

[TRANSLATION]

Citation: *R. G. v. Canada Employment Insurance Commission*, 2014 SSTGDEI 10

Appeal No.: GE-13-2316

BETWEEN:

**R. G.**

Appellant  
Claimant

and

**Canada Employment Insurance Commission**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**General Division – Employment Insurance**

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SOCIAL SECURITY TRIBUNAL MEMBER: Joanne Blanchard

HEARING DATE: February 5, 2014

TYPE OF HEARING: Teleconference

DECISION: Appeal dismissed with modifications

## **PERSONS IN ATTENDANCE**

The Appellant, R. G., participated in the telephone hearing.

## **DECISION**

[1] The Tribunal concludes that the Appellant knowingly made false representations to the Canada Employment Insurance Commission (the Commission) by failing to declare that he was self-employed. The Tribunal is of the opinion, however, that the Commission did not exercise its discretion judicially in calculating the penalty. Given the Appellant's precarious financial situation, the many errors made in his file and the inordinate length of the proceedings, the Tribunal concludes that, in the circumstances, the amount of the penalty should be reduced by an additional 40%.

## **INTRODUCTION**

[2] The Appellant had an Employment Insurance benefit period established effective June 8, 2008.

[3] On March 11, 2011, the Commission concluded that the Appellant was operating a business and that he could therefore not be considered to be unemployed (GD2B-19). This decision resulted in an overpayment of \$9,570. Having determined that the Appellant knowingly made false representations by failing to declare his self-employment, the Commission imposed a penalty of \$2,393 (GD2B-22).

[4] When calculating the penalty, the Commission considered the fact that the Appellant was not drawing a salary to be a mitigating circumstance. It reduced the penalty by 25% (GD2B-17).

[5] On June 23, 2011, a Board of Referees dismissed the Appellant's initial appeal regarding his unemployment and the penalty. It allowed the appeal regarding the notice of violation.

[6] On March 22, 2012, Umpire Goulard concluded that the Board of Referees had failed to analyze the six criteria under subsection 30(3) of the *Employment Insurance Regulations* (the Regulations). He therefore ordered that the file be referred back to a differently constituted Board for a new determination (GD2B-53 to GD2B-55).

[7] On July 5, 2012, a differently constituted Board of Referees dismissed with modifications the Appellant's appeal regarding his unemployment. It also dismissed the appeal regarding the penalty.

[8] The Appellant appealed from this decision before the Umpire on March 7, 2013. On April 3, 2013, the Umpire upheld the Board of Referees' decision regarding his unemployment; however, it allowed the appeal regarding the penalty. The Tribunal will therefore examine the issue of the penalty only (GD2-1 to GD2-6).

#### **TYPE OF HEARING**

[9] The hearing was held on February 5, 2014, for the reasons set out in the Notice of Hearing dated January 7, 2014.

#### **ISSUE**

[10] The Appellant is appealing from the imposition of a penalty under section 38 of the *Employment Insurance Act* (the Act) for committing an act or omission by knowingly making false or misleading representations regarding his earnings.

#### **APPLICABLE LAW**

[11] Section 38 of the Act provides that the Commission may impose a penalty “on a claimant, or any other person acting for a claimant, for [certain] acts or omissions if the Commission becomes aware of facts that in its opinion establish that the claimant or other person has” committed one of these acts or omissions. Section 38 specifies that the claimant must have made the false representations *knowingly*.

[12] The Tribunal must therefore determine whether a false or misleading representation was made, whether it was made knowingly and, where applicable, whether the Commission exercised its discretion properly with respect to the calculation of the penalty amount (*Uppal*, 2008 FCA 388). The Federal Court of Appeal (the FCA) established that it must be determined, on a balance of probabilities, whether the claimant subjectively knew that a false or misleading statement had been made (*Canada (Attorney General) v. Mootoo*, 2003 FCA 206).

[13] The FCA concluded as follows:

In order to establish if the Commission’s decision was exercised in a judicially correct manner, this Court established in *Canada v. Dunham*, [1997] 1 F.C. 462 (F.C.A.) that the Board can rely not only on the evidence that was before the Commission, but also on the evidence put before the Board. The appeal from the Commission to a Board of Referees is held *de novo*. Additional evidence can be introduced and the Board must make its own decision based on it.

(*Kaur*, 2007 FCA 287).

[14] The FCA also concluded that the Board of Referees may take into consideration any mitigating circumstances that did not arise at the time the false representations were knowingly made but only after the penalty was imposed (*Gray*, 2003 FCA 464).

## **EVIDENCE**

[15] The Appellant had an Employment Insurance benefit period established effective June 8, 2008.

[16] On March 11, 2011, the Commission concluded that the Appellant was operating a business and that he could therefore not be considered to be unemployed (GD2B-19). This decision resulted in an overpayment of \$9,570. Having determined that the Appellant made false representations by failing to declare his self-employment, the Commission imposed a penalty of \$2,393 (GD2B-22).

[17] The Appellant stated that he did not declare that he was operating a business when he indicated that he was unemployed because he had no other choice. Having no other income, he had no other choice in order to survive (GD2A-61).

[18] When calculating the penalty, the Commission considered the fact that the Appellant was not drawing a salary as a mitigating circumstance. It reduced the penalty by 25% (GD2B-17).

[19] On June 23, 2011, a Board of Referees dismissed the Appellant's initial appeal regarding his unemployment and the penalty. It allowed the appeal regarding the notice of violation.

[20] On March 22, 2012, Umpire Goulard concluded that the Board of Referees had failed to analyze the six criteria under subsection 30(3) of the Regulations. He therefore ordered that the file be referred back to a differently constituted Board for a new determination (GD2B-53 to GD2B-55).

[21] On July 5, 2012, a differently constituted Board of Referees dismissed with modifications the Appellant's appeal regarding his unemployment. It also dismissed the appeal regarding the penalty.

[22] The Appellant appealed from this decision before the Umpire on March 7, 2013. On April 3, 2013, the Umpire upheld the Board of Referees' decision regarding his unemployment; however, it allowed the appeal regarding

the penalty. The Tribunal will therefore examine the issue of the penalty only (GD2-1 to GD2-6).

## **SUBMISSIONS OF THE PARTIES**

[23] The claimant submitted the following:

- a) He deplors the errors that were made in his file and the delays incurred in concluding his appeal. He is frustrated that none of the stakeholders have dealt with his file as a whole in order to correct the calculation errors.
- b) He has contributed to the Employment Insurance system for 25 years and does not understand why he is accused of bad faith when he never intended to commit fraud. He needed Employment Insurance and is very frustrated at how the events in his file unfolded.
- c) The questions he was asked about the number of hours spent on his business were done in 2010. This created confusion regarding his employment in 2008. He denies being self-employed from October 2008 to January 2009.
- d) He registered his business on October 1, 2008. His first bills were dated October 28, 2008, in the amount of \$55.44; October 28, in the amount of \$101.53; October 29, 2008, in the amount of \$78.96; and October 31, 2008, in the amount of \$668.22.
- e) He maintains that, in his opinion, he did not consider himself to be working as he was not drawing a salary. He finds it illogical that the Commission considered him to be self-employed given that he did not start billing clients until the end of October 2008. Moreover, he reiterates that these amounts were not earnings. He

considered himself to be unemployed during this period and was available for work.

- f) He considers the question regarding his work to be misleading and that it may be easily misinterpreted. He did not intend to provide false or misleading information.
- g) Considering all the errors made in his file, he finds the imposition of a penalty to be excessive.

[24] The Respondent made the following submissions:

- a) The onus was on the Commission to establish that the claimant knowingly made a false or misleading representation. The standard of proof required was the balance of probabilities.
- b) The case law established that the Commission is not required to prove the existence of an intention to mislead to prove that a claimant knowingly made a false or misleading representation.
- c) The claimant admitted that he knowingly made a false representation because he did not have any other income.
- d) The claimant was aware of the consequences of knowingly making false or misleading representations having been invited to an information session on September 11, 2008, to discuss his duties under the Employment Insurance program.
- e) The Commission exercised its discretion judiciously since it considered all the relevant circumstances of the case when setting the penalty amount. The claimant's not having any other income was considered to be a mitigating circumstance.

## ANALYSIS

[25] In a decision dated April 3, 2013, the Umpire upheld the decision of the Board of Referees regarding the Appellant's unemployment; however, it allowed the appeal regarding the penalty. In the present matter, the Tribunal is only concerned with the issue regarding the penalty.

[26] To assess whether a penalty should have been imposed, the Tribunal must determine whether a false or misleading representation was made, whether it was made knowingly and, where applicable, whether the Commission properly exercised its discretion when calculating the penalty amount.

[27] In *Canada (Attorney General) v. Mootoo*, 2003 FCA 206, the FCA confirmed the principle according to which a false or misleading representation is made only when the claimants subjectively know that the information they have given or the representations they have made are false.

[28] In his initial statements of March 18, 2010, the Appellant stated that he did not declare his self-employment because he had no other choice. Having no other income, he had no other choice in order to survive.

[29] At the hearing, the Appellant stated, rather, that he did not consider himself to be self-employed between October 2008 and January 2009. When the Commission wanted clarifications concerning his unemployment, it asked him questions regarding the 2010 period. This created confusion regarding his business in 2008. He reiterated that he did not declare his self-employment because he was not drawing a salary and therefore did not consider himself to be working.

[30] The Tribunal notes the principle that more weight must be given to initial statements made spontaneously than to subsequent statements. The Tribunal therefore affords more weight to the Appellant's previous statement regarding his lack of an income.



[31] The Appellant's intention at the time of making the representations must be examined. For the Tribunal to conclude that the penalty was justified, the Commission must establish that the Appellant subjectively knew that his information was incorrect.

[32] Even though the Appellant stated that since he was not drawing a salary, he did not consider himself to be working, the Tribunal is of the opinion that the question about work is clear and precise in the claimant's report. In particular, the questions are set out so as to differentiate between self-employment and unpaid work. The claimant stated that he misinterpreted the question; the Tribunal, however, concludes that the question is sufficiently clear and precise.

[33] Given the initial reasons given by the Appellant to the effect that he had no other choice than to answer no to the question regarding work as he would have been without income otherwise, the Tribunal concludes that the Appellant subjectively knew that his representations were false. Even though the Tribunal sympathizes with the Appellant's precarious financial situation when he made these representations, it concludes that he had the duty to respond truthfully regarding his self-employment.

[34] The Appellant states that he never intended to provide the Commission with incorrect information. However, not intending to defraud the Commission is not a factor. What is important is whether the representations were made knowingly. In the matter at hand, the Appellant failed to declare that he was operating a business in his Employment Insurance reports. Yet the evidence suggests that the Appellant knowingly made false representations.

[35] For the above reasons, the Tribunal is of the view that, on a balance of probabilities, the Appellant subjectively knew that he was making a false representation (*Canada (Attorney General) v. Mootoo*, 2003 FCA 206). In light of the facts in this matter, the Tribunal concludes that the claimant knowingly made false representations.

[36] Having determined that the false or misleading representations were made knowingly, the Tribunal must assess whether the Commission exercised its discretion judiciously when calculating the penalty amount. In its decision, the

Commission considered the fact that the Appellant was not drawing a salary as a mitigating factor when calculating the penalty.

[37] The Tribunal relies on the FCA, which concluded that the Board of Referees could take into consideration any mitigating circumstances that did not arise at the time the false representations were knowingly made but only after the penalty was imposed (*Gray*, 2003 FCA 464).

[38] At the hearing, the Appellant also submitted that it was illogical for a penalty to be imposed when several errors were made in his file and unreasonable delays were incurred. He is of the opinion that it would be fair for the Tribunal to overturn the decision regarding the penalty in a perspective of fairness and justice towards him. The Tribunal sympathizes with the Appellant's frustration with regard to the progress of his file. The matter has cost him a great deal of time and energy.

[39] According to the facts on file and the additional information presented at the hearing, the Appellant knew that the information he was providing was incorrect. However, his precarious financial situation and the many errors made in his file must be considered as mitigating circumstances.

[40] Considering this additional information, the Tribunal concludes that the Commission did not exercise its discretion judiciously when calculating the penalty amount in its decision. In drawing this conclusion, the Tribunal relies on *Kaur*, 2007 FCA 287:

In order to establish if the Commission's decision was exercised in a judicially correct manner, this Court established in *Canada v. Dunham*, [1997] 1 F.C. 462 (F.C.A.) that the Board can rely not only on the evidence that was before the Commission, but also on the evidence put before the Board. The appeal from the Commission to a Board of Referees is held *de novo*. Additional evidence can be introduced and the Board must make its own decision based on it.

[41] On the basis of the facts in the file and the additional information presented at the hearing, the Tribunal concludes that the Commission did not exercise its discretion judiciously. It did not consider all the evidence presented to assess the relevant factors and the mitigating circumstances in this case, particularly the fact that many errors were made and that inordinate delays were incurred in the Appellant's file (*Uppal*, 2008 FCA 388).

[42] In light of the Appellant's precarious financial situation, the inordinate delays and the many errors made in his file, the Tribunal concludes that the imposed penalty should be reduced by an additional 40%.

## **CONCLUSION**

[43] The appeal is dismissed with modifications.

Joanne Blanchard  
Member, General Division

DATE OF REASONS: February 20, 2014