



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *MB v Canada Employment Insurance Commission*, 2020 SST 1196

Tribunal File Number: GE-20-2000

BETWEEN:

**M. B.**

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: October 28, 2020

DATE OF DECISION: November 3, 2020

## **Decision**

[1] The appeal is allowed in part.

[2] The Claimant made misrepresentations when he failed to report that he was working and receiving wages in two periods.

[3] The Commission has not met its burden of proving that it judicially exercised its discretion when it calculated the penalty and I have reduced the penalties to \$71.00 for the first period and \$129.00 for the second period.

## **Overview**

[4] The Claimant applied for EI sickness benefits effective February 5, 2018 and a claim was established effective February 4, 2018. He received EI sickness benefits until May 26, 2018. His claim was converted to EI regular benefits beginning May 27, 2018. The Claimant returned to work from October 1, 2018, to October 25, 2018 and from December 6, 2018 to June 7, 2019. He continued to receive EI benefits until February 5, 2019. The Commission found out that he Claimant worked for these two periods while receiving EI benefits but the Claimant did not report any of his earnings. This meant the Claimant received EI benefits to which he was not entitled. This created a total overpayment of \$3,991.00 for the two periods.<sup>1</sup> The Commission also initially imposed penalties totalling \$1,674.00 for the two periods and a notice of serious violation because it says the Claimant knowingly made 8 misrepresentations when he did not report his earnings while receiving EI benefits.<sup>2</sup> The Commission later reduced the two penalties to a total of \$624.50 for the two periods and removed the violation. The Claimant disagrees with the penalties, he says he did not knowingly make the misrepresentations. He appeals to the Social Security Tribunal.

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<sup>1</sup> The Claimant was overpaid \$1,417.00 in EI benefits for the period September 30, 2018 to November 3, 2018 and was overpaid \$2,574.00 in EI benefits for the period December 2, 2018 to January 26, 2019

<sup>2</sup> The Commission imposed a penalty of \$709.00 for the misrepresentations made during the period September 30, 2018 to November 3, 2018 and a penalty of \$965.00 for the misrepresentations made during the period December 2, 2018 to January 26, 2019.

## Issues

[5] I have to decide if the Claimant knowingly made false statements when he did not report that he was working and did not report the earnings he received while he was receiving EI benefits. If I find that false statements were knowingly made, I then have to decide if the Commission judicially exercised its discretion when it calculated the penalty amount.

## Reasons for my decision

[6] 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>3</sup>

[7] 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 (emphasis added). Knowingly means the claimant knew the information provided was untrue when he made the statement, and does not include any element of intention to deceive.<sup>4</sup>

[8] 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>5</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>6</sup>

[9] 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.

[10] I do not have to determine that there was an intention to deceive in order to conclude that a false statement was knowingly made.<sup>7</sup>

[11] The decision to impose a monetary penalty and the calculation of the penalty amount are discretionary decisions of the Commission.<sup>8</sup> This means that it is open to the Commission to set

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<sup>3</sup> *Employment Insurance Act*, section 38(1). This is how I refer to the law that applies to this appeal.

<sup>4</sup> *Attorney General of Canada v. Gates*, A-600-94. This how I refer to the court cases that contain principles I am applying to this appeal.

<sup>5</sup> *Mootoo v. Canada (Minister of Human Resources Development)*, 2003 FCA 206

<sup>6</sup> *Canada (Attorney General) v. Purcell* A-694-94, *Attorney General of Canada v. Gates*, A-600-94

<sup>7</sup> *Attorney General of Canada v. Gates*, A-600-94

<sup>8</sup> *Canada (Attorney General) v. Gauley*, 2002 FCA 219

the penalty at an 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>9</sup>

[12] If the Commission acted in bad faith or for an improper motive, took into account irrelevant factors or failed to consider relevant factors, or if it acted in a discriminatory manner, then it did not exercise its discretion judicially.<sup>10</sup> If I find the Commission did not exercise its discretion judicially, I may make the decision the Commission should have made.

[13] In these cases, I am respectful of the Commission's discretion to assess a penalty, and recognize that the law has clarified that I have the ability to modify a penalty under the circumstances above, but I cannot negate a penalty if I find the Commission had a legal basis to impose it.<sup>11</sup>

#### ***The Claimant made misrepresentations***

[14] At the hearing, the Claimant testified that he recalled working for both employers. He said he was not disputing that he had earnings or the amounts earned. Even though the Claimant stated that he is not disputing the repayment of the EI benefits he received for the two periods when he was also working, I must still decide whether a misrepresentation was made when he filed his claim reports for those periods and whether a penalty is warranted.

[15] The Claimant testified that he did not knowingly make false statements. He explained he was experiencing stress due to a marital break up, causing a heart attack in February 2018, which led to him claiming EI sickness benefits. The Claimant testified that after he was cleared to return to work he was laid off. He then claimed EI regular benefits. The Claimant separated from his spouse in June 2018. There was an ongoing dispute over the custody of children. The Claimant testified that he has problems with his memory. The Claimant testified that he has experienced memory issues since 2018. A specialist doctor recently told him that he does not

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<sup>9</sup> *Canada (Attorney General) v. Kaur*, 2007 FCA 287

<sup>10</sup> *Canada (Attorney General) v. Purcell*, A-694-94

<sup>11</sup> *Canada (Attorney General) v. Gauley*, 2002 FCA 219

have enough oxygen going to his brain. The lack of oxygen affects his memory and can cause him to pass out. Stress makes his condition more severe.

[16] The Claimant testified that he completed the claim reports for both periods on line. In the first period, September 30, 2018 to November 3, 2018, he completed three consecutive reports. Each report covered a period of two weeks. In each report he was asked “Did you work or receive any earnings during the period of this report? This includes work for which you will be paid later, unpaid work or self employment.” In each of the three reports the Claimant answered “No.”

[17] The Claimant said that he was not working full time at the first employer. He worked for less than a month. He might have been paid for time he was off sick while working for this employer. He could not confirm why he was paid by the employer. He does not know why he answered “No” to the question about working or getting earnings on each of the three reports. He said that he had a lot of medical issues at the time.

[18] I accept that the Claimant was in a stressful period of his life during this time, however, his doctor had cleared him to return to work and he did so. I also accept that the Claimant’s memory issues, recently diagnosed, may have been affecting him during these two periods and his ability to recall at this time what happened during those two periods.

[19] There is no evidence that the Claimant did not understand the question if he worked or had earnings. In the first period, he explained that he was working part-time and that he cannot now recall if he was paid. In each of three claim reports he was asked if he worked and if had received or would receive wages. There is no evidence that he did not understand the question. He worked and was aware that he was working at the time he made his reports. He replied “No” in each of the three reports. As a result, I find that the Claimant stated “No” in each of the three reports with the knowledge that the statement was false or misleading. Accordingly, I find that the statements were knowingly made, and as a result, a penalty is warranted.

[20] In the second period, December 6, 2018 to February 5, 2019, the Claimant completed five consecutive claim reports. Each report covered a period of two weeks. In each report he was asked “Did you work or receive any earnings during the period of this report? This includes

work for which you will be paid later, unpaid work or self employment.” In each of the five reports the Claimant answered “No.”

[21] The Claimant testified that he recalled working for the second employer. The Claimant said that he did not think he was getting EI during this second period. He said that he called into the office and someone said that he was to continue doing the reports. The Claimant thought that his employer would inform the Commission that he was working by submitting a monthly report of his earnings to it.

[22] In the last report claim for the second period, filed on February 12, 2019, the Claimant answered “Yes” to the question “Have you moved, changed your mailing address or changed the banking information you provided for Direct Deposit purposes?” The Claimant said that the closing date for the sale of his home was the end of February 2019. He would have moved on or about February 12, 2019.

[23] In the second period, the Claimant was able to understand the question about moving, because he answered yes and testified that he moved on or about February 12, 2018, and that the closing date for the sale of his home was at the end of that month. There is no evidence that the Claimant did not understand the question did you work or receive wages during the two week period. His explanation for answering “no” to the question about working and earnings in the five consecutive reports submitted in the second period, that he thought he was no longer receiving EI benefits, is not reasonable. The answer to the question have you worked or had earnings is not determined by whether you are receiving EI benefits. The answer is determined by the fact that you are or are not working and receiving wages. He worked and was aware that he was working at the time he made his reports. He replied “No” in each of the five reports. As a result, I find that the Claimant stated “No” in each of the five reports with the knowledge that the statement was false or misleading. Accordingly, I find that the statements were knowingly made, and as a result, a penalty is warranted.

***The Commission did not judicially exercise its discretion***

[24] I find the Commission did not judicially exercise its discretion when it calculated the penalty amount. As a result, I may determine the penalty to be imposed.

[25] 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>12</sup> The Commission may issue a warning instead of setting a penalty.<sup>13</sup>

[26] The Commission submitted that it rendered its decisions in this case in a judicial manner, as all the pertinent circumstances were considered when assessing the penalty amount. For the first period, September 30, 2018 to November 3, 2018, it noted that the penalty amount was reduced from 50% to 10% (to \$142.00) of the overpayment in light of the Claimant's mitigating circumstances. In addition, the serious violation was removed. For the second period, December 6, 2018 to February 5, 2019, it noted that the penalty amount was reduced from 50% to 37.5% (to \$483.00) of the overpayment in consideration of the Claimant's mitigating circumstances. The Commission noted the Claimant has asked that the \$483 penalty be waived entirely. The Commission submits that it imposed the penalty judiciously and that any further reduction is not warranted under the circumstances. It says that the Claimant failed to report his earnings when he had to have known that he was working and being paid for that work and has not offered a reasonable explanation for his actions.

[27] The Commission provided a Record of Decision (ROD) for imposing the penalty and serious violation for the misrepresentations made in the first period. The Claimant did not respond to the Commission's request for information so they made the initial decision without his explanation. The Claimant requested reconsideration. When contacted by the Commission he explained his marital situation, he is now a single parent and his medical issues with respect to the heart attack. In the second ROD the Commission took that information into consideration, noted that the Claimant said was experiencing financial difficulty and had not been able to find work since he was last laid off (June 2019). The Commission decided that the Claimant's mitigating circumstances warranted a reduction of the penalty, from \$709.00 to \$142.00 and the removal of the violation.

[28] The Commission provided an ROD for imposing the penalty for the second period. The Claimant did respond to the Commission's request for information and he spoke to a

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<sup>12</sup> *Employment Insurance Act*, section 38

<sup>13</sup> *Employment Insurance Act*, section 41.1

Commission agent before a decision was reached. In this ROD the agent noted that the Claimant expressed remorse, had made reparations for the overpayment, and had explained that his stress and personal situation had led him to the situation he now found himself in. The Commission noted that monetary penalties are warranted in cases such as these, with the understanding that it does not seek to be punitive in administering penalties. The Commission reduced the \$950.00 penalty to \$482.50.

[29] The Claimant submitted that he had no problem paying back the EI benefits that he was not entitled to receive. He did not act inappropriately or dishonestly. He did not think that the Commission did anything wrong procedurally. He sold his home and is now living with other family members. It took a long time for his divorce and the custody issues to be settled. He testified that he had \$45,000 in legal fees. The Claimant said that he is experiencing financial difficulty and waiving the penalties would really help his situation.

[30] There is no evidence the Commission considered irrelevant factors or acted in bad faith when it reached its decisions.

[31] I find that the Commission is allowed to impose a penalty. However, because it failed to consider relevant factors and it considered irrelevant factors it did not properly exercise its discretionary power when it set the amount of the penalty.

[32] The Claimant testified that he did not tell the Commission about his recent diagnosis that he did not have sufficient oxygen going to his brain, that he was experiencing memory issues as a result and that he was experiencing those memory issues during 2018. I recognize that the Commission did not have this information when it reached its decision but I consider this information to be a relevant factor for consideration when assessing the penalty for both periods.

[33] I have found that the Claimant knowingly made three misrepresentations in the three claim reports he submitted from September 30, 2018 to November 3, 2018 and five misrepresentations in the claim reports he submitted from December 6, 2018 to February 5, 2019. The Commission was aware of some of the Claimant's medical issues but not all of the issues the Claimant was experiencing. I find, in light of the Claimant's circumstances and the mitigating factors



presented, the penalty for the first period is more appropriately set at \$71.00 and for the second period the penalty is more appropriately set at \$129.00.

[34] I am sympathetic to the Claimant's circumstances as he has indicated that he is having financial difficulties. Unfortunately, I do not have the authority to "write-off" or forgive a debt owed to the Commission because that authority belongs solely to the Commission.<sup>14</sup> As such, the Claimant is free to contact the Commission to see if it is able to reduce or write off the debt.

**Conclusion**

[35] The appeal is allowed in part. The Claimant made misrepresentations when he failed to report that he was working and receiving wages in two periods. The Commission has not met its burden of proving that it judicially exercised its discretion when it calculated the penalty and I have reduced the penalties to \$71.00 for the first period and \$129.00 for the second period.

Raelene R. Thomas

Member, General Division - Employment Insurance Section

HEARD ON:	October 28, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	M. B., Appellant

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<sup>14</sup> *Canada (Attorney General) v. Villeneuve* 2005 FCA440; *Buffone v. Canada (Minister of Human Resources Development)*, A-666-99