



Citation: *BS v Canada Employment Insurance Commission*, 2023 SST 1212

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

Decision

Appellant: B. S.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (548117) dated November 12, 2022 (issued by Service Canada)

Tribunal member: Linda Bell

Type of hearing: Written

Decision date: May 23, 2023

File number: GE-23-596

Decision

[1] B. S. is the Appellant. I am dismissing his appeal.

[2] The Appellant failed to properly report his work and earnings. The Commission allocated (in other words, assigned) those earnings to the correct weeks.

[3] The retroactive allocation of earnings results in an overpayment of Employment Insurance (EI) benefits. I am not writing off or reducing the overpayment that results from the allocation of earnings.

[4] The Commission acted properly (judicially) when imposing and reducing the penalty to \$1,311. This means I can't reduce or wave the penalty.

Overview

[5] The Appellant applied for regular EI benefits. The Commission set up his claim for regular EI benefits starting March 8, 2020.

[6] To be paid Employment Insurance (EI) benefits, Appellants complete biweekly reports. The reports ask a series of questions. Based on the answers, the Commission decides the Appellant's entitlement to benefits.

[7] The Commission reviewed the Appellant's answers on his reports, about whether he had worked and had earnings. It decided the Appellant knowingly provided false or misleading information when he answered he didn't work and didn't have any earnings. As a result, the Commission allocated the Appellant's earnings to the weeks worked. This allocation results in a \$3,277 overpayment of EI benefits.

[8] The Commission also determined the Appellant made 7 misrepresentations. So, it imposed a penalty of \$1,639. Upon reconsideration, the Commission maintained the allocation of earnings and reduced the penalty to \$1,311.

[9] The Appellant appeals to the Social Security Tribunal (Tribunal). He says he wasn't in receipt of earnings at the same time he received EI benefits. He says all his earnings were reported properly through the EI portal.

Matters I have to consider first

Appellant's Name

[10] I have listed the Appellant's name as B. S. in the style of cause, on the front page of this decision.

[11] I recognize the Appellant listed his name as B. S. on his appeal to the Tribunal. But he submitted a copy of the Commission's decision with his appeal, which lists his name as A. S.

[12] I also recognize that all the Commission's documents on file and the Request for Reconsideration completed by or for the Appellant, lists his name as A. S. But in the emails he sent to the Commission, he signed his name as "B. S."¹ The email addresses show his name listed as B. S., but the email address listed initials "as8125". Accordingly, it is reasonable to conclude that he is also known as A. S. So, I have listed his name as B. S.

Method of hearing

[13] The hearing proceeded in writing, as requested by the Appellant.

[14] On April 6, 2023, I wrote to the Appellant and explained that if he wished to submit any further statements or documents in response to the Commission's documents (GD3 and GD4), he must do so by May 12, 2023. I also explained that if he wished to change his hearing to a teleconference or videoconference, he must tell the Tribunal no later than May 12, 2023.

[15] There is nothing on file that suggests the Appellant tried to submit additional information or contact the Tribunal to request a different form of hearing. Nor is there any indication that the Appellant requested more time to make those submissions. Accordingly, the hearing proceeded based on the information on file.

¹ See the emails at page GD3-49, GD3-51, and GD3-52.

Issues

- [16] Is the money paid to the Appellant earnings?
- [17] If the money is earnings, how is it to be allocated?
- [18] Did the Commission reconsider the claims within the allowable timeframe?
- [19] Did the Appellant knowingly provide false or misleading information?
- [20] Did the Commission act properly (judicially) when imposing the penalty?
- [21] Is the Appellant required to repay the overpayment and penalty?

Analysis

Is the money paid to the Appellant earnings?

[22] Yes, the money paid to the Appellant from C.C.E. and E.P.C., during the period of review, is earnings.

[23] The law says that earnings are the entire income that you get from any employment.² The law defines both “income” and “employment.”

- **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.³
- **Employment** is any work that you did or will do under any kind of service or work agreement.⁴

[24] The Commission says the Appellant failed to properly report that he worked and had earnings during nine weeks while he was collecting regular EI benefits. The Commission says that both employers pay on a calendar weekly schedule (Sunday to Saturday) which mirrors the EI reports submitted by claimants. The Records of

² See section 35(2) of the EI Regulations.

³ See section 35(1) of the EI Regulations.

⁴ See section 35(1) of the EI Regulations.

Employment (ROE) issued for the Appellant set out pay period earnings in Block 15C with the most recent pay period (Pay Period 1) reflecting the earnings in the last week of work.

[25] Upon review of each ROE, I accept that the Appellant had earnings in each of the weeks under review.⁵ I have also reviewed the Appellant's biweekly reports on file.⁶ I've listed the earnings as reported on the ROEs, the amounts the Appellant reported on his biweekly claims, and the weeks in question below.

Week beginning:	Your earnings are:	Instead of what you Reported as follows:
April 12, 2020	\$1,961.00	\$0.00
May 3, 2020	\$ 784.00	\$0.00
June 28, 2020	\$1,816.00	\$0.00
July 5, 2020	\$2,270.00	\$0.00
July 12, 2020	\$ 908.00	\$0.00
January 3, 2021	\$2,579.00	\$0.00
January 24, 2021	\$ 868.00	\$0.00
January 31, 2021	\$1,370.00	\$868.00
February 7, 2021	\$ 0.00	\$868.00

[26] Based on the evidence on file, I find the Appellant had earnings in eight of the nine weeks listed above. These earnings were paid to the Appellant for work he performed in each of those weeks.

⁵ See the ROEs at pages GD3-15 to GD3-24.

⁶ See pages GD3-29 to GD3-35.

How are the earnings to be allocated?

[27] The law says that earnings have to be allocated to certain weeks. The weeks that the earnings are allocated depends on why you received the earnings.⁷

[28] The law says that the earnings you receive for work, have to be allocated to the weeks that the work was done.⁸

[29] I find the Appellant received the earnings for work performed in each week, as set out above in paragraph [25]. This is because in this case, the Appellant's earnings were payable for the work he completed each week, as reported on his ROEs.

[30] The Appellant argues he didn't receive earnings during the same weeks he received EI benefits. He relies on copies of his bank statements as evidence to support this argument.

[31] I agree with the Commission that copies of bank statements aren't sufficient to prove weeks worked or weeks for which earnings were paid. This is because the Appellant may have more than one bank account, he may be paid by cheque that he cashes or deposits into a different account, or he may be paid by cash that he doesn't deposit into a specific bank account.

[32] Further, earnings are to be reported in the week that the work was performed, not the week in which the earnings are given to the Appellant or deposited into his bank account. I also recognize that EI benefits are deposited into the Appellant's bank account the week following the two weeks for which the biweekly reports are completed online.

⁷ See section 36 of the EI Regulations.

⁸ See section 36(4) of the EI Regulations.

Did the Commission reconsider the claims within the required timeframe?

[33] Yes. I find the Commission reconsidered the claims within the required timeframe.

[34] The law says the Commission may reconsider a claim for benefits within 36 months after the benefits have been paid or would have been payable.⁹ This period is extended to 72 months in cases where, if in the opinion of the Commission, a false or misleading statement or representation has been made in connection to a claim.¹⁰

[35] The Federal Court of Appeal has said the Commission must be “reasonably satisfied” of its opinion that a false or misleading statement had been made in order to extend the period of review to 72 months.¹¹

[36] In this case the documents on file show the Commission allocated the earnings and reconsidered the claims 28 months after the benefits were payable or paid. This means the Commission reconsidered the claims within the required time frame.

[37] I recognize the week of April 12, 2020, is the first claim reconsidered and the Commission issued its letter to the to the Appellant on August 25, 2022, setting out each week of the allocation. That letter also states the Commission determined the Appellant had knowingly made 7 false representations when he failed to properly report his earnings on his weekly claims.¹²

[38] As per the facts set out above, I find the Commission reconsidered the claims within the allowable 36-month period. So, there is no need to assess whether the requirements to extend the timeframe to 72 months have been met. I will now turn my mind to determine whether the Appellant provided false or misleading information.

⁹ See section 52(1) of the *Employment Insurance Act (Act)*.

¹⁰ See section 52(5) of the *Act*.

¹¹ *Canada (Attorney General) v Langelier*, 2002 FCA 157; *Canada (Attorney General) v Dussault*, 2003 FCA 372.

¹² See the letter at page GD3-40.

Did the Appellant knowingly provide false or misleading information ?

[39] Yes. I find that the Commission has proven the Appellant knowingly provided false or misleading information.

[40] To impose a penalty, the Commission has to prove that the Appellant knowingly provided false or misleading information.¹³ To be subject to a penalty, the Commission has to show that it is more likely than not that the Appellant provided the information, knowing that it was false or misleading.¹⁴

[41] If it is clear from the evidence that the questions were simple and the Appellant answered incorrectly, then I can infer that the Appellant knew the information was false or misleading. Then, the Appellant must explain why he gave incorrect answers and show that he did not do it knowingly.¹⁵ The Commission may impose a penalty for each false or misleading statement knowingly made by the Appellant.

[42] The burden rests upon the Appellant to ensure his claims are completed truthfully. This is supported by the attestation on the reports that includes, in part, "...that giving false information for myself or someone other than myself constitutes fraud. I also understand there are penalties for knowingly making false statements."

[43] The Commission submits that the Appellant made misrepresentations on 7 separate biweekly claim reports during the following periods

- April 12, 2020, to May 9, 2020,
- June 28, 2020, to July 18, 2020,
- September 6, 2020, to September 12, 2020
- January 3, 2021, to February 13, 2021

¹³ Section 38 of the *Act*.

¹⁴ *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.

¹⁵ *Nangle v Canada (Attorney General)*, 2003 FCA 210.

[44] The Commission says the Appellant knew he was working during these weeks and knew he had been or would be paid for his work.

[45] The Commission provides evidence including: the Appellant's ROEs, his on-line reports, and payroll information obtained from his employer. The Commission provided a copy of its record of the July 7, 2022, telephone call with the employer, verifying the payroll information.

[46] The ROEs show the Appellant worked and had earnings in each of the weeks under review. However, on each biweekly report (claim) for the weeks between April 12, 2020, and January 30, 2021, the Appellant answered "No" to the question, "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."

[47] I recognize that for the weeks from January 31, 2023, to February 13, 2021, the Appellant declared earnings of \$868.00 in each week. But his earnings for the week of January 31, 2021, were \$1,369.69 (rounded up to \$1,370) and his earnings for the week of February 7, 2021, were \$0.00.

[48] The Appellant doesn't speak to the dates he actually worked. Instead, he says he wasn't in receipt of earnings while in receipt of EI benefits. He says all earnings were clearly submitted to the EI portal.

[49] I find it is clear from the evidence that the Appellant knowingly provided false or misleading information on his biweekly claims. That evidence includes the payroll information obtained from the employer, the ROEs, and the Appellant's biweekly reports. I favoured the Commission's documentary evidence over the Appellant's bank statements and arguments.

[50] I favoured the Commission's evidence because the copies of the biweekly reports were certified by an agent of the Commission, to be the reports filed under the Appellant's Social Insurance Number. The agent states in their certification that the documents are evidence of the facts, without further proof, of a copy of a document submitted, that is in the custody of the Commission.

[51] Further, the Appellant didn't provide a response to the Commission's submissions, as requested in my April 6, 2023, letter. On his appeal form the Appellant argues he wasn't in receipt of earnings while in receipt of EI benefits.

[52] After careful consideration of the totality of the evidence before me, I find the Commission has proven the Appellant knowingly provided false or misleading information on his biweekly claims. This means the Commission may impose a penalty.

Did the Commission decide the penalty and amount properly (judicially)?

[53] Yes. I find the Commission decided the penalty amount properly (judicially). Here is what I considered.

[54] The Commission makes its own decisions about issuing a penalty and deciding the penalty amount. This is called a discretionary power.¹⁶ This means that it is open to the Commission to set the penalty at an amount it thinks is correct.

[55] Even though the Commission has discretionary power to issue a penalty and set the penalty amount, the Commission must make its decision fairly. The Commission must look at all the information when it makes a decision. The Commission should pay attention to important information about why your work and earnings weren't reported properly and ignore things that are not important.¹⁷

[56] I must respect the Commission's discretionary power. Usually, this means that I can't change the Commission's decision. But, if the Commission didn't make its decision fairly, then I can step into the Commission's role. Then, I may change the penalty amount.¹⁸

¹⁶ *Canada (Attorney General) v Kaur*, 2007 FCA 287.

¹⁷ In *Canada (Attorney General) v. Purcell*, A-694-94, the Federal Court of Appeal states that the Commission must consider all relevant factors, ignore irrelevant factors, act in good faith, and act in a manner that is not discriminatory.

¹⁸ *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.

[57] The Commission states they considered the following when setting the penalty amount.¹⁹

- The Appellant knew the statements were false because he knew he was working and knew he had been (or would be) paid for this work.
- The Appellant didn't respond to the Commission's request for clarification of earnings form. He said he didn't receive it.
- The Appellant didn't provide proof or was not able to show that he didn't work in the weeks under review.
- The Appellant made 7 misrepresentations. The net overpayment amount is \$3,277. The penalty was initially set at \$1,639.
- The penalty was calculated at 50% of the net overpayment for first misrepresentation, and then if there are claims with misrepresentation, it is 100% on a second claim, and 150% on third claim of misrepresentation.
- The Appellant said he had called Service Canada to report he had returned to work, but there was no record of that call.
- During the reconsideration process the Appellant told the Commission on November 12, 2022, that he wasn't working or collecting EI benefits at that time.
- Upon reconsideration the Commission reduced the penalty amount by 10% to \$1,311

[58] The Appellant presented no evidence that the Commission was motivated by an improper or discriminatory motive, or that the Commission acted in bad faith when issuing or reducing the penalty amount. He didn't point out any irrelevant factors the

¹⁹ These details are set out in the Supplementary Record of Claim at page GD3-70 and the Record of Decision at pages GD3-74 to GD3-75.

Commission relied on or relevant factors that were before them that they failed to consider.

[59] I recognize the penalty may contribute to the Appellant's financial hardship. But the Commission considered his financial circumstances as a mitigating factor when reducing the penalty amount to \$1,311. This means I can't interfere with the Commission's decision to maintain the penalty at \$1,311.

Requirement to repay an overpayment of EI benefits

[60] The law says a claimant is required to repay benefits they were not entitled to receive.²⁰

[61] I don't have the jurisdiction to decide on requests to write off or reduce an overpayment or penalty. This authority belongs to the Commission.²¹ A decision by the Commission about waiving an overpayment or penalty can't be appealed to the Tribunal.²²

[62] The Federal Court of Canada has the jurisdiction to hear an appeal relating to a write-off issue.²³ So if the Commission refuses to write off the debt, the Appellant may wish to pursue an appeal at the Federal Court of Canada.

[63] If the Appellant is wanting to negotiate repayment arrangements, he may wish to contact the Canada Revenue Agency (CRA) to discuss repayment options.

Conclusion

[64] The appeal is dismissed.

Linda Bell

Member, General Division – Employment Insurance Section

²⁰ See section 43(b) of the Act.

²¹ See section 56 of the Regulations.

²² Section 112.1 of the Act.

²³ See *Steel v Canada (Attorney General)*, 2011 FCA 153, and *Bernatchez v Canada (Attorney General)*, 2013 FC 111.