



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *K. M. v Canada Employment Insurance Commission*, 2019 SST 1318

Tribunal File Number: GE-19-3415

BETWEEN:

**K. M.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

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

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DECISION BY: Charlotte McQuade

HEARD ON: October 21, 2019

DATE OF DECISION: October 22, 2019

## **DECISION**

[1] The appeal is allowed in part. The Claimant received earnings and the Commission allocated these earnings to the correct weeks. The Tribunal has no discretion to write-off the overpayment. The appeal is dismissed on these issues. The Commission has not proven<sup>1</sup> that the Claimant knowingly provided false or misleading information, so the non-monetary penalty of a warning is removed. The appeal is allowed on this issue.

## **OVERVIEW**

[2] The Claimant received sickness employment insurance benefits from August 28, 2016 to December 24, 2016. Her former employer provided information to the Commission that the Claimant had worked and earned wages from the week beginning November 13, 2016 to the week beginning December 18, 2016.

[3] The Claimant had not declared this work or her earnings in this period on her claimant's reports with the exception of telling the Commission she earned \$100.00 in the week of December 4, 2016.

[4] The Commission decided that the wages the employer says it paid to the Claimant were earnings. The law says that all earnings have to be allocated. The weeks to which the earnings are allocated depends on the reason why the earnings were received. Wages are to be allocated to the period in which the services were performed.<sup>2</sup> The Commission allocated the Claimant's earnings to the weeks in which the Claimant worked and earned the wages. The Claimant says she does not remember what earnings she had but she does not dispute that she had earnings or the allocation of those earnings. However, she asks that the overpayment arising from the allocation of those earnings be removed because it arose due to her medical difficulties at the time. She also asks that her personal circumstances of recent homelessness and financial need be considered.

[5] The Commission also decided that the Claimant provided three representations on her claimant's reports that she knew were false or misleading when she reported that she did not

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<sup>1</sup> The Commission has to prove this on a balance of probabilities, which means it is more likely than not.

<sup>2</sup> Subsection 36(4) of the *Employment Insurance Regulations*.

work and when she did not declare all her earnings. As a result, it imposed a non-monetary penalty of a warning.

[6] The Claimant says that the Commission was wrong to impose the non-monetary penalty of a warning because she did not knowingly provide false representations. She says that prior to her return to work, she had suffered a nervous breakdown and been hospitalized. She was placed on a community treatment order and given a new medication that was too strong and which caused sedation. The Claimant says she was not taken off that medication until the first week in December 2016 and, although she returned to work, it was not until February 2017 that she was herself again. She says she was under sedation at the time the reports were completed and only vaguely recalls the claimant's reports. The Claimant explained also factoring into the situation was that she was facing information overload and under duress when she returned to work.

## **ISSUES**

[7] I must decide:

1. Did the Claimant receive earnings?
2. If so, did the Commission allocate those earnings to the proper weeks?
3. Did the Commission prove the Claimant knowingly provided false or misleading representations on her claimant's reports? If she did, then I must also decide whether the Commission exercised its discretion properly in imposing a non-monetary penalty of a warning.
4. Do I have discretion to write off the overpayment arising from the allocation of earnings?

## **ANALYSIS**

### **Did the Claimant receive earnings?**

[8] Yes. The Claimant received wages which are earnings.

[9] The law says that earnings are the entire income of a claimant arising out of any employment.<sup>3</sup> The law defines both “income” and “employment.” “Income” includes any income that a claimant did or will get from an employer or any other person, whether it is in the form of money or something else.<sup>4</sup> “Employment” includes any employment under any kind of contract of service or employment.<sup>5</sup>

[10] The law says specifically that amounts payable to a claimant in respect of wages are earnings.<sup>6</sup>

[11] The employer provided a Record of Employment (ROE) stating that the Claimant worked from November 14, 2016 to September 23, 2017. The ROE noted her insurable earnings during this period.<sup>7</sup>

[12] The Commission sent the employer a letter seeking verification of the Claimant’s earnings. The employer told the Commission that the Claimant was paid the following wages:<sup>8</sup>

<u>Week of</u>	<u>Wages</u>
November 13, 2016	\$486.00
November 20, 2016	\$392.00
November 27, 2016	\$392.00
December 4, 2016	\$392.00
December 11, 2016	\$392.00
December 18, 2016	\$392.00

[13] The Commission submits that the Claimant received the above-noted money from her

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<sup>3</sup> Subsection 35(2) of the *Employment Insurance Regulations*.

<sup>4</sup> Subsection 35(1) of the *Employment Insurance Regulations*.

<sup>5</sup> Subsection 35(1) of the *Employment Insurance Regulations*.

<sup>6</sup> Paragraph 35(2)(a) of the *Employment Insurance Regulations*.

<sup>7</sup> GD3-11.

<sup>8</sup> GD3-38.

employer and this money was paid to her as wages. The Commission maintains that this money constitutes earnings under the law because the payment was made to compensate the Claimant for hours worked.<sup>9</sup>

[14] The Claimant is the party who has to prove that it is more likely than not that the money is not earnings.

[15] The Claimant told the Commission and also testified that she does not remember what her earnings were. She testified that she has no documentation that might help verify when she worked or what her pay was as she became homeless after losing her employment. She testified that she is not disputing that she worked and was paid the wages the employer reported to the Commission.

[16] The Claimant submitted to the Tribunal a copy of a Human Rights complaint dated November 12, 2018, that she filed against her employer. This complaint alleges discriminatory treatment by the Claimant's employer upon her return to work. The complaint notes that the Claimant returned to work with her employer mid-November 2016 with medical restrictions and that the Claimant began looking for new work in June 2017.<sup>10</sup>

[17] I find the Claimant worked and received the payments reported by her employer in the weeks beginning November 13, 2016 to the week beginning December 18, 2016. The evidence supports this finding. The ROE says she worked during this period. The Commission confirmed the payroll information directly with the employer. The Claimant's Human Rights complaint, signed by her, indicates a return to work mid-November 2016 and continued employment past June 2017 when she began to seek out other work. The Claimant does not dispute that she worked and was paid the wages reported by her employer. She has provided no evidence to suggest the amounts the employer said she was paid are incorrect.

[18] I find the above-noted sums were paid to the Claimant by her employer as wages as they are payments for hours worked. Wages are considered earnings under the law.<sup>11</sup> As such, I find

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<sup>9</sup> Paragraph 35(2)(a) of the *Employment Insurance Regulations*.

<sup>10</sup> GD3-61 to GD3-62.

<sup>11</sup> Paragraph 35(2)(a) of the *Employment Insurance Regulations*.

these payments are earnings.

**Did the Commission allocate the earnings to the proper weeks?**

[19] Yes. The Commission allocated the earnings to the proper weeks.

[20] The law says that earnings have to be allocated.<sup>12</sup> Earnings are allocated depending on the nature of the earnings: why were the earnings paid?

[21] The Claimant's earnings are wages. The Claimant was paid the wages for hours worked. The law says that wages are allocated to the period in which the services are performed.<sup>13</sup>

[22] The Commission allocated the Claimant's earnings as set out below<sup>14</sup> to the weeks she worked and earned the wages.

<u>Week of</u>	<u>Earnings allocated</u>	<u>Instead of</u>
November 13, 2016	\$486.00	\$0.00
November 20, 2016	\$392.00	\$0.00
November 27, 2016	\$392.00	\$0.00
December 4, 2016	\$392.00	\$100.00 <sup>15</sup>
December 11, 2016	\$392.00	\$0.00
December 18, 2016	\$392.00	\$0.00

[23] This allocation resulted in an overpayment of \$2274.00.<sup>16</sup>

[24] The Claimant does not dispute this allocation.

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<sup>12</sup> Section 36 of the *Employment Insurance Regulations*.

<sup>13</sup> Subsection 36(4) of the *Employment Insurance Regulations*.

<sup>14</sup> GD3-40.

<sup>15</sup> The Commission says the Claimant reported \$100.00 in earnings this week.

<sup>16</sup> GD3-44.

[25] I find the Commission has properly allocated the Claimant's earnings to the weeks she worked and earned the wages.

**Did the Commission prove the Claimant knowingly provided false or misleading representations on her claimant's reports?**

[26] No. The Commission has not proven that the Claimant knowingly provided false or misleading representations on her claimant's reports.

[27] To impose a penalty, the Commission has to prove that the Claimant knowingly provided false or misleading information.<sup>17</sup>

[28] It is not enough that the information is false or misleading. To be subject to a penalty, the Commission has to show that it is more likely than not that the Claimant knowingly provided it, knowing that it was false or misleading.<sup>18</sup>

[29] If it is clear from the evidence, the questions were simple and the Claimant answered incorrectly, then I can infer that the Claimant knew the information was false or misleading. Then, the Claimant must explain why she gave incorrect answers and show that she did not do it knowingly.<sup>19</sup> The Commission may impose a penalty for each false or misleading statement knowingly made by the Claimant.

[30] I do not need to consider whether the Claimant intended to defraud or deceive the Commission when deciding whether she is subject to a penalty.<sup>20</sup>

[31] The Claimant submitted three bi-weekly claim reports over the internet covering the reporting period from November 13, 2016 to December 24, 2016. The claim reports asked whether the Claimant worked or received any earnings for the weeks of November 13, 2016, November 20, 2016, November 27, 2016, December 4, 2016, December 11, 2016 and December 18, 2016. The Claimant responded "No" to this question on each of the reports.<sup>21</sup> Although not

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<sup>17</sup> Section 38 of the *Employment Insurance Act*.

<sup>18</sup> *Bajwa v Canada*, 2003 FCA 341; the Commission has to prove this on a balance of probabilities, which means it is more likely than not.

<sup>19</sup> *Nangle v Canada (Attorney General)*, 2003 FCA 210.

<sup>20</sup> *Canada (Attorney General) v Miller*, 2002 FCA 24.

<sup>21</sup> GD3-19, GD3-25 and GD3-31.

noted on the Claimant reports, the Commission says the Claimant did make a report of earnings of \$100.00 the week of December 4, 2016.

[32] The Commission says that the Claimant knowingly made false or misleading statements with her responses because she knew that she was employed from November 13, 2016 to December 24, 2016 when she reported that she did not work and did not earn any income during that period, with the exception of \$100.00 reported in the week of December 4, 2016.

[33] The Commission says that the Claimant had agreed to her Rights and Responsibilities on her application, which informed her of the requirement to report all work, and total earnings, yet when she was asked the clear and simple question concerning whether she had worked and had earnings on each of the weeks, she reported that she did not. She only declared \$100 in the week of December 4, 2016. In addition, on each occasion when the Claimant made an internet report, she was asked to confirm her response that she did not work and did not have any earnings. The Commission says that, on the balance of probabilities the claimant subjectively knew that her representations were false. By responding that she had not worked, when she clearly had, the Claimant either knew or ought to have known that she was providing false information.

[34] I agree with the Commission that the question on the claimant reports was simple and the claimant's responses were objectively false. She answered she was not working when she was working. I can infer, therefore, that the Claimant knew the information she provided on those reports was false or misleading. The burden now shifts to the Claimant to explain why she gave incorrect answers and show that she did not do so knowingly.

[35] The Claimant argues in her Notice of Appeal that she did not knowingly provide false or misleading information because she was heavily sedated at the time of the wrongful entry. She also refers to having a Human Rights claim against her former employer.<sup>22</sup>

[36] The Commission asked the Claimant why she did not report her earnings when she returned to work. The Claimant told the Commission that she was on different medications and she was not reacting well. She said she was also having issues at her employment. She explained that she had suffered a nervous breakdown. She related having bipolar disorder and that her post

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<sup>22</sup> GD2-3.



traumatic stress disorder had been triggered. She explained she was homeless and had not been employed for several years.<sup>23</sup>

[37] The Claimant testified that she had a nervous breakdown in 2016. She was placed under a community treatment order against her will and a really strong drug was forced on her. She explained she was over medicated while in the hospital. The Claimant says she was sedated and under duress at the time she completed her claimant's reports. The Claimant said she cannot remember anything from that time. She says the drug she was given under the community treatment order was way too strong and she could not function. She had to apply to a board to be taken off the drug. The Claimant explained that it was the first week of December before she was taken off that specific drug and it was another two months later that she was back to herself, even though she was still experiencing duress at work. The Claimant says she does not know if she earned the wages the employer says she did. She was too medicated and under too much duress and also she had information overload. She explained it was the worse time in her life.

[38] The Claimant testified that when she went back to work she was not herself. She vaguely remembers completing the reports but does not know why she put the answers she did. She does not know what her thought process was. Her employer told her she was not acting like herself and they were not prepared to put her back on her regular hours. She was only allowed to monitor loads at work. The Claimant says she was not given regular hours until January and it was not until February that she felt improved.

[39] I find the Commission has not proven that the Claimant knowingly provided false or misleading representations on her claimant's reports. I am not satisfied, on a balance of probabilities, that the Claimant had subjective knowledge that her answers were false. The Claimant has met the onus placed upon her to provide a reasonable explanation to show that the misrepresentations were not knowingly made.

[40] I accept the Claimant's credible testimony that the drug she was given in the hospital caused sedation and that, even though she was taken off the drug in question and returned to

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<sup>23</sup> GD3-63.

work on November 13, 2016, that she still was feeling the impact of that medication until February 2017.

[41] The Claimant's testimony is supported by the social worker's letter of September 17, 2019. The social worker wrote in the letter that a review of the Claimant's medical case file indicates that the Claimant was under the care of a doctor from October 2016 to December 2018. The letter advises that the Claimant was provided medication, as per the conditions established in a Community Treatment Order (CTO). The letter notes that, while on the medication prescribed, the Claimant complained of sedation. The letter provides further that the medication was ineffective for management of the Claimant's bipolar disorder, which caused irrational behaviour. The letter goes on to say that the Claimant challenged the CTO and the order was discontinued in November 2016. The letter states that, at that time, the medication was discontinued and the Claimant was restarted on another medication. As a result, her cognitive functioning improved.

[42] I accept the Claimant's explanation that the incorrect answers were not knowingly made as she was still suffering from the impact of the medication at the time she completed the claim reports. The social worker's letter says the medication was discontinued in November 2016 and she was started on another medication which, as a result, her cognitive functioning improved. The Claimant said that she did not go off the medication until the first week of December. Whether the medication was discontinued sometime in November, or early December, I accept the Claimant's testimony that she experienced ongoing effects from that medication until February 2017. I am not satisfied, given the sedation she relates experiencing from the drug, that she fully appreciated what she was being asked or the responses she gave on the claimant's forms. I am not satisfied, therefore, on a balance of probabilities, that she knew she was providing false information by not reporting her work or earnings.

[43] Since the Claimant did not knowingly make false or misleading representations on her claimant's reports, there is no basis for the imposition of the non-monetary penalty of a warning. As such, the warning is removed. There is no need to address whether the Commission properly exercised its discretion when it imposed a non-monetary penalty of a warning.

**Do I have discretion to write off the overpayment arising from the allocation of earnings?**

[44] No. I do not have this discretion. I cannot write off the overpayment.

[45] The Claimant requested that the overpayment created by the allocation of her earnings be waived or written off due to mitigating circumstances. She submits that the overpayment arose due to her illness. She is currently homeless and in dire financial need.

[46] A claimant is liable to repay an amount paid by the Commission to the claimant as benefits to which the claimant is not entitled.<sup>24</sup>

[47] If earnings are received by a claimant for a period in a week of unemployment during which the claimant is incapable of work because of illness all those earnings are required to be deducted from the benefits payable for that week.<sup>25</sup>

[48] The Claimant was working and received wages during the period of her sickness claim but her wages were not deducted from her benefits. As such, she received benefits she was not entitled to.

[49] The Tribunal does not have jurisdiction to waive the overpayment in this case. The law provides that only the Commission has the discretion to write off overpayments in certain prescribed circumstances.<sup>26</sup> The Tribunal has no authority to review such a decision.<sup>27</sup> If the Claimant wishes to request a write-off of her debt, she must make that request directly to the Commission.

[50] I acknowledge the Claimant's financial difficulty and her compelling circumstances. However, I have no authority to write off her overpayment.

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<sup>24</sup> Subsection 43(b) of the *Employment Insurance Act*.

<sup>25</sup> Subsection 21(3) of the *Employment Insurance Act*.

<sup>26</sup> Subsection 56(1) of the *Employment Insurance Regulations*.

<sup>27</sup> Section 112.1 of the *Employment Insurance Act*.

**CONCLUSION**

[51] The appeal is allowed in part. The wages paid to the Claimant are earnings and the Commission has properly allocated them. The Tribunal has no authority to write off the overpayment. The Claimant did not knowingly make false or misleading representations on her claimant's reports so the warning is removed.

Charlotte McQuade

Member, General Division - Employment Insurance Section

HEARD ON:	October 21, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	K. M., Appellant