



Government  
of Canada

Gouvernement  
du Canada

Social Security  
Tribunal

Tribunal de la  
sécurité sociale

Citation: *SN v Canada Employment Insurance Commission*, 2014 SSTGDEI 151

Appeal #: GE-13-1511

BETWEEN:

**S. N.**

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: Katherine Wallocha

HEARING DATE: March 25, 2014

TYPE OF HEARING: Videoconference

DECISION: Appeal Dismissed



## **PERSONS IN ATTENDANCE**

S. N., the claimant, did not attend the hearing via videoconference.

## **DECISION**

[1] The Tribunal finds that, pursuant to section 35 of the *Employment Insurance Regulations* (EI Regulations) the claimant did have earnings from February 13 to June 3, 2012 by reason of employment and in accordance with section 36 of the Regulations these earnings were allocated correctly.

[2] The Tribunal finds that the claimant knowingly provided false or misleading information to the Canada Employment Insurance Commission (Commission) and should be assessed a penalty pursuant to section 38 of the *Employment Insurance Act* (EI Act).

[3] The Tribunal finds that the claimant should be assessed a violation in accordance with subsection 7.1(4) of the EI Act.

## **INTRODUCTION**

[4] The claimant became unemployed on January 23, 2012. He filed for Employment Insurance (EI) benefits on January 26, 2012. An initial claim for EI benefits was established on January 22, 2012. The Commission learned through an integrity investigation that the claimant was working while in receipt of EI benefits which resulted in an overpayment, penalty and violation. The claimant sought reconsideration of the Commission's decision, which the Commission maintained in their letter dated September 17, 2013. The claimant appealed to the Social Security Tribunal (SST).

[5] The claimant was scheduled for a telephone hearing on January 9, 2014. Prior to the hearing, the Notice of Hearing was returned unclaimed. The claimant was contacted and it was learned that he had moved. A new hearing was scheduled for January 23, 2014.

[6] Prior to the hearing scheduled for January 23, 2014, additional information was submitted by the Commission. The hearing was adjourned again in order to give the claimant an opportunity to review this information. A Notice of Hearing, dated January 24, 2014 was sent to the claimant informing him that an in-person hearing was scheduled for February 12, 2014.

[7] The claimant submitted a fax dated February 11, 2014 indicating that he had not received any correspondence regarding his hearing scheduled for February 12, 2014. A Notice of Hearing, dated March 3, 2014, was sent to the claimant via regular mail informing him that a videoconference was scheduled for March 25, 2014. A second letter, dated March 13, 2014 was sent to the claimant via regular mail providing a reminder and further instructions on how to find the videoconference centre.

[8] The claimant did not attend the hearing scheduled for March 25, 2014. There has been no returned or undeliverable mail to the SST.

[9] Subsection 19(2) of the *Social Security Tribunal Regulations* (SST Regulations) states that any document sent by the Tribunal is deemed to have been communicated to a party if sent by regular mail, 10 days after the day on which it is mailed to the party.

[10] Subsection 12(1) of the SST Regulations states that if a party fails to appear at a hearing, the Tribunal may proceed in the party's absence if the Tribunal is satisfied that the party received notice of the hearing.

[11] The Tribunal is satisfied that the claimant received notice of the hearing.

## **FORM OF HEARING**

[12] The hearing of this appeal was by videoconference for the reasons given in the Notice of Hearing dated December 10, 2014.

## **ISSUES**

[13] The issues under appeal are:

1. Whether the claimant has earnings to be allocated to a period of a claim pursuant to sections 35 and 36 of the EI Regulations.
2. Whether the claimant should be assessed a penalty pursuant to section 38 of the EI Act for making a misrepresentation by knowingly providing false or misleading information to the Commission.
3. Whether the claimant should be assessed a very serious violation under section 7.1 of the EI Act.

## **THE LAW**

### **Earnings and Allocation of Earnings**

[14] Section 35(1) of the Regulations defines income as “any pecuniary or non-pecuniary income that is or will be received by a claimant from an employer or any other person, including a trustee in bankruptcy.”

[15] Subsection 35(2) of the Regulations provides, in part, that earnings to be taken into account for the purposes of determining whether an interruption of earnings under section 14 has occurred and the amount to be deducted from benefits payable under section 19, subsection 21(3), 22(5), 152.03(3) or 152.04(4) or section 152.18 of the EI Act, and to be taken into account for the purposes of sections 45 and 46 of the EI Act, are the entire income of a claimant arising out of any employment.

[16] Subsection 36(1) of the Regulations provides that earnings as determined under section 35 shall be allocated in the manner describe in this section.

[17] Subsection 36(4) of the Regulations states that earnings that are payable to a claimant under a contract of employment for the performance of services shall be allocated to the period in which the services were performed.

[18] Subsection 36(9) of the Regulations states that all earnings paid or payable to a claimant by reason of a lay-off or separation from an employment shall, regardless of the period in respect of which the earnings are purported to be paid or payable, be allocated to a number of weeks that begins with the week of the lay-off or separation in such a manner that the total earnings of the claimant from that employment are, in each consecutive week except the last, equal to the claimant's normal weekly earnings from that employment.

### **Penalty**

[19] Section 38 of the EI Act states that the Commission may impose on a claimant, or any other person acting for a claimant, a penalty for each of the following acts or omissions if the Commission becomes aware of facts that in its opinion establish that the claimant or other person has

- a) in relation to a claim for benefits, made a representation that the claimant or other person knew was false or misleading;
- b) being required under this Act or the regulations to provide information, provided information or made a representation that the claimant or other person knew was false or misleading;
- c) knowingly failed to declare to the Commission all or some of the claimant's earnings for a period determined under the regulations for which the claimant claimed benefits;
- d) made a claim or declaration that the claimant or other person knew was false or misleading because of the non-disclosure of facts;

- e) being the payee of a special warrant, knowingly negotiated or attempted to negotiate it for benefits to which the claimant was not entitled;
- f) knowingly failed to return a special warrant or the amount of the warrant or any excess amount, as required by section 44;
- g) imported or exported a document issued by the Commission, or had it imported or exported, for the purpose of defrauding or deceiving the Commission; or
- h) participated in, assented to or acquiesced in an act or omission mentioned in paragraphs (a) to (g).

[20] The Federal Court of Appeal (FCA) decision in **Mootoo (2003 FCA 206)**, in which the court upheld the principle, established in **Gates (A-600-94)**, that for a finding of misrepresentation, on the balance of probabilities, the claimant must have subjective knowledge that the report was false in order to penalize him or her.

### **Violation**

[21] Subsection 7.1(4) of the Employment Insurance Act provides, in part, that a claimant will accumulate a violation if a penalty was imposed on him/her under section 38 of the EI Act.

[22] The FCA decision in **Gill (2010 FCA 182)** recognized that the Commission has the discretionary power to issue a Notice of Violation but established that it is not mandatory or automatic under subsection 7.1(4) of the EI Act. The Commission must exercise this discretion in a judicial manner.

## EVIDENCE

[23] The evidence in the docket is as follows:

- a) The claimant submitted nine electronic internet E-reports for the period of February 12, 2012 to June 16, 2012 where he declared that he did not work or receive any earnings during the period of this report (Pages GD3-17 to GD3-62).
- b) A Record of Employment (ROE) on file provided evidence that the claimant began new employment on February 13, 2012 and maintained full-time employment until June 3, 2012. Upon termination of this employment the claimant received \$899.80 vacation pay and \$2,673.60 pay in lieu of notice (Page GD3-68).
- c) The claimant was contacted on October 24, 2012 and he agreed that he worked for this employer for the period in question however, he had already declared this information because he had filed another claim for EI benefits on August 2, 2012. The claimant stated he was doing his bi-weekly reports and was declaring his earnings and is not sure what happened to the system as it does not show his earnings (Pages GD3-73 and GD3-74).
- d) The claimant contacted the Commission on October 31, 2012 indicating that he had received the letter with his weekly earnings provided by the employer and stated that he had already informed Service Canada about his employment and earnings and if Service Canada had not corrected the situation this is not his problem and he should not be held accountable (Page GD3-75).
- e) The claimant confirmed that he was on EI from January 22 to July 7, 2012 and had worked from February 13 to June 3, 2012. He was informed that he was paid 22 weeks of benefits out of his total entitlement of 22 weeks but there is no record of him informing the Commission of his employment or declaring his earnings until he applied for EI benefits on August 2, 2012. He stated that he did inform Service Canada about his employment and was told by an agent it was all fine. He kept



repeating that he had informed the Commission and if the situation was not corrected this is not his problem and he should not be penalized for this (Page GD3-75).

- f) The claimant submitted the Request for Clarification of Employment Information form on November 13, 2012 and he indicated that he did not receive the payments as shown as all he worked for this employer was as a part-time employee and he would have been overly happy if he had earned that much. Secondly, he called Service Canada and reported that he was working part-time. The agent advised that she will document the information and she also advised that he is not to report the small earnings as she is to do that. He made no false or misleading statements regarding his earnings. He was and has been very honest with Service Canada. The agent advised him he did not have to report his earnings because once she documented the information; it will show on his claim. This was misinformation from Service Canada and he is new at filing claims. It was not intentional (Page GD3-78).
- g) The claimant informed the Commission on November 16, 2012 that he would retrieve his pay stubs and confirmed that he would submit this information by November 21, 2012. He again stated that he already informed the Commission of his employment while collecting EI benefits and that every time he calls the call centre he talks to people with different training levels (Page GD3-81).
- h) An internal review indicated that there are no noted records regarding any calls to the call centre but there is one indicating a conversation about his Worker's Compensation Board (WCB) in 2011 (Page GD3-85).
- i) The claimant was sent a Notice of Debt on May 25, 2013 indicating that he misrepresented his earning creating an overpayment of \$7125.00 and a penalty of \$3563.00 (Page GD3-92).
- j) The claimant was contacted after his Request for Reconsideration and he stated that when he returned to work, he called the Commission and spoke with a representative about returning to work. He stated that he told a female agent that he was working and was assured that his claim would be updated to show that information. He told the agent the name of his employer and that he was working full-time. He insisted

that he was told this information would be placed on his file and that he was to continue completing his reports as usual (Page GD3-152).

- k) He was asked why he failed to declare that he was working when he was completing his reports. He replied that he answered the questions as usual and thought maybe he was not paying enough attention to the questions. He was asked why he answered incorrectly straightforward and easy question. He responded that he was not making false claims and again stated he had told an agent that he had returned to work and was just answering as he had before (Page GD3-152).
- l) The claimant stated that he did not think it unusual that he was working full-time and receiving full EI benefits because he is unfamiliar with the system as he is not originally from Canada and believed that because he told an agent that he had returned to work, he must be eligible for benefits. When asked why he indicated that he was working part-time and not full-time, he explained that he must not have been very clear in his response as English is not his first language (Page GD3-153).
- m) The claimant, to support his appeal to the SST, submitted a doctor's note indicating that the claimant is unable to work from September 19 to November 19, 2013 (Page GD2-3).
- n) The employer submitted all documents relating to the claimant's pay (Pages DG3-96 to GD3-138).

## SUBMISSIONS

[24] The claimant submitted that:

- a) He never misrepresented himself at all. He called the customer service number and informed that he was working. He cannot exactly remember the name of the person but it was on February 14, 2012. The agent said that she would indicate that he was working in the system (Page GD3-94).
- b) If you look at the claim dated January 22, 2012 to January 19, 2013, the agent who worked on his claim gave him less weeks to receive benefits but after a review by Service Canada, he got the extra weeks. In essence the agent he spoke with on the phone erred by not putting the information in the system. Also, in one of the claims, the agency deposited almost \$7000.00 into his bank account by mistake and he is repaying that debt today and he currently owes around \$2000.00 (Page GD3-94).
- c) The fact that the Commission imposed a fine of \$3563.00 plus he has to work more hours to qualify for benefits is unfair, inconsiderate and uncalled for. He has a wife and two children aged 7 and 2. This is unbearable and he kindly request this decision be overturned. He has never given false information knowingly and he was filing his reports after talking to the agent (Page GD3-94).
- d) He provided further documentation to show that he was in receipt of EI benefits in 2009 and was asked for clarification regarding his earnings at the same time. He stated that he did report that someone was using his Social Insurance Number (SIN) and was making claims on his employment insurance. He went to Service Canada and was given a new SIN. He closed his bank account almost 3 times because of identity fraud. He has also applied to have a legal name change based on those circumstances and it was allowed. He still continues to get hotel bills from places he

has never been. He has a police report, certificate of legal name change and credit reports to show that he never made any false claims for EI (Page GD5-7).

[25] The Respondent submitted that:

- a) The claimant was issued two SINs because when he originally came to Canada he was a temporary foreign worker and therefore was issued a temporary SIN. The claimant has since been granted permanent residence in Canada and was issued a new SIN with a different name. The Commission has reviewed the claimant's entire EI file and at no time whatsoever has he ever reported to Service Canada or the Commission that he had concerns that either of his SINs were being used fraudulently or for fraudulent purposes (Page GD6-3).
- b) The claimant did not allege his SIN was being used fraudulently when he submitted his Request for Reconsideration nor did he raise the issue when speaking with the Commission on September 16, 2013 but in fact, acknowledged receiving earnings from an employer while also receiving EI benefits. He has not provided any evidence or documentation to support his statement that he filed a Police Report regarding identity fraud, or to show that he closed any bank accounts due to identity fraud concerns. He did change his name but the reason for the name change is not known and he has provided no proof that it was due to concerns with identity fraud (Page GD6-3).

### **Earnings and Allocation of Earnings**

- c) The claimant received money from his employer and this money was paid to the claimant as wages, pay in lieu of notice, and accrued vacation pay, and therefore constituted earnings pursuant to the Regulations. The Commission maintains that these monies constituted earnings pursuant to subsection 35(2) of the Regulations because the payment was made to compensate the claimant for hours worked, pay in lieu of notice upon termination of employment, and accrued vacation pay (Page GD4- 7).

## **Penalty**

- d) The Commission submitted that in the case at hand, it has met the onus of establishing that the claimant made nine misrepresentations because he knew that he was employed from February 13, 2012 to June 3, 2012 when he reported that he did not work and did not earn any income during that period on claim. The claimant, who has a University level education, was asked a simple, straightforward, and unambiguous question each time he completed a claimant report:

“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.”

- e) On nine consecutive report cards the claimant answered “NO” to this question despite the fact that he had been working and had earned anywhere between \$215.00 and \$1,810.00 for each of the weeks in question. The Commission respectfully submitted that the claimant knew he was making false and / or misleading statements when he failed to answer the question correctly, and did so knowingly in order to collect benefits that he knew he was not entitled to receive. (Pages GD4- 8 and Pages GD4-9).
- f) The Commission submitted that it rendered its decision in this case in a judicial manner, as all the pertinent circumstances were considered when assessing the penalty amount. For the purposes of calculating the penalty, this was considered to be the claimant’s first misrepresentation. The original penalty amount, based on an overpayment of \$7,125.00, was determined to be \$3,563.00, which was 50% of the net overpayment. After reconsideration, the overpayment was increased to \$8,941.00. The maximum penalty that could be imposed would have been 50% of the net overpayment, or \$4,471.00 (50% x \$8,941.00). The Commission could, according to internal policy, have imposed a penalty of \$4,471.00. However, the

Commission considered that the penalty of \$3,563.00 that was initially imposed was sufficient, and did not increase the penalty amount (Pages GD4-10 and GD4-11).

### **Violation**

- g) It is submitted that the Commission exercised its discretion in a judicial manner when issuing the Notice of Violation. After considering the overall impact to the claimant of issuing a notice of violation, including mitigating circumstances, prior offences and the impact on the ability of the claimant to qualify on future claims, it was determined that a violation was applicable in this case (Page GD4-12).
  
- h) The claimant qualified for the claim in question with 1820 insurable hours. At the time, the claimant would have required 700 insurable hours to qualify for benefits. The imposition of a very serious violation means the claimant will need 1225 insurable hours to qualify for benefits (assuming no changes in the regional rate of unemployment). As the claimant previously qualified with 1820 hours, the imposition of the subsequent violation is not unduly harsh or excessive (Page GD3-156).

### **ANALYSIS**

#### **Earnings and Allocation of Earnings**

[26] In order to be considered earnings, the income must be arising out of any employment. The claimant must disclose all monies paid or payable and must prove that the income is not earnings and should not be allocated.

[27] The claimant was in receipt of EI benefits from January 22 to July 7, 2012. An investigation revealed that the claimant was working and had earnings during his benefit period and he failed to report his earnings from February 13 to June 3, 2012.

[28] When he was contacted the claimant admitted that he was working from February 13 to June 3, 2012 while in receipt of EI benefits.

[29] The Tribunal sought guidance from **CUB 67681**, where Justice Goulard states:

“In regard to the issue of the overpayment resulting from the allocation of earnings earned while the claimant was receiving employment insurance benefits, subsection 36(4) of the Employment Insurance Regulations provides that earnings for services rendered have to be allocated to the period when the services were rendered and the earnings earned. The monies received by the claimant, although only later, still had to be allocated to the period when they were earned in accordance with the applicable legislative provisions.”

[30] The Tribunal finds that the claimant was working while he was in receipt of EI benefits. He did not declare these earnings and therefore, he received benefits that he was not entitled to.

[31] While the claimant initially disputed the amount he received as wages, he has not presented any evidence to show that the information provided by the employer is incorrect. Section 44 of the EI Act states that “a person who has received or obtained a benefit payment to which the person is disentitled, or a benefit payment in excess of the amount to which the person is entitled, shall without delay return the amount, the excess amount or the special warrant for payment of the amount, as the case may be”.

[32] Therefore, the Tribunal concludes that the claimant had received earnings by an employer and these earnings were properly allocated pursuant to sections 35 and 36 of the EI Regulations.

### **Penalty**

[33] In order for the Commission to impose a penalty, the false or misleading statement must be made knowingly. Knowingly is determined on the balance of probabilities based on the circumstances of each case or the evidence of each case. Once the Commission has shown that the false statement was made knowingly, the onus then shifts to the claimant to explain why the incorrect information was given (**Gates A-600- 94**).

[34] The claimant was in receipt of EI benefits and he was working. He completed his bi-weekly reports in a timely fashion and was asked if he had worked or received any earnings during the period of this report. He was asked the same question each and every time and he responded “no” for each report. He completed nine reports.

[35] In the FCA decision **Mootoo (2003 FCA 206)**, Justice Linden states that:

“In order to be subject to a penalty under section 38(1)(a) it is not enough for the representation to be false or misleading; it must be made by the Applicant with the knowledge that it is false or misleading.

...In **Gates** the Court also referred to the jurisprudence developed by Umpires respecting the burden of proof. According to that jurisprudence, the initial onus is on the Commission to prove that a claimant knowingly made a false or misleading statement. Once it appears from the evidence, however, that a claimant has wrongly answered a very simple question or questions on a report card the burden shifts to claimant to explain why the incorrect answers were given.”

[36] The Tribunal sought further guidance in **CUB 69912**, where Justice Goulard states:

“In this case, over a three-week period beginning the week of October 31, 2005 and ending the week of November 14, 2005, the claimant worked and received earnings. However, for each of those weeks, he reported that he did not work or receive earnings.

A long line of authority holds that when a claimant is shown to have provided false information, the claimant is responsible for proving that he or she had a valid reason for making false statements. Otherwise, the claimant is presumed to have knowingly made false statements (**CUBs 23119, 40065 and 32017**). The fact that the claimant had no intention of committing fraud does not constitute a valid reason for not reporting his work or earnings (**CUB 23119**). In **CUBs 23119 and 40065**, the Umpire also found that the Board of Referees is responsible for determining whether



the claimant's explanation for making false statements constitutes an acceptable reason for acting as he or she did and whether the claimant knowingly made a false statement. **CUB 32017** was confirmed by the FCA in *Fecteau (A-182-96)*.

The FCA also determined that when a claimant is shown to have knowingly made false statements, the Commission has the exclusive discretion to decide whether a penalty should be imposed under section 38 of the Act and that neither the Board of Referees nor the Umpire can interfere with that decision unless the Commission is shown not to have exercised its discretion in good faith and in a judicial manner (*Martin, A-1001-92; Morin, A-453-95; Dunham, A-708-95; and Gauley, A-353-01*).”

[37] In this case, the claimant wrongly answered very simple questions. He was working. He had to know that he was working and it was his responsibility to inform the Commission that he had worked and to declare the wages he had earned.

[38] The Tribunal finds that the claimant did knowingly make false statements or representations to the Commission when he failed to report that he was working and did not declare his earnings for nine consecutive bi-weekly reports.

[39] The claimant was contacted on October 24, 2012 and he stated that he was doing his bi-weekly reports and was declaring his earnings and is not sure what happened to the system. He again confirmed on October 31, 2012 that he had already informed Service Canada about his employment and earnings and if the situation is not corrected it is not his problem and he should not be held accountable. The claimant then submitted his Request for Clarification of Employment Information form indicating that he informed a Service Canada representative he was working part-time and he was told that he did not have to report his earnings because once she documented the information, it would show on the claim.

[40] The claimant was contacted after he made his Request for Reconsideration and he told the Commission’s representative that he was working full-time and insisted that he was told that this information would be placed on his file and he was to continue completing his reports as usual. When asked why he responded to the simple questions incorrectly, he

responded that he thought maybe he was not paying enough attention to the questions. When he was asked why he initially reported that he was working part-time and not full-time, he stated that English is not his first language and he must not have been very clear.

[41] The Tribunal finds that the claimant's version of events is not credible. The claimant has contradicted his own verbal and written statements repeatedly. He initially reported that he was working part-time and he declared his earnings. He then stated that he was working full-time and did not declare his earnings because he was instructed not to.

[42] The claimant subsequently submitted that he did not make any false claims against EI because he is a victim of identity theft and someone else is making claims on his employment insurance. The Tribunal finds this statement to be in complete contradiction to his previous statements where he confirmed that he received EI benefits and he was working full-time at the same time.

[43] The Commission determined that the claimant made misrepresentations by knowingly providing false or misleading information and set the penalty at \$3,563.00, which was 50% of the net overpayment. As the actual overpayment was increased to \$8,941.00, the Commission decided to not increase the penalty amount to reflect 50% of the overpayment.

[44] The Tribunal finds that the Commission exercised its discretion in a judicial manner.

[45] For these reasons, the Tribunal concludes that the claimant did make statements or representations that he knew to be false or misleading. The Commission is appropriate in imposing a penalty pursuant to Section 38 of the EI Act.

**Violation**

[46] In order for the Commission to issue a Notice of Violation, the claimant must have committed one of the offences in section 7.1(4) of the EI Act and was imposed a penalty or issued a warning.

[47] In this case, the claimant was working while in receipt of EI benefits. He did not declare these earnings and it was determined that he made numerous false or misleading statements. Given the finding that the claimant should be imposed a penalty under section 38 of the EI Act; the Commission may then impose a Notice of Violation.

[48] The Commission considered the overall impact to the claimant including mitigating circumstances, prior offences and his ability to qualify on future claims. The Tribunal finds that the Commission did, in fact, exercise its discretion in a judicial manner.

[49] Therefore, the Tribunal concludes that the claimant should be imposed a Notice of Violation categorized as very serious.

**CONCLUSION**

[50] The appeal is dismissed.

K. Wallocha

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Member, General Division

DATED: March 26, 2014