



Citation: *KW v Canada Employment Insurance Commission*, 2023 SST 776

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

# **Decision**

**Appellant:** K. W.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (544535) dated January 23, 2023 (issued by Service Canada)

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**Tribunal member:** Elyse Rosen

**Type of hearing:** Videoconference

**Hearing date:** May 18, 2023

**Hearing participant:** Appellant

**Decision date:** May 31, 2023

**File number:** GE-23-712

## Decision

[1] The appeal is allowed in part.

[2] I find that:

- The Appellant had just cause to leave her job and isn't disqualified from receiving Employment Insurance (EI) benefits.
- The Appellant's self-employment earnings of \$1100 should be allocated to the weeks of July 11, 2021, and August 22, 2021.
- The penalty of \$5000 imposed by the Canada Employment Insurance Commission (Commission) should be reduced to \$275.
- The notice of violation issued by the Commission should be cancelled.

## Overview

[3] The Appellant left her job to be closer to her mother, who needed her care.

[4] The Appellant's mother is legally blind. She had recently lost her husband, and was now living alone. She needed assistance with many basic tasks, including meal preparation. The Appellant moved 400 km away from the city where she was living, so that she could look after her.<sup>1</sup>

[5] The Appellant told the Commission that the reason she left her job is because she had to care for her mother and because her husband had been relocated. She applied for, and received, EI benefits.

[6] The Commission commenced an investigation of the claim, which led it to reconsider its decision to pay the Appellant benefits.

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<sup>1</sup> The Appellant lived in a major city. Her mother lived in a small town. Given the size of the town, naming it could identify the Appellant. So, I will use the term city to describe where the Appellant was living, and town to describe the small town her mother lived in.

[7] The Commission says the Appellant misrepresented the reason she quit her job. It also discovered that while she was receiving benefits, she received self-employment income that she failed to report.

[8] As a result, the Commission:

- decided the Appellant was disqualified from receiving benefits because she had left her job voluntarily without just cause
- allocated the earnings the Appellant failed to report
- imposed a penalty and issued a notice of violation
- issued a notice of debt for the overpayment of benefits resulting from the disqualification and the allocation, and for the penalty

[9] The Appellant says that she had just cause for leaving her job. She claims she didn't knowingly make false and misleading statements to the Commission. She disputes the penalty and the notice of violation. She doesn't dispute that her self-employment earnings should be allocated, but does dispute how it was allocated.

[10] She also says that she feels she is being targeted by the Commission because of a separate investigation that the same investigator had conducted in a matter concerning her husband.

## **Issues**

[11] Did the Commission act judicially (as that term is explained, below) when it decided to reconsider the Appellant's claim for benefits?

[12] Did the Appellant leave her job voluntarily without just cause?

[13] Did the Commission properly allocate the earnings the Appellant received while collecting benefits?

[14] Did the Commission properly impose a penalty?

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

## Analysis

### **Did the Commission act judicially when it decided to reconsider the Appellant's claim for benefits?**

[16] I find that the Commission acted judicially when it decided to reconsider the Appellant's claim for benefits.

[17] The law allows the Commission to reconsider a claim for benefits on its own initiative.<sup>2</sup> It has the discretion to decide whether or not it should do so. In other words, it has the freedom to apply its own judgement as to whether or not it should revisit the claim. The Tribunal must be respectful of the Commission's discretion.

[18] However, when the Commission makes a discretionary decision, it must act **judicially**. This means it has to act in good faith and must consider all of the relevant facts, but only the relevant facts, to arrive at its decision. If it doesn't, then the Tribunal can substitute its own decision for the decision the Commission made.

[19] The Appellant questions the Commission's good faith in reconsidering her claim. She says the investigator on her claim had previously investigated her husband on another matter. She thinks the investigator was upset with her husband and targeted her as a result. She says the investigator is now in another government department that investigates staff integrity, and has opened new investigations against her and her husband.<sup>3</sup>

[20] The record shows that in the context of a different case file, the investigator obtained information from the Appellant's husband which contradicted information that

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<sup>2</sup> See section 52 of the *Employment Insurance Act* (Act).

<sup>3</sup> The Appellant testified that she and her husband are both government employees. She says they are both currently the subject of staff integrity investigations being conducted by the same investigator.

the Appellant had provided to the Commission with respect to her claim.<sup>4</sup> It would appear that this is what triggered the investigation into the Appellant's claim.

[21] The Commission has a policy about when it will exercise its discretion to reconsider a claim.<sup>5</sup> One of the circumstances that will cause it to reconsider a claim is when it believes a claimant may have made false or misleading statements in connection with a claim for benefits.<sup>6</sup>

[22] In this case, the Commission received information relating to the Appellant's claim for benefits that it found to be contradictory. In accordance with its policy, it investigated further and reconsidered the claim.

[23] I understand why the Appellant may suspect that the investigator's feelings about her husband, resulting from the other investigation, may have impacted her decision to investigate the Appellant. But, I can't act on suspicion. I have no evidence that would allow me to conclude that the Commission wasn't acting in good faith when it decided to reconsider the Appellant's claim.

[24] Based on the evidence, I find that the Commission was simply following its policy. I also don't have any reason to think that it considered irrelevant facts or failed to consider relevant facts when it decided to reconsider the Appellant's claim.

[25] So, I have no reason to interfere in the Commission's decision to exercise its discretion to reconsider the Appellant's claim. But, as I explain below, I don't agree with the conclusions it came to when it reconsidered the claim.

### **Did the Appellant have just cause to leave her job?**

[26] To answer this question, I must first determine if the Appellant left her job voluntarily. I then have to decide whether the Appellant had just cause for leaving.

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<sup>4</sup> According to a call log dated September 28, 2021, the investigator obtained information from the Appellant's husband during a call relating to case 06393931M4. The Appellant's case file number is 06394948M7. See GD3-85.

<sup>5</sup> See the Digest of Benefit Entitlement Principles (Digest), chapter 17.

<sup>6</sup> See section 17.3.3.3 of the Digest.

– **The Appellant left her job voluntarily**

[27] I find that the Appellant left her job voluntarily. The record of employment that her employer issued states that she quit her job on October 30, 2020.<sup>7</sup> She quit in order to move to the town where her mother lived.

[28] The Appellant confirms this to be the case. So, I accept it as fact.

– **The Appellant had just cause to leave her job**

[29] I find that the Appellant had just cause to leave her job when she did.

[30] The law says that you are disqualified from receiving benefits if you left your job voluntarily and you didn't have just cause to do so.<sup>8</sup> Having a good reason for leaving a job isn't enough to prove just cause.

[31] The law explains what it means by "just cause." You have just cause to leave your job if you had no other reasonable alternative in the circumstances.<sup>9</sup>

[32] It's up to the Appellant to prove that she had just cause. She has to prove this on a balance of probabilities. This means that she has to show that it is more likely than not that her only reasonable option was to leave her job when she did.<sup>10</sup>

[33] When I decide whether the Appellant had just cause, I have to look at all of the circumstances that existed when she quit. The law sets out some of the circumstances I have to look at.<sup>11</sup>

[34] After I decide what circumstances apply, the Appellant has to show that she had no reasonable alternative to leaving in those circumstances.<sup>12</sup>

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<sup>7</sup> See GD3-166.

<sup>8</sup> See section 30 of the Act.

<sup>9</sup> See *Canada (Attorney General) v White*, 2011 FCA 190 at para 3, and section 29(c) of the Act.

<sup>10</sup> See *Canada (Attorney General) v White*, 2011 FCA 190 at para 4.

<sup>11</sup> See section 29(c) of the Act.

<sup>12</sup> See section 29(c) of the Act.

[35] I have considered all of the circumstances that existed when the Appellant quit. I find she has proven that there were circumstances that could give rise to just cause for her to leave her job.

[36] The law says that the obligation to care for a member of the immediate family is a circumstance that I have to consider when I decide whether the Appellant had just cause to leave her job.<sup>13</sup>

[37] The Appellant says that she quit her job and moved in order to care for her mother.

[38] She explained that her 80-year-old mother has been legally blind since childhood. Her mother is relatively independent, but needs assistance with many tasks, such as preparing meals, grocery shopping, banking, and trips to the doctor at least twice a month. She also suffers from a heart condition and a serious bladder issue.

[39] The Appellant's father had been the one to look after her mother until he became ill in late 2019. He passed away in April 2020. Prior to his illness, he had done all of the cooking, groceries, and banking. He was the one who took his wife to all of her appointments.

[40] In March 2020, the Appellant was laid off because of the Covid-19 pandemic. She went to stay with her parents to care for them, and once her father passed, her mother. From May 2020, when she was called back to work on a part-time basis, until July 2020, she stayed with her mother and worked remotely. In July 2020, her employer insisted that she return to the office. So, she would drive the 800 km twice a month to assist her mother. This included preparing meals, and doing her groceries and banking. Neighbours would look in on her mother in between the Appellant's visits. However, the situation was far from ideal. Her mother needed more help than that.

[41] After her father died, the Appellant and her husband decided they would move to her mother's town. The Appellant began looking for work in two cities that were both 60

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<sup>13</sup> See section 29(c)(v) of the Act.

km from the town.<sup>14</sup> She also began looking for a home in the town, and put her home in the city on the market.

[42] In preparation for the move, her husband spoke to his employer to secure a transfer to its office located in a city close to the town. He told the Appellant that it had all been arranged.<sup>15</sup>

[43] Once her husband confirmed to her that he would be transferred, and she had arranged to purchase a home in the town and found renters for their home in the city (she had not been able to find a buyer), she quit her job and moved.<sup>16</sup>

[44] The Commission doesn't accept that the Appellant left her job because of an obligation to care for her mother. It says that:<sup>17</sup>

- her mother is sufficiently independent and doesn't need care
- she had neighbours who checked in on her regularly
- the move wasn't urgent
- caring for her mother wasn't the reason the Appellant originally gave for having left her job, so it was not the real reason why she left

[45] The Commission argues that the Appellant's decision to leave her job was a personal choice rather than a necessity. I disagree.

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<sup>14</sup> Her mother's town is a small retirement community, and she realized it would be difficult for her to find work there.

<sup>15</sup> As it turns out, this wasn't true. As the Appellant only later learned from a Service Canada agent investigating her claim, he hadn't secured a transfer.

<sup>16</sup> The closing of the purchase was delayed due to mortgage issues. This explains the delay between the date she quit and the date she moved (first week of December 2020). The closing was supposed to happen the first week of November 2020.

<sup>17</sup> See the Commission's submissions at GD4-4.



[46] The law doesn't explain what it means by "care." But case law confirms that it includes providing support to an aging parent who is anxious, ill, and lonely, even when there is no physical medical emergency.<sup>18</sup>

[47] I conclude that the Appellant had an obligation to care for her mother. I base this conclusion on the following facts:

- Inasmuch as her mother had been blind since childhood and had adapted to her disability, the Appellant's father had taken care of all of her needs for decades. She had never lived independently. At 80 years of age, she was unable to adapt to caring entirely for herself.
- Although her mother was able to use the stovetop and microwave for simple tasks, like warming up a can of soup, she wasn't able to cook and prepare meals for herself. She wouldn't have been able to keep up her nutrition on her own.
- Neighbours had been very helpful in the period after the Appellant returned to work following her father's passing. But, the Appellant's mother wouldn't be able to count on that level of support from neighbours indefinitely. Moreover, the neighbours who had been the most helpful to her mother moved out of town in January 2021.
- The Appellant is an only child. Once her father became ill and died, there was no one else but her to care for her mother.
- Her mother's only other family was an elderly sister who lived 45 minutes away.
- Neither the Appellant, nor her mother, had the means to pay for the cost of help at home or of an assisted living facility. In any event, a facility wasn't an appropriate choice for her mother given her blindness. The Appellant had considered that option, but concluded that it would be too much of an adjustment for her mother. As a blind person, familiarity with her surroundings was essential,

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<sup>18</sup> See *Canada (Attorney General) v Chafe*, A-734-95, confirming CUB 29959. Note that this decision refers to section 28(4)(e) of a previous version of the Act, now section 29(c)(v) of the Act.

and at her age it would be too difficult to adjust. Moreover, in a facility her mother would be unable to participate in her normal routine, which included regular trips to church. This was a central part of her mother's life, and one that she felt she couldn't take away from her.

[48] These facts are uncontradicted, and I have no reason not to accept them as true.

[49] I don't agree with the Commission that the Appellant's decision to leave her job and move to her mother's town was a personal choice and not a necessity.

[50] The Appellant's mother was ageing and disabled. She couldn't care for herself. Although there was no medical emergency, and therefore moving wasn't urgent, as the case law explains, this is not a required criterion.

[51] Moreover, the Appellant didn't want to live in the town. She explained that it is a small retirement community. It holds nothing of any interest for her and her husband. She never would have moved there were it not for the fact that she had an obligation to care for her mother.

[52] I have no doubt that the Appellant left her job to care for her mother. I find that the obligation to care for her mother is a circumstance that could give rise to just cause for leaving her job. But, the Appellant must also show that there were no other reasonable alternatives available to her.

[53] I find that the Appellant has proven that she had no other reasonable alternative but to quit her job to move so that she could care for her mother.

[54] The Commission says that the Appellant could have found a job in her mother's town before quitting her job. However, the Appellant testified that she tried for many months to find a job there before she quit her job. She asked her employer to transfer her to one of their locations in a neighbouring city to her mother's town, but it wasn't able to do that. Nor was it prepared to let her work remotely. She tried to find work in her mother's town and in the surrounding towns, applying to a variety of positions. She registered on job boards and looked for positions in other cities and provinces that

would allow her to work remotely. However, she felt she couldn't postpone her move indefinitely, simply because she hadn't found work. This is because her mother needed her.

[55] Her testimony regarding her efforts to find work prior to moving were clear, credible, and uncontradicted. It is also consistent with what she told the Commission during the investigation of her claim.<sup>19</sup> So, I find that the Appellant made sufficient efforts to find work for a long enough period of time before moving. I accept that it wasn't reasonable to continue those efforts before moving, given her mother's need for care.

[56] As set out above, the Appellant considered the possibility of putting her mother in a facility, but ruled it out as a reasonable alternative for the reasons I've already described.

[57] Before deciding to move, the Appellant had invited her mother to come live with her in the city, but her mother refused to move. The Commission says that this indicates that her mother was sufficiently independent to live on her own. I don't agree. I see her mother's refusal as further evidence that her own surroundings and routine were essential to her. As a result, the Appellant had to go to her, rather than have her mother come to her.

[58] I see no reasonable alternative available to the Appellant in the circumstances, other than leaving her job to care for her mother. I am satisfied that she had just cause to do that.

[59] The Commission says I shouldn't accept that leaving her job to care for her mother is the real reason the Appellant left her job. This is because it wasn't the initial reason that she gave for leaving. It says the Appellant isn't credible and I shouldn't believe her.

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<sup>19</sup> See GD3-26, GD3-27, and GD3-175.

[60] However, caring for her mother isn't a reason the Appellant gave as an afterthought. The Appellant testified that every time she spoke to an agent at the Commission about her reasons for leaving her job, she told them that her husband had been transferred so that they could move to be closer to her mother. She gave both reasons.

[61] When the Commission called her husband to verify the reason she left her job, he told the truth. He said that they had moved so that he and the Appellant could care for her mother. He explained that he had applied for a transfer to an office closer to the Appellant's mother, and believed he would get one. When he first asked his employer for permission to move, he was working remotely because of the pandemic. As a result, his employer had no issue with him moving. Ultimately, when employees were called back to the office, his request to transfer was refused. But at the time they moved, he was under the impression he had unofficial approval and would eventually get official permission to transfer to the office that was closer to his mother-in-law's town.

[62] When the reason for the Appellant leaving her job had clearly become the issue of an investigation that could put her benefits in jeopardy, he told the Commission that he had told his wife to focus on the transfer rather than her mother's care needs when she gave her reasons to the Commission. But the Appellant says this isn't true. She says he never told her to do this. He only told the Commission he had, because he wanted to put the blame on himself rather than on her. He was trying to protect her.

[63] Although the Commission didn't find the Appellant to be credible, I do. These are the reasons:

- The Appellant wasn't at all evasive in her testimony. Her explanations were coherent and believable.
- She was honest about the fact that when speaking to the Commission she added the information about her husband having been transferred in order to strengthen her reasons for leaving, rather than simply saying it was to care for her mother.

But she insists she believed the information she provided about her husband's transfer to be true.

- She says she had two reasons for moving to her mother's town, and she gave them both to the agents she spoke with. I find this credible. I see no reason for her to have hidden the fact that she had left her job to care for her mother. And, she says she didn't hide it, she just didn't highlight it as the main reason. Although the call log of what appears to be the first conversation between the Commission and the Appellant only deals with the issue of her husband's transfer, I can't conclude that she didn't also say her husband got a transfer so that they could move to be closer to her mother.<sup>20</sup> And, in later call logs she does refer to the need to move to be closer to her mother.<sup>21</sup>
- The Commission has clearly inferred (in other words, assumed) that the Appellant's husband encouraged her to say he had been transferred. Based on this inference, it questions the Appellant's credibility.<sup>22</sup> I find that the inference is not reasonable. From the outset, her husband told the Commission the reason for the move was to be closer to the Appellant's mother.<sup>23</sup>
- The Appellant was brought to tears when she testified about not being able to leave her mother alone after her dad became ill and died.<sup>24</sup>

[64] I can't disregard the obligation to care for her mother as a legitimate reason for why the Appellant left her job just because she also gave another reason. I accept that the Appellant may have thought caring for her mother wasn't a good enough reason to leave her job when she spoke to the Commission. This is very likely why she also told the Commission that her husband had been transferred. She wanted to buttress (in other words, prop up) her claim. But, this doesn't change the fact that caring for her

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<sup>20</sup> See GD3-26.

<sup>21</sup> See GD3-175.

<sup>22</sup> See GD3-178.

<sup>23</sup> See GD3-85.

<sup>24</sup> I note that she didn't cry when she testified about other difficult things, such as the overpayment debt she might have to repay. I don't believe these were crocodile tears meant to elicit sympathy.

mother is a sufficient reason. This is true even though the Appellant may not have realized it was sufficient, and wanted to make her explanation for leaving her job better by giving both reasons.

[65] Moreover, as I explained, above, I have no evidence that contradicts the Appellant's testimony that her mother required care and that she was the only one who could provide it. I also don't have any evidence that she knew her husband hadn't been transferred.

[66] So, I can't accept the Commission's argument that the Appellant's reason for leaving her job isn't credible.

[67] Given my finding that the Appellant had just cause to leave her job, she isn't disqualified from receiving benefits.

### **Did the Commission properly allocate the Appellant's earnings?**

[68] In the course of its investigation, the Commission learned that while the Appellant was receiving benefits, she did some work as a wedding planner. The Appellant didn't report the income she had received from providing these services. So, it allocated (in other words, applied) those amounts to weeks during the Appellant's benefit period.

[69] I find that these amounts are earnings, so they have to be allocated. But, I find the Commission didn't allocate them to the right weeks.

[70] The law provides that certain monies you receive (earnings) must be deducted from the benefits payable to you.<sup>25</sup>

[71] The law says that earnings are the entire income that you get from any employment.<sup>26</sup>

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<sup>25</sup> See section 35 of the *Employment Insurance Regulations* (Regulations).

<sup>26</sup> See section 35(2) of the Regulations.

[72] If you are self-employed, income includes the gross amount you receive from self-employment, less your operating expenses.<sup>27</sup>

[73] The Commission says the Appellant was self-employed and that she received \$1100 for performing wedding planning services. It has provided invoices which demonstrate that this is the case, and the Appellant doesn't dispute it. So, I accept as fact that the Appellant was self employed and received \$1100 for performing wedding planning services.

[74] She says that she had expenses that significantly reduced the net amount that she received, because she had to travel to the city and stay in a hotel. However, she has provided no evidence of the amount of expenses she incurred. As a result, I can't take her expenses into account.

[75] I find that the entire \$1100 she received is earnings, and must be allocated.

[76] The law says that when a self-employed person performs services, their earnings are allocated to the weeks where the services were performed, regardless of when payment is received.<sup>28</sup>

[77] As mentioned above, I find that the \$1100 of earnings relates to services the Appellant performed while self employed.

[78] The Commission reviewed the contracts for which the Appellant received the \$1100. It allocated this amount to the weeks that the contracts indicate the services would have been performed.

[79] However, I have no evidence that the Appellant performed services during each of the 30 days over which the contract says the services will be performed. The evidence I have is that the Appellant attended weddings on July 17 and August 28,

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<sup>27</sup> See section 35(10)(c) of the Regulations.

<sup>28</sup> See section 36(6) of the Regulations.

2021. Her testimony is that she performed services over two days, attending a rehearsal and then the event.

[80] From the evidence, it appears that services were rendered only during the weeks of July 11 and August 22, 2021. The Appellant attended weddings on behalf of clients during these weeks. She earned \$500 and \$600 for each of these weddings, respectively.

[81] Considering the evidence, I find that the Commission should have allocated \$500 to the week of July 11, 2021, and \$600 to the week of August 22, 2021.

[82] Since the \$1100 of earnings should have been deducted from the benefits the Appellant received, but weren't, they must be repaid.

[83] The Commission also allocated \$173 of income which the Appellant received from her employer the week of June 20, 2021. The Appellant doesn't dispute that this amount is earnings, or that it was properly allocated. However, contrary to what the Commission asserts, the Appellant reported this income.<sup>29</sup> She says this amount shouldn't be included in the overpayment she has been asked to repay.

[84] The Commission has a policy not to create an overpayment when that overpayment results from its own mistake, and that mistake doesn't relate to what it calls the "structure of the Act".<sup>30</sup> A mistake relating to the allocation of earnings is not a mistake relating to the structure of the Act.<sup>31</sup>

[85] Since the Appellant declared these earnings, the Commission made a mistake when it failed to allocate them. According to its policy, the \$173 shouldn't have been allocated retrospectively (in other words, after the fact) to create an overpayment. This is because the mistake relates to the allocation of earnings.

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<sup>29</sup> See GD3-34, GD3-139, and GD3-163. The Appellant had declared \$171 rather than \$173.

<sup>30</sup> See section 17.3.2.2 of the Digest.

<sup>31</sup> See section 17.3.3.2 of the Digest.



[86] I unfortunately don't have the authority to apply the Commission's policy to change the overpayment. That is because the policy is not law, and I can only apply the law. According to the law, the \$173 must be repaid.<sup>32</sup> However, the Commission may want to review whether it should reverse the \$173 overpayment given its policy.

### **Did the Commission properly impose a penalty?**

[87] I find that the Commission didn't act judicially when it imposed a penalty on the Appellant. Therefore, I have reduced the penalty to \$275.

[88] 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.<sup>33</sup>

### **Did the Appellant make false or misleading statements?**

[89] I find that the Appellant made false statements to the Commission.

[90] The Commission says that the Appellant made ten false and misleading statements. They are set out in the reconsideration decision details.<sup>34</sup> I agree with the Commission that most of these statements were false or misleading.

[91] The Appellant told the Commission that one of the reasons she quit her job is because her husband had been transferred to a different office of his employer. This statement was false. Her husband hadn't been transferred. She made the statement three times.

[92] However, I don't agree with the Commission's characterization of what she said. I don't accept that she told the Commission that she had an obligation to follow her spouse, as the reconsideration agent suggests. In a call log for one of the dates that the Commission says the misrepresentation was made,<sup>35</sup> the Appellant stated that her husband's transfer and the decision to move to be closer to her mother occurred

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<sup>32</sup> See section 44 of the Act.

<sup>33</sup> See section 38(1)(b) of the Act.

<sup>34</sup> See GD3-182.

<sup>35</sup> See GD3-98.

simultaneously. This corroborates the Appellant's testimony to the effect that she gave both reasons, not just one.

[93] The Appellant stated that she wasn't self-employed on her February 23, 2020, application for benefits. This statement was false. She was actively promoting herself as a wedding planner. Shortly after the statement was made, she signed a contract for wedding planning services.<sup>36</sup> This is sufficient for her to be considered self employed on the date that she made the statement.<sup>37</sup>

[94] She also answered no to the following questions on her bi-weekly report cards, for a period during which she had performed wedding planning services and received payment:

- Did you work or receive any earnings during (the period) of this report?
- Is there any other money that you have not previously told us about, that you received or will receive for the period of this report?

[95] These statements were false. The evidence shows that she provided wedding planning services during the weeks of July 11 and August 22, 2021. She received payment for these services during those weeks. The Commission counted this as six false statements. Although I agree that the statements were false, I don't agree with the count, as I will explain further, below.

### **Did the Appellant make the false statements knowingly?**

[96] I find that some of the false statements the Appellant made were not made knowingly. I find that there were only two false statements knowingly made.

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<sup>36</sup> See GD3-169.

<sup>37</sup> See *Canada (Attorney General) v. Miller*, 2002 FCA 24.

[97] To determine if information was provided knowingly, I must decide if the Appellant knew that the statement was false or misleading.<sup>38</sup> To do this, I have to consider whether the Appellant honestly believed that the statement was true.<sup>39</sup>

[98] Although this is a subjective test,<sup>40</sup> common sense and objective factors should be considered when determining if the Appellant had subjective knowledge that the information provided was false.<sup>41</sup>

[99] Once the Commission proves that a claimant made a statement that was false or misleading, the burden then shifts to the claimant to explain why they believed the statement wasn't false or misleading.<sup>42</sup>

[100] As explained, above, I have already found that the Commission met its burden of showing that the Appellant made false and misleading statements.

[101] However, I don't believe that the Appellant made all of these statements knowingly.

[102] The Appellant says that her husband told her he had been transferred to another office. I have no reason not to believe her. There is no evidence to contradict this.

[103] I think it was reasonable for the Appellant to believe her husband when he told her that he had been transferred. He had agreed to make the move to her mother's town with her. Since she had left her job and hadn't yet found a new one, he would be the sole breadwinner in the family until she could find another job. It would have been reasonable for her to conclude that he wouldn't have put their livelihood at risk by agreeing to move without having secured a transfer.

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<sup>38</sup> See *Mootoo v. Canada (Minister of Human Resources Development)*, 2003 FCA 206 and *Bajwa v. Canada (Attorney General)*, 2003 FCA 341.

<sup>39</sup> See *Moretto v. Canada (Attorney General)*, A-667-96.

<sup>40</sup> See *Canada (Attorney General) v. Bellil*, 2017 FCA 104 and *Canada (Attorney General) v. Gates*, A-600-94.

<sup>41</sup> *Mootoo v. Canada (AG)*, 2003 FCA 206; *Canada (AG) v. Gates*, 1995 FCA 600

<sup>42</sup> *Canada (AG) v. Purcell*, A-694-94, *Gates, supra*

[104] I find that when she told the Commission her husband had been transferred, she believed that statement to be true.

[105] I also don't think that the Appellant believed she was making a false or misleading statement when she reported that she wasn't self-employed on her February 23, 2020, application for benefits.

[106] The Appellant had run a more elaborate wedding planning and décor business in the past, but had closed that business in 2017. In the context of an EI claim made in 2016, when she was running a more extensive business, she had declared that she was self-employed and had reported her self-employment income.<sup>43</sup>

[107] After she closed her business, she got a full-time job. She continued to plan the odd wedding as a "side hustle."

[108] When she filed her application for benefits in February 2020, she had been employed at a car dealership for over two years on a full-time basis. Although she had a website and social media presence for her wedding planning business, there is no evidence that she had any pending weddings booked at that date.

[109] Given that the Appellant wasn't actively doing wedding planning work at the time she made the statement, I believe her when she says she didn't consider that she was still self-employed. So, I find that when she stated she wasn't self-employed on her application for benefits, she wasn't knowingly making a false statement.

[110] As for the Appellant's failure to report the wedding planning work she had done and received payment for in July and August 2021, I find that she knowingly misled the Commission when she answered no to questions about work, earnings, and monies received on her bi-weekly report cards.

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<sup>43</sup> See GD3-25.

[111] Inasmuch as the time spent and the amounts received were not significant, the questions on the reporting cards are clear. The Appellant had worked and had received monies, but nonetheless answered no to these questions.

[112] At the hearing she admitted that this was a mistake. She recognizes that she should have declared the wedding planning work she had done and the earnings she had received.

[113] She explained that she answered no to these questions, because she considered that these wedding planning jobs related to a prior period, and not to the period for which she was reporting. The weddings had been booked in March and June, 2020, but had been postponed to 2021 because of the pandemic. The deposits had been received at the time of booking.

[114] The Appellant admits that she attended these weddings and received a balance of payment for her work during the weeks of July 11 and August 22, 2021.

[115] I can't accept that the Appellant didn't know that answering no to these questions was false. The questions are clear. Common sense dictates that the answer to these questions should have been yes in the circumstances. The Appellant could have contacted the Commission to qualify her answers if she felt the earnings she had received shouldn't be allocated to her benefits in the circumstances or if she felt that a simple yes/no answer wasn't possible.

[116] The Appellant says she also believed that she didn't have to declare the amounts received, because she had incurred expenses for these weddings. They had been booked while she was living in the city and the venue was there. Because she had moved, she had to travel 800 km return and stay in a hotel to attend the weddings. She says she couldn't charge these expenses to her clients.

[117] She argues that because of these unexpected expenses, she didn't really make very much money, if any. This is another reason she claims to have answered no to these questions.

[118] I don't accept this explanation. The questions on the report card ask about any earnings or money received. The questions are simple and clear, and the response clearly should have been yes. However, the Appellant answered no.

[119] Even if the Appellant had expenses to offset against the amounts received, she was obliged to declare that she had received them. She didn't do this.

[120] I find that the Appellant knowingly failed to report that she had worked during the benefit period and had received earnings for that work.

[121] However, contrary to what the Commission decided, I find she only made two statements that were knowingly false.

[122] The Appellant argues that because she attended two weddings, and received payment at that time, each event should be counted only once. I agree.

[123] The contracts for the weddings indicate that services are to be performed in a 30-day period. Because of this, the Commission allocated the earnings for each wedding to each of the 30 days prior. Since each of these 30-day periods fell over several reporting periods, the Commission counted a separate false statement for every reporting period to which it had allocated the earnings received from the weddings.

[124] However, as I explained, above, the evidence shows that there were only two weeks where services were performed, and money was received.

[125] I find that the Appellant knowingly made the statement that she hadn't worked or received any earnings or other monies only twice, in each of the weeks where services were performed, and monies were received.

### **Did the Commission exercise its discretion judicially when it imposed the penalty?**

[126] I find that the Commission didn't exercise its discretion judicially when it imposed the penalty. As a result, I can impose the penalty that I think it should have imposed.

[127] The Commission's decision to impose a penalty is discretionary. As I have already explained, discretionary decisions shouldn't be disturbed unless the Commission didn't act in good faith, having regard to all the relevant facts, and disregarding all irrelevant facts.<sup>44</sup>

[128] The Commission says it considered all relevant facts, and didn't consider any irrelevant facts, when it assessed the penalty. I disagree.

[129] The law says that the Commission can set a penalty for each false or misleading statement a claimant makes and for each time a claimant fails to report earnings.<sup>45</sup>

[130] In calculating the penalty to impose, the Commission considered that the Appellant had accumulated ten separate acts and omissions because she knowingly made ten false or misleading statements.<sup>46</sup> As explained above, I find that there were only two.

[131] By counting ten rather than two false and misleading statements knowingly made when assessing the penalty, I find that the Commission didn't act judicially. I will therefore make the decision that should have been made in the Commission's place.

[132] The law says that the maximum penalty the Commission can impose for each false or misleading statement knowingly made is three times the amount of the claimant's rate of weekly benefits.<sup>47</sup>

[133] The Appellant's rate of weekly benefits was \$500.<sup>48</sup> Three times this amount is \$1500. Multiplied by two false and misleading statements knowingly made, the maximum penalty that can be imposed on the Appellant at law is \$3000.

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<sup>44</sup> *Canada (AG) v. Sirois*, A-600-95, *Canada (AG) v. Chartier*, A-42-90, and *Canada (Attorney General) v. Purcell*, A-694-94.

<sup>45</sup> See section 38(1) of the Act.

<sup>46</sup> See GD3-182.

<sup>47</sup> See section 38(2) of the Act.

<sup>48</sup> See GD3-148.

[134] According to the Commission's policy, for a first offence, the penalty should be no more than 50% of any overpayment that results from a misrepresentation.<sup>49</sup> This percentage can be further reduced where there are mitigating circumstances.<sup>50</sup> Although the policy is not law, and I am not bound to apply it, I find it helpful for the purposes of deciding what an appropriate penalty should be.

[135] I find that the fact that the Appellant had expenses associated with her self-employment earnings is a mitigating circumstance. I believe her when she says she had to travel to attend the weddings at which she performed the services giving rise to these earnings, and that she had to stay in a hotel.

[136] The Appellant says she didn't declare her earnings for the weddings because the net amount she went home with was insignificant. This is a fair explanation, although it doesn't change the fact that her false declarations were knowingly made.

[137] Although there isn't enough evidence to consider the expenses the Appellant incurred when determining her earnings for the purpose of allocation, the fact that she had expenses is a mitigating factor to be considered in establishing the penalty amount. She felt she hadn't really earned much money if any. This is why she decided to falsely declare that she had no earnings.

[138] This is the Appellant's first offence. Her misrepresentations resulted in an overpayment of \$1100. Because there are mitigating circumstances, I find that the percentage that should be applied to the overpayment to establish the amount of the penalty is 25%, reduced from 50%. 25% of 1100 is \$275.

### **Did the Commission properly issue the notice of violation?**

[139] I find that the Appellant didn't exercise its discretion judicially when it issued a notice of violation. As a result, I can decide in its place whether a notice of violation should be issued.

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<sup>49</sup> See section 18.5.1.2 of the Digest.

<sup>50</sup> See section 18.5.1.3 of the Digest.



[140] A claimant can accumulate a violation if the Commission imposes a penalty on them.<sup>51</sup> The Commission has discretion to issue a notice of violation or not to issue a notice of violation, depending on the circumstances.<sup>52</sup> The violation is classified as minor, serious, or very serious in relation to the amount of the penalty imposed.<sup>53</sup>

[141] Since it imposed a penalty, the Commission had a legal basis to issue a notice of violation. Based on the amount of the penalty it imposed, the violation was classified as very serious.

[142] However, I have reduced the penalty to \$275. So, at most, the violation would be minor.<sup>54</sup>

[143] Moreover, I have decided that there were mitigating circumstances. The Commission didn't take these mitigating circumstances into account.

[144] I don't think that a first-time infraction resulting in an overpayment of \$1100, where there were mitigating circumstances, warrants a notice of violation.

[145] Based on the above, I find that the Commission didn't exercise its discretion judicially. Making the decision that it should have made, I find that no notice of violation should be issued.

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<sup>51</sup> See section 7.1(4)(a) of the Act.

<sup>52</sup> *Gill v. Canada (Attorney General)*, 2010 FCA 182.

<sup>53</sup> See section 7.1(5) of the Act.

<sup>54</sup> See section 7.1(5)(a)(i) of the Act.

## **Conclusion**

[146] The appeal is allowed in part.

[147] The Appellant had just cause to leave her job voluntarily. She isn't disqualified from receiving benefits.

[148] The \$1100 the Appellant received for wedding planning services is earnings, and must be allocated. However, \$500 should be allocated to the week of July 11, 2022, and \$600 should be allocated to the week of August 22, 2021.

[149] The Commission didn't act judicially when it imposed a penalty of \$5000 and issued a notice of violation. The penalty is reduced to \$275. The notice of violation is cancelled.

Elyse Rosen

Member, General Division – Employment Insurance Section