



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation : *S. M. v Canada Employment Insurance Commission*, 2019 SST 743

Tribunal File Number: GE-19-2207  
GE-19-2208

BETWEEN:

**S. M.**

Appellant/ Claimant

and

**Canada Employment Insurance Commission**

Respondent / Commission

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

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DECISION BY: Raelene R. Thomas

HEARD ON: July 4, 2019

DATE OF DECISION: July 17, 2019

## **DECISION**

[1] The appeal is allowed. I find the Claimant had a reasonable explanation for the incorrect information provided to the Canada Employment Insurance Commission (Commission) on his bi-weekly claim reports and so the penalty and violation may not be imposed.

## **OVERVIEW**

[2] The Appellant, who I shall refer to as the Claimant, was working occasionally while receiving employment insurance (EI) regular benefits. Over the course of two benefit periods, he reported the hours he worked and, although he was to report his total gross earnings, he reported his hourly rate of pay. The Respondent, the Canada Employment Insurance Commission (Commission), determined the Claimant knowingly made false representations when he failed to report the total gross earnings, and it imposed a penalty and a notice of violation for each benefit period. The Claimant requested reconsideration of the penalties and notices of violation. The Commission reduced the penalties, removed one notice of violation and modified the second notice of violation. The Claimant appeals to the Social Security Tribunal (Tribunal).

## **PRELIMINARY MATTERS**

[3] The hearing was scheduled for June 26, 2019. The docket was sent to the Claimant via email as several attachments and the Claimant was not able to access the entire docket at the hearing. As a result, the Claimant did not have an opportunity to properly participate in the hearing. In the interest of natural justice, I adjourned the hearing and arranged for the hearing to be held at a later date. The hearing proceeded on July 4, 2019.

[4] The Commission issued two reconsideration decisions on May 2, 2019. The reconsideration decision appealed in file GE-19-2207, dealt with the Claimant's earnings reported from the weeks beginning June 18, 2017, to October 8, 2017, the reduction of the previously imposed penalty and the removal of a notice of violation. At the hearing the Claimant stated that he was appealing the penalty. The reconsideration decision appealed in file GE-19-2208, dealt with the Claimant's earnings reported from the weeks beginning October 29, 2017, to February 4, 2018, the reduction of the previously imposed penalty and the modification of the

previously imposed notice of violation. At the hearing, the Claimant indicated that he was appealing the penalty and the notice of violation.

[5] The Tribunal may on its own initiative deal with two or more appeals or applications together if a common question of law or fact arises in the appeals or applications and no injustice is likely to be caused to any party to the appeals or applications.<sup>1</sup> I heard the Claimant's two appeals (GE-19-2207 and GE-19-2208) together because the appeals have common facts, involve benefit periods that are sequential and I am satisfied that no injustice is likely to be caused to any party as a result of joining the appeals. The Claimant was notified the appeals had been joined and would be heard at the same time in the notice of hearing issued on June 12, 2019.

## **ISSUES**

[6] Issue: Did the Claimant knowingly make false statements when he did not report the total earnings received?

[7] Issue: If the Claimant knowingly made false statements, did the Commission judicially exercise its discretion when it calculated the penalty amount?

## **ANALYSIS**

[8] The Commission may impose a penalty on a claimant, or any other person acting for a claimant, for each act or omission they knew was false or misleading.<sup>2</sup> In this case, the Commission imposed a penalty of \$470.00 for seven false representations from June 18, 2017, to October 8, 2017, and, a penalty of \$654.00 and a notice of serious violation for seven false representations from October 29, 2017, to February 4, 2018.

[9] 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

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<sup>1</sup> *Social Security Tribunal Regulations*, section 13

<sup>2</sup> *Employment Insurance Act* (Act), section 38(1)

claimant knew the information provided was untrue when he made the statement, and does not include any element of intention to deceive.<sup>3</sup>

[10] The Commission has the burden to show the statement or representation is false or misleading and that the claimant made the misrepresentation with the knowledge that it was false or misleading.<sup>4</sup> If proven, the burden then shifts to the claimant to prove the statements were not made knowingly and to provide a reasonable explanation for the incorrect information.<sup>5</sup> The burden of proof in this case is a balance of probabilities, which means it is “more likely than not” the events occurred as described.

[11] The decision to impose a monetary penalty and the calculation of the penalty amount are discretionary decisions of the Commission.<sup>6</sup> The decision to issue a notice of violation is also a discretionary decision of the Commission.<sup>7</sup>

[12] If the Commission acted in bad faith or for an improper motive, if it took into account irrelevant factors or failed to consider relevant factors, or if it acted in a discriminatory manner, then the Commission did not exercise its discretion in a judicial manner.<sup>8</sup> If I find the Commission did not exercise its discretion judicially, I may make the decision the Commission should have made. That is, I may reduce the penalty amount, waive the penalty amount entirely or remove the notice of violation. I cannot negate a penalty if I find the Commission has a legal basis to impose it.<sup>9</sup>

**Issue 1: Did the Claimant knowingly make false statements when he did not report the total earnings received?**

[13] The Commission submitted that it met the onus of establishing that the Claimant made seven misrepresentations in each of two benefit periods by knowingly failing to report all his earnings. In support of its position, the Commission provided transcripts from the internet

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<sup>3</sup> *Attorney General of Canada v. Gates*, A-600-94

<sup>4</sup> *Mootoo v. Canada (Minister of Human Resources Development)*, 2003 FCA 206

<sup>5</sup> *Canada (Attorney General) v. Purcell* A-694-94, *Gates* A-600-94

<sup>6</sup> *Canada (Attorney General) v. Gauley*, 2002 FCA 219

<sup>7</sup> *Gill v. Canada (Attorney General)*, 2010 FCA 182

<sup>8</sup> *Purcell*, *supra*

<sup>9</sup> *Gauley*, *supra*

reporting system of the Claimant's biweekly claim reports from the week beginning May 28, 2017, to the week beginning October 14, 2017, and from the week beginning October 29, 2017, to the week beginning February 10, 2018. The Commission submitted that the Claimant was a frequent claimant, had reported his full earnings on previous reports and would have been aware of the proper reporting procedures. In support of its position, the Commission provided a transcript from the internet reporting system for the period May 28, 2017, to June 10, 2017. This transcript shows the Claimant reporting 16 hours of work during the first week of the report and earnings of \$384 during the first week of the report and answering "no" to the question if he worked or received earnings during the second week of the report. The appeal files show that in each of the weeks, after the May 28, 2017, to June 10, 2017, claim period, while in receipt of EI regular benefits, when the Claimant worked he reported a variety of hours worked he reported that his total earnings were \$24. The appeal file shows for the weeks beginning December 24, 2017, and December 31, 2017, the employer told the Commission that it paid the Claimant \$192 in each week, however, the Claimant did not report any hours or worked or earnings received during those weeks.

[14] The Claimant stated to the Commission that he did not dispute his earnings but made a mistake as he was not a frequent Claimant. He believed he was reporting his earnings correctly. He received his EI benefits by direct deposit. The Claimant told the Commission that he is a single parent, he is the only contributor to his household income and paying back the penalty would cause him financial distress.

[15] The Claimant testified that at the time of his EI claim work was really slow. He did report the hours that he worked, and those were correct. He would refer to his bi-weekly paystubs, emailed to him by the employer, for the hours of work. The Claimant testified it was his mistake reporting his earnings as \$24. He misread the question and consistently put in his hourly rate. The Claimant testified that at the time he was rushing through the reports so that he could get his benefits quickly. At the time of making the reports it was a difficult time, he was hardly working and stressed out. He stated that he should have left his employment earlier but the employer kept promising more work yet none materialized. The Claimant submitted that there was no benefit to him to mislead the government, he "would not knowingly do this" and that he had no idea he was making a mistake. He testified he has no issue repaying the EI

benefits. He stated that he wished he was notified earlier of the issues, it came as a shock being fined in this way. The Claimant testified that he cannot afford to pay the penalties. The Claimant testified that he did not wonder why his EI benefits did not change with the various hours he was reporting; he accepted what he got.

[16] With respect to the \$192 paid to him by his employer in each of the weeks beginning December 24, 2017, and December 31, 2017, the Claimant testified he was not aware that his employer had paid him during these weeks as he did not work for the employer during either week.

[17] The appeal file contains a letter dated November 7, 2018, from the Commission to the Claimant in reference to a list of 10 weeks beginning with June 18, 2017, and ending with October 8, 2017. In the letter, the Commission concluded the Claimant had “knowingly made one false representation in 7 reports to claim benefits.” I note that there are seven bi-weekly claim reports represented in the 10 dates listed, but some biweekly claim periods only show one week of earnings.

[18] I find the Commission has not met its onus to prove the Claimant failed to report his earnings during the week beginning September 24, 2017, because it has not provided sufficient evidence. The Commission advised the Claimant for the week beginning September 24, 2017, he reported an income of \$24 when his earnings were \$588. The Commission did not provide a copy of the transcript of the internet reporting system of the Claimant’s biweekly claim report for that week. As a result, I cannot make a finding as to whether there was a false representation for that week because there is insufficient evidence.

[19] The Commission also issued a letter dated November 29, 2018, to the Claimant in reference to a list of 10 weeks beginning with October 29, 2017, and ending with February 4, 2018. In this letter, the Commission concluded the Claimant had “knowingly made 7 false representations in 7 reports to claim benefits.” I note that there is one report covering a period of one week and seven bi-weekly claim reports represented in the 10 dates listed, but some biweekly claim periods only show one week of earnings.

[20] In the weeks beginning December 24, 2017 and December 31, 2017, the Claimant testified that he did not work during those weeks and was not aware he had been paid any money. This testimony is consistent with the transcripts from the internet reporting system where the Claimant answered “no” to the question “Did you work or receive any earnings during the [first / second] week of this report?” In light of the foregoing, I find that the Claimant was genuinely not aware that he was paid during these two weeks and therefore could not have knowingly failed to report his earnings in these two weeks. Accordingly, I find the Claimant did not have the subjective knowledge that the representations made by him, that of not reporting his earnings in these two weeks were false.

[21] I find that the Commission has failed to prove that, on a balance of probabilities, the Claimant knowingly made false statements on the remaining bi-weekly reports referenced in its letters dated November 7, 2018, and November 29, 2018. The fact that the Claimant correctly reported his full weekly earnings in one report, for the period May 28, 2017 to June 10, 2017, does not, as the Commission implies, demonstrate that he knowingly made false representations in subsequent reports. The correctly completed claim report demonstrates only that the report for that period was correctly completed. It also demonstrates the Claimant’s hourly rate was \$24 ( $\$384 \text{ earnings} \div 16 \text{ hours} = \$24$ ). The Claimant’s reported hours of work from June 18, 2017, to February 10, 2018, varied from a low of 0 to a high of 45 hours. While I accept that the Claimant answered the question regarding his earnings in 11 instances incorrectly by providing his hourly rate, I find that the Claimant genuinely made a mistake when he reported his hourly rate rather than the total earnings he received. This is supported by the Claimant consistently entering \$24 on each report regardless of the number of hours worked from the week beginning June 18, 2017, to the week beginning February 4, 2018. I rely on the Claimant’s open and credible testimony, given at the hearing, that he made a mistake answering the question of total earnings with his hourly rate. As a result, I find that the Claimant did not knowingly make a false representation when he reported his earnings as \$24 rather than the full earnings he received. Accordingly, I find the Claimant did not have the subjective knowledge that the representations made by him, that of reporting his hourly rate rather than his weekly earnings, were false.

[22] As the Claimant did not knowingly make false or misleading representations, a penalty and violation may not be imposed.

**Issue 2: If the Claimant knowingly made false statements, did the Commission judicially exercise its discretion when it calculated the penalty amount?**

[23] Having found the Claimant did not knowingly make false or misleading statements, there is no need to address whether the Commission properly exercised its discretion when it imposed the penalty and violation.

**CONCLUSION**

[24] The appeal is allowed.

Raelene R. Thomas  
Member, General Division - Employment Insurance Section

HEARD ON:	July 4, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	S. M., Appellant