each instance. The evidence weighs more heavily towards the Claimant having completed the claim reports, and towards her having worked the hours identified by the employer.

[23] The Commission contacted the Claimant on January 17, 2019. The Claimant reiterated her position that she always reported her earnings, so the employer's records must be incorrect. The Claimant stated she had examples of weeks where she worked only 24 hours but the employer reported she worked 55 hours in the week. The Claimant stated she did not have detailed records, and could only go from what she had written down. The Commission verbally advised the Claimant on January 17, 2019, that it was upholding its previous decision. A letter was issued on the same date confirming the Commission upheld its November 14, 2018, decision as to earnings and penalty.

[24] On the Notice of Appeal, filed on February 14, 2019, the Claimant stated the Commission failed to consider that her employer may have played a part in causing the overpayment by providing incorrect information to the Commission. The Claimant submitted the employer was not consistent and transparent regarding payment, and did not always provide timely paystubs for reporting. The Claimant also submitted she was paid for more hours than she worked, in an hours banking scheme which required her to work at a later date for the pay she previously earned. The Claimant submitted she also has a letter from the employer terminating her from the employment on the same date she received a lay off from the employment, and explained at the hearing that the employer expected her to continue working after she was laid off to bank hours for her subsequent EI claim.

[25] The Claimant entered two letters from the employer into the docket at the hearing. The first letter is dated August 25, 2016, and states the Claimant has been absent from work since August 14, 2016, despite being advised by her supervisor that she had to report for work on August 15, 2016. The letter states if the Claimant does not contact her supervisor by September 5, 2016, she will be considered to have resigned her employment. The second letter is dated November 28, 2016, and confirms the Claimant abandoned her position and was terminated from her employment. The Claimant testified that she was issued a lay off at the end of the night shift on August 13, 2016, and this is why she did not report to work on August 14, 2016. I note this submission relates to a different time period than the issue of this hearing, so I find the additional documentation is irrelevant to the matter.

[26] The Claimant submitted a handwritten letter with her Notice of Appeal, and submits that in the 2014-2015 season, she signed up for the employer's "Club 55" program, which paid employees 55 hours weekly no matter how many hours the individual actually worked. The Claimant submitted the employer held back two weeks at the beginning of the season, and paid 55 hours per week for the remainder of the season. At the end of the season, the employees either owed hours to the employer or the employer owed money to the employees for hours worked over and above the 55 hours. The Claimant explained that at the end of the season, an employee may work 50 hours in a week but be paid for only 20 hours because the other 30 hours were paid earlier in the season. For this reason, the Claimant submits that it was difficult to know what to claim on biweekly EI reports because what she was paid on paper did not always reflect the hours she worked. The Claimant testified that when she started working, the employer banked the first two weeks of employment, being 100 hours, to cover the advance payments of the Club 55 plan.

[27] The Claimant is not questioning whether monies received from her employer constitute earnings that must be allocated, but is submitting she did not receive the earnings as reported by the employer due to the Club 55 structure of payment.

[28] The Commission submitted that the agreement described by the Claimant, to be paid a set number of hours regardless of the hours she worked, shows that she was aware of the employer's payments to be more than she reported. The Commission also submitted that while the Claimant



stated she estimated some earnings while waiting on paystubs, she did not contact the Commission to correct the information once paystubs were received.

[29] The Claimant testified that she claimed the amount of hours on her biweekly reports that she actually worked each week, which often differed from the amount of hours she was paid. The Claimant again explained the Club 55 program, and said that she claimed the actual hours that she worked and when she got her paystubs she put in the extra hours. The Claimant stated she may have claimed monies in incorrect weeks.

[30] During the hearing, I addressed each of the weeks identified by the Commission as containing reporting errors. The Claimant testified that she tried to contact the employer three times to clarify the income information, and contacted her former supervisor via social media, but received no response. The Claimant testified that she was laid off from the employment on July 23, 2014, and was recalled two or three weeks later. The Claimant state she does not know why the Commission's November 14, 2018, decision states she had earnings in the week of August 3, 2014, because she was not working at that time. I note the Record of Employment states she started working on August 3, 2014, and had earnings in the pay period. The Claimant also completed a biweekly report for EI benefits on Saturday, August 9, 2014, for the week of August 3, 2014, until August 9, 2014. In the report, the Claimant stated that she did not work or earn wages during the period from August 3, 2014, until August 9, 2014. The Claimant submitted that she unfortunately cannot provide evidence of her income from paystubs, because they are unavailable.

[31] The Claimant testified that she started working again somewhere between August 10, 2014, and August 13, 2014. She is not disputing that she had earnings in the week of August 17, 2014, but testified that for the remainder of the dates listed on the Commission's November 14, 2018, decision letter, aside from August 3, 2014, she did not think she was on an EI claim. The Claimant stated she was advised her claim was pending, and was not collecting benefits. The Claimant states that in September 2014, she had a day off of work and attended a Service Canada centre to obtain further information about her claim. The Claimant testified she was told that her previous employer had not issued a Record of Employment, which delayed the processing of her claim.

[32] I asked the Claimant why she was completing biweekly reports if she was not on a claim, and she testified that she was told to continue calling in her reports even though her claim was not

processed. The Claimant maintained that she claimed all of the earnings she had in the relevant periods, but may have made a mistake in claiming the amounts at the wrong dates.

[33] The Claimant testified that, aside from the week of August 3, 2014, when she believes she was not working, the other weeks in question are mistakes because she claimed the hours she worked and the hours did not always correspond with what she was paid. Relatedly, the Claimant stated that in some weeks she had already claimed the hours at an earlier date and was working without being paid.

[34] The Claimant argued that she worked less than 55 hours in most weeks, and claimed the hours she worked instead of the hours she was paid. She stated this evened out, because she would later claim the hours she worked on a claim where she had not been paid by the employer because she was making up time that was already paid. The Claimant essentially argued that she always claimed whatever time was remaining from the banking of her hours.

[35] I have considered the evidence, and find on a balance of probabilities that the Claimant received the payments from the employer as outlined on the Commission's November 14, 2018, decision letter. Where the Claimant's evidence is inconsistent with the employer's evidence, I prefer the employer's evidence because it is more consistent and more likely to be accurately recorded than the Claimant's statements, which are based almost solely on her recollection of what happened four to five years ago. While the Claimant disputes the dates she returned to work, and argues that she claimed the actual hours she worked and was overpaid by the employer, the evidence more strongly supports that the Claimant was paid the amounts identified by the employer. The Claimant testified that she does not remember the specifics of when she returned to work and how much money she made in each period, and I have no way to verify that information other than to review the record and make a decision.

[36] As I have found the Claimant received the monies listed on the November 14, 2018, decision letter, I must also make a determination as to whether the monies are earnings which must be allocated to the claim. I find that they are. The Claimant was paid the monies as wages, for work completed or not, and because the money was paid as wages it must be allocated to the weeks she worked and earned the wages.

[37] I find the monies at issue were received by the Claimant, and are earnings which required allocation.

## **ANALYSIS**

### **Penalty**

[38] The Commission may impose a penalty on a claimant if a claimant makes a representation that she knew was false or misleading.<sup>8</sup>

[39] It is not enough that the statement or omission be false or misleading, the claimant must knowingly make the false or misleading statement or representation. Knowingly means the claimant knew the information provided was untrue when she made the statement, and does not include any element of intention to deceive.<sup>9</sup>

[40] The Commission has the burden to show the statement or representation is false or misleading, and that the claimant made the misrepresentation with the knowledge that it was false or misleading.<sup>10</sup> If proven, the burden shifts to the claimant to prove the statements were not made knowingly.

[41] The decision to impose a monetary penalty and the calculation of the penalty amount are discretionary decisions of the Commission.<sup>11</sup> In this case, the Commission imposed a warning letter.

[42] If the Commission acted in bad faith or for an improper motive, took into account irrelevant factors or failed to consider relevant factors, or if it acted in a discriminatory manner, then it did not exercise its discretion in a judicial manner.<sup>12</sup> If I find the Commission did not exercise its discretion judicially, I may make the decision the Commission should have made.

[43] In these cases, I am respectful of the Commission's discretion to assess a penalty, and recognize that the law has clarified that under the circumstances above I have the ability to

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<sup>8</sup> *Employment Insurance Act*, section 38(1)(a)

<sup>9</sup> *Attorney General of Canada v. Gates*, A-600-94

<sup>10</sup> *Mootoo v. Canada (Minister of Human Resources Development)*, 2003 FCA 206

<sup>11</sup> *Canada (Attorney General) v. Gauley*, 2002 FCA 219

<sup>12</sup> *Canada (Attorney General) v. Purcell*, A-694-94

modify a penalty, but I cannot negate a penalty if I find the Commission had a legal basis to impose it.<sup>13</sup>

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

### ***Did the Claimant knowingly make false or misleading statements to the Commission?***

[44] The Commission determined the Claimant made seven misrepresentations because she knew she was employed from August 4, 2014, until August 1, 2015, when she incorrectly reported her income for the period on a claim. The Commission submitted that while the Claimant argued the employer's records were incorrect, the employer provided detailed information for the Claimant's pay records and the Claimant had no supporting documentation.

[45] The Claimant testified that she did not intentionally misrepresent her earnings. She stated that she claimed the number of hours she actually worked each week on the biweekly EI claim reports, but was often paid more than she actually worked so on paper it looks like she has unclaimed earnings. The Claimant was inconsistent on this point as she also stated she did not remember making biweekly claim reports, and also argued that she may have claimed hours in the incorrect weeks.

[46] The Federal Court of Appeal has found that, in these cases, the Commission has the onus of proving the allegation that a claimant knowingly made a false or misleading statement on a balance of probabilities, and to discharge that onus the Commission must adduce evidence of both the actual questions asked as well as the answers given.<sup>14</sup>

[47] The Commission provided a recounting of its reasoning relative to the penalty, and copies of the conversations it had with the Claimant. I find no fault with its production of evidence.

[48] I find, however, that the Commission has not met its burden as it has not proven on a balance of probabilities that the Claimant knowingly made false statements to the Commission. I find the Claimant believed she was supposed to claim the hours she worked in the employment, and because of the Club 55 hours banking scheme, she was often paid more hours than she claimed.

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<sup>13</sup> *Canada (Attorney General) v. Gauley*, 2002 FCA 219

<sup>14</sup> *Caverly v. The Minister of Human Resources Development*, 2002 FCA 92

I find the Claimant did not knowingly make false or misleading statements when she failed to claim all of her earnings on biweekly claim reports. Due to the Claimant's lack of subjective knowledge, the provisions of the *Employment Insurance Act* have not been met and a penalty may not be imposed.<sup>15</sup>

**Did the Commission judicially exercise its discretion when it calculated the penalty?**

[49] As I have determined the Claimant did not knowingly make false statements, there is no need to address this consideration. Additionally, the penalty in question is a warning letter.

**CONCLUSION**

[50] On the matter of allocation of earnings, the appeal is dismissed.

[51] On the matter of penalty, the appeal is allowed.

Candace R. Salmon

Member, General Division - Employment Insurance Section

HEARD ON:	March 11, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	T. R., Appellant

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<sup>15</sup> *Employment Insurance Act*, section 38(1)