



Citation: *RN v Canada Employment Insurance Commission*, 2021 SST 708

Social Security Tribunal of Canada General Division – Employment Insurance Section

Decision

Appellant:	R. N.
Respondent:	Canada Employment Insurance Commission
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Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (431832) dated September 3, 2021 (issued by Service Canada)
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Tribunal member:	Nathalie Léger
Type of hearing:	Teleconference
Hearing date:	October 15, 2021
Hearing participant:	Appellant
Decision date:	October 17, 2021
File number:	GE-21-1780

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. It properly calculated the amount of the overpayment. The Commission also imposed a penalty on the Claimant. I find that it did make this decision judicially, so the notice of violation remains.

Overview

[2] The Claimant got \$500 per week for 8 weeks from his employer and did not declare those earnings. The Commission decided that those payment were “earnings” under the law because they were an advance on commissions to be earned. The Commission also imposed a penalty to the Claimant in the amount of \$1500 for failing to properly declare his earnings.

[3] At the hearing, the Claimant confirmed he does not dispute the overpayment or the allocation. What he really contests is the penalty and the amounts that are claimed from him by a recovery agency.

[4] I agree with the Claimant that the allocation of the undeclared earnings and the calculation of the overpayment was done correctly by the Commission. I will therefore only deal with the issue of the penalty.

Issues

OVERVIEW

[5] To be paid employment insurance (EI) benefits, claimants complete online reports. The reports ask a series of questions. Based on the answers, the Commission decides a claimant’s entitlement to EI benefits.

[6] The Commission reviewed the Claimant’s answers about whether he had earnings paid to him during the benefits period and decided that the Claimant knowingly provided false or misleading information, on 8 occasions, when he did not disclose his

full earnings received during the benefits period. As a result, it imposed a penalty of \$2,745. The Commission also issued a notice of violation, which means that the Claimant has to work more hours of insurable employment to qualify for EI benefits.

[7] The Claimant says that the Commission was wrong to impose both the penalty and the notice of violation because he was not aware that his employer was paying him overtime on the weeks where he was not working or not working a full week. Furthermore, he made the same mistake 8 times, which should count as only one, and therefore feels he does not deserve such a severe penalty.

ISSUE

[8] I must decide two issues:

- Did the Commission prove the Claimant knowingly provided false or misleading information on his claim reports?
- Did the Commission properly decided the penalty amount?

ANALYSIS

Did the Claimant knowingly provide false or misleading information?

[9] To impose a penalty, the Commission has to prove that the Claimant knowingly provided false or misleading information.¹

[10] 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.²

[11] 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

¹ Section 38 of the *Employment Insurance Act*.

² *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.

show that he did not do it knowingly.³ The Commission may impose a penalty for each false or misleading statement knowingly made by the Claimant.

[12] 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.⁴

[13] The claim report 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. ” The Claimant responded “No” on 8 occasions even if, during those weeks, he did receive payments from his employer.

[14] The Commission says that the Claimant knowingly made false or misleading statements in answering in this way because the question is very simple and it is highly unlikely that he did not know he was receiving money.

[15] The Claimant says he did not know or understand that he needed to declare advances on commissions. He was under the impression that he only had to declare earnings when the work warranted it. He has not lived all his life in Canada and recognizes he made a mistake.

[16] 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 question is so simple that he should have known he was giving a false information. Even if he was mistaken as to the nature of the money received, he could not ignore that when he answered “No” to “Did you work during this period?” he was giving a false information. Considering that the Claimant does not dispute this, I find that the Commission decided correctly on this question.

³ *Nangle v Canada (Attorney General)*, 2003 FCA 210.

⁴ *Canada (Attorney General) v Miller*, 2002 FCA 24.

Did the Commission properly decide the penalty amount?

[17] The Commission's decision on the penalty amount is discretionary.⁵ 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.⁶

[18] The Commission set the penalty by following its internal policy on the matter and then taking into account mitigating factors. The internal policy provides that the amount for the penalty is set at a maximum of 50% of the overpayment for a first misrepresentation. The Commission also considered, as a mitigating circumstance, the fact that the Claimant was not familiar with the employment insurance process. Because of this, it reduced the penalty to 30% of the overpayment. This results in a penalty in the amount of 1950\$.

[19] The Claimant does not point to faults in the Commission's reasoning or provide any other mitigating circumstances that should be taken into account. What he is essentially arguing, is that this amount is too high and that recovery agencies are asking him to repay close to 12 000\$ because of the Commission's decision. Unfortunately, difficulty to pay a penalty or an overpayment is not something that the Commission can – or has to – take into consideration when setting the amount of the penalty⁷.

[20] I find that the Commission did exercise its discretion properly because it examined all the particular circumstances of this case. I found no evidence that the Commission acted in bad faith, or for an improper purpose or motive, or took into

⁵ *Canada (Attorney General) v Kaur*, 2007 FCA 287.

⁶ *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.

⁷ *Canada (Attorney General) v. Pawchuk*, 2007 FCA 231

account an irrelevant factor, ignored a relevant factor or acted in a discriminatory manner.

[21] The Commission exercised its discretion properly so I cannot change the penalty amount.

CONCLUSION

[22] I find that the Commission properly considered as earnings the amounts that were not declared. I also find that the Commission properly established at 6 500\$ the amount of the overpayment. This means that the appeal on the issue of the overpayment is dismissed.

[23] I find that the Claimant is subject to a penalty in the amount of 1500\$, and that the Commission properly exercised its jurisdiction in setting this amount. This means that the appeal on the issue of the penalty is dismissed.

Nathalie Léger

Member, General Division – Employment Insurance Section