



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *D. C. v Canada Employment Insurance Commission*, 2019 SST 1544

Tribunal File Number: GE-19-2791

BETWEEN:

D. C.

Appellant/Claimant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Catherine Shaw

HEARD ON: September 18, 2019

DATE OF DECISION: November 29, 2019

DECISION

[1] The Claimant's appeal is dismissed because she has not proven that she had any hours of insurable employment in her qualifying period. This means the Commission correctly canceled the benefit period that started on July 3, 2016.

[2] The Claimant knowingly made a false representation to receive EI benefits, so a penalty was warranted. I have changed the penalty amount to \$940.

OVERVIEW

[3] The Claimant applied for regular EI benefits. She gave the Commission a record of employment (ROE) saying that she 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 her to repay the benefits she had received. It also imposed a penalty on the Claimant for providing an ROE with false information to establish her 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 her 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 she qualified for benefits. To do this, I must first address whether the evidence supports that the Claimant was employed as documented on her ROE. Then I will see if she had enough insurable hours of employment in her 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 in order to establish a benefit period. If she 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 July 3, 2016?

[9] Yes. I find the Claimant did not qualify for benefits on July 3, 2016. Considering all of the evidence, it is most likely that the Claimant was not employed by X, as documented on her ROE. She has not shown that she had any hours of insurable employment in her 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.¹ This means that you must have an interruption in earnings and a minimum number of hours of insurable employment.² If you prove that you qualify, then the Commission establishes a benefit period and you can receive EI benefits.³

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

² 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*.

³ 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.⁴ 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.⁵

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 her ROE.⁶

[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 \$1040 per week.⁷

[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 her claim that she was employed with X for the following reasons:

- The Claimant's bank account had no record of pay cheques received or cash deposited into her bank account during the period of her alleged employment.
- Neither the Claimant nor her spouse were able to provide any addresses of where they performed their work.

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

⁵ 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

⁶ 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.

⁷ The ROE is found at GD3-16 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 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.⁸ He said the company did several big jobs, including working on a church roof and building a house.⁹

[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.¹⁰ The records do not show any cash withdrawals that correspond to the pay schedule or pay amounts recorded on the Claimant's ROE.

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

⁸ This is noted in the conversation on GD3-19 of the appeal file.

⁹ This is noted in the conversation on GD3-22 of the appeal file.

¹⁰ These records are located on GD3-95 to GD3-180 of the appeal file.

[20] The Claimant says that she was employed by X and worked all of the hours stated on her ROE. She asserts that she did not do anything wrong and feels that she is being punished for something that is not her fault.

[21] The Claimant stated that she was employed as her spouse's assistant for X. She worked only with her spouse. Her spouse directed her work, told her where they were working and what they were doing that day. She said she never met the employer. Her spouse handled all of the contact with the employer and also received both of their wages, which he then brought home to her. In other words, both of their wages were paid directly to her spouse and then she would get her share from her spouse.

[22] The Claimant said that she was only paid in cash and the employer would provide a slip of paper which stated her and her spouse's wages minus the deductions. She said that she no longer has the slips of paper.

[23] The Claimant's spouse appeared at the hearing as her representative and gave testimony as a witness. She said that her contact with the Commission was limited and that her spouse spoke to the Commission on her behalf.

[24] In addition to the ROE, the Claimant relies on the following evidence to support her claim that she was employed by X:

- A T4 for the year 2016 issued by X for the Claimant.¹¹
- 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's spouse says represent wages for their work at X. These cheques were signed by K. N.¹²
- A list of five properties which the Claimant's spouse says they worked on during their employment with X.¹³

¹¹ This T4 is located on GD2-6 of the appeal file.

¹² These cheques are located at GD3-56, GD3-59, GD3-60, and GD3-62.

¹³ This list was provided to the Tribunal by e-mail on September 27, 2019 and is located on GD10-1.

[25] The Claimant's spouse provided additional information to the Tribunal regarding their employment arrangement. He said that they worked exclusively on rental properties belonging to another company, X. They received their layoff and T4 from X, but says that they received their wages from X. This company was then reimbursed for the wages by X. He said X was owned by several people, one of whom was K. N.

[26] The Claimant and her 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.
- 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.

[27] The Claimant's spouse 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.

[28] The Claimant's spouse's testimony regarding the payment of their wages and his contact with the employer contradicts the information that he gave to the Commission. The Claimant's spouse initially told the Commission that they were paid in cash and did not receive any pay stubs. He also said that the Claimant and himself worked by themselves, stating that the only people who could verify the Claimant's employment was himself and the employer, M. H.

[29] This version of events is a significant departure from what the Claimant's spouse stated at the hearing. He testified that he worked directly under K. N., who was there to oversee the other workers, provide the materials for each job, and who directed the Claimant where he and his spouse were working each day and paid their wage by either cash or cheque. He also said that

their wage payments were behind at the end of their employment period and K. N. continued to pay them as a result. According to her ROE, the Claimant's employment ended on April 22, 2016, but the banking records show that the Claimant and her spouse received cheques from K. N. dated April 29, 2016, May 13, 2016, and May 27, 2016. The Claimant's spouse explained that the cheques from K. N. were 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.

[30] 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 spouse's initial statements because they were made spontaneously, they were also made closer in time to the Claimant's supposed period of employment, and they were made before either party was informed that they were denied EI benefits.

[31] At the hearing, the Claimant's spouse said that he had already provided a list of the properties that he had performed work on to the Commission. On September 27, 2019, the Claimant and her spouse provided a list of properties that they say they worked on during their employment to the Tribunal. In this e-mail, they said that this information, along with their banking records, were mailed to an agent of the Commission in May 2017.

[32] I do not find the Claimant's list of properties to be convincing evidence that she was employed with X. Although the Claimant's spouse 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's spouse stated to the Commission in January 2019, that he could not provide such a list of properties because he did not recall where he had worked.¹⁴ 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's spouse stated that he could not produce such a list even years later. The evidence indicates that the Claimant did not provide this list contemporaneously with the Commission's investigation into her 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.

¹⁴ On GD3-200, it is noted that the Claimant's spouse could not provide this list of properties as of January 8, 2019.

[33] 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.

[34] The Claimant's has not presented reliable evidence of her employment. Her spouse's various accounts of their employment arrangement have been vague and inconsistent. The information he provided to the Commission and the Tribunal was changed several times, and he was not able to satisfactorily reconcile his contradictory answers.

[35] 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 she 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 July 3, 2016?

[36] 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.¹⁵ You must prove that you are qualified to receive benefits.¹⁶

[37] 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.

[38] The Claimant has not produced any evidence that she worked any insurable hours in her qualifying period. On her application for benefits, she stated that she did not have any employers other than X in the preceding 52 weeks.¹⁷ 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 her qualifying period related to the claim for benefits made on July 3, 2016.

¹⁵ 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*.

¹⁶ This is set out in sections 48(1) and 49 of the *Employment Insurance Act*.

¹⁷ This response is located on GD3-8 of the appeal file.

[39] 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 she qualified to receive benefits on July 3, 2016. The Claimant could not establish a benefit period on that date, so the Commission correctly canceled the Claimant's benefit period established on July 3, 2016.

PENALTY

[40] The law says the Commission can impose a penalty if you have made a representation that you knew was false or misleading.¹⁸ 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.¹⁹ The Commission must prove that you knowingly made a false or misleading representation.²⁰

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

[42] 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 she did not work for the employer during this period of time. Therefore, I find when she applied for EI benefits and provided an ROE from that employer which claimed she was employed from January 18, 2016 to April 22, 2016, she knowingly provided false information in order to establish a benefit period.

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

¹⁸ This is set out in section 38(1)(a) of the *Employment Insurance Act*.

¹⁹ *Canada (Attorney General) v. Gates*, A-600-94

²⁰ *Canada (Attorney General) v. Purcell*, [1996] 1 FC 644

[44] The law says the Commission's decision on the penalty amount is discretionary.²¹ 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.²²

[45] The Commission imposed a monetary penalty of \$1,611 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. She said at the hearing that repaying the EI benefits and the penalty amount put her and her spouse into a position of financial hardship. They are receiving social assistance benefits that amounts to only \$700 every two weeks, which makes it difficult to pay their bills.

[46] 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.

[47] 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 \$18,795. This means the penalty amount is now set at \$940.

CONCLUSION

²¹ *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.

²² 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 in irrelevant factor or ignored a relevant factor or acted in a discriminatory manner: *Canada (Attorney General) v. Purcell*, [1996] 1 FC 644.

[48] The appeal is dismissed with modification. The Claimant did not qualify for benefits on July 3, 2016, therefore she could not establish a benefit period on that date. The penalty amount is reduced from \$1,611 to \$940.

Catherine Shaw

Member, General Division - Employment Insurance Section

HEARD ON:	September 18, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	D. C., Appellant R. B., Representative for the Appellant