



Citation: *BR v Canada Employment Insurance Commission*, 2021 SST 463

GE-17-2889

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

**Decision**

**Appellant:** B. R.  
**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission  
reconsideration decision (418188) dated March 19, 2021  
(issued by Service Canada)

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**Tribunal member:** Christianna Scott

**Type of hearing:** Teleconference  
**Hearing date:** May 11, 2021  
**Hearing participant:** Appellant

**Decision date:** May 26, 2021  
**File number:** GE-21-636

## Decision

[1] The appeal is dismissed.

[2] I find that the Canada Employment Insurance Commission (the Commission) reviewed B. R.'s (the Claimant) claim in a timely manner.

[3] I find that the Claimant received earnings in the form of wages. The Commission allocated (in other words, assigned) those earnings to the right weeks.

[4] Last, the Commission also properly imposed a non-monetary penalty.

## Overview

[5] The Claimant was enrolled in a course to become a truck driver. In a previous decision from the Social Security Tribunal of Canada (the Tribunal), the Tribunal confirmed the Claimant's availability despite attending school on a full-time basis.<sup>1</sup> The Claimant received regular employment insurance (EI) benefits.

[6] The Commission conducted an investigation of the claim close to three and a half years after benefits were paid. The Commission decided that the Claimant got money from his former employer. The Commission decided that the money is "earnings" under the law because it is wages.

[7] The law says that all earnings have to be allocated to certain weeks. What weeks earnings are allocated to depend on why a client received the earnings.<sup>2</sup>

[8] The Commission allocated the earnings during the weeks the Claimant performed the work. The Claimant also received regular EI benefits during these weeks. So, this resulted in an overpayment of benefits of \$1,853.00.

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<sup>1</sup> See decision GE-17-2889

<sup>2</sup> See section 36 of the *Employment Insurance Regulations* (EI Regulations).

[9] The Commission also 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.

[10] The Claimant disagrees with the Commission. First, the Claimant argues that the Commission waited too long to review his claim. The Claimant argues that he thought everything was resolved. As such, he says that the Commission cannot review his claim so many years after he was paid benefits.

[11] Second, the Claimant says that the money isn't earnings because he did not deposit any of the cheques. The cheques were given directly to friends that supported him while he was attending school. He also argues that he wasn't paid the money until after he stopped working and therefore was not paid at the same time he received benefits.

[12] So, the Claimant has appealed the Commission's decision before the Tribunal.

## **Matters I have to consider first**

### **The Claimant alleged that the Commission mistreated him and asked for the mistreatment**

[13] The Claimant said that the Commission mistreated him during the course of their investigation into his claim. He says that this is a pattern of conduct from the Commission since he had to appeal a previous Commission decision before the Tribunal in order to have the issue resolved in his favour.

[14] The Claimant says that he received assurances from an agent that the subject of this appeal had been resolved in his favour. He argues that because of the assurances he got from the agent as well as the mistreatment he received from the Commission, this appeal should be resolved in his favour.

[15] I acknowledge the Claimant's perception that he is being treated unfairly by the Commission. I also understand that he believes that this appeal should be decided in his favour because of this alleged mistreatment. However, the law does not give me the

authority to make a decision based on the Commission's conduct or to take their conduct into consideration when assessing the merits of the appeal.

## Issues

[16] I have to decide the following four issues:

- a) Can the Commission review the claim close to three and a half years after the benefits were paid?
- b) Is the money that the Claimant received earnings?
- c) If the money is earnings, did the Commission allocate the earnings correctly?
- d) Did the Commission properly impose a non-monetary penalty?

## Analysis

### Can the Commission review the claim?

[17] The law restricts the time where the Commission can review a claim. The Commission can revisit a claim for benefits within 36 months after the benefits have been paid or would have been payable.<sup>3</sup> In situations where the Commission decides that a false or misleading statement has been made in connection to the claim, the Commission has 72 months to revisit the claim.<sup>4</sup>

[18] The Commission said that the Claimant made false and misleading statements when he completed his biweekly reports. The Commission maintained that the Claimant reported that he was not working and was not receiving money even though he was working. The Commission argued that the questions on the biweekly reports are broad and therefore the Claimant made false statements. The Commission says that the Claimant reported "no" when asked if he worked (which included work for which he would be paid later, unpaid work or self-employment).

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<sup>3</sup> See section 52(1) of the *Employment Insurance Act* (EI Act).

<sup>4</sup> See section 52(5) of the EI Act.

[19] The Claimant said that he did not make false or misleading statements. The Claimant explained that he worked for an agency and he was placed in a grocery store to drive a truck. He explained that he was referred by his school to the agency to get more hours driving large vehicles. He said that he did not know that he would be paid for his services. He thought that the cheques were because the employer recognized his good work. The Claimant said that when he got the cheques he was too ill to contact the Commission. But later, he communicated with an agent from the Commission. He thought that everything had been resolved.

[20] To prove that the Claimant made a false or misleading statement, the Commission must show that a false or misleading statement was made in connection to a claim benefit. The Commission does not need to show that the Claimant knowingly defrauded the Commission.

[21] I have reviewed the record and I conclude that the Commission finalized its review about three and a half years after the benefits were paid. The record shows that the benefits were paid between July and September 2017. The Commission started its review of the claim in September 2018<sup>5</sup> and issued its original decision in February 2021.<sup>6</sup> Although the investigative phase was lengthy, I conclude that the Commission nevertheless made its decision a little over three years and a half after the benefits were paid.

[22] The record shows that the Claimant responded “no” to the following questions:

- 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.
- Is there any other money that you have not previously told us about, that you received or will receive for the period of this report?

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<sup>5</sup> See GD3-51.

<sup>6</sup> See GD3-65.

[23] When I asked the Claimant why he thought that his situation was not captured by these questions, he was unable to provide me with a convincing answer. He continued to rely upon his belief that he was not being paid and the eventual late timing of the payments as the reason for responding “no” to the questions. However, the first question relates to unpaid work and the second questions relates to any money that the Claimant will receive for the period of the report. Given the clarity and the breadth of the questions in the report, I find that the Claimant made a misleading statement.

[24] Moreover, I do not find the Claimant credible in his explanation. The Claimant said that he was referred to the agency by his school and it is for this reason that he believed he would not be paid for his services. He says that he was with the agency to get experience and not for the purposes of being paid. However, this statement is contradicted by three elements on the record and other statements that Claimant said at the hearing.

[25] First, the Claimant said that he was referred to the agency by the school and that this was a form of internship (*stage*) to gain more experience. However, the statement from the school states that the Claimant left the school on June 27, 2020.<sup>7</sup> As such, his work with the agency between July 2, 2019, and September 10, 2017, could not have fallen under the auspices of a non-remunerated internship as the Claimant was no longer part of the training program at the time.

[26] Second, the Claimant said that he received the money from the agency after he stopped working with the agency because they thought he was so good. However, this statement is contradicted by the record of employment and a written statement from the Claimant where he says that he was fired from the agency.<sup>8</sup>

[27] Third, the Claimant said on several occasions during the hearing that he experienced financial difficulty when he was going to school. In his written statement to the Commission he said that he “quit school due to financial purposes, he was sent by an agency [...] to gain experience by doing delivery with heavy vehicle trucks.”

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<sup>7</sup> See GD5 -15.

<sup>8</sup> See GD5-23 (written statement) and GD3- 16 (ROE).

(Emphasis added)<sup>9</sup> I therefore find it implausible that the Claimant would quit school for financial reasons and work for an agency on a volunteer basis.

[28] So, I find that the Commission has proven that the Claimant made misleading statements in his biweekly reports. I do not accept the Claimant's explanations around why he responded "no" to the Commission's questions.

[29] Last, I note that the Claimant argues that he acted in good faith. He says that he knows that he should have told the Commission about the sums earlier but he says that he was ill. He said that once the Commission contacted him, he gave all of his information to one of the Commission's agents. I see from the record that the Claimant did give the Commission information when the Commission started its investigation into the money he got from the agency. However, the good faith of the Claimant does not affect the Commission's ability to revisit a claim in the event of a false or misleading statement. Also, any conversations that the Claimant had with the Commission agent are not binding upon the Commission or the Tribunal.<sup>10</sup>

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

[30] Yes, the money that the Claimant received is earnings.<sup>11</sup> Here are my reasons for deciding that the money is earnings.

[31] The law says that earnings are the entire income that you get from any employment.<sup>12</sup> The law defines both "income" and "employment."

[32] **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>13</sup>

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<sup>9</sup> SeeGD5-23

<sup>10</sup> The process before the Tribunal is *de novo* which means that I must take a fresh look and apply the law to the facts shared with the Tribunal.

<sup>11</sup> Sums set out in GD3-67.

<sup>12</sup> See section 35(2) of the EI Regulations.

<sup>13</sup> See section 35(1) of the EI Regulations.

[33] **Employment** is any work that you did or will do under any kind of service or work agreement.<sup>14</sup>

[34] The Claimant's former employer gave him a series of payments. The Commission decided that this money was wages. So, it said that the money is earnings under the law.

[35] The Claimant doesn't agree. He argues two points:

- The money isn't earnings that he received because he did not cash any of the cheques that his employer gave him. He says that when he got the cheques, he gave them directly to people who helped him while he was without income and going to school. The Claimant provided bank statements which show that he did not deposit the cheques. This is also consistent with the information the Claimant gave in a written statement to the Commission.<sup>15</sup>
- The money is not earnings because he understood that he was working for the Company on a voluntary basis to gain experience for his course. He received the cheques much later and he believes that it was because the Company liked his work.

[36] 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.

[37] I find that the money he received is wages. I come to this conclusion for the following two reasons.

[38] First, even though I accept that the Claimant did not cash the cheques and handed the cheques directly to his friends, he received moneys from his employer. I see nothing on the record that shows that the sums were not paid to him by this employer. What the Claimant did with his money is not of importance when assessing whether the

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<sup>14</sup> See section 35(1) of the EI Regulations.

<sup>15</sup> See GD3-57.



money is earnings. What counts is that he was given these cheques by his employer. By his own admission, the Claimant said that he gave the money to reimburse friends. So, I find that he received the sums from his employer.

[39] Second, I do not accept the Claimant's position that the money is not wages. Since the Claimant was performing services for the employer, I find that it is more likely than not that the sums were paid in exchange for the work that he performed. The Claimant did not prove that the sums were for any reason that falls within the exception of what is considered income.<sup>16</sup> Moreover, there was no evidence submitted to show that the amounts indicated in the ROE were incorrect.

[40] So, I find that the sums outlined in the letter of February 11, 2021, are earnings in the form of wages. As such, I conclude that the Commission correctly identified that the Claimant was paid wages from his employer for work performed between July 2, 2017, and September 10, 2017.<sup>17</sup>

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

[41] 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>18</sup>

[42] The Claimant's earnings are wages. The Claimant's employer gave the Claimant those earnings because the Claimant worked and performed services. This is reflected in the Claimant's record of employment.<sup>19</sup>

[43] The law says that the earnings that a Claimant gets in the form of wages have to be allocated to the week that the services were performed. The law says that it doesn't matter when the Claimant actually receive those earnings.<sup>20</sup>

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<sup>16</sup> See section 35 (7) of the EI Regulations.

<sup>17</sup> See the Claimant's record of employment at GD3-18. See also the letter outlining the earnings considered by the Commission (GD3-67).

<sup>18</sup> See section 36 of the EI Regulations.

<sup>19</sup> See GD3-18.

<sup>20</sup> See section 36(4) of the EI Regulations.

[44] I find that the Commission allocated these sums to proper weeks as these are the weeks that the work was performed. In coming to this conclusion, I give considerable weight to the information provided in the record of employment. The Claimant recognizes that he rendered services for the employer during those weeks. Even though the sums may have been paid later, after the Claimant stopped working for the employer, the timing of the payment is not important to determining the allocation of the earnings.

[45] Last, I acknowledge the Claimant's request for flexibility in the application of the rules. He spoke at length about his personal situation, his challenges since he has come to Canada and his desire to work. I admire the Claimant for his tenacity and resilience in the face of the challenges that he has experienced. However, I must follow the rules around earnings and allocations. I do not have the power to apply these rules in a way that overlooks the plain meaning of the law.<sup>21</sup>

### **Did the Commission properly impose a non-monetary penalty?**

[46] To impose a penalty, the Commission has to prove that the Claimant knowingly provided false or misleading information.<sup>22</sup>

[47] 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>23</sup>

[48] The Commission's decision on the penalty amount is discretionary.<sup>24</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

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<sup>21</sup> *Canada (Attorney General) v Knee*, 2011 FCA 301.

<sup>22</sup> Section 38 of the *Employment Insurance Act*.

<sup>23</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>24</sup> *Canada (Attorney General) v Kaur*, 2007 FCA 287.

I first decided that the Commission did not exercise its discretion properly when it set the amount.<sup>25</sup>

[49] The Commission set the penalty as a non-monetary penalty. It did not impose a monetary penalty because it did not reconsider this claim within 36 months after the benefits were paid to the Claimant. If it thinks that the Claimant made a false or misleading statement or representation, it has 72 months to reconsider a claim. Because it reviewed this claim within 72 months, but after 36 months, it can set a penalty in the form of a non-monetary penalty.

[50] If it is clear from the evidence that 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>26</sup> The Commission may impose a penalty for each false or misleading statement knowingly made by the Claimant.

[51] The Commission notified the Claimant that based on the information in the biweekly reports, he knowingly made 6 false representations. So, the Commission imposed a non-monetary penalty given the circumstances surrounding the false representations.

[52] The Commission argues that it acted properly when it imposed a non-monetary penalty since this was the Claimant's first time making improper reports and the penalty was imposed more than 36 months after its discovery.

[53] The Claimant did not make any specific representations on this point.

[54] As stated above, it is clear from the evidence that the questions were simple and the Claimant answered incorrectly. I infer that the Claimant knew the information was

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<sup>25</sup> 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.

<sup>26</sup> *Nangle v Canada (Attorney General)*, 2003 FCA 210.

false or misleading. As I outlined above, I do not accept the Claimant's explanation about why he gave he gave incorrect answers.

[55] I find no reason to intervene with the Commission's decision on a non-monetary penalty. When the Commission imposed the non-monetary penalty, it took into account the time that lapsed since benefits were paid in this claim<sup>27</sup> and the number of false representations. Because the Commission took into account all relevant factors, I find that it exercised its discretion properly. I therefore cannot change or remove the penalty.

## **Conclusion**

[56] For the reasons set out above, I conclude that the Commission was allowed to review the Claimant's claim even though his benefits were paid over three and a half years before.

[57] I also find that the Commission properly determined that the sums the employer paid to the Claimant are wages. I also find that the Commission properly allocated these sums to the weeks the Claimant performed the services.

[58] Last, I find that the Commission exercised its discretion judicially when it imposed a non-monetary penalty for knowingly making false statements on his biweekly reports.

Christianna Scott  
Member, General Division – Employment Insurance Section

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<sup>27</sup> See section 41.1 of the EI Act.