



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *R. B. v Canada Employment Insurance Commission*, 2019 SST 1543

Tribunal File Number: GE-19-2792

BETWEEN:

**R. B.**

Appellant/Claimant

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: Catherine Shaw

HEARD ON: September 18, 2019

DATE OF DECISION: November 29, 2019

## **DECISION**

[1] The Claimant's appeal is dismissed because he has not proven that he had any hours of insurable employment in his qualifying period. This means the Commission correctly canceled the benefit period that started on June 5, 2016.

[2] The Claimant also knowingly made a false representation to receive EI benefits, so a penalty was warranted. I have changed the penalty amount to \$1,047.

## **OVERVIEW**

[3] The Claimant applied for regular EI benefits. He gave the Commission a record of employment (ROE) saying that he had worked for a contractor and accumulated 700 hours of insurable employment. The Commission later investigated the Claimant's EI claim and decided the Claimant had not really worked for the contractor. It believed the contractor was not actually operating a business at all. The Commission canceled the Claimant's benefit period and asked him to repay the benefits he had received. It also imposed a penalty on the Claimant for providing an ROE with false information to establish his claim for benefits.

## **PRELIMINARY MATTERS**

[4] The Claimant's spouse is also the subject of an appeal to the Tribunal. They are both appealing similar issues, but the appeals have been heard and decided separately because the files do not share a common question of fact or law.

[5] The hearings for the Claimant and his spouse were held consecutively and they both participated in each hearing. In the interest of natural justice, I have considered any relevant testimony that they gave in each other's hearings as evidence in this decision.

## ISSUES

[6] The issues before me are as follows:

[7] **ISSUE 1:** I have to decide whether the Commission correctly canceled the Claimant's benefit period. This means I have to see if he qualified for benefits. To do this, I must first address whether the evidence supports that the Claimant was employed as documented on his ROE. Then I will see if he had enough insurable hours of employment in his qualifying period to qualify for benefits.

[8] **ISSUE 2:** I have to decide whether the Commission correctly imposed a penalty on the Claimant. This means I must determine whether the Claimant knowingly provided false information to the Commission to establish a benefit period. If he did, I must then decide whether the Commission properly exercised its discretion when it set the penalty amount.

## ANALYSIS

### **Did the Commission correctly cancel the Claimant's benefit period starting June 5, 2016?**

[9] Yes. I find the Claimant did not qualify for benefits on June 5, 2016. Considering all of the evidence, it is most likely that the Claimant was not employed by X, as documented on his ROE. He has not shown that he had any hours of insurable employment in his qualifying period. Therefore, the evidence indicates that the Claimant did not qualify for benefits. My reasons for this decision are below.

[10] The law says that you have to prove you are qualified to receive EI benefits.<sup>1</sup> This means that you must have an interruption in earnings and a minimum number of hours of insurable employment.<sup>2</sup> If you prove that you qualify, then the Commission establishes a benefit period and you can receive EI benefits.<sup>3</sup>

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<sup>1</sup> The Claimant must prove that he is qualified to receive EI benefits. This is set out in the *Employment Insurance Act* at section 48.

<sup>2</sup> The minimum number of hours required to qualify for benefits is based on your region of residence and the rate of unemployment in that region at the time you applied for benefits. This is set out in the table located at section 7(2) of the *Employment Insurance Act*.

<sup>3</sup> A benefit period is established under section 10 of the *Employment Insurance Act*.

[11] A benefit period can be canceled if you are found to not have enough insurable hours during your qualifying period.<sup>4</sup> This means that the benefit period that was established will be considered to have never started and you will have to repay any benefits you received during that benefit period.<sup>5</sup>

**Was the Claimant employed by X?**

[12] No. I find it is more likely than not that the Claimant was not employed by X as documented on his ROE.<sup>6</sup>

[13] The ROE filed in support of the Claimant's application for benefits is dated May 31, 2016. It states that the Claimant worked from January 18, 2016 to April 22, 2016 for X and accumulated 700 hours of insurable employment. It lists 14 pay periods with earnings of \$1,300 per week.<sup>7</sup>

[14] The Commission says this ROE contains false information. It says the Claimant was not employed with X and, as a result, did not work 700 insurable hours for that employer. It says that X was not an operating business, and so the Claimant could not have worked there.

[15] The Commission argues that the Claimant has been unable to support his claim that he was employed with X for the following reasons:

- The Claimant's bank account had no record of pay cheques received or cash deposited into his bank account during the period of his alleged employment.
- The Claimant was unable to provide any addresses of where he performed his work.
- The Claimant said that he frequently met the employer at the employer's house during his employment, but was unable to say where the employer's house was located.

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<sup>4</sup> A benefit period is canceled under section 10(6)(a) of the *Employment Insurance Act*.

<sup>5</sup> This principle is stated in CUB 56329 and was reaffirmed by the Federal Court of Appeal in *Kassam v. Canada (Attorney General)*, 2004 FCA 331

<sup>6</sup> The burden of proof in this case is a balance of probabilities, which means it is more likely than not that the events occurred as described.

<sup>7</sup> The ROE is found at GD3-15 of the appeal file. Section 9 of the *Employment Insurance Act* sets out that benefits are payable to a claimant for each week of unemployment that falls in the benefit period.

- The Claimant and the employer told the Commission contradictory information about the work they had performed. Specifically, the employer claimed they worked on a church and built a house. The Claimant said they had never worked on a church, but had done numerous small jobs on residential properties.
- The employer's bank account had no record of payments that were made to the Claimant or cash withdrawals that correspond to the Claimant's alleged wages.
- The employer could not provide documentation to support that he had an operating business during the period of time in question.

[16] The Commission has provided the several interviews with M. H., the employer. In these interviews, he said that he paid all of the company's employees in cash and had pay stubs to support their employment.<sup>8</sup> He said the company did several big jobs, including working on a church roof and building a house.<sup>9</sup>

[17] The Commission asked the employer to provide documentation to support that he was operating a business, including bank statements, paystubs, worksite information, customer estimates and invoices. On January 23, 2017, the employer told the Commission that he would send the information shortly, but called the Commission several days later and told them that it would not be possible to provide the banking statements or a list of the properties that he worked on. He said that he would still provide a list of the employees and the customer estimates and invoices. He did not provide this information and stopped responding to the Commission's attempts to contact him.

[18] The employer's bank statements were provided by the Commission.<sup>10</sup> The records do not show any cash withdrawals that correspond to the pay schedule or pay amounts recorded on the Claimant's ROE.

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<sup>8</sup> This is noted in the conversation on GD3-18 of the appeal file.

<sup>9</sup> This is noted in the conversation on GD3-23 of the appeal file.

<sup>10</sup> These records are located on GD3-99 to GD3-186 of the appeal file.

[19] The Commission argues that neither the employer nor the Claimant has provided any reliable evidence to prove that the Claimant performed and was paid for employment duties completed for the employer.

[20] The Claimant says that he was employed by X and worked all of the hours stated on his ROE. He says that he does not know why the Commission has canceled his benefits because this issue is between the Commission and the employer.

[21] In addition to the ROE, the Claimant relies on the following evidence to support his claim that he was employed by X:

- A T4 for the year 2016 issued by “X” for the Claimant.<sup>11</sup>
- Bank statements for the period from January 1, 2016 to April 30, 2017. These statements include images of four cheques deposited into the account which the Claimant says represent wages for his work at X. These cheques were signed by K. N.<sup>12</sup>
- A list of five properties which he says he says he worked on during his employment with X.<sup>13</sup>

[22] The Claimant provided additional information to the Tribunal regarding his employment arrangement. He said that he worked exclusively on rental properties belonging to another company, X. He received his layoff and T4 from X, but says that he was paid by X who were then paid by X. He said X was owned by several people, one of whom was K. N..

[23] The Claimant and his spouse’s joint bank account records were provided by the Commission. It includes copies of the cheques that were deposited into the joint account that he shares with his spouse. There are four cheques which the Claimant identified as wages for his employment with X. These cheques are all signed by K. N. and are summarized as follows:

- A cheque dated February 12, 2016, for the amount of \$750.00.

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<sup>11</sup> This T4 is located on GD2-6 of the appeal file.

<sup>12</sup> These cheques are located at GD3-62, GD3-65, GD3-66, and GD3-68.

<sup>13</sup> This list was provided to the Tribunal by e-mail on September 27, 2019 and is located on GD10-1 of the docket.

- A cheque dated April 29, 2016, for the amount of \$987.60.
- A cheque dated May 13, 2016, for the amount of \$875.00.
- A cheque dated May 27, 2016, for the amount of \$475.00.

[24] The Claimant testified that K. N. also worked for X to oversee the rest of the workers. He said that K. N. would pick up the materials for the jobs and bring them to the properties. K. N. would also direct the Claimant where he was working each day. He said at the hearing that he did not personally have contact with M. H. to take orders, but that he would meet up with him sometimes in the mornings at a house that M. H. was building, which now belongs to K. N.

[25] The Claimant's testimony regarding the payment of his wages and his contact with the employer directly contradicts the information that he gave to the Commission. The Claimant initially told the Commission that he reported directly to M. H.<sup>14</sup> He said that M. H. did all of the quotes and told him what needed to be done. M. H. told him where he would be working each day, either by calling him or when they would meet up in the morning at M. H.'s house. M. H. also handled getting all the material. The Claimant said that he worked mostly with his spouse and only worked with other employees, such as K. N., when there was a big job to be done, like shingling a roof or installing a large window.<sup>15</sup> The Claimant also told the Commission that he was paid cash by the employer, M. H., and did not receive any pay stubs. He said that he was mostly paid every week, either Friday or Monday, but sometimes was not paid until the job was done.

[26] This version of events is a significant departure from what he stated at the hearing. He testified that K. N. was there to oversee the other workers, provided the materials for each job, directed the Claimant where to work each day, and paid his wage by either cash or cheque. He also said that his wage payments were behind at the end of his employment period and K. N. continued to pay him as a result. According to his ROE, his employment ended on April 22, 2016, but his banking records show that he received cheques from K. N. dated April 29, 2016, May 13, 2016, and May 27, 2016. The Claimant has explained that the cheques from K. N. were

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<sup>14</sup> This statement is part of the conversation located on GD3-21 of the appeal file.

<sup>15</sup> These statements are noted in the conversation on GD3-28 to GD3-31 of the appeal file.

wages for his employment with X. However, the cheques do not correspond with the pay schedule or wage amounts that are recorded on the Claimant's ROE.

[27] In the face of contradictory statements, I must weigh the evidence and decide which is more reliable. In this case, I prefer to rely on the Claimant's initial statements because they were made spontaneously, they were also made closer in time to his supposed period of employment, and they were made before he was informed that he was denied EI benefits. Since that time, it appears that his story has changed to fit the banking information, rather than providing evidence to support his original version of events. This inconsistent and conflicting information reduces the reliability of the Claimant's testimony.

[28] At the hearing, the Claimant said that he had already provided a list of the properties that he had performed work on to the Commission. He said that many of the properties do not have civic numbers, but that he described them in a handwritten note that was sent to the Commission around three or four weeks after his conversation with Melissa White from the Commission. On September 27, 2019, he provided a list of properties that he says he worked on during his employment to the Tribunal. In this e-mail, he said that this information, along with his banking records, were mailed to Melissa White two weeks after her initial conversation with the Claimant.

[29] The Commission's records show that Melissa White contacted the Claimant on April 26, 2017.<sup>16</sup> During this conversation, she asked the Claimant to provide copies of his bank statements and to drive around town and write down the addresses of the homes that he remembers working at.<sup>17</sup> The Claimant called her back on April 27, 2017, and stated that getting the bank statements would be difficult but he would send them off within the next couple of days. The Claimant next spoke with an agent, Tanya Dawe, on January 8, 2019. In this conversation, he said that he cannot provide any names or addresses for the jobs that he performed.<sup>18</sup>

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<sup>16</sup> The notes of this conversation are located on GD3-28 of the appeal file.

<sup>17</sup> This exchange is noted at GD3-30 of the appeal file, as part of the same conversation.

<sup>18</sup> The notes of this conversation are located on GD3-204 of the appeal file.



[30] I do not find the Claimant's list of properties to be convincing evidence that he was employed with X. Although he testified that he provided this list of properties to the Commission during its investigation, the Commission denied that it had received such information. Further, the Claimant stated multiple times to the Commission that he could not provide such a list of properties because he did not recall where he had worked.<sup>19</sup> This list of properties is not extensive. It should have easily been produced at the time it was requested by the Commission, but the Claimant repeatedly stated that he could not produce such a list. As such, the evidence indicates that the Claimant did not provide this list contemporaneously with the Commission's investigation into his employment claim. For these reasons, I find the list of properties does not establish that the Claimant was employed with X from January to April 2016.

[31] Taken as a whole, I find that the evidence on file does not support that the Claimant's employment took place as recorded on the ROE.

[32] The Claimant's various accounts of his work duties, and when and where he performed them, have been vague and inconsistent. The Commission's interviews with the Claimant documents that he did not know the approximate period of his employment, the hours per week that he worked, his hourly wages, which properties he worked on, or where the employer's house was located, despite saying that he would meet the employer at that house every work day. Additionally, he has changed his story regarding his employment arrangement and how he was paid several times throughout his conversations with the Commission and in his testimony before the Tribunal. The information he provided to the Commission and the Tribunal was inconsistent, and he was not able to satisfactorily reconcile his contradictory answers.

[33] I find the Commission's evidence is more persuasive, plausible, and consistent than that of the Claimant. I find that, on a balance of probabilities, the Claimant has not proven that he was employed at X. It is more likely that the ROE contains false information that the Claimant was employed with X from January 18 to April 22, 2016.

### **Did the Claimant qualify for benefits on June 5, 2016?**

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<sup>19</sup> The Commission asked the Claimant to provide a record of the properties during the telephone conversations noted on GD3-30 and GD3-204 of the appeal file. On GD3-204, it is noted that the Claimant could not provide this list of properties as of January 8, 2019.

[34] To qualify for benefits, you must have an interruption in earnings and work a minimum number of hours of insurable employment in your qualifying period.<sup>20</sup> You must prove that you are qualified to receive benefits.<sup>21</sup>

[35] I have found that the Claimant, on a balance of probabilities, was not employed at X. Therefore, the ROE from that employer cannot be used to establish the Claimant worked any hours of insurable employment during his qualifying period.

[36] The Claimant has not produced any evidence that he worked any insurable hours in his qualifying period. On his application for benefits, he stated that he did not have any employers other than X in the preceding 52 weeks. Without the ROE from X and with no other evidence that would demonstrate the number of hours of insurable employment worked by the Claimant, I must conclude that the Claimant had zero hours of insurable employment in his qualifying period related to the claim for benefits made on June 5, 2016.

[37] The Commission has not submitted how many hours the Claimant required to qualify for benefits, but you need a minimum of 420 hours to qualify for benefits in any region. Therefore, the Claimant has failed to prove he qualified to receive benefits on June 5, 2016. The Claimant could not establish a benefit period on that date, so the Commission correctly canceled the Claimant's benefit period established on June 5, 2016.

## **PENALTY**

[38] The law says the Commission can impose a penalty if you have made a representation that you knew was false or misleading.<sup>22</sup> This means that you knew the information was untrue when you made the statement, it does not mean that you had the intention to deceive anyone.<sup>23</sup> The Commission prove that you knowingly made a false or misleading representation.<sup>24</sup>

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<sup>20</sup> The minimum number of hours required to qualify for benefits is based on your region of residence and the rate of unemployment in that region at the time you applied for benefits. This is set out in the table located at section 7(2) of the *Employment Insurance Act*.

<sup>21</sup> This is set out in sections 48(1) and 49 of the *Employment Insurance Act*.

<sup>22</sup> This is set out at section 38(1)(a) of the *Employment Insurance Act*

<sup>23</sup> *Canada (Attorney General) v. Gates*, A-600-94

<sup>24</sup> *Canada (Attorney General) v. Purcell*, [1996] 1 FC 644

[39] The Commission submits the Claimant made two false representations. The first was when he applied for EI benefits claiming that he was employed with X from January 18, 2016 to April 22, 2016. The second was when he provided an ROE from that employer claiming that he was employed for the same period. As a result of that misrepresentation, he was paid a significant amount of EI benefits that he was not qualified to receive.

[40] I have found it is most likely that the Claimant was not employed by X for the period of time in question. I agree with the Commission's submission that the Claimant would have known that he did not work for the employer during this period of time. Therefore, I find when he applied for EI benefits and provided an ROE from that employer which claimed he was employed from January 18, 2016 to April 22, 2016, he knowingly provided false information to establish a benefit period.

[41] As the Claimant knowingly made false representations, the Commission was allowed to impose a penalty. However, I find that the Commission did not properly exercise its discretion when it set the penalty amount, therefore I will modify the penalty amount based on all of the relevant information.

[42] The law says the Commission's decision on the penalty amount is discretionary.<sup>25</sup> This means that it is open to the Commission to set it at the amount it thinks is correct. I have to look at how the Commission exercised its discretion. I can only change the penalty amount if I first decide that the Commission did not exercise its discretion properly when it set the amount.<sup>26</sup>

[43] The Commission imposed a monetary penalty of \$2,148 after considering the total amount of the overpayment and that the Claimant had knowingly provided false information. The Claimant had no submissions regarding whether the Commission properly exercised its discretion. The Claimant's spouse said at the hearing that repaying the EI benefits and the penalty amount put both her and the Claimant into a position of financial hardship. They are

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<sup>25</sup> *Canada (Attorney General) v Kaur*, 2007 FCA 287. The Commission's decision can only be interfered with if it exercised its discretionary power in a non-judicial manner or acted in a perverse or capricious manner without regard to the material before it: *Canada (Attorney General) v Tong*, 2003 FCA 281.

<sup>26</sup> Discretion is exercised in a non-judicial manner if the decision-maker acted in bad faith, or for an improper purpose or motive, took into account an irrelevant factor or ignored a relevant factor or acted in a discriminatory manner: *Canada (Attorney General) v Purcell*, [1996] 1 FC 644.

receiving social assistance benefits that amounts to only \$700 every two weeks, which makes it difficult to pay their bills.

[44] The Claimant's financial hardship is a relevant factor that should have been considered by the Commission. I recognize that the Commission may not have been aware of the Claimant's financial situation at the time it made the decision to impose the penalty. However, appeals to the Tribunal allow the Claimant to submit new evidence. Therefore, I find the Commission did not properly exercise its discretion because it did not consider all of the relevant factors.

[45] As the Commission did not properly exercise its discretion, I must now set the penalty amount. Penalties are meant to deter claimant's from making future misrepresentations. Having considered that, the relevant factors set out by the Commission, and the Claimant's financial circumstances discussed above, I set the penalty amount at 5% of the total overpayment amount. The total overpayment amount is \$20,943. This means the penalty amount is set at \$1,047.

## **CONCLUSION**

[46] The appeal is dismissed with modification. The Claimant did not qualify for benefits on June 5, 2016, therefore he could not establish a benefit period on that date. The penalty amount is reduced from \$2,148 to \$1,047.

Catherine Shaw

Member, General Division - Employment Insurance Section

HEARD ON:	September 18, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	R. B., Appellant