



Citation: *JL v Canada Employment Insurance Commission*, 2023 SST 28

Social Security Tribunal of Canada General Division – Employment Insurance Section

Decision

Appellant: J. L.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decisions (339751 and 342720) dated May 14, 2019 (issued by Service Canada)

Tribunal member: Angela Ryan Bourgeois

Type of hearing: Teleconference

Hearing date: October 27, 2022

Hearing participant: Appellant

Decision date: January 11, 2023

File number: GE-21-2360

Decision

[1] I am allowing the appeal on some issues, but not all.

– Misconduct

[2] The appeal about misconduct is allowed. The Tribunal agrees with the Appellant (Claimant).

[3] The Canada Employment Insurance Commission (Commission) hasn't proven that the Claimant lost his job because of misconduct under the *Employment Insurance Act* (Act). This means that the Claimant isn't disqualified from receiving Employment Insurance (EI) benefits.¹

– Allocation

[4] I am dismissing the Claimant's appeal about the allocation of earnings.

[5] The Commission allocated (in other words, assigned) the Claimant's earnings in the correct amounts to the correct weeks.

– Misrepresentation, penalty, and violation

[6] The Claimant knowingly misrepresented his earnings and that he lost his job, so the Commission was allowed to issue a penalty and notice of violation.

[7] The penalty amount is reduced to \$1,000.

[8] The violation remains and is classified as serious.

Overview

[9] The Commission made some decisions about the Claimant's EI benefits. It decided that:

¹ Section 30 of the *Employment Insurance Act* (Act) says that claimants who lose their job because of misconduct are disqualified from receiving benefits. The Commission can't pay these claimants EI benefits.

- He lost his job because of misconduct so he was disqualified from receiving EI benefits.
- He knowingly misrepresented how much he earned and that he'd lost his job. So,
 - his earnings had to be reallocated, which changed the amount of EI benefits he was entitled to receive
 - it imposed a \$5,000 penalty
 - it issued a notice of violation, classified as "very serious"

[10] Next, I will provide some details about each of these issues.

– **Misconduct**

[11] The Claimant lost his job. According to the termination letter, the Claimant's employer dismissed him because

- he brought a group of people back to Apartment B at approximately 4 a.m. on Sunday, April 14, 2018,²
- the use of illicit drugs.

[12] The Claimant doesn't dispute that this happened. He says that this isn't misconduct. He says the employer shouldn't have moved him from the camp to the apartment because it knew of his struggle with drugs.

[13] The Commission accepted the employer's reasons for the dismissal. It decided that the Claimant lost his job because of misconduct. Because of this, the Commission decided that the Claimant is disqualified from receiving EI benefits.

² April 14, 2018, is a Saturday, not a Sunday.

– **Allocation**

[14] The Claimant received earnings while he was collecting EI benefits. He reported earnings, but the amounts he reported weren't accurate. The Commission paid him EI benefits based on the earnings information he provided.

[15] The Commission then received earnings information from the Claimant's employers. Based on the new information, it adjusted the original allocations.

[16] The new allocations meant the Claimant received more in EI benefits than he should have received. In other words, the Commission overpaid the Claimant EI benefits. The Commission wants the Claimant to repay the overpayment. It issued a notice of debt.³

[17] The Claimant agrees with the earnings information the employers provided.

[18] I have to decide if the Commission correctly allocated the Claimant's earnings.

– **Misrepresentation, penalty, and violation**

[19] The Commission decided that the Claimant knowingly misrepresented his earnings and that he lost his job.

[20] Because of this, it decided to give a monetary penalty and issue a notice of violation.

[21] The penalty was \$5,000. The violation was classified as "very serious."

[22] I have to decide if the Commission was allowed to impose the penalty and issue the violation. I also have to decide if the Commission acted judicially (in other words, properly), when it made these decisions.

Issues

[23] These are the questions I have to answer.

³ See notice of debt for \$2,516 on page GD3A-59.

– **Misconduct**

[24] Did the Claimant lose his job because of misconduct?

– **Allocation**

[25] Did the Commission correctly allocate the Claimant's earnings? In other words, did it allocate the earnings to the right weeks in the right amounts?

– **Misrepresentation, penalty, and violation**

[26] Was the Commission allowed to impose a penalty? In other words, did the Claimant knowingly misrepresent his earnings and that he had lost his job?

[27] If the Commission was allowed to impose a penalty, did it act judicially when it set the penalty amount? If not, how much should the penalty be?

[28] Was the Commission allowed to issue a notice of violation?

[29] If so, did the Commission act judicially in issuing a notice of violation? If not, should a notice of violation be issued?

[30] What is the proper classification of the violation?

Analysis

Misconduct

[31] To decide if the Claimant lost his job because of misconduct, I have to consider two things. First, I have to determine why the Claimant lost his job. Then, I have to look at whether the law considers that reason to be misconduct.

– **Why did the Claimant lose his job?**

[32] I find that the Claimant lost his job for the reasons the employer stated – for bringing people to a party at the apartment above his, and for using drugs.

[33] The Claimant wrote that the true reason he was dismissed was because he asked for a layoff or to be moved back to camp as there was a lot of drug use in his house.

[34] The Claimant suggests that if he was fired because of the party, the employer wouldn't have waited a week before dismissing him.⁴

[35] I find the employer dismissed the Claimant for the reasons it gave – guests/party and drug use. I find it unlikely that the employer would have dismissed the Claimant because he asked to be moved from the housing, especially when the Claimant says the employer was happy with his work. The delay of four or five days to dismiss him doesn't mean the employer didn't dismiss him for the reasons in the letter.

– **Is the reason for the Claimant's dismissal misconduct under the law?**

[36] The reason for the Claimant's dismissal isn't misconduct under the law.

[37] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.⁵ Misconduct also includes conduct that is so reckless that it is almost wilful.⁶ The Claimant doesn't have to have wrongful intent (in other words, he doesn't have to mean to be doing something wrong) for his behaviour to be misconduct under the law.⁷

[38] There is misconduct if the Claimant knew or should have known that his conduct could get in the way of carrying out his duties toward his employer and that there was a real possibility of being let go because of that.⁸

[39] The Commission has to prove that the Claimant lost his job because of misconduct. The Commission has to prove this on a balance of probabilities. This

⁴ See page GD3B-77.

⁵ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁶ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁷ See *Attorney General of Canada v Secours*, A-352-94.

⁸ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

means that it has to show that it is more likely than not that the Claimant lost his job because of misconduct.⁹

[40] The Commission didn't provide written submissions about why there was misconduct.¹⁰

[41] The Claimant says that there was no misconduct because he didn't think he'd lose his job for attending a party. Everyone was there. There was no arguing or fighting – it was just a good time.

[42] I find that the Commission hasn't proven that there was misconduct. The Commission hasn't proven that the Claimant knew or ought to have known that his actions could get in the way of carrying out his duties or lead to his dismissal.

[43] First, the Commission hasn't proven that the Claimant received the final warning letter before he did what led to his dismissal, or that the conduct in the warning letter was relevant to his dismissal.

[44] The employer provided the Commission with a final warning letter about missing scheduled work time.¹¹ It said that if he missed more time he could be terminated. The warning is dated Friday, April 13, 2018, and was signed by the employer on Sunday, April 15, 2018.

[45] This means that the Claimant hadn't received the warning letter when he attended the party on Saturday night. Further, the dismissal letter didn't mention the missed time as being a reason for his dismissal.

[46] Secondly, the Commission hasn't proven that the Claimant knew that he'd be dismissed (or even disciplined) for drug use.

⁹ See *Minister of Employment and Immigration v Bartone*, A-369-88.

¹⁰ In my decision that the Claimant's appeal wasn't late (RGD15), I gave the parties time to provide submissions about the merits of the appeal. The Commission didn't provide any.

¹¹ See page GD3A-52.

[47] The employer told the Commission that its employee handbook states that it has zero tolerance for drug and alcohol use. It did not provide a copy of the employee handbook or any policy about drug use.

[48] At the hearing, the Claimant told me that he knew some people had to sign a letter. But the employer didn't tell him about a drug use policy. The employer never had him sign such a policy. He told the Commission he didn't know about a drug use policy.¹²

[49] I find that if the employer had such a policy, in the handbook or otherwise, it likely would have given a copy to the Commission when it provided the warning and dismissal letters. It did not.

[50] So, I find that the Commission hasn't proven that the employer communicated its policy on drug use to the Claimant. It hasn't proven that he received a copy of the policy, or that the Claimant otherwise knew the details, including what could happen if he breached the policy.

[51] I am not allowed to speculate about what the drug policy might have said and how the Claimant breached it.¹³ The Commission says the Claimant breached the policy, but it hasn't proven this because there isn't a copy of the policy in the file.¹⁴

[52] As the Commission hasn't proven the Claimant knew of the policy and the impact of breaching it, it can't be said that he knew or ought to have known that he would (or could) be dismissed by breaching it.

[53] Thirdly, I accept what the Claimant said about other employees using drugs in the apartment and that they were not dismissed. The Claimant's evidence about this has been consistent. He admitted to using drugs that others at the party had purchased and brought to the party. As these other employees were not dismissed, it can't be said

¹² See page GD3A-66.

¹³ Misconduct can only be found on the basis of clear evidence, not speculation, supposition, or the opinion of the employer. See *Crichlow v Canada (Attorney General)*, A-562-97.

¹⁴ See the Commission's explanation for finding misconduct on page GD3A-67.

that the Claimant should have known that his actions could lead to his dismissal. This is especially so when the party was in the other employees' apartment, and the drugs were supplied at the party.

– **So, did the Claimant lose his job because of misconduct?**

[54] Based on my findings above, I find that the Claimant didn't lose his job because of misconduct. The Commission hasn't proven that the Claimant knew or ought to have known that by attending the party and doing drugs that he could lose his job.

Allocation of Earnings

[55] The law says that all earnings have to be allocated to certain weeks.¹⁵ Earnings for the performance of services are allocated to the weeks when the work is done.¹⁶

[56] There is no dispute that the Claimant's pay constituted earnings that had to be allocated.

[57] There is no dispute about the amount of the Claimant's earnings or when the work was done. The Claimant agrees with the information his employers provided to the Commission.

[58] I agree with how the Commission allocated the Claimant's earnings. I have reviewed the earnings evidence (records of employment and information from the employer). And the Commission correctly allocated the earnings to the weeks when the work was done.

[59] The allocations are

March 18, 2018	\$0.00
March 25, 2018	\$279.00
April 1, 2018	\$1,568.00

¹⁵ See sections 35 and 36 of the *Employment Insurance Regulations* (EI Regulations). Earnings are the entire income you get from employment. The EI Regulations also define income and employment.

¹⁶ See section 36(4) of the EI Regulations.

July 29, 2018	\$1,271.00
August 5, 2018	\$411.00
November 11, 2018	\$1,272.00
December 2, 2018	\$489.00

[60] But I would ask the Commission to take another look at whether the Claimant was entitled to more EI benefits than shown in the overpayment breakdown chart, especially for the weeks of March 18, 2018, August 5, 2018, and December 2, 2018. Given the reallocation, the Claimant may have been entitled to benefits for the week of March 18, 2018, as he had no earnings that week. And for the other two weeks, his actual earnings were significantly lower than what he reported, so the EI benefits payable could be higher than what he was actually paid.¹⁷

Penalty

[61] The Commission can impose a penalty on a claimant if the Commission becomes aware of facts that in its opinion establish that the claimant made a representation or provided information that the person knew was false or misleading.

[62] The Commission must prove that the Claimant knowingly made a false statement. To do so, it must provide evidence of both the actual questions asked of the Claimant and the answers that the Claimant gave.

[63] If the Commission proves that the Claimant knowingly made a false statement, to avoid the imposition of a penalty, the Claimant must provide a reasonable explanation for the incorrect information.

– Was the Commission allowed to impose a penalty?

[64] Yes. The Commission has proven that the Claimant knowingly made false statements about his earnings.

¹⁷ The amount of EI benefits payable isn't an issue before me. There could be reasons why benefits weren't payable, or were payable in those amounts, which aren't evident in the file.

[65] Comparing the relevant records of employment, which the Claimant agrees are correct, with his biweekly reports, I find that he knowingly made seven false representations for the weeks of March 18, 2018, March 25, 2018, April 1, 2018, July 29, 2018, August 5, 2018, November 11, 2018, and December 2, 2018.

[66] The Claimant also misrepresented that he stopped working on April 21, 2018, because he was dismissed.

[67] His record of employment shows that he was dismissed. There is no dispute that he lost his job. But his biweekly report asked if he had stopped working, and he said no.¹⁸ And the next time he applied for EI benefits, he stated that he wasn't working for that employer because of a shortage of work (not a dismissal).¹⁹

[68] So, I am satisfied that the Claimant knowingly provided false information. Now I will look at whether he has provided a reasonable explanation.

– **Has he provided a reasonable explanation for giving the incorrect information?**

[69] No.

[70] There is no reasonable explanation for providing incorrect earnings information.

[71] The Claimant says that his former girlfriend completed the reports on his behalf. Sometimes she overreported his earnings and sometimes she underreported them. It is hard to report the exact earnings when he is working away from home.

[72] This isn't a reasonable explanation for the incorrect information. The Claimant chose to have his girlfriend report his earnings on his behalf. But the onus remained with him to ensure his earnings were properly reported. When paid weekly he could have waited for his pay stubs before reporting his earnings. He could have multiplied his hours worked by his hourly wage to determine the correct earnings. He could have asked someone else to help him. If he filed his report before receiving a paystub, when

¹⁸ See page GD3B-35. The report was completed on April 29, 2018. He was dismissed on April 21, 2018.

¹⁹ See page GD3A-16.

he received it, he could have checked to see if his report was right. And if it wasn't, he could have called Service Canada to provide the correct information.

[73] I understand that the Claimant didn't mean to report his earnings incorrectly. But the Act only requires that false or misleading statements are made. There doesn't have to be an intention to defraud or deceive for the Commission to impose a penalty.²⁰

[74] He provided no reasonable explanation for the false information about when and why he stopped working.

[75] The Claimant knew he stopped working; yet he didn't say so on his biweekly report. He knew he was dismissed, but on his application form he indicated that he had been laid off.

[76] It isn't reasonable for the Claimant to think he should have reported otherwise, even if advised to by friends and family.

[77] Because there was no reasonable explanation for the false or misleading information, the Commission was allowed to impose a penalty.

[78] Next, I will look at the penalty amount.

– **Did the Commission act judicially when it set the penalty amount?**

[79] The Claimant knowingly made false statements, so the Commission is allowed to impose a penalty amount within the limitations of the Act.²¹

[80] The Commission's decision about the amount of the penalty is discretionary up to the maximum amount allowed by law. This means that I have to set aside the decision if the Commission made the decision in bad faith, considered irrelevant factors, or ignored relevant factors.²²

²⁰ See *Canada (Attorney General) v Gates*, A-600-94.

²¹ See section 38 of the Act.

²² I can only change the Commission's decision if it did not exercise its discretion judicially. For example, if it based its decision on a wrong principle, took into account an irrelevant consideration, or failed to

[81] The Commission set the penalty at \$5,000.

[82] It followed its policy in setting this amount. It considered the following:²³

- the Claimant has a prior incident of incorrectly declared earnings
- the Claimant didn't report that he had been dismissed
- he has a drug addiction

[83] Following its policy, the Commission used the lowest of three possible penalty amounts. It reduced one of the amounts by 10% to account for his drug addiction. But that didn't lower the final penalty amount, because even with the reduction, the calculation wasn't the lowest of the three possible amounts.

– **The Commission missed relevant factors**

[84] The Commission didn't consider that the Claimant overrepresented his earnings on his reports. He reported more earnings than he actually earned. For example,

- For employer 1, for the three weeks of March 18, March 25, and April 1, 2018, he declared \$2,035 in earnings, but his actual earnings for those three weeks were only \$1,847.
- For employer 2, he declared earnings of \$1,745, but he only earned \$1,682.
- For employer 3, he declared earnings of \$13,583 but only earned \$13,417.

[85] Also, the Commission ignored the Claimant's mental health conditions. It didn't consider his difficulties in completing his reports, and that he had to rely on someone for help.

consider something relevant. See *Canada (Attorney General) v Tong*, 2003 FCA 281. See also *Canada (Attorney General) v Purcell*, A-694-94.

²³ See record of decision on page GD3B-67.

[86] This was relevant information that the Commission didn't consider. This means it didn't exercise its discretion judicially. So, I have to decide on the correct amount of the penalty.

– **What is the penalty amount?**

[87] I set the penalty amount at \$1,000. I have reduced the Commission's penalty of \$5,000 by 80%. This is what I considered:

- He had an earlier incident of misrepresenting his earnings, although I have no details about this.
- His reporting errors created an overpayment.
- Because of his mental health condition and drug addiction, he needed someone to help him with his biweekly reporting. He made efforts to get the needed help by asking his girlfriend to do the reporting on his behalf.
- Overall, he reported more in earnings than he should have.
- His misrepresentation about when he stopped working delayed the Commission's decision about the reason for his dismissal.

[88] Although this is the second time the Claimant misrepresented his earnings, it must be acknowledged that he made efforts to have his earnings properly reported by enlisting help, and that he reported more in earnings than he earned.

[89] A significant penalty of \$1,000 will deter him from further misrepresentations but recognizes his efforts with respect to accurately reporting his earnings, and the difficulties he faced at the time because of his addiction and mental health conditions.

Violation

– **Was the Commission allowed to issue a notice of violation?**

[90] Yes. The Commission was allowed to issue a notice of violation because it imposed a penalty.²⁴

– **Did the Commission act judicially in issuing a notice of violation?**

[91] Yes. The Commission considered the overall impact of issuing the notice of violation, including mitigating circumstances (such as his drug addiction), prior offences, and his ability to qualify for benefits in the future.

[92] I find that this shows that the Commission considered all relevant factors and ignored irrelevant facts. There is no evidence that the Commission acted in bad faith or for an improper purpose.

[93] As the Commission's decision to issue a notice of violation was made judicially, the violation stays.²⁵

– **What is the proper classification of the violation?**

[94] Violations are classified as minor, serious, very serious and subsequent. It is based on the value of the violation.²⁶

[95] In the Claimant's case, the classification will change because the value of the violation has decreased. There is no longer an overpayment from the disqualification because I allowed the appeal on the misconduct.

²⁴ Section 7.1 of the Act says that when a penalty is imposed under section 38 of the Act, the Commission can issue a notice of violation.

²⁵ Even if the Commission hadn't acted judicially, I agree with the Commission that a notice of violation was in order. It acted as a deterrent against future misrepresentations, and since he has established two new claims since then, it has proven not to have been too onerous.

²⁶ See section 7.1(5) of the Act.

[96] The overpayment amount because of the allocation of earnings is about \$2,500.²⁷ As the value of the violation is between \$1,000 and \$5,000, it is classified as “serious.”

Conclusion

[97] The Claimant isn’t disqualified from receiving EI benefits because the Commission hasn’t proven that he lost his job because of misconduct. So, the part of the overpayment caused by the disqualification is removed.

[98] But there is still an overpayment because of the reallocation of the Claimant’s earnings. The Commission correctly reallocated his earnings.

[99] I would ask the Commission to take another look at whether the overpayment breakdown chart correctly shows the benefits payable after the reallocation of earnings, specifically for the weeks of March 18, 2018, August 5, 2018, and December 2, 2018.²⁸

[100] The Claimant misrepresented his earnings and that he lost his job, so the Commission was allowed to issue a penalty and notice of violation.

[101] There is still a penalty and violation.

[102] The penalty is reduced to \$1,000.

[103] The violation is classified as serious.

[104] This means the appeal is allowed in part.

Angela Ryan Bourgeois
Member, General Division – Employment Insurance Section

²⁷ See Notice of Debt Details on page GD3B-74. The overpayment due to the disqualification will be removed because I allowed the appeal on the misconduct issue.

²⁸ See paragraph 60 of this decision.