



Citation: *RC v Canada Employment Insurance Commission*, 2022 SST 1447

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

Decision

Appellant: R. C.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (464608) dated March 26, 2022 (issued by Service Canada)

Tribunal member: Audrey Mitchell

Type of hearing: In person

Hearing date: October 20, 2022

Hearing participant: Appellant

Decision date: October 31, 2022

File number: GE-22-2998

Decision

[1] The appeal is dismissed with modification. The Tribunal disagrees with the Claimant.

[2] The Commission correctly adjusted the allocation of the Claimant's earnings. It imposed a penalty because the Claimant knowingly made false or misleading statements when he completed his bi-weekly claims. But it didn't act in a judicial way. So, the penalty is reduced from \$981 to \$400. The Commission properly issued a notice of violation.

Overview

[3] The Claimant was laid off from his seasonal job. He applied for Employment Insurance (EI) benefits. During the off-season, the Claimant did snow removal for another employer. He received stand-by pay and pay for when he plowed snow. The Claimant did not declare the stand-by pay or pay for actual work performed on his bi-weekly claims.

[4] The Commission says the Claimant didn't report all of his earnings when completing his bi-weekly claims. So they adjusted the allocation of his earnings.

[5] The Commission says the Claimant knowingly made false representations. It says he didn't declare earnings for services performed and services not performed. So it imposed a penalty and issued a notice of violation.

[6] The Claimant says Service Canada gave him incorrect information. He says officers there told him he didn't need to report his stand-by pay. He argues he acted on the advice of Service Canada and thought he was legally collecting EI benefits and stand-by pay at the same time.

Matter I have to consider first

The Claimant didn't file a copy of the Commission's reconsideration decision

[7] The Claimant has to send the Tribunal a copy of the Commission's decision with his notice of appeal.¹ He didn't do so. I have a copy of the Commission's file that has this decision. So, I don't need the Claimant to send it.²

Issues

[8] Is the money the Claimant received earnings?

[9] If the money is earnings, did the Commission allocate the earnings correctly?

[10] Did the Commission properly impose a penalty?

[11] Did the Commission properly issue a notice of violation?

Analysis

Is the money the Claimant received earnings?

[12] Yes, the money that the Claimant received is earnings. Here are my reasons for deciding this.

[13] The law says that earnings are the entire income that you get from any employment.³ The law defines both "income" and "employment."

[14] **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.⁴

¹ See section 24(1)(b) of the *Social Security Regulations* .

² See section 3(1)(b) of the *Social Security Regulations*.

³ See section 35(2) of the *Employment Insurance Regulations* (Regulations).

⁴ See section 35(1) of the Regulations.

[15] **Employment** is any work that you did or will do under any kind of service or work agreement.⁵

[16] 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.

[17] The Commission did an investigation. It asked the Claimant's employer for details of the Claimant's earnings. The employer gave the Commission a breakdown of the Claimant's earnings for the period the Commission asked. The Commission says the money is earnings because the employer paid the Claimant wages for services performed (snow removal) and services not performed (stand-by pay).

[18] The Claimant doesn't dispute that the money paid to him is earnings. He gave reasons for not reporting the earnings. Because of this, I find that the money paid to him is earnings. I find the employer paid him for snow removal and stand-by pay.

Did the Commission adjust the allocation of the Claimant's earnings correctly?

[19] Yes, the Commission adjusted the allocation of the Claimant's earnings correctly.

[20] 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.⁶

[21] The Claimant's earnings are wages. The Claimant's employer gave the Claimant those earnings for work he performed at his job and for work not performed when he was on stand-by.

[22] The law says that the earnings you get for performing services for an employer have to be allocated to the weeks those services are performed.⁷ Earnings you get for

⁵ See section 35(1) of the Regulations.

⁶ See section 36 of the Regulations.

⁷ See section 36(4) of the Regulations.

services not performed have to be allocated to the weeks that the earnings are payable.⁸

[23] The Claimant didn't dispute how the Commission adjusted the allocation of his earnings. Again, he just says Service Canada told him he didn't have to report his earnings.

[24] The Commission allocated the earnings using earnings details the employer gave. Since the Claimant doesn't dispute the way the Commission allocated the earnings, I find that the Commission correctly adjusted the allocation of his earnings.

Did the Commission properly impose a penalty?

[25] The Commission can impose a penalty on a claimant if, in its opinion, the claimant provided information or made a representation that the claimant knew was false or misleading.⁹

– Did the Claimant make false or misleading statements?

[26] Yes, the Claimant made false or misleading statements.

[27] The Claimant said he got laid off from his summer job. He then worked on contract with another employer. He was on stand-by for snow removal. This was a part-time job he had while collecting EI benefits.

[28] The Claimant testified that he went to a Service Canada office when he applied for EI benefits. He asked if he could use a computer there, and an officer helped him. He said he told her that he would be on stand-by for snow removal and asked if he had to claim this. The Claimant testified that the Service Canada officer told him he didn't have to. He said he asked another officer who said the same thing. The Claimant said he was shocked, but went with what they said.

⁸ See section 36(5) of the Regulations.

⁹ See section 38(1)(b) of the *Employment Insurance Act* (Act).

[29] The Claimant confirmed at the hearing that he completed bi-weekly claims. He said he remembered being asked if he worked, had earnings, and how much his earnings were.

[30] The Claimant doesn't dispute receiving earnings from his snow removal job. Although he has an explanation for not doing so, he agrees didn't report the earnings on his bi-weekly claims when asked if he worked and had earnings. Because of this, I find the Claimant made false statements since he did work, he was on stand-by and he did have earnings.

– **Did the Claimant make the false statements knowingly?**

[31] Yes, the Claimant made the false statements knowingly.

[32] To determine if information was provided knowingly, I must decide if the Claimant subjectively knew that the statement was false or misleading. Common sense and objective factors should be taken into account when determining if a claimant had subjective knowledge that the information provided was false.¹⁰

[33] The Commission must prove that the Claimant made a statement that he knew was false or misleading. The burden then shifts to the Claimant to explain why the false or misleading statements were made.¹¹

[34] The Claimant worked part-time doing snow removal while he was getting EI benefits. His employer paid him stand-by pay and pay for actual snow removal. The Claimant says Service Canada told him he didn't have to report this pay on his bi-weekly claims.

[35] I asked the Claimant if he remembered being asked in his bi-weekly claims if he worked and had earnings. The Claimant said he remembered being asked that. But he said the Service Canada officer told him he didn't have to report any earnings because it was stand-by.

¹⁰ *Mootoo v. Canada (AG)*, 2003 FCA 206; *Canada (AG) v. Gates*, 1995 FCA 600.

¹¹ *Canada (AG) v. Purcell*, A-694-94, *Gates*, *supra*.

[36] I have no reason to doubt the Claimant's testimony that when he spoke to an officer at Service Canada, he understood that he didn't have to report his earnings. However, he confirms that he was asked in his bi-weekly claims if he worked and had earnings. But he didn't declare any earnings.

[37] I find that subjectively, the Claimant knew that when he answered the question if he had earnings, the statement was false. Even if he thought he didn't have to report the stand-by pay, the Claimant knew that he worked when he actually removed snow and that the employer paid him to perform that service. I find that his testimony that he was shocked by the advice he got from Service Canada supports his subjective knowledge.

[38] I find there could be confusion about having to report stand-by pay. But I don't think this is the case, especially in a week where the Claimant plowed snow. The Claimant says he was asked if he worked and had earnings. I find these are simple questions. The Claimant had a part-time job. In the weeks where he plowed snow, he knew he worked. So, I find the answer to the simple questions were clear, especially in those weeks.

[39] It is unfortunate that the advice the Claimant got from Service Canada led him to believe that he didn't have to report his earnings. But the Federal Court of Appeal has said that misinformation by the Commission isn't a basis for relief from the operation of the law. A claimant has to follow the law even if the Commission made a mistake.¹²

[40] The Claimant may have been misinformed by Service Canada. But he had access to other, clear information. The application for EI benefits lists claimants' rights and responsibilities. One is that claimants "accurately report all employment earnings before deductions in the week(s) in which [they] earn them, as well as any other money [they] may receive".¹³

¹² See *Canada (Attorney General) v. Levesque*, 2001 FCA 304.

¹³ See GD3-9.

[41] The Claimant confirmed that he didn't report any earnings in his bi-weekly claims for in the weeks November 11, 2018 to April 7, 2019. I have already found that the statements about earnings in those claims were false or misleading. I find that the Claimant made those false or misleading statements knowingly.

– **Did the Commission exercise its discretion in a judicial way when it imposed the penalty?**

[42] No, the Commission didn't exercise its discretion in a judicial way when it imposed a penalty. So I can determine the penalty to be imposed.

[43] The Commission's decisions to impose a penalty and to issue a notice of violation are discretionary. These discretionary decisions should not be disturbed unless the Commission did not act in good faith, having regard to all the relevant factors.¹⁴

[44] The Commission says it considered all pertinent circumstances when it considered assessing the penalty. The Commission followed its own policy when it first assessed the penalty at \$1,280. The Claimant told the Commission that he must have made a mistake and expressed remorse for it. The Commission considered this a mitigating circumstance and reduced the penalty from \$1,227 to \$981.

[45] At the hearing, the Claimant testified that following the advice of Service Canada has put a big burden on him that he can afford. I find that this is a new mitigating factor that wasn't before the Commission.

[46] Given his openness and honesty at the hearing, I have no reason to doubt that having to repay the overpayment from not declaring his earnings plus the penalty will impact the Claimant financially. So, I will intervene and consider this additional mitigating circumstance. In the circumstances, I find that a penalty amount of \$400 is appropriate.

¹⁴ *Canada (AG) v. Sirois*, A-600-95; *Canada (AG) v. Chartier*, A-42-90).

Did the Commission properly issue the notice of violation?

[47] Yes, the Commission properly issued the notice of violation.

[48] A claimant accumulates a violation if the Commission imposes a penalty on them.¹⁵ The Commission has discretion to issue a notice of violation or not to issue a notice of violation, depending on the circumstances.¹⁶

[49] Since a penalty has been imposed, the Commission had the legal basis to issue a notice of violation. The overpayment that resulted from the Claimant not declaring his earnings is \$7,012. As a result, the Commission classified the notice of violation as very serious since the overpayment amount is more than \$5,000.

[50] The Commission considered the impact on the Claimant of issuing a notice of violation and mitigating circumstances. The Commission could not consider the Claimant's financial circumstances. But I don't find this is as relevant to the decision to issue a notice of violation. This is especially so since the Commission decided that issuing a notice of violation would unlikely affect the Claimant's future applications for benefits.

[51] Based on the above, I find that the Commission exercised its discretion judicially. I find that the Commission properly issued the notice of violation.

¹⁵ See section 7.1(4)(a) of the Act.

¹⁶ *Gill v. Canada (Attorney General)*, 2010 FCA 182.

Conclusion

[52] The appeal is dismissed, with modification.

[53] The Claimant received earnings in the form of wages, but didn't declare them. The Commission correctly allocated those earnings. The Claimant knowingly made false or misleading statements. The Commission didn't act judicially when it imposed a penalty, so I reduced the penalty amount. The Commission properly issued a notice of violation.

Audrey Mitchell

Member, General Division – Employment Insurance Section