



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *GM v Canada Employment Insurance Commission*, 2020 SST 1105

Tribunal File Numbers: GE-20-903 and GE-20-904

BETWEEN:

G. M.

Claimant

and

Canada Employment Insurance Commission

Commission

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Audrey Mitchell

DATE OF DECISION: July 31, 2020

DECISION

[1] The appeal is allowed. The wages paid to the Claimant are earnings but the Commission incorrectly allocated the earnings. The Commission did not correctly impose penalties because the Claimant did not knowingly make false or misleading statements. The Commission did not correctly issue notices of violation.

OVERVIEW

[2] The Claimant has worked in the construction industry for many years. He has made annual applications for employment insurance (EI) benefits when laid off. The Commission conducted an investigation and determined that the Claimant worked while collecting EI benefits. They gave the Claimant an opportunity to explain the discrepancy between information his employer gave them and his failure to report his earnings. The Claimant apologized for the mistake, stating that he would take steps to ensure this did not happen again.

[3] The Commission allocated the Claimant's earnings. They imposed two penalties and issued two notices of violation because they determined that he made false or misleading statements concerning his earnings.

[4] On appeal, the Claimant argued that his estranged wife accessed his filing information, completed bi-weekly reports while he was working without his knowledge, and diverted the benefits to her bank account. The General Division of the Social Security Tribunal (SST) dismissed the Claimant's appeal of the Commission's decision. The Appeal Division of the SST allowed the Claimant's appeal and returned it to the General Division for a new decision.

PRELIMINARY MATTERS

[5] In his request for reconsideration dated September 26, 2017, the Claimant referred to the Commission's decisions of September 5, 2017 and September 6, 2017. However, the Commission's reconsideration decision refers only to the September 6, 2017 decision. The Claimant did not file with the Tribunal a reconsideration decision for the Commission's September 5, 2017 initial decision.

[6] In response to a request from the Tribunal, the Commission provided additional evidence and the reconsideration decision of their September 5, 2017 initial decision. Because of this, I dispense the Claimant from having to file a copy of the Commission's reconsideration decision.¹

ISSUES

[7] Did the Commission prove the Claimant knowingly provided false or misleading information on his claim reports?

[8] If so, did the Commission properly impose penalties?

[9] Did the Commission properly issue notices of violation?

[10] Is the money that the Claimant received earnings?

[11] If so, did the Commission correctly allocate the Claimant's earnings?

ANALYSIS

Issue 1: Did the Claimant knowingly provide false or misleading information?

[12] I do not find that the Claimant completed the bi-weekly claimant's reports in question. I find that a third party, possibly his estranged wife completed the reports. Although the information provided about the Claimant working and receiving earnings was false or misleading, I do not find that the Claimant knowingly provided false or misleading information.

[13] The Commission can impose a penalty on a claimant if, in their opinion, the claimant provided information or made a representation that the claimant knew was false or misleading.²

[14] To impose a penalty, the Commission has to prove that the Claimant knowingly provided false or misleading information.³

¹ Paragraph 3(1)(b) of the *Social Security Regulations*.

² Paragraph 38(1)(b) of the *Employment Insurance Act*.

³ Section 38 of the *Employment Insurance Act*.

[15] 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.⁴

[16] The Claimant said that his estranged wife made bi-weekly claims for EI benefits in his name and diverted the benefits paid to her bank account. To determine if the Claimant was the victim of fraud, I must determine whether a third party fraudulently caused the Commission to pay the benefits, and if so, whether the third party committed the fraud with the Claimant's knowledge and consent.⁵

[17] The Claimant applied for EI benefits on January 1, 2015, and December 22, 2015. The Commission's evidence is that the Claimant had earnings from the week of May 24, 2015 to the week of August 23, 2015, and from the week of March 27, 2016 to the week of June 19, 2016. They paid the Claimant EI benefits for these periods based on bi-weekly claims for benefits.

[18] The Commission's file includes a report from their Full Text Screens software. The report shows the Claimant's e-report questions and answers from March 20, 2016 to June 25, 2016. The Claimant says he did not complete these reports. However, the report shows that responses of "[n]o" to the question, "[d]id you work or earn wages during the period of this report?" for each bi-weekly period. The Commission did not include a similar report for the weeks from May 24, 2015 to August 23, 2015.

[19] The Commission gave the Claimant an opportunity to respond to information they got from his employer about his earnings while he received EI benefits. The Claimant called the Commission before responding to their inquiries. He said that he had checked his bank account but did not see any deposits. After speaking to the Commission, the Claimant completed one of the forms they sent to him. He apologized for the mistake. He also suggested that someone else in his household had accessed his filing information.

⁴ *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.

⁵ *Canada (Attorney General) v. Lylander*, 2008 FCA 365

Did a third party fraudulently cause the Commission to pay benefits?

[20] I find that a third party fraudulently caused the Commission to pay benefits.

[21] The Claimant has maintained that his estranged wife completed bi-weekly claims in his name without his knowledge. His evidence is that since his wife opened the family mail, he believes this is how she got his access code. He confirmed that before 2014, his wife had never helped him with applications for benefits or bi-weekly claims. Concerning the bi-weekly claims, the Claimant testified at his hearing before the General Division in 2018 that his wife had made the claims while he was at work.

[22] The Commission included only one report of bi-weekly claims in their file. Of the seven claims completed for the periods March 20, 2016 and June 26, 2016, the first was completed at 8:57 p.m. The others were completed during normal business hours.

[23] I asked the Claimant about his work schedule. The Claimant said that he works eight to 10 hours a day, five days per week. He also stated he did not have the opportunity to take care of personal tasks while on the job site.

[24] At his hearing in 2018, the suggested that now it is possible to complete claims using a cellphone, but not previously. When the Member asked him if he had completed claims online, the Claimant confirmed that he had, and said that he and his wife shared a computer at home.

[25] I do not doubt the Claimant's evidence concerning his work schedule and inability to complete personal tasks while at work. This is especially the case since the Claimant works in the construction industry. Because of when most of the bi-weekly claims during the period covered by the bi-weekly report of claims in the Commission's file when the Claimant would have been at work, I do not find that he completed the seven bi-weekly claims. Although the bi-weekly reports of claims for the period in question in 2015 is not before me, I am persuaded by the activity in the 2016 period and from the Claimant's statements, that the 2015 claims were likely also completed while the Claimant was at work, and that he did not make these claims. The Claimant testified that his wife had EI benefits deposited into her bank account. He said that he did not have access to this account. The Commission's evidence shows a change in banking information effective March 7, 2014.

[26] The Claimant submitted two letters from his bank to support his testimony that he did not have access to the new bank account to which the Commission deposited EI benefits. The first letter confirms that the Claimant opened an account at the bank in June 2007. He then opened a joint account with his wife. The bank then directed to the joint account all funds previously credited by direct deposit to the Claimant's original account.

[27] The second letter confirms that the Claimant has never owned or operated the bank account identified for deposit of EI benefits from March 7, 2014. The bank could not say who owns the account or when it was opened without a court order. I find from the bank's two letters that the Claimant did not receive EI benefits in a bank account he owned from March 7, 2014 until he updated his banking information with the Commission effective December 22, 2016.

[28] I asked the Claimant if he received EI benefits from the application he made on December 22, 2015. The Claimant confirmed that he did. In a follow-up question, I asked him to explain this since he said that his wife had changed banking information with the Commission in 2014. The Claimant, through his representative, provided an initial and an amended response. In the first, he said that his wife had filed for benefits in his name from the week of March 7, 2014 and routed the benefits to her account without his knowledge or consent. In the amended response, the Claimant again said that he received benefits from this application. He added that his wife filed for benefits without his knowledge from "the week beginning March 27, 2016 to the week beginning June 19, 2016".

[29] I do not find that the amended response makes sense. It does not adequately explain how the Claimant could say he received EI benefits when he did not have access to the account to which the Commission deposited benefits since March 2014. However, I find that the Claimant's previous testimony at his 2018 appeal hearing provides a reasonable explanation that is more consistent with his initial response.

[30] The Claimant testified that his wife did all of the banking, including paying bills and rent. His wife gave him an allowance. The Claimant said that because of his work schedule, it was hard for him to go to the bank to see where his benefits went. I have already found that the Commission deposited benefits to an account that the Claimant did not own. I also have no reason to doubt his earlier testimony that his wife managed the money. Therefore, I do not find

that his statement that he received benefits from his December 2015 is in conflict with the fact that the Commission did not deposit the benefits to his account.

[31] The Claimant submitted copies of bank statements of his joint account with his wife, to show that no EI benefits were deposited to the account. The bank statements show some deposits with the description “CANADA”, some of which fall within one of the periods in question. At his Appeal Division hearing, the Claimant said that these deposits were likely child tax benefits. He noted that the amounts deposited are different from his weekly benefit rate for EI benefits. He also pointed to transfers from the joint account to the new account identified for deposit of EI benefits effective March 7, 2014 that the Claimant did not own.

[32] I find from the bank statements that the deposits with the description “CANADA” are not EI benefits that the Commission deposited. The Commission’s evidence is that the Claimant’s weekly benefit rate was \$524, which is much different from the total monthly deposit amounts, even taking into account tax deductions. In addition, some of the deposits fall outside the periods in question and when the Claimant would not otherwise have collected EI benefits.

[33] I have already found that the Claimant did not make the bi-weekly claims for the periods in question. I accept his evidence that his wife likely got his access code by opening the mail and not because she had previously helped him with an application for benefits or bi-weekly claims. I also do not find that he knew of or received the corresponding benefits since the Commission deposited them to an account he did not own. I find, therefore, that a third party fraudulently caused the Commission to pay the benefits based on the bi-weekly claims.

Did the Claimant know of or consent to a third party making bi-weekly claims in his name?

[34] I do not find that the Claimant knew of or consented to a third party making bi-weekly claims in his name.

[35] At his hearing before the General Division in 2018, the Claimant testified that he had worked for different construction companies, but with the same union for 20 years. He said that he was laid off most winters, unless there was work, so he applied for EI benefits. He stated that when he went back to work, he would stop his claims and reactivate them the following year after lay-off. He added that he had done this for the last 20 years without issue until recently.

[36] The Claimant testified that he had been with his now estranged wife for 16 years and married to her for 10. He said he and his wife were having marital problems around the time of the problems with the EI claims. They are not currently together.

[37] Because the Commission did not contact the Claimant until 2017 about his earnings while collecting benefits, I asked him what prompted him to change banking information with the Commission in December 2016. The Claimant responded that he did so because of the breakdown of his relationship with his wife. He said that he did not know at the time that banking information had been changed previously.

[38] I find the Claimant's suggestion that all was fine with his EI claims until he began to have relationship issues with his wife is plausible. I find that the Claimant's action to change his banking information from what he thought was the joint account with his wife gives credence to his statements that he did not know of or consent to his wife claiming EI benefits in his name.

[39] I note that in response to the Commission's request for clarification of earnings information his employer gave them, the Claimant apologized and took full responsibility for the "mistake". The Commission submits that the Claimant admitted to making the applications for benefits and completing his bi-weekly claims, and apologized for his actions.

[40] I asked the Claimant about his response to the Commission. He said that he did not really understand the question of discrepancies as a mistake at the time. Again, I am not satisfied with this response. However, in the response to the Commission, the Claimant suggested that someone in his household had accessed his EI filing information. I find from this that although he apologized, the Claimant signaled that he was not the one who made a "mistake". As a result, I do not find that the apology equates to an admission that he completed the bi-weekly claims during the periods in question.

[41] I asked the Claimant what he meant when he told the Commission that he completed his own application and bi-weekly claims. The Claimant said that he did so online, but stopped once he returned to work. I do not find the Claimant's statement to the Commission to be an admission that he made the bi-weekly claims during the periods in question. The Commission asked the Claimant a general question without specifying any dates. After his employer laid him

off, the Claimant did apply for benefits as the Commission's files reflect. I have no reason to disbelieve that he stopped reporting each time he returned to work.

[42] The Claimant filed a police report concerning alleged fraud concerning his EI benefits. Approximately three months later, the police closed their case, concluding that no offence was committed. The Claimant argued that he could refile the case after the conclusion of this appeal.

[43] I note that the information given to the police about bank accounts, financing and the Claimant accessing money from the joint account with his wife is consistent with his statements to the Commission and in his appeal. It is clear that the police investigation did not result in any charges. However, there is insufficient information for me to conclude that the Claimant knew of or consented to what he alleges his wife did. I give a lot of weight to his action of pursuing a case against his wife with the police. I find that this lends credibility to his statement that at the time he did not know of or consent to what his wife was doing.

[44] Based on the analysis above, I do not find that the Claimant knew or consented to a third party making claims in his name.

[45] I have found that the Claimant did not make the bi-weekly claims from the week of May 24, 2015 to the week of August 23, 2015, and from the week of March 27, 2016 to the week of June 19, 2016. I have also found that a third party, perhaps the Claimant's ex-wife, fraudulently caused the Commission to pay him benefits, and that he did not know of or consent to this action. Because of this, I do not find that he knowingly made false or misleading statements.

Issue 2: Did the Commission properly impose the penalties?

[46] Because I have found that the Claimant did not knowingly make a false or misleading statements, I do not find that the Claimant is subject to the penalties the Commission imposed.

Issue 3: Did the Commission properly issue notices of violation?

[47] Because I have found that the Claimant is not subject to penalties, I also find that he is not subject to notices of violation.

Issue 4: Is the money that the Claimant received earnings?

[48] I find that the money the Claimant received is earnings.

[49] The law says that earnings are the entire income of a claimant arising out of any employment.⁶ 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.⁷ “Employment” includes any employment under any kind of contract of service or employment.⁸

[50] A claimant’s income is earnings if it is given in return for work or if there is sufficient connection between the claimant’s employment and the sum of money received.⁹

[51] The Claimant did not dispute that he received money from the employer as they reported to the Commission. The earnings the employer reported were for three periods. These periods are from the week of March 16, 2014 to the week of August 17, 2014, from the week of May 24, 2015 to the week of August 23, 2015, and from the week of March 27, 2016 to the week of June 19, 2016.

[52] Because the Claimant does not dispute the Commission’s evidence that the employer paid him for services performed in the periods identified above, I find sufficient connection between the Claimant’s employment and the money paid to him. For the same reason, I find that the money arose out of the Claimant’s employment with the employer. I find, therefore, that the money was earnings.

Issue 5: Did the Commission correctly allocate the Claimant’s earnings?

[53] Although I have found that the money paid to the Claimant by the employer are earnings, I do not find that the Commission has correctly allocated the earnings.

⁶ Subsection 35(2) of the *Employment Insurance Regulations*.

⁷ Subsection 35(1) of the *Employment Insurance Regulations*.

⁸ Subsection 35(1) of the *Employment Insurance Regulations*.

⁹ *Canada (Attorney General) v. Roch*, 2003 FCA 356

[54] Earnings to be paid to a claimant who is under a contract of employment to perform services must be allocated to the period in which the services are performed.¹⁰

[55] The Commission allocated earnings to the week beginning March 16, 2014 to the week beginning August 3, 2014, from the week beginning April 24, 2015 to the week beginning August 23, 2015, and from the week of March 27, 2016 to the week beginning June 19, 2016.

[56] The Claimant did not dispute having these earnings. However, I have found that a third party fraudulently caused the Commission to pay benefits to which the Claimant was not entitled. I have also found that the third party did so without the Claimant's knowledge or consent. As a result, I cannot make a finding that would require the Claimant to repay the benefits through an allocation of his earnings in the weeks noted above.

[57] Based on the above, I do not find that the Commission correctly allocated the Claimant's earnings.

CONCLUSION

[58] The appeal is allowed.

Audrey Mitchell

Member, General Division - Employment Insurance Section

HEARD ON:	
METHOD OF PROCEEDING:	Questions and answers
APPEARANCES:	

¹⁰ Subsection 36(4) of the *Employment Insurance Regulations*.