



Citation: *WM v Canada Employment Insurance Commission*, 2021 SST 454

**Social Security Tribunal of Canada  
General Division – Employment Insurance Section**

## Decision

**Appellant:** W. M.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (415335) dated February 8, 2021 (issued by Service Canada)

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**Tribunal member:** Solange Losier

**Type of hearing:** Teleconference  
**Hearing date:** April 7, 2021  
**Hearing participant:** Appellant  
**Decision date:** April 11, 2021  
**File number:** GE-21-437

## Decision

[1] The appeal is dismissed. The Claimant received earnings. The Canada Employment Insurance Commission (Commission) allocated (in other words, assigned) those earnings to the right weeks.

[2] The Commission has proven<sup>1</sup> that the Claimant knowingly provided false or misleading information, so the warning letter issued remains.

## Overview

[3] The Claimant got \$1,268.80 from his former employer. The Commission decided that the money is “earnings” under the law because it was wages.

[4] The law says that all earnings have to be allocated to certain weeks. The weeks earnings are allocated to depends on why you received the earnings.<sup>2</sup> The Commission allocated the earnings to the weeks they were earned. The Commission said that earnings were wages. This resulted in an overpayment.

[5] The Claimant disagrees with the Commission. The Claimant says that not all of the money is earnings because he was wrongfully dismissed. He says that part of the money paid by his employer was wages for hours he worked, but there was an approximate \$500.00 fine paid by his employer. He says that the fine paid by his employer should not count as earnings or be allocated to his claim.

[6] Also, to be paid employment insurance (EI) benefits, claimants must complete online reports which ask a series of questions. The Commission reviewed the Claimant’s answers about whether he had earnings and decided that the Claimant knowingly provided false or misleading information when he said that he did not have any earnings and did not work. As a result, they imposed a non-monetary penalty, only a warning letter.

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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> See section 36 of the *Employment Insurance Regulations* (EI Regulations).

[7] The Claimant says that forgot to report his earnings because of mental health issues and the shock of losing his employment. He cannot afford to repay the overpayment.

## **Issues**

### **Earnings/Allocation**

[8] I have to decide:

- a) Is the money that the Claimant received earnings?
- b) If it is earnings, did the Commission allocate it correctly to his claim?

### **Misrepresentation/Penalty/Warning Letter**

[9] I also have to decide:

- a) Did the Commission prove the Claimant knowingly provided false or misleading information on his claim report?
- b) If he did, then I must also decide whether the Commission properly decided to impose a non-monetary penalty (a warning letter).

## **Analysis**

### **Is the money that the Claimant received earnings?**

[10] Yes, the \$1,268.80 that the Claimant received is earnings. Here are my reasons for deciding that the money is earnings.

[11] The law says that earnings are the entire income that you get from any employment.<sup>3</sup> The law defines both “income” and “employment.”

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<sup>3</sup> See section 35(2) of the EI Regulations.

[12] **Income** can be anything that you got or will get from an employer or any other person. It doesn't have to be money, but it often is.<sup>4</sup>

[13] **Employment** is any work that you did or will do under any kind of service or work agreement.<sup>5</sup>

[14] The Claimant's former employer paid the Claimant \$1,268.80. This total amount is listed in the record of employment (GD3-11).

[15] The Commission decided that this money was wages. So, it said that the money is earnings under the law.

[16] The Claimant agrees in part that \$782.08 is earnings because he was paid wages for working at a warehouse. However, he does not agree that the remaining amount of \$486.72 is earnings because he says it was a fine paid by the employer for wrongfully dismissing him. There was a case at the Ministry of Labour and the employer had to pay a fine.

[17] The Claimant has to prove that the money is **not** earnings. The Claimant has to prove this on a balance of probabilities. This means that he has to show that it is more likely than not that the money isn't earnings.

[18] I find that the Claimant received total earnings of \$1,268.80 as shown on the record of employment.

[19] I was not persuaded that the Employer had to pay the Claimant a fine of \$486.72 because there was no supporting evidence to show that there had been a claim, settlement or order involving the employer and the Ministry of Labour.

[20] In the alternative, even if the amount was paid by the employer for damages or as a settlement for wrongfully dismissing him, it would still be considered earnings

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<sup>4</sup> See section 35(1) of the EI Regulations.

<sup>5</sup> See section 35(1) of the EI Regulations.

under the law because it is considered income arising out of employment. It is not excluded<sup>6</sup>. There were no legal fees incurred.

### **Did the Commission allocate the earnings correctly?**

[21] The law says that earnings have to be allocated to certain weeks. What weeks earnings are allocated to depend on why you received the earnings.<sup>7</sup>

[22] I find it was more likely than not, that the employer paid the Claimant wages. There was not enough evidence that would show they were paid for some other reason. I note that the record of employment does not identify that these monies were paid for any other reason(GD3-11).

[23] There is a section in the law on allocation that applies to earnings that are paid (or payable) for this reason.<sup>8</sup> It says that earnings that are payable to a claimant under a contract of employment for the performance of services shall be allocated to the period in which the services were performed.

[24] I find that the Commission correctly allocated the wages to the weeks they were earned, starting from November 18, 2018 to December 1, 2018.

### **What about the overpayment?**

[25] The Claimant does not agree with the \$553.00 overpayment imposed by the Commission (GD3-27). He agrees that he likely received EI benefits and wages from his employer around the same time. He is asking for relief on the overpayment based on compassionate reasons.

[26] If the Claimant received EI benefits that he was not entitled to, then he is liable to repay any amount paid by the Commission<sup>9</sup> Also, I do not have the authority to write off

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<sup>6</sup> See section 35(7) of the *EI Regulations*.

<sup>7</sup> See section 36 of the *EI Regulations*.

<sup>8</sup> See section 36(4) of the *EI Regulations*.

<sup>9</sup> See section 43 of the *EI Act*.

the overpayment, even for compassionate or hardship reasons. The authority to write-off an overpayment is with the Commission.

### **Did the Claimant knowingly provide false or misleading information?**

[27] To impose a penalty, the Commission has to prove that the Claimant knowingly provided false or misleading information.<sup>10</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>11</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 he gave incorrect answers and show that he did not do it knowingly.<sup>12</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 he is subject to a penalty.<sup>13</sup>

[31] On the Claimant's telephone reports to the Commission, he responded "no" to a question that asked him if had worked or had earnings during the periods covered by the report (GD3-15 to GD3-21). This was not dispute by the Claimant.

[32] The Commission says that the Claimant knowingly made a false or misleading statement with that response because it was a clear and simple question (GD4-5). He was also asked to confirm his responses in the reports.

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<sup>10</sup> Section 38 of the *Employment Insurance Act*.

<sup>11</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>12</sup> *Nangle v Canada (Attorney General)*, 2003 FCA 210.

<sup>13</sup> *Canada (Attorney General) v Miller*, 2002 FCA 24.

[33] The Claimant says that that he did not knowingly provide false or misleading information because he was dealing with mental health issues, he was shocked after his dismissal and has memory issues (GD2-5).

[34] I find that the Commission has proven that it is more likely than not that the Claimant knowingly provided false or misleading information because the questions he was asked were simple and his answers were false. While I acknowledge that he may have been experiencing mental health related issues and the shock of his dismissal, I was not persuaded that it impaired his ability to answer the questions he was asked. They were clear and simple questions. I also note that the Claimant completed the reports after his employment ended, so he knew that he worked and had earnings.

### **Did the Commission properly decide the penalty amount?**

[35] The Commission's decision on the penalty amount is discretionary.<sup>14</sup> This means that it is open to the Commission to set it at the amount it thinks is correct.

[36] 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>15</sup>

[37] In this case, the Commission did not impose an additional monetary penalty on the Claimant for the misrepresentation. I explained to the Claimant that that a monetary penalty is different from the overpayment that he was issued for receiving EI benefits. At the hearing, the Claimant said that he agreed with the Commission's decision because he did not want a monetary penalty.

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<sup>14</sup> *Canada (Attorney General) v Kaur*, 2007 FCA 287.

<sup>15</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. 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: *Attorney General of Canada v Purcell*, A-694-94.

## **Did the Commission properly decide to impose a warning?**

[38] The Commission has the authority to issue a warning letter instead of a monetary penalty.<sup>16</sup> This is considered a non-monetary penalty. In this case, the Commission imposed a warning letter to the Claimant.

[39] I find that the Commission did exercise its discretion properly in deciding to impose a warning letter instead of a monetary penalty. The Commission considered his reasons for failing to declare the wages he received. The Commission provided a detailed rationale for making their decision (GD3-100 to GD3-101).

[40] I found no evidence that the Commission 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. This means that the Commission exercised its discretion properly so I cannot remove the warning letter.

## **Conclusion**

[41] The appeal is dismissed.

[42] The Claimant received \$1,268.80 in earnings. These earnings are allocated starting the week of November 18, 2018 to December 1, 2018. Also, the Commission properly made the decision to impose a warning letter, so it remains.

Solange Losier  
Member, General Division – Employment Insurance Section

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<sup>16</sup> See section 41.1 of the EI Act: the limitation period is 72 months for warning letters.