



Citation: *SH v Canada Employment Insurance Commission*, 2023 SST 78

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

## Decision

**Appellant:** S. H.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission  
reconsideration decision 426088 dated July 6, 2022  
(issued by Service Canada)

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**Tribunal member:** Angela Ryan Bourgeois

**Type of hearing:** Teleconference

**Hearing date:** September 15, 2022

**Hearing participant:** Appellant

**Decision date:** January 24, 2023

**File number:** GE-22-2138

## Decision

- [1] The appeal about the repayment is dismissed.
- [2] The appeal about the penalty and violation is allowed.
- [3] The Appellant must repay \$4,190 in Employment Insurance (EI) benefits.
- [4] The penalty and notice of violation are removed. The Canada Employment Insurance Commission (Commission) hasn't proven that it was allowed to impose a penalty. This means there is no penalty or violation.

## Overview

- [5] This appeal is about whether the Appellant has to repay EI benefits deposited to her account. The EI benefits were paid on someone else's EI claim. The appeal is also about whether the Commission was allowed to give the Appellant a penalty and violation.
- [6] In 2018, the Appellant was in a relationship with S. P.
- [7] S. P. was acquainted with R. S., who was going to jail.
- [8] R. S. had an EI claim, but he couldn't receive EI benefits while in jail.
- [9] In this decision, I sometimes refer to R. S. as the Claimant.
- [10] According to the Appellant, S. P. and R. S. came up with the idea that S. P. would file R. S.'s biweekly reports while R. S. was in jail. S. P. would collect the money, and give half of it to R. S.
- [11] S. P. didn't have a bank account where the EI benefits could be deposited. So, he asked the Appellant for her banking information. She gave it to him.
- [12] The plan proceeded, and R. S.'s EI benefits were deposited to the Appellant's bank account. Some of the EI benefits were withdrawn from her account.

[13] When R. S. was released from jail, he tried to receive more EI benefits. He told the Commission that he hadn't known of and hadn't been part of the scheme. It seems the Commission believed R. S.

[14] The Commission made these decisions in relation to the Appellant:

- She had to repay the overpayment of \$4,190, being the benefits deposited to her bank account under R. S.'s EI claim.
- She had to pay a penalty of \$1,257.
- She received a notice of violation.

[15] The Appellant is appealing all of these decisions. She says that:

- She should only have to repay the EI benefits that remained in her bank account as she didn't have the benefit of the funds taken by S. P. and presumably shared with R. S.
- She didn't make any misrepresentations to the Commission. She didn't file any reports. She gave S. P. her banking information, but he could have found her information even if she hadn't given it to him.

[16] This is the second time the appeal has been heard at the General Division. The Appellant successfully appealed the first General Division's decision to the Appeal Division. The Appeal Division returned the matter to the General Division. The Appeal Division directed I reconsider all issues.

## **Issues**

[17] The questions I have to answer to decide this appeal are:

- a) Does the Appellant have to repay the EI benefits?
- b) If so, how much does she have to repay?

- c) Was the Commission allowed to impose a penalty and issue a notice of violation?

## Analysis

### Repayment

[18] The law says that when someone receives EI benefits that they aren't entitled to receive, they have to repay those benefits.<sup>1</sup>

[19] The Appellant acknowledges that some of the EI benefits remained in her account. She agrees that she should have to repay some of the money, but not the money she gave to S. P.

#### – She didn't complete the reports

[20] The Appellant states that she didn't complete the reports that caused the EI benefits to be deposited to her account.

[21] I recognize that the Appellant wasn't the person claiming benefits or completing the reports. But the law says that **any person**, not just claimants, must return benefits they receive to which they aren't entitled.<sup>2</sup>

#### – Overpayment resulting from fraud

[22] The Federal Court of Appeal says that a claimant doesn't have to repay an overpayment if both of the following apply:

- a third party caused the Commission to make the overpayment
- the fraud was committed without the claimant's knowledge and consent<sup>3</sup>

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<sup>1</sup> See sections 43 and 44 of the *Employment Insurance Act* (Act).

<sup>2</sup> Section 44 of the Act refers to "a person" not "a claimant."

<sup>3</sup> This is what the Federal Court of Appeal said in *Canada (Attorney General) v Lylander*, 2008 FCA 365. See also *Fournier v Canada (Minister of Human Resources Development)*, 2002 FCA 138.

[23] While the Federal Court of Appeal was talking about a claimant, it follows that no one should have to repay an overpayment if the overpayment was caused by another person, and the fraud was committed without the person's knowledge and consent.

[24] Considering these two factors, I make these findings that I explain in the following paragraphs:

- The overpayment was caused by S. P., not the Appellant.
- The fraud was committed with the Appellant's knowledge.

– **The overpayment was caused by S. P., not the Appellant**

[25] The evidence shows that the overpayment was caused by S. P., not the Appellant.

[26] The Appellant provided her banking information to S. P. There is no dispute about this.

[27] But it was S. P. who changed the banking information on R. S.'s Service Canada account and filed the biweekly reports. Those actions cause the overpayment, not the Appellant giving her boyfriend her banking information.

– **The Appellant knew about the fraud**

[28] I find the Appellant knew about the fraud. This is why:

- she testified that she knew that R. S. wasn't entitled to receive EI benefits while in jail
- she knew that money was being deposited to her account by "Canada"
- she withdrew the money deposited to her account by "Canada"
- she said she gave the money to S. P. because she knew it wasn't meant for her.

[29] This shows that the fraud was committed with her knowledge.

[30] Further, rather than report the deposits to Service Canada, she withdrew the funds and gave some to S. P. This shows that she consented to the use of her bank account for the fraudulent receipt of EI benefits.

[31] Although she didn't cause the overpayment, she knew about the fraud, and so must repay the EI benefits she received.

– **She must repay the entire overpayment of \$4,190**

[32] The Appellant agrees that \$4,190 in EI benefits was deposited to her account and that she wasn't entitled to those benefits.

[33] She says that she should only have to repay the EI benefits that stayed in her account – not the EI benefits she handed over to S. P.

[34] At the hearing, we looked at her bank statements and she pointed out the withdrawals that went to S. P. She originally stated that she paid \$1,400 to S. P., but when we reviewed her bank statements, it seems that more than that was withdrawn.<sup>4</sup>

[35] S. P. testified that he gave R. S. about \$4,000 when he was released from jail.<sup>5</sup> He also testified that he told the Appellant to keep the money because they have a child together, and that is what you do.

[36] I have considered the Appellant's argument. I acknowledge that she likely paid some of the EI benefits to S. P., and that S. P. may have even given R. S. some money.

[37] But the Appellant still has to repay the entire overpayment. This is because she wasn't entitled to receive the EI benefits, and she knew the deposits were the result of a fraud.<sup>6</sup>

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<sup>4</sup> For example, see her arguments on page AD6-2.

<sup>5</sup> I heard this on the recording of the hearing held before the other General Division member on September 21, 2021. S. P. wasn't a witness at the hearing before me.

<sup>6</sup> See section 44 of the Act, and *Canada (Attorney General) v Lylander*, 2008 FCA 365.

## **Misrepresentation, Penalty and Violation**

[38] In certain circumstances, the Commission may impose a penalty on a claimant or **any person acting for a claimant.**<sup>7</sup>

[39] The Appellant isn't the claimant. So, the first thing I have to look at is whether the Appellant was acting for a claimant, in this case, R. S.

### **– Acting for the claimant**

[40] I find that the Appellant acted on behalf of a claimant when she gave her banking information to S. P. for the purpose of receiving R. S.'s EI benefits.

[41] The Appellant testified that she had only met the claimant in passing. She would recognize him, but she didn't know anything of his background. She was not privy to any conversations about the scheme between S. P. and R. S. She learned about the scheme from S. P., who wasn't the claimant.

[42] She accepted the deposits. She accepted the payments by not notifying Service Canada or her bank of the error, and by withdrawing some of the money to give to S. P.

[43] I find that in these circumstances, even though she didn't know the Claimant well, she was acting on R. S.'s behalf by accepting deposits of EI benefits paid on his EI claim.

### **– Was the Commission allowed to issue a penalty?**

[44] The onus is on the Commission to prove that it was allowed to issue a penalty.

[45] The Commission says that it was allowed to issue a penalty because the Appellant breached section 38 of the Act. Section 38 sets out when the Commission can impose a penalty.

[46] But the Commission hasn't specified which of those circumstances it believes exists. In other words, it hasn't set out the legal basis for the penalty.

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<sup>7</sup> See section 38(1) of the Act.

– **This is what section 38 says**

[47] **Section 38(1)** says that the Commission may impose a penalty on a claimant or any other person acting for a claimant, if the Commission becomes aware of facts that in its opinion establish that the claimant or other person, has done one of the following:

- (a) in relation to a claim for benefits, **made a representation that they knew was false or misleading**
- (e) being **the payee of a special warrant**, knowingly negotiated or attempted to negotiate it for benefits **to which the claimant** was not entitled
- (f) **knowingly failed to return a special warrant**, or the amount of the warrant or any excess amount, **as required by section 44**
- (h) **participated in, assented to, or acquiesced in** an act or omission mentioned above.

[48] The paragraph lettering above reflects the paragraph numbering in section 38(1) of the Act. There are other circumstances when the Commission may impose a penalty, but based on what the Commission wrote, these are the most relevant paragraphs.

[49] **Section 44** of the Act says that a person who has received a benefit payment to which the person is disentitled or more than they are entitled must return the amount without delay.

– **What the Commission said about its decision**

[50] The **initial decision letter** doesn't identify which paragraph of section 38(1) it was applying. But because it refers to representations, it could refer to paragraph (a).

[51] The initial decision letter reads:

[W]e have concluded that you **knowingly made false or misleading representation(s)** while acting for R. [last name omitted]. Specifically, in connection with the direct deposit banking



information, you indicated you entered your own banking information, unbeknownst to R. [last name omitted], whereas you were only entitled to receive the maternity and parental benefits for which you had applied on 15MAY2018 [sic], you changed the banking information with the intent of collecting another's Employment Insurance benefit payments.

...

In addition, you also **knowingly provided false information** while acting for R. [last name omitted]. Specifically, when we requested information in connection with the direct deposits of regular benefits, you indicated you intentionally completed the transactions and obtained the deposits without the consent or participation of R. [last name omitted], whereas you were in receipt of automated parental benefits and had no need to complete reports in order to receive benefit payments.

A penalty may be imposed on a person acting for a claimant who **knowingly provides false information**.

We have decided that your **representation** constitute such an act.<sup>8</sup>  
[emphasis mine]

[52] The **reconsideration decision letter** doesn't specify which paragraph of section 38(1) the Commission relied upon to impose the penalty. This decision didn't mention the changing of banking information at all. It said that the earlier decision was maintained. It goes on to state that it determined that her **failure to return** direct deposit payments received without entitlement constitutes **misrepresentation**.<sup>9</sup>

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<sup>8</sup> See initial decision letter on page GD3-41.

<sup>9</sup> See reconsideration decision letter on page GD3-55.

[53] This seems to be an application of both paragraph (a), misrepresentation, and paragraph (f), failing to return a special warrant.

[54] The **rationale behind the reconsideration decision**, according to the Commission's Supplementary Record of Claim, is that the Commission can impose a penalty for any misrepresentation that was knowingly made.<sup>10</sup> The Commission wrote:

The Commission examined all of the relevant facts and concluded that the false statements, acts, or omissions were knowingly made because the evidence indicates [identify the false statement, act, or omission, referring to concrete evidence that the client knew the statement, act or omission was false].

[55] The Commission's notes don't identify the concrete evidence. But its notes do say that the Appellant provided her banking information and that she didn't give the moneys to anyone else.<sup>11</sup>

[56] This seems to point to a combined application of paragraph (a), misrepresentation, and paragraph (f), failing to return a special warrant.

[57] No where in its **written representations** to the **General Division**, does the Commission identify the part of Section 38(1) it relied upon to impose the penalty. It wrote that the Appellant made six **representations** when **she was aware that she was not entitled to the direct deposits** that went into her bank account and kept the payments. The Commission continued - the Appellant knew that she committed fraud, repeatedly and did not come forward to correct the matter, rather admitted fault once caught.<sup>12</sup> In conclusion, it wrote that the penalty was imposed pursuant to section 38 for making six misrepresentations by knowingly providing **false or misleading information** to the Commission.<sup>13</sup>

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<sup>10</sup> See supplementary record of claim on page GD3-51.

<sup>11</sup> See page GD3-52. The Commission called the Appellant the "claimant," but from the context, I am satisfied that it was referring to the Appellant, not R. S.

<sup>12</sup> See page GD4-5, paragraph 3.

<sup>13</sup> See page GD4-7, last paragraph.

[58] Here again, the Commission seems to combine paragraphs (a), false representations, and (f), not returning the special warrant.

[59] In its **written representations** to the **Appeal Division**, the Commission wrote that the Appellant knowingly provided **false or misleading information** when she was aware of the **direct deposit** warrants that went into her bank account and **kept** the payments. It then says that it was allowed to impose a penalty when someone acting for the claimant **knowingly participates in, consents to, or acquiesces** in the perpetration of an act such as being the **payee of a warrant** to which she was not entitled.<sup>14</sup>

[60] Again, it seems the Commission is relying on paragraph (a), misrepresentation, (f), not returning the money, and has now added (h), participating in, assenting to, or acquiescing and (e), being the payee of a special warrant to which she wasn't entitled.

[61] Reviewing these documents, and the file as a whole, I cannot determine what the Commission relied upon as the legal basis for its decision to impose a penalty.

– **The Commission hasn't proven its case**

[62] Because the Commission hasn't set out the legal basis for its penalty decision, I find it hasn't shown that it was allowed to impose a penalty under section 38(1) of the Act.

[63] It isn't for the Tribunal to guess about which provision the Commission relied upon. And as a matter of fairness, the Appellant must know the legal basis upon which a penalty has been imposed.

[64] For this reason, the penalty is set aside.

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<sup>14</sup> See page AD7-1, paragraphs 3 and 5.

– **Violation**

[65] Without the penalty, the Commission has no basis upon which to issue the notice of violation.<sup>15</sup>

[66] So there is no violation.

**Conclusion**

[67] The Appellant must repay the EI benefits deposited to her bank account under R. S.'s EI claim in the amount of \$4,190.

[68] The penalty and violation are rescinded. In other words, there is no penalty or violation.

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

Angela Ryan Bourgeois  
Member, General Division – Employment Insurance Section

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<sup>15</sup> See section 7.1 of the Act.