Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *S. M. v Canada Employment Insurance Commission*, 2019 SST 597

Tribunal File Number: GE-18-2014

BETWEEN:

S. M.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Candace R. Salmon

HEARD ON: April 9-10, 2019

DATE OF DECISION: June 28, 2019

Canada

DECISION

[1] The appeal is allowed on all issues.

OVERVIEW

[2] The Appellant, who I will refer to as the Claimant, worked as a roofer. The Claimant's work schedule was variable due to weather, and he was instructed by his employer that he could claim his hours of employment in a manner which allowed him to receive full weeks of pay, whether it be from employment insurance (EI) benefits or payment relating to completed work. This is called a banking hours system, and is generally not permitted. The Claimant banked his hours and used them as advised by his employer. The Canada Employment Insurance Commission, which I will refer to as the Commission, determined the Claimant received earnings that were not properly allocated to his claim. It reallocated the earnings based on employer records, and determined the Claimant was overpaid and had to repay the benefits to which he was not entitled. The Commission also assessed a penalty to the Claimant for misrepresentation, and issued a notice of violation. The Commission reconsidered its decisions upon request of the Claimant, and upheld all of its findings. The Claimant appealed the decision to the Board of Referees, who found in favour of the Claimant. The Commission appealed to the Social Security Tribunal's (Tribunal) Appeal Division, and was successful. The case was sent back to the Board of Referees, which was replaced by the Tribunal, for a second hearing. The Tribunal found in the Claimant's favour, but the decision was also overturned on appeal to the Appeal Division. The matter was returned by the Appeal Division for a third hearing before the Tribunal.

PRELIMINARY MATTERS

[3] There are a number of preliminary issues to address in this file.

Pre-Hearing Conference

[4] This file has a lengthy history with this Tribunal, and its predecessor body, which will be addressed more fully below. The current file was originally assigned to another Tribunal Member (Member), who held a pre-hearing conference on October 1, 2018, with both Claimant and Commission representatives in attendance. The file was then reassigned to me to conduct an in-

person hearing. Upon a review of the file, I determined there were additional case management issues to address and convened a second pre-hearing conference on March 11, 2019. Again, both Claimant and Commission representatives attended. Two individuals represent the Claimant: legal counsel, who I will refer to as Claimant counsel, and a bilingual representative, who I will refer to as the representative. The Commission is represented by legal counsel, who I will refer to as Commission counsel.

Group Appeal

[5] This case was heard in conjunction with four other files, which were joined as a group appeal due to similar issues of fact and law, in a consolidated hearing. The files were grouped together, but will each result in a separate decision as the facts of each Claimant's employment differ, and because one of the issues is that of penalty, which cannot be addressed on a group basis.

Post-hearing documents

[6] At the hearing, Claimant counsel sought to enter two documents that were not already included in the file. Commission counsel did not object to the admission of these documents. I accepted the documents and asked Claimant counsel to submit them to the Tribunal after the hearing, for inclusion in the file. While these are technically considered post-hearing documents, I admitted them at the hearing and Commission counsel was provided a copy. The documents include an article titled, "Conservatives have set 'targets' for EI fraud but not quotas, Human Resources Minister Diane Finley says," dated February 25, 2013, from the Toronto Star, and an article entitled, "Tories set 'targets' not quotas for EI fraud," dated February 25, 2013, from CBC News.

Interpretation

[7] Claimant counsel noted that the group appeal includes five francophone Claimants, each having a varying ability to communicate in English. Claimant counsel stated his clients were not comfortable testifying in English. All five Claimants in the group appeal testified in French at the April 2019 hearing.

[8] Numerous language issues are noted throughout the file, specifically with respect to the protection of the Claimant's right to communicate in the language of his choice. While the Tribunal generally conducts bilingual hearings through an interpreter, who provides line by line translation, given the anticipated length of this hearing and the number of individuals testifying, I decided that form of interpretation would be inappropriate. The Tribunal arranged simultaneous translation with a third party provider. Two interpreters attended the hearings and were affirmed to interpret to and from English and French, meaning they agreed to translate to the best of their ability and protect the confidentiality of the information. The translation was conducted from a booth in the same room as the hearings, and each hearing participant was given a headset to allow them to listen to the hearing in the language of their choice. I asked the parties to advise me immediately if there was any issue with hearing or understanding the interpretation; where there was an issue, we paused the hearing.

Recording of the Hearing

[9] Claimant counsel noted that while the Tribunal's 2016 General Division hearing was recorded, the Member was unable to retrieve the recording and it was unavailable to the Tribunal's Appeal Division when it heard an appeal of the General Division decision.

[10] For the April 2019 hearing, the Tribunal engaged a third party recording company to attend the hearing and professionally record the proceedings. A recording of the French translation, English translation, and the raw bilingual floor feed has been added to the Claimant's file.

Exclusion of Witnesses

[11] At the outset of the hearing, Commission counsel made a request to exclude witnesses. Given it is a group appeal, the Claimants in five related files were in attendance and the Commission sought to exclude all Claimants from each other's testimony. Claimant counsel objected to the request, stating he feared there would be a denial of natural justice and that exclusion may prejudice his clients as their testimony all related to the same employer and factual circumstances. His position was that the matter was consolidated, and each person had the right to hear the evidence of the other.

[12] Commission counsel responded that while the appeals were consolidated, the appeals were also being dealt with individually. She submitted that given the nature of the appeals, dealing with overpayments and penalties, along with violations, based on misrepresentation, there was concern that the Claimants could tailor their evidence based on what they heard each other say.

[13] I allowed the request for exclusion in part. The Claimant has both a lawyer and a representative, and the representative was also affirmed as a witness. The representative was affirmed to give evidence which applied to all of the consolidated files, so I determined her testimony would not be subject to exclusion as it impacted each file. I determined that since the remaining files would be dealt with on an individual basis, despite being heard in a consolidated hearing, the chance of one Claimant being prejudiced by not hearing the testimony of another was low. Deciding the cases on an individual basis means the testimony of one Claimant will not impact the decision of another. The result is that the Claimants gave their testimony without the presence of the other members of the group appeal, but were in attendance for the representative's testimony as it related to errors in the employer's records. I directed the Claimants, as a group, that they were not to discuss the contents of their testimony outside of the hearing room for the duration of the hearing.

[14] At the end of the hearing, the representative asked to give a short statement without the presence of any Claimants. Neither Claimant nor Commission counsel objected to this and I allowed the testimony. The representative made this request to clarify her answer to a question posed by Commission counsel, and asked for the exclusion of the Claimants because the statement related to a personal matter. It is unnecessary to review the evidence of that supplemental submission because the information was not relevant to the determination of the appeal.

Concession

[15] At the hearing, the Commission stated it accepted the findings of the Claimant's representative relative to the errors she identified in the reconstructed payroll information. The Commission specified that while it did not agree with the submission that these errors resulted in unreliable information, it did accept that the specific errors she identified in a document marked as **Exhibit 51-1** (RGD9-40) do exist. This exhibit notes more than 20 errors in the payroll information, mostly addressing incorrect dates.

Conflicting Information

[16] Previous decisions in this case have been successfully appealed, principally because the decision makers failed to address contradictory evidence. It is undisputed that where there is contradictory evidence, I must decide which contradictory evidence I prefer and must provide reasons why I prefer that evidence.[1] I have detailed the evidence in a thorough manner within this decision in an effort to ensure that all relevant evidence is considered, and in the hope that this decision provides finalization to this issue for all parties. While I have attempted to make the decision as accessible and plain language as possible, I am conscious of the length; however, in this instance a lengthy decision is required to properly deal with all of the evidence, including testimony and documentary, and to make findings of fact.

ISSUES

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

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

[19] **Issue #3** – Should a violation be imposed on the Claimant?

HISTORY OF THE FILE

[20] This file began with a hearing before the Board of Referees, the precedent body to this Tribunal. The Board of Referees found in favour of the Claimant on all issues. The Commission appealed the Board of Referees decision to the Tribunal's Appeal Division, which found in favour of the Commission and returned the matter to the Tribunal's General Division for rehearing because the Board of Referees failed to consider the Commission's evidence relating to the Claimant's prior inconsistent statements.

[21] The matter was heard by the General Division on June 22, 2016, which again found in favour of the Claimant. The Commission again appealed to the Tribunal's Appeal Division, and

[1] *Bellefleur v. Attorney General of Canada*, 2008 FCA 13

was successful. Unfortunately, the General Division erred in the exact same fashion as had the Board of Referees, by failing to consider the Claimant's prior inconsistent statements.

[22] The matter was returned to the Tribunal's General Division for a third hearing, which was held over two days in April 2019.

ANALYSIS

Earnings and Allocation

[23] When an EI claimant gets an amount of money, it has to be decided whether that money is "earnings" under the law.[2] If it is, then the earnings need to be allocated, meaning designated, to the proper weeks.[3] 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.[4] The burden is on the Claimant to demonstrate the amounts are not earnings.

[24] If earnings are allocated to weeks when EI is payable to a claimant, the earnings are deducted from their benefits.[5]

[25] The Commission allocates earnings paid as wages to the week the claimant worked and earned those wages. [6]

[26] 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.[7] In other words, if an employee receives money from an employer without working to 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

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[2] *Employment Insurance Regulations*, section 35
[3] *Employment Insurance Regulations*, section 36
[4] *Employment Insurance Regulations*, section 35(7)
[5] *Employment Insurance Act*, section 19
[6] *Employment Insurance Regulations*, section 36(4)
[7] *Employment Insurance Regulations*, section 36(5)

requiring allocation?

[27] If the Claimant received monies from his employer as wages, this money would generally constitute earnings because the payment was made to compensate for hours worked.[8]

[28] The Claimant worked for a roofing company as a roofer. He established initial claims for EI benefits effective November 2, 2008, November 1, 2009, October 31, 2010, and October 30, 2011.

[29] At some point, the Commission became concerned that the employer was using an hours banking system, and referred the matter for an investigation. The investigator charted six months of EI claims related to the employer and found that employees claimed to have worked 50 to 60 hours in a week, and then had no hours the following week. The Commission states this is characteristic with a company banking hours for their employees, meaning the employee will work a certain number of hours over a period of time but claim the hours in such a way that they are able to receive EI benefits to which they would not be entitled if the income was allocated to the period it was earned.

[30] The Commission's investigation revealed that there were discrepancies between the employer's payroll and the Claimant's Records of Employment. During the course of the investigation, the employer's Director of Finance provided the Commission time cards alleged to reflect the Claimant's actual time cards and a second set of purportedly accurate payroll books. With this new information, a new payroll was reconstructed by the Commission with the Claimant's supposedly correct weekly earnings.

[31] On November 25, 2011, the Commission conducted an in-person interview with the employer's Director of Finance. The Director stated he was employed as the Director of Finance and Controller since September 2008, and that he was a chartered accountant. The Commission identified a number of employees and asked the witness why the number of hours the employee in question worked in a given week differed from the amount for which they were paid in the same week. The witness stated he was not sure why that happened, and said he was not involved in payroll very much but needed to get more involved. The Commission also noted expense reports,

[8] *Employment Insurance Regulations*, section 35(2)

where employees were paid per diems for days working out of the province, but the payroll stated they did not work. The Commission asked how that was possible, and the witness said he did not know.

[32] The Commission also asked the Director whether certain records of employment were false or misleading because the records stated employees worked on dates different from the dates they actually worked. The Director said he agreed that the records were false or misleading. The Director was also asked if he understood that maintaining the company payroll and completing the records of employment improperly allowed employees to obtain EI benefits when not entitled. He stated he understood that was true.

[33] During the interview, the Commission asked the Director if he agreed that there was collusion between the company and the employees, to which he replied that he wanted to look into it on his own. The Commission asked who was responsible for submitting the false or misleading information, and the Director said that it was ultimately his responsibility. The Commission again asked about employee collusion, by asking whether the Director thought an employee could be responsible. The Director stated he thought the problems arose from the way the previous general manager conducted payroll; he explained that the former general manager had left to start his own company, and submitted that the payroll system in place had not been changed, though he believed the payroll costs per job were accurate.

[34] The Director undertook to go back to the employer's records and get the "actual hours for the employees." He stated he would "find everything." The Director later provided a copy of the employer's second set of payroll books for the years of 2009, 2010, and 2011, and allegedly "actual" time cards. These documents are a point of contention in the file, and were used by the Commission to reconstruct an actual payroll record with supposedly correct weekly earnings. The reconstructed payroll forms the basis for the overpayment.

[35] The Commission directed the Claimant to attend an in-person meeting with an investigator. The meeting was to be on May 16, 2012, but the Claimant did not attend. The Claimant testified at the April 2019 hearing that he was working, and could not afford to take time off to attend the meeting. This is confirmed in a July 17, 2012, note in the file, where it states the Claimant contacted the Commission to advise that he was working full-time with a new employer and could

not leave his work to attend the meeting. The Commission stated it would send a form to the Claimant, for his completion. The Commission sent a Request for Clarification of Employment Information form to the Claimant. The Claimant responded to the document, stating the employer's secretary called him Monday mornings and advised how many hours he had accumulated and how many he would be paid for. He stated the secretary spoke directly to the foreman to obtain information about the hours he worked. The Claimant submitted that he thought this process was allowed.

[36] The Commission interviewed the employer's Branch Manager on July 10, 2012. The Branch Manager said he worked for the employer for 27 years, managed employees, and oversaw everything. He stated the employees usually worked 30 to 50 or 60 hours per week depending on the time of year and weather. He further stated the foreman tracked the employee's hours and gave the hours to the secretary, which is consistent with what the Claimant stated to the Commission and in testimony at the hearing.

[37] At the interview, the Branch Manager was asked what discussion he had with the employees about banking hours. He stated that prior to the investigation, it was not a typical conversation he had with employees, but since the investigation there had been a lot of discussion and questions. The Branch Manager stated, "banking of hours I thought was ok. Just as long as all the hours are accounted for and taxes paid on it. My goal was to help employees get full week's pay cheque. This would help them stay with us as employees and prevent them from going someplace else." He added, "we wanted them to come in for part days as well as full days or weeks. If we did not save hours they would lose income coming in for part day or half day." The Branch Manager stated the banking of hours had been going on as far back as he could remember. He added that he did not tell employees it was legal to bank hours. He also stated he did not ever discuss the banking of hours in a staff meeting, but later made the statement that the banking of hours was discussed at a meeting and the staff brought it up, which appears inconsistent with his previous statement. When asked if he understood the questions, the Branch Manager stated, "I think so."

[38] On September 14, 2012, the Commission issued multiple decisions on the file, finding the Claimant misrepresented his earnings, and was subject to a penalty and violation. The Commission

recorded how it proceeded with making a decision on the file. It stated it obtained the employer's payroll records, and time sheets showing the "actual hours the claimant worked." The Commission notes that the time sheets show discrepancies between the hours indicated as worked and the payroll hours worked. The expenses also showed some employees being paid for work related expenses during weeks when they were not on payroll. The Commission determined the Claimant did not correctly declare his earnings during numerous weeks. When it allocated the earnings to the weeks the money was earned, it created an overpayment.

[39] The Claimant filed a handwritten Notice of Appeal with the Board of Referees upon receipt of the Commission's decision, stating he worked for the employer for nine years and followed the same process of being contacted on Monday mornings to confirm his hours for the week. The Claimant stated that if he had only 20 to 25 hours, or even 15 hours, he was told to bank hours so that he could receive a full pay cheque. He stated that when your employer tells you to play with the numbers for your EI benefits, he did not know anyone who would resist that system if they wanted to survive. At the hearing, he clarified that the employer requested employees to bank hours and submitted the employer had total control of the payroll.

[40] The amounts of the overpayment are divided by year of the claim, as the Claimant had four separate benefit periods in question. The Commission's allocation of the money received from the employer as wages resulted in an overpayment of $2,953 for the claim beginning on November 2, 2008, an overpayment of $7,211 for the claim beginning on November 1, 2009, an overpayment of $3,691 for the claim beginning on October 31, 2010, and an overpayment of $673 for the claim beginning on October 30, 2011.

[41] The appeal went before the Board of Referees. In its representations to the Board, the Commission stated:

> An investigation revealed that there were discrepancies in the employer's payroll and with the record of employment provided because the employer was keeping two separate sets of payroll books. During the course of the investigation, the employer provided the actual time cards and with this new information, a new payroll was reconstructed with the correct gross weekly earning. *(sic)*

[42] The Commission's documents detail the method followed to calculate the overpayment and penalty amounts. The Claimant did not argue that the calculation itself was in question, but

argued that the basis of the calculation was fatally flawed and could not be relied upon to establish the overpayment.

[43] Claimant counsel submitted at the April 2019 hearing that the basis of the Commission's calculations for an overpayment is flawed because the Commission reconstructed a version of the employer's payroll based on questionable sources, being a second set of books and timecards which the Claimant did not know about. Specifically, Claimant counsel submitted the reconstructed payroll documents are "inaccurate and unreliable hearsay." Due to this, Claimant counsel submitted the overpayment cannot be supported at law because the foundational documents are unreliable.

[44] The Commission called no witnesses at the April 2019 hearing. It did not provide a copy of the set of books it relied upon to establish the payroll information used in calculating the allocations. The Commission also made a brief submission stating it continued to rely on the position put forth in the brief dated December 2, 2016, prepared by former Commission counsel Michael Stevenson relating to a previous hearing of this case ("Stevenson brief"). As previously noted, the Commission conceded that there are errors in the payroll information. In the previous General Division decision, issued on August 19, 2016, the Member detailed the Commission's submission on this exact point and listed the numerous ways the reconstructed information may be flawed and said, "with the Commission not present then these questions remain unanswered." At the hearing before me, the Commission was present, and while it conceded to the evident errors in the payroll information, it did not add any evidence to support its use of and reliance upon the employer's second set of payroll books.

[45] The Commission submits in the Stevenson brief that there is clear evidence the Claimant declared earnings for a period of time when work was not actually performed, and that the Claimant understood that he was not accurately reporting his earnings information when making claims for EI benefits. Claimant counsel submits that the affirmed evidence in April 2019 hearing testimony should be more credible than the payroll information reconstructed from the employer's second set of payroll books.

[46] With respect to hearsay evidence, which is evidence that is offered by a witness based on what has been said to them and of which they do not have direct knowledge, the admissibility rules

vary between a court and a tribunal. Tribunals provide administrative, not judicial, justice. While a court may not accept hearsay evidence, or require that it fall within a narrow exception, I am not bound by strict rules of evidence applicable in criminal or civil courts.[9] I am able to accept hearsay evidence and, like other types of evidence, I will weigh it in coming to a determination of fact.

[47] It is undisputed that when the Claimant completed biweekly claim reports, he sometimes stated he had not worked in weeks when he did work, so that he could carry forward hours and ensure he was paid full time hours. This means it is undisputed that he has earnings that were not declared in the weeks he worked. As a result, I find the Claimant received monies from his employer which constituted earnings requiring allocation.[10] Earnings must be allocated pursuant to the *Employment Insurance Regulations.*[11]

[48] There is also no question that the Claimant completed biweekly EI claim reports and accepted his rights and responsibilities, which included a bar against providing false information. The Claimant did provide false information, because he had earnings in particular weeks and failed to declare those earnings in the week in which they were earned. Instead, he banked, or "saved," those earnings and declared them in other weeks to subsidize his earnings with EI benefits when employment earnings were low. The hours banking system existed to ensure employees could have full weeks of income and would be more likely to remain working for the employer, according to the Branch Manager's interview.

[49] The Claimant testified at the April 2019 hearing that he was doing what his company told him to do, so he did not really understand what he was being accused of. He stated he often worked more than 40 hours per week, but added that those additional hours were not paid out. Instead, he stated they were banked. The Claimant stated he never saw a timesheet, and only heard from the secretary to confirm the hours he would be paid for. He said the foreman tracked the hours and sent them to the secretary, and while he thinks the hours were put onto paper, he never saw a timesheet.

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[9] *Attorney General of Canada v. Mills*, A-1873-83
[10] These monies are earnings based on the *Employment Insurance Regulations*, section 35(2)
[11] *Employment Insurance Regulations*, section 36

[50] I am troubled by the issue of the time cards and payroll information. While I appreciate the Commission's position that this is the best evidence they could provide relative to the overpayment, the Commission also admits that there are errors in the payroll information. These errors are identified on **Exhibit 51-1**, and include dates that are not a week apart, incorrect dates and years, handwritten dates added in pen without initials, and some entries missing dates, with other entries accounting for the same date twice. While the Claimant was unable to provide paystubs and information relative to his actual earnings in 2008, 2009, 2010, and 2011, he testified at length about the work environment, how the hours banking system worked, his knowledge of the system, how the hours worked were tracked, and the submission of hours to the company. While I do not require concrete, beyond a reasonable doubt proof to support the accuracy of the timecards and payroll information, I have to be convinced on a balance of probabilities that they are, more likely than not, reliable evidence.

[51] The Claimant that he company had a "saved" hours system where he would, for example, work 60 hours in a week and be paid for 40 or 50 hours. This allowed him to "save" 10 to 20 hours to be paid in a week where the weather was poor and he was unable to accumulate full-time hours. The Claimant testified that the saving of hours was how the company operated, and he did not intentionally misrepresent anything. The Claimant stated that when he worked, the foreman tracked how many hours he worked and the foreman told a secretary, who organized the payment. The Claimant testified that he never completed timesheets and he did not ever see a timesheet.

[52] I recognize that the onus is on the Claimant to prove that payroll information is incorrect, and mere allegations that cast doubt on the truthfulness of documentary evidence are insufficient. I do not have the luxury of applying the benefit of the doubt to either party and must weigh evidence on a balance of probabilities. With this in mind, I find it is more likely than not that the Commission's reconstructed payroll documentation contains errors which render it inappropriate and unreliable as a basis for calculation.

[53] I recognize the *Employment Insurance Act* states that a claimant is liable to repay an amount paid by the Commission to him as benefits to which he was not entitled.[12] I have further considered that the Supreme Court of Canada has often referred to Driedger's 'Modern Principle,'

[12] *Employment Insurance Act,* section 43(b)

which states that statutory interpretation cannot be founded on the wording of the legislation alone. This principle provides that:

> Today there is only one principle or approach; namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[13]

[54] I find that the requirement that a Claimant repay an overpayment without qualification is not an error, but a directive made with legislative intent. The *Employment Insurance Act* does not intend for Claimants to receive both EI benefits and other earnings beyond a certain threshold; EI benefits are a supplement available under certain conditions of unemployment, or special circumstance. The requirement that a Claimant repay an overpayment intends for the Claimant to repay the entire amount of money to which he was not entitled

[55] In its submissions to the Board of Referees, the Commission states the actual payroll was reconstructed based on the employer's second set of books, which was revealed during its investigation. This process is not well-described by the Commission. While I have flexibility in accepting evidence that would not generally be admissible before a court, in my view, stretching that flexibility to extend to evidence that has no credible basis would be an error. The Commission did not state how it recreated the payroll. It is difficult to accept corporate records as the basis of the Claimant's overpayment when I do not know how those records were created. I do not know why the employer kept a second set of books, and whether those books were verifiable or created as a way to shift responsibility for the banking of hours. Claimant counsel submitted that the company maintaining a separate set of books is a questionable corporate practice, and should be a red flag that the employer was trying to hide something from authorities. I find that there is no explanation by the Commission as to why it accepted the employer's second set of books as accurate information.

[56] I recognize the Commission is not required to present its employees for examination.[14] Given that the Commission did not explain how it determined the payroll information was reliable or how it verified its accuracy, I am unclear why the employer's second set of payroll books was accepted by the Commission as containing correct information. I find there is insufficient evidence

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[13] *Rizzo & Rizzo Shoes Ltd*., [1998] 1 S.C.R. 27, at paragraph 21
[14] *The Attorney General of Canada v. Childs*, A-418-97, paragraph 17

to support the credibility of the Commission's reconstruction. I further find the Commission could not allocate the Claimant's earnings because it did not have reliable records to establish what those earnings were.

[57] The issue in this case is not whether the Claimant was overpaid benefits; I find that he was. The issue is that there is no reasonable way to quantify the amount the Claimant was overpaid because the employer kept multiple sets of payroll documentation and I cannot find the information used by the Commission is reliable. It is clear that the employer kept a set of payroll books which reflected untrue information. It is also clear that it was not until an interview and the threat of legal sanction, which was stated at the outset of the Commission investigator meetings with both the Branch Manager and the Director of Finance, that the second set of payroll books—purporting to be true and accurate—became available. The Claimant testified that he did not fill out time cards or approve his hours. While the Commission submits it should be able to enforce an overpayment and related penalties and violation based on the employer's records, I find the information provided by the employer lacks the requisite credibility to be used in reclaiming benefits paid to the Claimant. On the balance of probabilities, the employer-supplied payroll information is untrustworthy and cannot be used to establish with any reliable amount of accuracy the Claimant's actual hours and dates worked. It is not, in my view, probative evidence because of the numerous identified flaws, including that the "new" or "actual" payroll was reconstructed by the Commission using the "correct" gross weekly earnings based on a second set of employer books and timecards that were revealed during its investigation. I place more weight on the Claimant's direct testimony at the hearing that he did not fill out timecards, and find Claimant counsel's submission regarding the questionable provenance of the Commission's payroll information more compelling than the Commission's submission that I should accept the error-laden reconstructed payroll as accurate.

[58] The Branch Manager stated that he thought banking hours was ok, as long as all the hours were claimed and taxes were paid on them. He stated he wanted to help employees get a full weeks' paycheque and stated banking hours was an incentive to keep employees. The Director of Finance agreed that some employees worked during weeks for which the payroll shows they did not, and stated that ultimately it was his responsibility for the company having submitted false or misleading information to the Commission. He was also asked whether he agreed that there was collusion between the company and the employees, and stated he wanted to look into it on his own.

He was further asked if there was an employee that could be responsible, and stated he felt the issue was the way the previous general manager tracked payroll. At no point did he state the employees colluded with management to create the hours banking system, and the Branch Manager with 27 years of experience with this employer stated the banking hours practice had been going on back as "far back as he can remember."

[59] The employer's Director of Finance did not state there was collusion between the employer and employees to create an hours banking system, and did not identify any employee as responsible for the banking of hours system, other than the former general manager of the company. While the employees benefitted from the banking of hours, I find it is a system conceived and operated by the employer to keep employees incentivized to work and stay with the company. While the Claimant admitted at the April 2019 hearing that he knew what banking hours meant, the overwhelming evidence is that he did not know he was doing something in violation of the *Employment Insurance Act* because he trusted his employer. I find the employer advised the Claimant that he could bank 50 hours, and the Claimant was reasonable in believing the employer's statements. I recognize the Claimant incorrectly completed biweekly reports because he did not properly answer all of the questions, including "did you work" and "did you have earnings," but find he did not know his responses were incorrect because his employer told him how to report his hours.

[60] While the Branch Manager stated to the investigator that he did not discuss the banking of hours at a staff meeting and did not tell employees it was legal to bank hours, he also stated that he thought banking hours was acceptable, that the practice had been going on as long as he could remember, and that the practice was discussed at a meeting after the investigation had already begun. I find, on a balance of probabilities, that the employer told the Claimant that it was acceptable to bank up to 50 hours, and that this occurred prior to the Commission's investigation because the Branch Manager stated he worked more than 20 years for the employer and the banking of hours had occurred for as long as he could remember. Therefore, it is more likely than not that the Claimant was told about this practice, and how to claim his hours, prior to the Commission investigation. I also prefer the Claimant's evidence that he was told by the Branch Manager that he could bank 50 hours because it was directly stated to me and I had the opportunity to test the evidence and question the Claimant.

[61] The Claimant is a long tenured employee of the roofing company, who appears to have trusted the company and believed his employer when he was told it was acceptable to bank up to 50 hours, which the Claimant described as saving hours. I find he reasonably did not know that he was making a mistake, despite the biweekly claim report warnings. While his knowledge is not relevant to my determination, I make note of it because I found the Claimant was credible. He gave evidence in French, in a forthright and direct manner.

[62] Claimant counsel submitted that the Commission's case is untenable as it is "anchored in nothing." While perhaps more blunt than I would have worded it, I agree with this submission. The entire basis of the Commission's case is the recreated payroll information, which is unreliable. I have considered the recreated payroll evidence against the Claimant's testimony regarding payroll and timecards, and find on a balance of probabilities that the Claimant's evidence is more reliable.

[63] While generally I agree with the Commission that when a Claimant is paid benefits to which he was not entitled he is liable to pay them back, this case presents the added challenge of there being no trustworthy records of the actual earnings accumulated by the Claimant in a given week. The employer kept multiple sets of books and presented what it purported to be actual payroll and timecards to the Commission. The Claimant testified that he never completed timecards or approved his hours. The employer has admitted to its participation in an hours banking system, and described its benefit as being the retention of employees who would otherwise leave if they did not have full weeks of pay. I simply cannot find the employer, with its admissions of fault in this case, has, on the balance of probabilities, provided reliable payroll information which can justifiably form the basis of an overpayment.

[64] If the payroll was not in question and the Claimant had banked hours, even without knowing it was wrong, the outcome may be different; however, the payroll is not reliable and cannot reasonably be used to demand a repayment of benefits. Were the second set of payroll books revealed or produced to the Commission, and if so, then by whom and to whom? Evidence shows that some books were allegedly produced by someone in the company, but by whom? Was it the Director of Finance? Were the books fraudulent? If there were two sets of books then which ones are the true books? Were there any further sets of payroll books? Was there an analysis of the

contradictions and mistakes in the books? The books are the foundation of the Commission's case, and so must be reliable if they are to form the basis of an overpayment, penalty, and violation.

[65] Given the foregoing, while I find the Claimant was paid money which required allocation and was not allocated properly due to an hours banking system, I find there is no reliable basis to calculate the overpayment. While the Commission has presented a reconstructed payroll based on a second set of employer records, I find the identified errors in this information combined with the Claimant's testimony render it inappropriate as a basis of calculation because the documentation cannot be verified. The employer admitted it had two sets of payroll books, neither of which was presented as evidence. The Commission's payroll reconstruction, with admitted errors, leads me to find on a balance of probabilities that the evidence is not sufficiently reliable to establish a correct allocation. Where the result is to deprive a Claimant of a benefit, perhaps properly paid, I must be confident that the calculation is correct and the Claimant is becoming responsible for a debt he truly owes. In this case, I do not have that assurance because the employer's information is unreliable.

ANALYSIS

Penalty

[66] The Commission may impose a penalty on a claimant if a claimant makes a representation that he knew was false or misleading.[15]

[67] 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 he made the statement, and does not include any element of intention to deceive.[16]

[68] 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

[15] *Employment Insurance Act*, section 38(1)(a)
[16] *Attorney General of Canada v. Gates*, A-600-94

or misleading.[17] If proven, the burden shifts to the claimant to prove the statements were not made knowingly.

[69] The decision to impose a monetary penalty and the calculation of the penalty amount are discretionary decisions of the Commission.[18]

[70] 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 judicially.[19] If I find the Commission did not exercise its discretion judicially, I may make the decision the Commission should have made.

[71] 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 modify a penalty, but I cannot negate a penalty if I find the Commission had a legal basis to impose it.[20]

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

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

[72] I find the Claimant did not knowingly make false or misleading statements to the Commission.

[73] The Commission concluded the Claimant made misrepresentations by knowingly providing false or misleading information on four established claims and imposed penalties of $358, $1,940, $2,175 and $337. In its representations to the Board of Referees, the Commission stated the Claimant knowingly failed to declare actual gross earnings for amounts worked and earned in each of the respective weeks for the years 2008, 2009, 2010, and 2011.

[74] The Commission submitted to the Board of Referees that every time the Claimant completed his report cards, he knew the amounts being reported were not the actual hours or earnings worked, which constitutes false statements for which a sanction is warranted. It also

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[17] *Mootoo v. Canada (Minister of Human Resources Development*), 2003 FCA 206
[18] *Canada (Attorney General) v. Gauley*, 2002 FCA 219
[19] *Canada (Attorney General) v. Purcell*, A-694-94
[20] *Canada (Attorney General) v. Gauley*, 2002 FCA 219

submitted that the Claimant accepted his rights and responsibilities each time he submitted a biweekly claim for EI benefits, and knew he was misleading the Commission when he failed to report hours worked in a specific week, or reported more hours than he had worked in that week. This submission was reiterated in the Stevenson brief, which stated the Claimant knowingly banked hours.

[75] My conclusion, that there is no basis for the allocation of earnings based on the reconstructed payroll information, does not ignore the admission of the Claimant that he knew what the concept of banking hours meant. However, the Claimant also stated that he was told by the employer that it was acceptable to bank hours. He testified that he did not know this practice was wrong, because it was how the employer functioned and he thought it was allowed, and was done so he could receive full weeks of pay. I find the Claimant did not knowingly provide misinformation to the Commission and has given evidence that rebuts the Commission's conclusion that false statements were knowingly made.[21] Knowingly means the Claimant knew the information provided was untrue when he made the statement, and while the Claimant completed biweekly EI claim reports and incorrectly reported the hours worked, I cannot find that his actions meet the test for knowingly providing false information. I make this finding because, in his case, the Claimant "knew" that he was allowed to bank 50 hours and did not, by extension, know that reporting his hours with the banking system in mind was incorrect.

[76] The *Employment Insurance Act* states[22] the Commission may impose a penalty if the Claimant made a representation that he "knew" was false or misleading, relative to a claim for EI benefits. The Federal Court of Appeal has explained that interpreting the word "knew" requires a subjective test, to determine whether the required knowledge existed.[23] In this case, I find the Claimant has proven, on a balance of probabilities, that he did not know his answers on the biweekly report cards were wrong. Where he stated he did not work, or stated he worked more hours than he had worked, he made those statements believing them to be the correct way to report his earnings.

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[21] *Attorney General of Canada v. Gates*, [1995] 3 F.C. 17
[22] *Employment Insurance Act*, section 38(1)(a)
[23] *Attorney General of Canada v. Bellil*, 2017 FCA 104

[77] I find the Claimant knew he had to complete biweekly report cards for EI benefits, and knew his employer advised him how to claim hours so that he could get full weeks of pay. He also knew that his foreman tracked his hours, and translated that information to the employer's secretary. The employer's Branch Manager also stated in the 2012 interview that he thought banking 50 hours was an acceptable practice. So, at the time the Claimant filled out his biweekly report cards, did he truly know he was providing false information? Despite the warnings on the cards relating to misrepresentation and false statements, and questions of "did you work" and "did you have earnings," I find on a balance of probabilities that the Claimant did not know he was misrepresenting his earnings because he trusted his employer and thought he was supposed to report the hours in a certain way. It is not unreasonable that the Claimant failed to contact Service Canada to inquire about how to complete biweekly report cards because he had no reason to disbelieve his employer's system and instructions.

[78] While the Board of Referees no longer exists, the principle in *Mootoo* continues to apply:

> Where as here the Board of Referees believed that the Claimant had no intent to mislead, that is the end of the penalty issue. The requirement that the Claimant have subjective knowledge that his statements were false was not met.[24]

I find the Claimant lacked the necessary subjective knowledge that his statements were false, so a penalty is inappropriate.

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

[79] As I have determined the Claimant did not knowingly make false statements, there is no need to address this consideration.

ANALYSIS

Violation

[80] The Commission may issue a violation in cases where a penalty has been imposed.[25]

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[24] *Mootoo v. Canada*, 2003 FCA 206, paragraph 6
[25] *Employment Insurance Act*, section 7.1

Issue 3: Should a violation be imposed on the Claimant?

[81] The Claimant was issued a Notice of Violation because the Commission determined that he made misrepresentations by knowingly providing false or misleading information when he knowingly failed to declare his correct earnings on three separate established claims.[26]

[82] The discovery of this false information resulted in the overpayments totaling over $5,000.[27] Consequently, the Commission determined that the Claimant incurred a very serious violation.[28] The impact of the Notice of Violation was that the Claimant would need more hours of insurable employment to establish a claim for EI benefits for the following fives years, or for his next two qualified claims, whichever occurred first.

[83] I find that since the penalty has been rescinded, the violation must also be rescinded. I have determined the Claimant did not knowingly make false or misleading statements to the Commission, so the imposition of a Notice of Violation is inappropriate.

CONCLUSION

[84] The appeal is allowed on all issues.

Candace R. Salmon
Member, General Division - Employment Insurance Section

HEARD ON:	April 9 and April 10, 2019
METHOD OF PROCEEDING:	In person
APPEARANCES:	S. M., Appellant Ian Bailey, Counsel for the Appellant

[26] *Employment Insurance Act*, section 7.1(4)
[27] *Employment Insurance Act*, Section 7.1(4) explains when an insured person accumulates a violation. Section 7.1(5) of the *Employment Insurance Act* explains how the violation is classified, either as minor, serious, or very serious.
[28] *Employment Insurance Act*, section 7.1(5)

	Denise Despres, Representative for the Appellant Sandra Doucette, Representative for the Respondent Added party