



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: N. L. v Canada Employment Insurance Commission, 2019 SST 471

Tribunal File Number: GE-19-1076

BETWEEN:

N. L.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Alison Kennedy

HEARD ON: April 8, 2019

DATE OF DECISION: April 15, 2019

OVERVIEW

[1] The Claimant applied for – and received – employment insurance benefits. After an investigation, the Canada Employment Insurance Commission determined that the Claimant knowingly made false statements by failing to declare the fact that he was working and receiving earnings during part of his benefit period. Consequently, the Claimant’s earnings were allocated resulting in an overpayment of employment insurance benefits. The Commission also imposed a monetary penalty on the Claimant and issued him a notice of violation. The Claimant is appealing the allocation of earnings, the penalty, and the violation to the Social Security Tribunal.

ISSUES

Issue 1: Is the money the Claimant received from the employer considered earnings, and if so, how should they be allocated?

Issue 2: Is the penalty for making misrepresentations to the Commission justified?

Issue 3: Did the Commission act judicially when it issued a Notice of Violation to the Claimant?

ANALYSIS

Issue 1: Is the money the Claimant received from the employer considered earnings, and if so, how should they be allocated?

[1] For the purpose of calculating benefits, earnings are a claimant’s entire income arising from any employment. Sums received from an employer are presumed to be earnings and must therefore be allocated under section 36 of the Regulations, unless the amount falls within an exception in subsection 35(7) of the Regulations or the sums do not arise from employment. The Claimant has the burden of proving that the money received is not derived from employment and should not be allocated.

[2] The employer reported that the Claimant received wages for the following weeks:

- September 25, 2016.....\$668.00
- October 2, 2016.....\$668.00
- December 11, 2016.....\$874.00
- January 1, 2017.....\$572.00
- January 8, 2017.....\$572.00
- January 15, 2017.....\$549.00
- January 22, 2017.....\$549.00
- January 29, 2017.....\$497.00
- February 5, 2017.....\$497.00
- February 12, 2017.....\$466.00
- February 19, 2017.....\$466.00
- February 26, 2017.....\$385.00
- March 5, 2017.....\$385.00

[2] The Claimant's reports, however, declared that he did not work and made no income for any of these weeks.

[3] The Claimant does not dispute that he received these wages or that these wages are earnings. Based on the Commission's evidence and the Claimant's concession on this point, I find that the sums received by the Claimant from his employer in the time period of September 25, 2016 to March 11, 2017 was earnings pursuant to the Regulations, as the payments were made to compensate the Claimant for hours worked.

[4] Monies that constitute earnings under section 35 of the Regulations must be allocated based on section 36 of the Regulations.

[5] Given that the income the Claimant received from his employer was earnings received as wages in return for work performed, I find these earnings are subject to allocation to the period in which the services were performed. As the Claimant performed the work in the weeks between September 25, 2016 to March 11, 2017 (inclusive), I find his allocation of earnings should begin on September 25, 2016.

[6] Based on an allocation of these earnings, the Commission determined that the Claimant was overpaid benefits and owes an overpayment of \$3583.00.

[7] While the Claimant has argued that he believed he was following advice he received from a Service Canada agent not to report his part-time income when completing his reports, the reasons for the discrepancy between the Claimant's report and employer's information are not factors to be considered in determining whether there are monies to be allocated, and whether the allocation of these earnings resulted in an overpayment.

Issue 2: Is the penalty for making misrepresentations to the Commission justified?

[8] Section 38 of the Act provides that a penalty may be imposed where claimants make a representation in relation to a claim for benefits which they "knew was false or misleading." For a false statement to be knowingly made, the Claimant must have subjective knowledge that the statement did not accurately reflect the facts (*Mootoo v. Canada (Minister of Human Resources Development)*).

[9] The decision to impose a monetary penalty and the amount of the penalty amount are discretionary decisions of the Commission (*Canada (Attorney General) v. Gauley*, 2002 FCA 219). As such, I cannot arbitrarily interfere with the Commission's decisions on these points. However, I can make the decision which the Commission should have made if I find that it failed to act judicially, that is, that it acted in bad faith or for an improper motive, if it took into account irrelevant factors, or failed to consider relevant factors (*Canada (Attorney General) v. Purcell*, A-694-94).

[10] The Commission determined that the Claimant knowingly made eight false statements by neither declaring that he was working or receiving earnings during his claimant reports for the period of September 25, 2016 to March 5, 2017. Consequently, the Commission imposed a monetary penalty on the Claimant. The Commission initially issued the Claimant a penalty of \$1,792.00 (50% of the overpayment). It lowered the penalty to \$1344.00 on reconsideration, based on the Claimant's personal situation and inexperience with employment insurance.

[11] I find that the Claimant had subjective knowledge that he worked for his employer in the weeks between September 25, 2016 to March 11, 2017. I also find that the Claimant did

knowingly make eight false statements in this case, as the Claimant worked between September 25, 2016 to March 11, 2017, but declared that he did not work on each claimant report made during this period. Specifically, the Claimant answered “no” to the question “did you work or receive any earnings during the period of this report” on each of his Claimant reports.

Consequently, I find that the Claimant made a total of eight misrepresentations – one for each claimant report made – when he declared that he was neither working nor receiving earnings during this time. As such, I find that a penalty was warranted in this instance.

[12] Having found that a penalty is warranted, I must determine whether the Commission exercised its discretion in a judicial manner when it determined the quantum of the penalty at \$1344.00 on reconsideration, based on the Claimant’s personal situation and inexperience with employment insurance.

[13] I find that the Commission failed to exercise its discretion judicially in this case, as it failed to consider a relevant factor in determining the quantum of the penalty. Specifically, I find that the Commission failed to consider the Claimant’s evidence that he believed that he was acting on the advice of a Service Canada agent when he failed to report his income from his part-time work. While the Claimant provided this explanation to the agent, the Service Canada agent stated that it found his explanation unreasonable and did not consider it as a mitigating factor.

[14] However, I find that the Claimant provided credible evidence in his hearing that he phoned the Commission shortly after starting his part-time job and asked about how these hours would affect his claim for benefits. The Claimant stated that he was advised to continue to submit his claims as he had been and that if any changes were required it could be fixed after the fact. The Claimant also stated that he was told that he should stop submitting his reports once he started working full-time. The Claimant interpreted this as being advised that he did not need to report any part-time hours he was working and to simply stop submitting his reports when he began working full-time again.

[15] I find that the Claimant was credible in his statements that he believed he was following advice from a government agent when he failed to report his employment and income between September 25, 2016 to March 11, 2017. While I agree with the Commission that it is unlikely that the Claimant was actually advised not to report his part-time working hours, I find

nevertheless that the Claimant has credibly stated that he genuinely believed that, in so doing, he was following the advice given to him by a Service Canada agent. Consequently, I find that the penalty in this case should be reduced to a non-monetary penalty, or a warning, to reflect the Claimant's lack of intention to deceive in this instance, while still acknowledging the objective fact that the Claimant did provide false or misleading information to the Commission regarding his income and employment.

Issue 3: Did the Commission act judicially when it issued a Notice of Violation to the Claimant?

[16] I must also consider whether the Commission has exercised its discretion in a judicial manner when issuing the Notice of Violation (*Gill v. Canada (Attorney General)*, 2010 FCA 182). I may only intervene with the Commission's decision to issue a serious violation if I determine that the Commission did not exercise its discretion in a judicial manner. However, if I find that it failed to act judicially, that is, that it acted in bad faith or for an improper motive, if it took into account irrelevant factors, or failed to consider relevant factors, I can make the decision which the Commission should have made (*Canada (Attorney General) v. Purcell*, A-694-94).

[17] I find that the Commission erred in failing to consider an important mitigating circumstance in issuing a serious violation against the Claimant, that being the fact that his failure to report his employment and income during the time in question were based on advice he believed he received from a government agent. When considering this important mitigating factor, as well as the reduction of the penalty to a non-monetary penalty, I find that a violation is no longer warranted in this case.

CONCLUSION

[18] The appeal on the issue of allocation of earnings is dismissed.

[19] The appeal on the issue of penalty is dismissed with modifications.

[20] The appeal on the issue of notice of violation is allowed.

Alison Kennedy

Member, General Division - Employment Insurance Section

HEARD ON:	April 8, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	N. L., Appellant