Citation: *KF v Canada Employment Insurance Commission*, 2025 SST 103

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	K. F.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (680190) dated September 19, 2024 (issued by Service Canada)

Tribunal member:	Gary Conrad
Type of hearing:	Teleconference
Hearing date:	December 31, 2024
Hearing participant:	Appellant
Decision date:	January 6, 2025
File number:	GE-24-3631

Decision

[1] The appeal is dismissed.

[2] The Canada Employment Insurance Commission (Commission) can go back and review the Appellant's claim. They also acted properly when they made their decision to go back and review the Appellant's claim.

[3] The Appellant had earnings, (in the form of wages, vacation pay, and pay in lieu of notice) and those earnings need to be allocated. The wages are allocated to the weeks she did the work she was paid the wages for, and the vacation pay and pay in lieu of notice are allocated starting the week she separated from her employment. This allocation means she will have to repay employment insurance (EI) benefits that she received.

[4] The Commission has also proven the Appellant knowingly provided false information and they acted properly when the made their decisions to issue a non-monetary penalty in the form of a warning letter. This means the warning letter will stay on the Appellant's claims.

[5] Finally, while I have immense sympathy for the Appellant, and if I could, I would immediately erase her overpayment, I cannot do that, only the Commission can write off an overpayment.

Overview

[6] The Commission became aware that the Appellant had worked at two different jobs while in receipt of benefits and had not reported the work and money she got from these jobs to them.

[7] After an investigation, the Commission decided that the Appellant had worked and had earnings from that work, in the form of wages, vacation pay, and pay in lieu of notice, and those earnings needed to be allocated.

[8] They also decided that the Appellant had knowingly provided false or misleading information when she failed to declare her earnings. So, they levied a non-monetary penalty in form of a warning letter.

[9] The Appellant agrees she was working and agrees she had earnings, but she argues this entire issue is the Commission's fault.

[10] The Appellant says that she called the Commission before she started her job and was told that she would need to make a certain amount of money, at least $22 an hour, in order to have it impact her EI benefits.

[11] She says that because she was only getting paid $20 an hour, based on what she had been told, she did not need to report anything on her claim reports.

[12] She also says that this investigation into her earnings and the massive debt from it, just so happened to come about after she won another appeal in front of the Tribunal, so this action by the Commission is just retribution because she won her appeal.

Matter I have to consider first

Issues under appeal

[13] The reconsideration decision issued by the Commission removed the violation they had initially imposed on the Appellant.

[14] Since this issue was decided in the Appellant's favour at the reconsideration stage[1], and she is not disputing that she wants the violation put back on her claim, she is not appealing this issue, so I did not address this issue in my decision. This means the violation will stay off the Appellant's claim.

Issues

[15] Can the Commission review the Appellant's claim?

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[1] GD04-13

[16] If so, did they do the review properly?

[17] Is the money the Appellant received earnings?

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

[19] Did the Commission prove the Appellant knowingly provided false or misleading information on her claim reports?

[20] If so, then did the Commission act properly when issuing a warning letter?

[21] What, if anything, can be done about the overpayment?

Analysis

Reviewing the claim

[22] The Commission may review a claim for benefits, for any reason, within 36 months after benefits have been paid.[2]

[23] The benefits under review start the week of January 15, 2023.[3]

[24] The decision of the Commission was made on June 26, 2024,[4] with a notice of debt issued on June 29, 2024.[5]

[25] I find that the Commission's decision, and notifying the Appellant of the debt, was made within 36 months from when the benefits were paid, so they are inside the time limit to review a claim for any reason.

[2] Section 52(1) of the *Employment Insurance Act*
[3] GD03-153
[4] GD03A-27 and GD03B-64
[5] GD03-156

Properness of the review

[26] Just because the Commission can go back and do a review does not mean that is the end of the analysis. They must also make their decision to do a review properly. In the case of EI, properly means “judicially”.

[27] For their decision to have been made “judicially” the decision maker (here, the Commission) cannot have acted in bad faith or for an improper purpose or motive, took into account an irrelevant factor or ignored a relevant factor, or acted in a discriminatory manner. Any discretionary decision that is not made “judicially” should be set aside.[6]

What the Appellant says

[28] She says this entire incident is the Commission’s fault. Prior to starting her job, she called the Commission and was told that she would need to make a certain amount of money, at least $22 an hour, before it would impact her EI benefits.

[29] The Appellant says that since she was making $20 an hour at her job, which was below the amount she was told would impact her benefits, she figured there was no need to report it.

[30] She also says that the Commission had the Record of Employment (ROE) from her job in August 2023, but did not bother to do anything with it until June 2024, which resulted in a massive overpayment. She says if they had dealt with it right away, they could have spoken with her, told her what the problem was, and dealt with it then.

[31] She says this is an ongoing problem with the Commission, as they never contacted her after she filed her application for EI to help her understand the program and what she needed to be doing.

[32] Finally, she says the Commission is acting with malice. She says this whole review into her earnings came about because she appealed a decision from the

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[6] *Canada (Attorney General) v Purcell,* 1 FCR 644

Commission to the Tribunal and won her appeal, so they are just trying to get back at her for winning.

My findings

[33] I find the Commission acted judicially when they made their decision to review the Appellant's claim. I find the evidence supports that they chose to review her claim not because she won an appeal, but due to receiving ROEs showing the Appellant working during a time she was in receipt of benefits, and no record of any monies being reported to them.[7]

[34] The notes on file show that the Commission was contacting the Appellant in February 2024 to investigate her earnings,[8] and their decision was in June 2024.[9] She says her appeal at the Tribunal was in September 2024, so this shows me that the Appellant winning her appeal had nothing to do with the Commission's investigation.

[35] I find doing a review based on receiving ROEs showing the Appellant working during a time she was in receipt of benefits, and no record of any monies being reported, is not bad faith or for an improper purpose or motive.

[36] Working while in receipt of EI could impact the Appellant's entitlement to benefits. Choosing to review her claim to investigate her work is the Commission doing its job as the administrator of the EI program to ensure that only people who are entitled to benefits get paid them. That is not bad faith or an improper purpose or motive.

[37] The fact the Commission took some time to finish their investigation does not make their actions bad faith or for an improper purpose. There is no evidence to convince me they delayed for any malicious reason.

[38] I find the Commission did not ignore a relevant factor when they made their decision to review the Appellant's claim. I can fully accept the Appellant was told when

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[7] See GD03-113 for one ROE and GD03-129 for another and GD03-48 as an example of not reporting earnings during the time covered by the ROEs.
[8] GD03-147
[9] GD03-153

she spoke to the Commission that she would need to make around $22 an hour to have an impact on her EI benefits, but that factor is not relevant to their decision to review her claim.

[39] This factor would be more relevant to explaining why the Appellant did what she did, so going towards whether there would be a penalty or not. It is not relevant to reviewing whether or not she was actually working and had earnings during a period she was in receipt of benefits.

[40] Even if I were to accept that it was a relevant factor (which I do not) it would actually **support** a review, to see what impact, if any, the Appellant's earnings had on her benefits. In other words, a review to see if she did earn enough to impact her benefits.

[41] Finally, I would note that the Federal Court of Appeal (FCA) has said that misinformation from the Commission cannot prevent the review of a claim or the creation of an overpayment.[10]

[42] I also do not see any evidence the Commission considered an irrelevant factor or discriminated against the Appellant.

[43] So, I find the Commission did act judicially when they made their decision to go back and review the Appellant's claim as they did not act in bad faith, or for an improper purpose or motive; did not take into account an irrelevant factor or ignore a relevant factor; and did not act in a discriminatory manner.

[44] This means I cannot interfere in their decision to go back and review the Appellant's claim.

[45] In other words, I cannot change their decision to review the claim, but I can, and will, decide whether the Appellant had earnings, if so, how they should be allocated, if

[10] *Molchan v Canada (Attorney General)*, 2024 FCA 46 at para 32.

the Commission can levy a penalty, and, if they can, whether they acted properly when they levied the penalty.

Is the money that the Appellant received earnings?

[46] Yes, the monies that the Appellant received are earnings. Here are my reasons for deciding that the money is earnings.

[47] The law says that earnings are the entire income from any employment.[11] The law defines both “income” and “employment.”

[48] **Income** can be anything that the Appellant got or will get from an employer or any other person. It doesn’t have to be money, but it often is.[12]

[49] **Employment** is any work that the Appellant did or will do under any kind of service or work agreement.[13]

[50] The Appellant has to prove that the money is not earnings. The Appellant has to prove this on a balance of probabilities. This means that she has to show that it is more likely than not that the money isn’t earnings.

[51] The Appellant agrees she was working for employer A for the period of January 15, 2023, to July 29, 2023, and was paid wages during this period; her ROE supports the same.[14] She also agrees she was working for employer B during the week of September 10, 2023, and was paid wages during this period.[15]

[52] I find the monies she was paid from employer A and B are earnings as they are wages, in other words money she received for work she did. Since they are income

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[11] See section 35(2) of the EI Regulations.
[12] See section 35(1) of the EI Regulations.
[13] See section 35(1) of the EI Regulations.
[14] GD03-113. To be clear, I am using weeks to explain this. I am not saying she worked every day in this period. I am saying that she did not work for employer A prior to the week starting January 15, and did not work for them after the week ending July 29, 2023.
[15] GD03-129. Again I am not saying she worked every day that week, just that she never worked for employer B prior to that week or after that week.

arising directly from her employment (she would not have gotten the wages if she was not working) they are earnings.

[53] I find the amounts as set out by the Commission for the periods of January 15, 2023, to July 29, 2023, and the week of September 10, 2023[16] are an accurate reflection of the amounts the Appellant received, as she did not dispute these amounts, and they come from the ROEs and information submitted by the employer.[17]

[54] I further find that the Appellant received $1,600 pay in lieu of notice and $948.66 of vacation pay from employer A. I find as such as the Appellant agrees she received pay in lieu of notice,[18] and I have nothing to make me doubt the employer's information the Appellant also received vacation pay.[19]

[55] I find the pay in lieu of notice and vacation pay are both earnings because they are income arising directly form the Appellant's employment. In other words, if she had not been employed, she would not have received those amounts.

How should the earnings be allocated?

[56] I find that the Appellant's wages from employers A and B should be allocated to the weeks in which the work she was paid for was performed because this is how the law says wages are to be allocated.[20]

[57] In the case of employer A, the Appellant's wages should be allocated starting the week of January 15, 2023, ending on July 29, 2023. This is because employer A says the Appellant worked until July 28, 2023.

[58] In the case of employer B, the Appellant's wages should be allocated to the week of September 10, 2023, as that is the week the Appellant worked for her employer.[21]

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[16] GD03-174 and 175
[17] GD03-113 for the ROE for employer A, and GD03-136, 137, and 138 for the information from the employer A. See GD03-129 for the ROE from employer B.
[18] GD03-165
[19] GD03-162
[20] Section 36(4) of the EI Regulations
[21] GD03-129

[59] I find the Appellant's pay in lieu of notice in the amount of $1,600 and vacation pay in the amount of $948.66 were paid to the Appellant as a result of separating from her employment since there is nothing to support she would have gotten this money even if she had kept working.

[60] I find the pay in lieu of and vacation pay should be allocated starting the week of July 23, 2023, because the law says that earnings paid due to separation from employment must be allocated starting the week of the separation.[22]

[61] The Appellant's last day of work was July 28, 2023, in EI a week starts on Sunday, and the Sunday of the week in which the Appellant's last day of work falls is July 23, 2023.

[62] Finally, I note the Appellant has not disputed the allocation of her earnings.

Did the Appellant knowingly provide false or misleading information?

[63] To impose a penalty, or a non-monetary penalty in the form of a warning letter, the Commission has to prove that the Appellant knowingly provided false or misleading information.[23]

[64] It is not enough that the information itself is false or misleading. To be subject to a penalty, the Commission has to show that it is more likely than not that the Appellant knowingly provided it. In other words, the Commission has to prove the Appellant knew the information she was providing was false or misleading.[24]

[65] If it is clear from the evidence 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 she gave incorrect answers and

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[22] Section 36(9) of the EI Regulations
[23] Sections 38 and 41.1 of the *Employment Insurance Act*.
[24] *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.

show that she did not do it knowingly.[25] The Commission may impose a penalty, or warning letter, for each false or misleading statement knowingly made by the Appellant.

[66] I do not need to consider whether the Appellant intended to defraud or deceive the Commission when deciding whether she is subject to a penalty or warning letter.[26]

[67] The Appellant testified that the reason she filled out the reports the way she did is due to ignorance and she is not really trying to justify the way she filled them out. She says that she was told by the Commission when she called that she needed to make $22 an hour at a minimum to have any impact on her EI benefits. Since she was making only $20 an hour, she felt she did not need to report it.

[68] I find the Commission has proven the Appellant provided false or misleading statements.

[69] In order to get paid EI, the Appellant must make a claim for each week she wishes to collect EI.[27] The Commission has provided examples of these claim reports.

[70] These claim reports the Appellant files in order to collect weeks of EI ask “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”.[28]

[71] While I have accepted that the Appellant was told by the Commission that she would need to make over $22 an hour before it would impact her earnings, this does not prevent me from finding she knowingly make false statements.

[72] One, she has never said she was told by the Commission to not report her earnings at all. From what she has said, it was her inference that she would not need to report her earnings based on what she was told.

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[25] *Nangle v Canada (Attorney General)*, 2003 FCA 210.
[26] *Canada (Attorney General) v Miller*, 2002 FCA 24.
[27] Section 49(1) of the *Employment Insurance Act*
[28] GD03-43 as an example

[73] Two, the question does not ask solely about earnings, it also asks if she had any work, and the question is simple and straightforward. I find the Appellant would have been aware she was working and so would have known that saying “no” to the question on the claim reports was false information.

[74] So, since the Appellant was aware she was working, and the question on the claim report is simple and not confusing, I find the Commission has proven the Appellant knowingly provided false information when she did not report her work or earnings.

Did the Commission act judicially when issuing the warning letter?

[75] The Commission’s decision on the penalty is discretionary.[29] This means that it is open to the Commission to set a penalty as it sees fit. I have to look at how the Commission exercised its discretion. I can only change the penalty if I first decide that the Commission did not exercise its discretion properly.[30]

[76] The Appellant says this entire situation is nightmarish and terrifying.

[77] She is fighting off repo men left and right, she has no money for food or to pay her bills, she cannot find steady work, and is under such a massive amount of stress it is inconceivable.

[78] I find the Commission did act properly (judicially) when they made their decision to issue non-monetary penalty in the form of a warning letter.

[79] I find the Commission did not act in bad faith or for an improper purpose or motive. The point of a penalty is to discourage an appellant from making false

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[29] *Canada (Attorney General) v Kaur*, 2007 FCA 287.
[30] *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. Discretion is exercised in a non-judicial manner if the decision-maker acted in bad faith, or for an improper purpose or motive, took into account an irrelevant factor or ignored a relevant factor or acted in a discriminatory manner: *Attorney General of Canada v Purcell*, A-694-94.

statements again. Issuing a warning letter for that reason is not bad faith or an improper purpose or motive.

[80] I find the Commission did not ignore a relevant factor as they considered the Appellant's financial situation and completely removed the financial penalty, putting it down to a warning letter.[31] They also considered the Appellant's explanation for how she filled out her claimant reports; her understanding that her low income would not impact her benefits.[32]

[81] I find the Commission did not consider an irrelevant factor as I see no irrelevant factors in their record of decision where they decided to issue a warning letter.[33]

[82] Finally, I find the Commission did not discriminate against the Appellant as there is nothing to suggest they singled her out for any protected characteristic.

[83] So, since the Commission acted judicially, I cannot interfere in their decisions to issue a warning letter to the Appellant.

What can be done about the overpayment?

[84] I have no doubts this overpayment is devastating to the Appellant; it is a large sum of money. As much as I would love to help the Appellant, as if I could erase the overpayment I would, unfortunately, I cannot write off, erase, reduce, or otherwise alter her overpayment, only the Commission can do so.

[85] This means that, if the Appellant has not already done so, she would have to specifically ask the Commission to write off her overpayment.

[86] I understand the Appellant being so upset, getting such a massive overpayment almost a year after she left the job. Unfortunately for the Appellant, according to the law earnings **always** have to be allocated and I cannot ignore the law.

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[31] GD03-171 and 172
[32] GD03-171
[33] GD03-171 and 172

Conclusion

[87] The appeal is dismissed.

[88] The Commission can go back and review the Appellant's claim and they acted properly when they did so.

[89] The Appellant had earnings, which were paid as wages, vacation pay, and pay in lieu of notice and these earnings need to be allocated. The wages need to be allocated to the period of time when she did the work she was paid the wages for, and the vacation pay and pay in lieu of notice are allocated starting the week she separated from her employment.

[90] The Commission has also proven the Appellant knowingly made false or misleading statements on her claim reports and they acted judicially when issuing the penalty in the form of a warning letter.

[91] Finally, as much as I would like to, I cannot erase the Appellant's overpayment, only the Commission can do that, so if she has not already, she would have to ask them to erase it.

Gary Conrad
Member, General Division – Employment Insurance Section