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

Citation: *S. M. v Canada Employment Insurance Commission*, 2019 SST 598

Tribunal File Number: GE-18-2015

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 she was instructed by her employer that she could claim her hours of employment in a manner which allowed her 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 her hours and used them as advised by her 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 her claim. It reallocated the earnings based on employer records, and determined the Claimant was overpaid and had to repay the benefits to which she 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 her 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 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.

Interviews and Credibility

[16] The file reflects that the Claimant was interviewed in person by a Commission investigator on May 16, 2012. The interview was conducted in the English language, with a bilingual Commission employee present at the Claimant's request, to explain questions if needed. The Claimant testified at the April 2019 hearing that at the time of the interview, she had a limited ability to communicate in English. She also testified that while she could not remember how much translation was provided, she stated the entire interview was not translated.

[17] I recognize the Interview Record of the May 2012 interview is a formative piece of the Commission's case, and the Claimant is purported to have made statements admitting to both knowing what banking of hours meant and to having banked hours. I note that "written evidence of oral admissions" are not necessarily to be accepted at face value.[1] I am entitled to make specific findings relative to whether a claimant was a credible witness notwithstanding conflicting statements in the notes of a Commission employee. The Federal Court of Appeal has also found that notes taken by a Commission employee are "intrinsically unreliable when not approved by claimants at the time made, but in the end"[2] it is up to me to determine what weight, if any, I give to the Interview Record. In this case, the Claimant signed her name at the end of the Interview Record, confirming the report and its use was explained to her and that a copy of the statement would be provided at a later time. The paragraph prior to her signature does not include any language confirming the Claimant understood the contents of the interview.

[18] I find the May 2012 interview has less evidentiary weight because the Claimant was questioned in English. I further find that, on the balance of probabilities, she did not have sufficient English language capacity in 2012 to understand all of the questions asked by the investigator. I found the Claimant to be a credible witness, because her statements were consistent with her arguments over the course of the file, and accept her submission that the bilingual agent did not proactively translate the questions at the May 2012 interview.

Conflicting Information

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[1] *The Attorney General of Canada v. Childs*, A-418-97, paragraph 17
[2] *The Attorney General of Canada v. Childs*, A-418-97, paragraph 17

[19] 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.[3] 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

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

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

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

HISTORY OF THE FILE

[23] 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.

[24] 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 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.

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

[25] 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

[26] When an EI claimant gets an amount of money, it has to be decided whether that money is "earnings" under the law.[4] If it is, then the earnings need to be allocated, meaning designated, to the proper weeks.[5] 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.[6] The burden is on the Claimant to demonstrate the amounts are not earnings.

[27] If earnings are allocated to weeks when EI is payable to a claimant, the earnings are deducted from their benefits.[7]

[28] The Commission allocates earnings paid as wages to the week the claimant worked and earned those wages. [8]

[29] 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.[9] 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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[4] *Employment Insurance Regulations*, section 35
[5] *Employment Insurance Regulations*, section 36
[6] *Employment Insurance Regulations*, section 35(7)
[7] *Employment Insurance Act*, section 19
[8] *Employment Insurance Regulations*, section 36(4)
[9] *Employment Insurance Regulations*, section 36(5)

requiring allocation?

[30] 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.[10]

[31] The Claimant worked for a roofing company as a roofer. She established initial claims for EI benefits effective August 28, 2008, August 30, 2009, September 5, 2010, and September 4, 2011.

[32] 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.

[33] 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.

[34] On November 25, 2011, the Commission conducted an in-person interview with the employer's Director of Finance. The witness 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,

[10] *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.

[35] 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.

[36] 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.

[37] 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.

[38] The Claimant met with the Commission's interviewer on May 16, 2012. A typed Report of Interview recounts the exchange and states the Claimant undertook that she understood her rights and responsibilities when claiming EI benefits. Based on the notes, the Claimant stated she started working for the employer in 2003 and could not estimate her weekly hours because the

work was weather dependant. She stated that on a good week, she could get 50 hours. The Claimant stated the foreman tracked the hours and gave them to the office to process.

[39] The Claimant was asked if she knew what the term "bank hours" meant and she is recorded as having said "yes." The Claimant was not asked to describe her understanding of the practice. The Commission investigator stated, "So you know it is working and not being paid for the hours until a later date," to which the Claimant replied, "yes." The investigator also asked the Claimant if she had ever banked hours, and she stated, "yes."

[40] The Commission investigator provided a specific example, asking the Claimant to look at a time card he had obtained from the employer. The Commission explained that the card related to the week ending January 22, 2011, and shows the Claimant worked 25 hours, but the employer's payroll stated she worked only 8 hours. The Claimant stated that every Monday morning the secretary called and asked employees how many hours they wanted to be paid for. The Claimant stated it was better for her to take only 8 hours of employment pay and claim EI benefits. She explained to the investigator that in the weeks she received EI benefits, she only received about 8 hours of employment income so she could get full EI benefits. In the next week, she would carry over the hours from the previous week, which she had not been paid for, to allow her to collect a full paycheque.

[41] The Commission asked the Claimant to look at 2009, 2010, and 2011 charts relating to payroll hours and payroll earnings, and stated these were actual hours and actual earnings numbers taken from company time sheets. The Commission stated the documents show what the Claimant reported while on EI, and what she actually received, as well as whether there was an overpayment. The Commission asked if the Claimant understood where the information was coming from. The Claimant stated she did understand.

[42] The Claimant stated to the Commission's investigator that the company told the employees they could "bank hours." The Claimant said to the investigator that she understood that not reporting work or earnings when she was working and in receipt of EI benefits was an offence under the *Employment Insurance Act*, but said the employer told employees they could bank hours.

[43] At the hearing, Claimant counsel raised questions regarding the reliability of the Interview Record because, he submitted, the Claimant is and was in 2012 a francophone. At the time of the interview, the Claimant testified that she had limited capacity to communicate in English. Claimant counsel submitted the interview was conducted in English, with little translation, and posed leading questions. During the interview, the Claimant was asked "did you understand all my questions?" and is recorded as having replied, "yes." She was also asked to review the final report with the investigator and was asked if she understood the contents. She is recorded as saying, "yes." At the April 2019 hearing, the Claimant testified that she was stressed and intimidated during the interview, and was not fluent in spoken English, nor could she read the language. She testified that she asked for a translator, who did not translate all of the questions. She submitted that she was very nervous during the interview and did not know what was going on.

[44] 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 the Claimant's testimony.

[45] 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."

[46] On September 14, 2012, the Commission issued multiple decisions on the file, finding the Claimant misrepresented her 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 considered the Claimant's interview statements, specifically that she admitted to banking hours when confronted with time sheets showing she worked while the payroll showed she did not work. It decided the Claimant did not correctly declare her earnings during numerous weeks. When it allocated the earnings to the weeks the money was earned, it created an overpayment.

[47] The Claimant filed a Notice of Appeal with the Board of Referees upon receipt of the Commission's decision, stating the employer told her she could bank hours.

[48] 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 $2,954 for the claim beginning on August 28, 2008, an overpayment of $3,618 for the claim beginning on August 30, 2009, an overpayment of $2,991 for the claim beginning on September 5, 2010, and an overpayment of $1,174 for the claim beginning on September 4, 2011.

[49] 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)*

[50] 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.

[51] The Commission submitted to the Board of Referees that the Claimant acknowledged having participated in an illegal practice, using the hours banking system, and had not provided any evidence to disprove the information received from the employer.

[52] 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.

[53] 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.

[54] 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 she was not accurately reporting her 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 statements made to the investigator because of language and intimidation issues, and submits the Claimant has a reasonable explanation for the statements.

[55] Claimant counsel further submits that the May 2012 interview with the Commission investigator was conducted under the threat of legal sanction, in a language the Claimant was not fluent in, and presented as fact information that was derived from the questionable documents of an employer with an incentive to defer some of the blame for the banking of hours. He also submitted that the Claimant was highly intimidated by the interview, and had done nothing but rely on the employer.

[56] 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.[11] I am able to accept hearsay evidence and, like other types of evidence, I will weigh it in coming to a determination of fact.

[57] In the Stevenson brief, the Commission submits the Claimant admitted in the May 2012 interview that she understood what it meant to "bank hours" and admitted that she engaged in this practice. It also notes that the employer corroborated that banking of hours occurred in this case.

[58] It is undisputed that when the Claimant completed biweekly claim reports, she sometimes stated she had not worked in weeks when she did work, so that she could carry forward hours and ensure she was paid a full paycheque. This means it is undisputed that she has earnings that were not declared in the weeks she worked. As a result, I find the Claimant received monies from her employer which constituted earnings requiring allocation.[12] Earnings must be allocated pursuant to the *Employment Insurance Regulations.*[13]

[59] There is also no question that the Claimant completed biweekly EI claim reports and accepted her rights and responsibilities, which included a bar against providing false information. The Claimant did provide false information, because she had earnings in particular weeks and failed to declare those earnings in the week in which they were earned. Instead, she banked, or "saved," those earnings and declared them in other weeks to subsidize her earnings with EI benefits

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

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.

[60] When the Claimant was interviewed by the Commission investigator, she was presented with time cards. The Commission appears to have suggested these were true, actual time cards reflecting her employment.

[61] 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 her actual earnings in 2008, 2009, 2010, and 2011, she testified at length about the work environment, how the hours banking system worked, her 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.

[62] The Claimant testified that the company had an hours banking system, where she would, for example, work 60 hours in a week and be paid a portion of those hours. This allowed her to save the other hours to be paid in a week where the weather was poor and she was unable to accumulate full time hours. The Claimant testified that the saving of hours was how the company operated. The Claimant stated that when she worked, the foreman tracked how long she was there and the foreman told someone in the office, who organized the payment.

[63] 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.

[64] I recognize the *Employment Insurance Act* states that a claimant is liable to repay an amount paid by the Commission to her as benefits to which she was not entitled.[14] I have further considered that the Supreme Court of Canada has often referred to Driedger's 'Modern Principle,' 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.[15]

[65] 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 she was not entitled.

[66] 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

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[14] *Employment Insurance Act,* section 43(b)
[15] *Rizzo & Rizzo Shoes Ltd*., [1998] 1 S.C.R. 27, at paragraph 21

explanation by the Commission as to why it accepted the employer's second set of books as accurate information.

[67] I recognize the Commission is not required to present its employees for examination.[16] 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 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.

[68] The issue in this case is not whether the Claimant was overpaid benefits; I find that she 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. 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 the foreman tracked her hours and the employer advised her she could bank hours, and find Claimant counsel's submission regarding the

[16] *The Attorney General of Canada v. Childs*, A-418-97, paragraph 17

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.

[69] 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."

[70] 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 she knew what banking hours meant and knew that she participated in the practice, the overwhelming evidence is that she did not know she was doing something in violation of the *Employment Insurance Act* because she trusted her employer. I find the employer advised the Claimant that she could bank hours, and the Claimant was reasonable in believing the employer's statements. I recognize the Claimant incorrectly completed biweekly reports because she did not properly answer all of the questions, including "did you work" and "did you have earnings," but find she did not know her responses were incorrect because her employer told her how to report her hours.

[71] 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 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 her hours, prior to the Commission investigation. I also prefer the Claimant's evidence that she was told by the employer that she could bank hours because it was directly stated to me and I had the opportunity to test the evidence and question the Claimant.

[72] The Claimant appears to have trusted the employer and believed it when she was told it was acceptable to bank hours. I find she reasonably did not know that she was making a mistake, despite the biweekly claim report warnings. While her knowledge is not relevant to my determination, I make note of it because I found the Claimant was credible. She gave evidence in French, in a forthright and direct manner. I have considered the contradictory statements in the file, and find the evidence weighs more heavily towards the Claimant not understanding the questions asked at the May 2012 interview. The evidence relating to the Claimant's lack of understanding in the English language and her presentation as a French-speaking person, as well as her testimony that she tried to answer the questions and did not entirely understand, but was nervous and stressed, give more weight to the Claimant's direct testimony and weaken the reliability of the May 2012 Interview Record.

[73] 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.

[74] While generally I agree with the Commission that when a Claimant is paid benefits to which she was not entitled she 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 the foreman tracked her hours and she did not approve them. 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.

[75] 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.

[76] 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 she truly owes. In this case, I do not have that assurance because the employer's information is unreliable.

ANALYSIS

Penalty

[77] The Commission may impose a penalty on a claimant if a claimant makes a representation that she knew was false or misleading.[17]

[78] 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.[18]

[79] 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.[19] If proven, the burden shifts to the claimant to prove the statements were not made knowingly.

[80] The decision to impose a monetary penalty and the calculation of the penalty amount are discretionary decisions of the Commission.[20]

[81] 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.[21] If I find the Commission did not exercise its discretion judicially, I may make the decision the Commission should have made.

[82] 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.[22]

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[17] *Employment Insurance Act*, section 38(1)(a)
[18] *Attorney General of Canada v. Gates*, A-600-94
[19] *Mootoo v. Canada (Minister of Human Resources Development*), 2003 FCA 206
[20] *Canada (Attorney General) v. Gauley*, 2002 FCA 219
[21] *Canada (Attorney General) v. Purcell*, A-694-94
[22] *Canada (Attorney General) v. Gauley*, 2002 FCA 219

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

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

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

[84] The Commission concluded the Claimant made misrepresentations by knowingly providing false or misleading information on three established claims and imposed penalties of $724, $598, and $235. In its representations to the Board of Referees, the Commission stated the Claimant agreed that she knowingly failed to declare actual gross earnings for amounts worked and earned in each of the respective weeks for the years 2009, 2010, and 2011.

[85] The Commission submitted to the Board of Referees that every time the Claimant completed her report cards, she 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 submitted that the Claimant accepted her rights and responsibilities each time she submitted a biweekly claim for EI benefits, and knew she was misleading the Commission when she failed to report hours worked in a specific week, or reported more hours than she had worked in that week. This submission was reiterated in the Stevenson brief, which stated the Claimant knowingly banked hours.

[86] 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 she knew what the concept of banking hours meant and that she has participated in the practice. However, the Claimant also stated that she was told by the employer that it was acceptable to bank hours. 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.[23] Knowingly means the Claimant knew the information provided was untrue when she made the statement, and while the Claimant completed biweekly EI claim reports and incorrectly reported the hours worked, I cannot find that her actions meet the test for knowingly providing false information. I make this finding because the Claimant "knew" that she was allowed to bank hours

[23] *Attorney General of Canada v. Gates*, [1995] 3 F.C. 17

and did not, by extension, know that reporting her hours with the banking system in mind was incorrect.

[87] The *Employment Insurance Act* states[24] the Commission may impose a penalty if the Claimant made a representation that she "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.[25] In this case, I find the Claimant has proven, on a balance of probabilities, that she did not know her answers on the biweekly report cards were wrong. Where she stated she did not work, or stated she worked more hours than she had worked, she made those statements believing them to be the correct way to report her earnings.

[88] I find the Claimant knew she had to complete biweekly report cards for EI benefits, and knew her employer advised her how to claim hours so that he could get full weeks of pay. She also knew that her foreman tracked her hours and translated that information to a 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 her biweekly report cards, did she truly know she 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 she was misrepresenting her earnings because she trusted her employer and thought she 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 she had no reason to disbelieve her employer's system and instructions.

[89] 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.[26]

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[24] *Employment Insurance Act*, section 38(1)(a)
[25] *Attorney General of Canada v. Bellil*, 2017 FCA 104
[26] *Mootoo v. Canada*, 2003 FCA 206, paragraph 6

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

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

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

ANALYSIS

Violation

[91] The Commission may issue a violation in cases where a penalty has been imposed.[27]

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

[92] The Claimant was issued a Notice of Violation because the Commission determined that she made misrepresentations by knowingly providing false or misleading information when she knowingly failed to declare her correct earnings on four separate established claims.[28]

[93] The discovery of this false information resulted in the overpayments totaling over $5,000.[29] Consequently, the Commission determined that the Claimant incurred a very serious violation.[30] 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 her next two qualified claims, whichever occurred first.

[94] 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.

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[27] *Employment Insurance Act,* section 7.1

[28] *Employment Insurance Act*, section 7.1(4)

[29] *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.

[30] *Employment Insurance Act*, section 7.1(5)

CONCLUSION

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