

[TRANSLATION]

Citation: *J. B. v. Canada Employment Insurance Commission*, 2014 SSTGDEI 93

Appeal #: GE-13-1235

BETWEEN:

J. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance

SOCIAL SECURITY TRIBUNAL MEMBER: Claude Durand

HEARING DATE: May 13, 2014

TYPE OF HEARING: In person

DECISION: Appeal dismissed

PERSONS IN ATTENDANCE AND TYPE OF HEARING

The Appellant, J. B., attended the hearing in person. The hearing was held in Trois-Rivières on May 13, 2014, for the reasons set out in the notice of hearing.

DECISION

[1] The Tribunal will not allow the appeal.

INTRODUCTION

[2] In this case, the Employment Insurance Commission (the Commission) determined that the Appellant had made false statements in failing to declare income received during his benefit periods. As a consequence, the income was allocated, creating overpayments. Penalties were also imposed, and notices of violation were issued.

[3] On July 18, 2013, the Commission informed the Appellant that it was upholding the decisions taken in his files. The files were numbered 12511 and 13889 (pages GD2-11 and GD2-12).

[4] The Appellant appealed these decisions to the Social Security Tribunal in August 2013 (Exhibit GD-2). When the files were transferred from the Commission to the Tribunal, the Appellant's files were merged into a single file.

[5] The appeal docket was incomplete. After the missing documents were received, a first date for a hearing was set for February 3, 2014.

[6] This first hearing was postponed at the Appellant's request. A second date for a hearing was set for May 13, 2014.

ISSUES

Allocation of earnings

[7] The Tribunal must decide whether the amounts received by the Appellant during the periods from September 29, 2009, to January 16, 2010, and from January 29, 2010, to November 9, 2010, constituted earnings within the meaning of the *Employment Insurance Act* (the Act).

[8] If so, the Tribunal must decide whether these amounts were correctly allocated in accordance with the *Employment Insurance Regulations* (the Regulations), creating an overpayment that was initially calculated to be \$15,636.

[9] The Tribunal must make a similar decision in regard to amounts received by the Appellant during the benefit periods from February 25, 2011, to February 9, 2012. In this latter case, the overpayment was initially calculated to be \$12,012.

False or misleading statements and penalty

[10] The Tribunal must determine whether the Appellant knowingly made false or misleading statements for the periods referred to above in paragraphs 7 and 8.

[11] Then, with respect to the period from 2009 to 2010, the Tribunal must determine whether the penalty imposed was warranted. Initially calculated to be \$4,691, the penalty was imposed for knowingly making false or misleading statements.

[12] The Tribunal must make a similar decision for the 2011 period, namely whether the penalty, initially in the amount of \$5,000 for knowingly making false or misleading statements, was warranted.

Notice of violation

[13] Lastly, for the periods in question, the Tribunal must decide whether the two notices of violation, one classified as very serious, the other classified as a subsequent violation, were warranted.

APPLICABLE LAW

Earnings and allocation:

[14] Subsection 35(1) of the Regulations:

The definitions in this subsection apply in this section.

“employment” means

(a) any employment, whether insurable, not insurable or excluded employment, under any express or implied contract of service or other contract of employment,

(i) whether or not services are or will be provided by a claimant to any other person, and

(ii) whether or not income received by the claimant is from a person other than the person to whom services are or will be provided;

(b) any self-employment, whether on the claimant's own account or in partnership or co-adventure; and

(c) the tenure of an office as defined in subsection 2(1) of the Canada Pension Plan. (emploi)

“income” means 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. (revenu)

[15] Paragraph 35(2)(a) of the Regulations:

Subject to the other provisions of this section, the earnings to be taken into account for the purpose of determining whether an interruption of earnings has occurred and the amount to be deducted from benefits payable under section 19, or subsection 21(3), 22(5) or 23(3) of the Act, and to be taken into account for the purposes of sections 45 and 46 of the Act, are the entire income of a claimant arising out of any employment, including:

(a) amounts payable to a claimant in respect of wages, benefits or other remuneration from the proceeds realized from the property of a bankrupt employer;

[16] Subsection 35(7) of the Regulations:

(7) That portion of the income of a claimant that is derived from any of the following sources does not constitute earnings for the purposes referred to in subsection (2):

(a) disability pension or a lump sum or pension paid in full and final settlement of a claim made for workers' compensation payments;

(b) payments under a sickness or disability wage-loss indemnity plan that is not a group plan;

(c) relief grants in cash or in kind;

(d) retroactive increases in wages or salary;

(e) the moneys referred to in paragraph (2)(e) if

(i) in the case of a self-employed person, the moneys became payable before the beginning of the period referred to in section 152.08 of the Act, and

(ii) in the case of other claimants, the number of hours of insurable employment required by section 7 or 7.1 of the Act for the establishment of their benefit period was accumulated after the date on which those moneys became payable and during the period in respect of which they received those moneys; and

(f) employment income excluded as income pursuant to subsection 6(16) of the Income Tax Act.

[17] Subsection 36(1) and (4) of the Regulations:

36. (1) Subject to subsection (2), the earnings of a claimant as determined under section 35 shall be allocated to weeks in the manner described in this section and, for the purposes referred to in subsection 35(2), shall be the earnings of the claimant for those weeks.

(4) 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] Section 43 of the Act:

A claimant is liable to repay an amount paid by the Commission to the claimant as benefits

(a) for any period for which the claimant is disqualified; or

(b) to which the claimant is not entitled.

False or misleading statements, penalty and notice of violation

[19] Section 38(1) of the Act:

(1) 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 received 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 of the warrant, as required by section 44;

(g) imported or exported a page 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).

(2) The Commission may set the amount of the penalty for each act or omission at not more than

(a) three times the claimant's rate of weekly benefits;

(b) if the penalty is imposed under paragraph (1)(c),

(i) three times the amount by which the claimant's benefits were reduced under subsection 19(3), and

(ii) three times the benefits that would have been paid to the claimant for the period mentioned in that paragraph if the benefits had not been reduced under subsection 19(3) or the claimant had not been disentitled or disqualified from receiving benefits; or

(c) three times the maximum rate of weekly benefits in effect when the act or omission occurred, if no benefit period was established.

(3) For greater certainty, weeks of regular benefits that are repaid as a result of an act or omission mentioned in subsection (1) are deemed to be weeks of regular benefits paid for the purposes of the application of subsection 145(2).

[20] Subsection 7.1(4) of the Act:

An insured person accumulates a violation if in any of the following circumstances the Commission issues a notice of violation to the person:

(a) one or more penalties are imposed on the person under section 38, 39, 41.1 or 65.1, as a result of acts or omissions mentioned in section 38, 39 or 65.1;

(b) the person is found guilty of one or more offences under section 135 or 136 as a result of acts or omissions mentioned in those sections; or

(c) the person is found guilty of one or more offences under the *Criminal Code* as a result of acts or omissions relating to the application of this Act.

[21] Subsection 7.1(5) of the Act:

Except for violations for which a warning was imposed, each violation is classified as a minor, serious, very serious or subsequent violation as follows:

(a) if the value of the violation is

(i) less than \$1,000, it is a minor violation,

(ii) \$1,000 or more, but less than \$5,000, it is a serious violation, or

(iii) \$5,000 or more, it is a very serious violation; and

(b) if the notice of violation is issued within 260 weeks after the person accumulates another violation, it is a subsequent violation, even if the acts or omissions on which it is based occurred before the person accumulated the other violation.

[22] Subsection 7.1(6) of the Act:

The value of a violation is the total of

(a) the amount of the overpayment of benefits resulting from the acts or omissions on which the violation is based, and

(b) if the claimant is disqualified or disentitled from receiving benefits, or the act or omission on which the violation is based relates to qualification requirements under section 7, the amount determined, subject to subsection (7), by multiplying the claimant's weekly rate of benefit by the average number of weeks of regular benefits, as determined under the regulations.

[23] Subsection 7.1(7) of the Act:

The maximum amount to be determined under paragraph (6)(b) is the amount of benefits that could have been paid to the claimant if the claimant had not been disentitled or disqualified or had met the qualification requirements under section 7.

[24] Subsection 52(1) of the Act:

Notwithstanding section 120, but subject to subsection (5), the Commission may reconsider a claim for benefits within 36 months after the benefits have been paid or would have been payable.

[25] Subsection 52(5) of the Act:

If, in the opinion of the Commission, a false or misleading statement or representation has been made in connection with a claim, the Commission has 72 months within which to reconsider the claim.

[26] Subsection 9(1) of the Regulations:

(1) A claimant who makes an initial claim for benefits, or a claim for benefits for a week of unemployment, by telephone or other electronic means, and provides the information required by section 50 of the Act, is deemed

(a) to have expressed an intention to make a claim for benefits and to have made such a claim for the purposes of section 48 or 49 of the Act, as the case may be; and

(b) to have supplied the information recorded on the dated printout from the Commission's computerized benefit pay system as responses to the questions posed by the interactive response system by telephone or other electronic means.

(2) A claimant who provides their Social Insurance Number and the following information by telephone or other electronic means is deemed to have signed their respective claim for benefit:

(a) in the case of an initial claim for benefits, their date of birth and, if the initial claim is made by electronic means, the maiden name of the claimant's mother; and

(b) in the case of a claim for benefits for a week of unemployment, their personal identification number.

(3) A claim for benefits that is made by the means referred to in subsection (1) is deemed to have been made on the day that the information is received and recorded by the Commission's computerized benefit pay system.

(4) For greater certainty, sections 38 and 135 of the Act apply to a declaration made by electronic means.

(5) The acts and omissions specified in subsections 38(1) and 135(1) of the Act are deemed to include the acts and omissions of a person who knowingly attempts to interfere with the operation of the electronic systems used in the administration of the Act, and the penalty provided for by subsection 38(2) of the Act and the punishment provided for by subsection 135(3) of the Act are deemed to include the right to refuse access to those electronic systems to such a person.

EVIDENCE

In the file

Period from September 27, 2009, to October 23, 2010

[27] The Appellant filed a claim for Employment Insurance benefits effective June 28, 2009 (pages GD3-3 to GD3-9).

[28] On January 26, 2010, the employer, FRONTENAC EXPRESS INC., issued a Record of Employment indicating that the Appellant had worked between September 29, 2009, and January 16, 2010 (page GD3-10).

[29] On December 23, 2010, the Commission received a Record of Employment from employer 9137-7317 Québec Inc. This other Record of Employment indicates that the Appellant worked from January 29, 2010, to November 9, 2010 page GD3-13).

[30] On February 2, 2011, an investigator met with the Appellant to determine why the Appellant had not declared his income from working for the employer FRONTENAC EXPRESS INC. for the period from September 2009 to January 2010 or for the employer 9137-7317 QUÉBEC INC. (Garland Transport) for the period from January 2010 to November 2010 (page GD3-20).

[31] Initially, the Appellant said that he did not remember anything. However, he did say that it was he who filled out his claimant report cards (page GD3-20).

[32] The Appellant was confronted with the table showing the income earned while working for the two employers, and the Employment Insurance benefits received during that period. He explained that he had not declared his earnings because he needed money. He said that he had declared bankruptcy in the past, that he had a lot of money problems, that his spouse had gone back to school to finish her Secondary V level, and that his salary with FRONTENAC EXPRESS INC. was not very high (page GD3-20).

[33] He also said that he had no drug, alcohol or gambling problems. The Appellant stated that he was prepared to reimburse the money by making a payment arrangement (page GD3-20).

Earnings

[34] The Commission argued that the money received by the Appellant from the two employers, FRONTENAC EXPRESS INC. and 9137-7317 QUÉBEC INC., constituted earnings within the meaning of subsection 35(2) of the Regulations.

[35] Consequently, pursuant to subsection 36(4) of the Regulations, the Commission allocated those earnings to the weeks in question.

[36] The allocation of that income gave rise to an overpayment of \$15,636.

False statements, penalty and notice of violation

[37] The Commission concluded that the Appellant had knowingly made false or misleading statements (page GD3-20).

[38] The Commission maintains that it has demonstrated that the Appellant knowingly made twenty-seven (27) false statements for which he submitted fifty-one (51) report cards requesting benefits.

[39] The Commission imposed a penalty of \$4,691 (page GD3-23). The penalty amount was calculated based on the net amount of the overpayment resulting from acts or omissions pursuant to paragraph 38(2)(a) of the Act.

[40] Because a penalty was imposed on the Claimant, a notice of very serious violation was issued to him under subsection 7.1(4) of the Act (page GD3-24).

Period from February 20, 2011, to November 12, 2011

[41] The Appellant filed a claim for Employment Insurance benefits effective November 14, 2010 (pages GD3-34 to GD3-40).

[42] On February 20, 2012, employer TRANSPORT EXPLORER INC. issued a Record of Employment indicating that the Appellant had worked between February 25, 2011, and February 9, 2012 (page GD3-41).

[43] On February 18, 2013, an investigator met with the Appellant to determine why he had not declared his income from working with the employer TRANSPORT EXPLORER INC for the period from February 25, 2011, to February 9, 2012 (page GD3-51).

[44] The Appellant confirmed that he had worked for TRANSPORT EXPLORER INC. over the period in question and confirmed the amounts indicated on the Record of Employment (page GD3-51).

[45] However, the Appellant stated that he had not applied for benefits for that period. He stated that, even though his benefits were paid to him, he had not touched the money.

[46] The Appellant stated that it was his spouse who had filled out his report cards without his knowledge. He also stated that it was not the first time she had done so. According to him, the same situation had occurred in 2009 (page GD3-52).

[47] The Appellant revised his original statements about his undeclared earnings in 2009 and 2010. At the time, he had stated that he himself had filled out his report cards; now he states that that is false. He says that he does not remember why he lied to the investigator at the time.

[48] The Appellant explained that he separated from his wife in 2012 and that she was the one who managed the couple's finances (page GD3-52).

[49] The Appellant explained that, as a truck driver, he was always on the road and that he did not have the time to check his bank account. That explains, in his view, why he did not notice that the Employment Insurance benefits were being deposited directly into his account (page GD3-52).

[50] The Appellant stated that he did not intend to sue his former spouse for identity theft and that he would reimburse the amounts by making a repayment arrangement as soon as he received the new amount (page GD3-52).

Earnings

[51] The Commission concluded that the money received by the Appellant from TRANSPORT EXPLORER INC. constituted earnings within the meaning of subsection 35(2) of the Regulations.

[52] Consequently, in accordance with subsection 36(4) of the Regulations, the Commission allocated these earnings to the weeks in question.

[53] The allocation of these earnings gave rise to an overpayment of \$12,012.

False statements, penalty and notice of violation

[54] The Commission concluded that the Appellant had knowingly made false or misleading statements.

[55] The Commission maintains that it has demonstrated that the claimant knowingly made twenty (20) false statements for which he submitted thirty-seven (37) report cards requesting benefits.

[56] The Commission imposed a penalty of \$5,000 (page GD3-59). The penalty amount was calculated based on the net amount of the overpayment resulting from acts or omissions pursuant to paragraph 38(2)(a) of the Act.

[57] Because a penalty was imposed on the claimant, a notice of subsequent violation was issued to him under subsection 7.1(4) of the Act (page GD3-59).

Evidence at the hearing. The salient points of the Appellant's testimony are as follows:

[58] He was living with his former spouse and he trusted her. She was the one who managed the day-to-day household affairs.

[59] He admitted to making false statements in 2009 solely [translation] "to avoid washing his dirty linen in public."

[60] The money was deposited directly into his account, he used the automatic teller to make withdrawals, and he never looked at his balance. He never noticed the payment of Employment Insurance benefits in addition to his wages.

[61] He met with inspector Karl Larivière from Sorel-Tracy and ended up filing a fraud complaint, which can be found on page GD2-13.

SUBMISSIONS OF THE PARTIES

[62] The Appellant pointed out that:

- a) he is not responsible for the problems caused by his former spouse or for the fact that she used his identity to make false statements;
- b) he never gave his former spouse his telephone access code. His code was tucked away in a folder in a filing cabinet. It was easy for his former spouse to search through his office and find his access code;
- c) he loved his spouse and he trusted her completely. He did not think that she would use the same scheme a second time;
- d) following a second investigation, he left his spouse and found himself virtually ruined;
- e) the first time he had not filed a complaint against his former spouse since an acquaintance had told him that it was not worth it because she was on social assistance;
- f) he has not yet received the police report regarding his former spouse;
- g) the Appellant maintains that the Commission is partly responsible for his debt because, in 2011, it continued to pay him benefits without his knowledge while he was travelling in the United States as a truck driver. If a claimant crosses the border, Employment Insurance is alerted. In his case, the Commission never took action to stop payment of his benefits.

[63] The Respondent Commission argued that:

- a) section 52 of the Act provides that the Commission may reconsider a claim for benefits within 36 months after the benefits have been paid or would have been payable;
- b) the reconsideration period is extended to 72 months after the benefits have been paid or would have been payable if the Commission finds that the claimant made a false or misleading statement;
- c) at the time of the first investigation, the Appellant admitted to making false statements;
- d) a claimant is always responsible for his access code and, if one or more false statements are made without their knowledge and they take no action to ensure that the person who used their identity is tried for the identity theft, the claimant remains responsible for the debts, as well as for the related false or misleading statements;
- e) at no point during the first investigation did the Appellant suggest that his spouse had possibly filled out the report cards without his knowledge;
- f) at the time of the first investigation, the Appellant admitted to acting knowingly because he had already declared bankruptcy, his spouse was not working because she had gone back to school, and they consequently needed money. The Commission had deemed these factors to be extenuating circumstances and had reduced the penalty to 30% of the net overpayment;
- g) the Appellant, who had been informed a first time about an overpayment of \$20,327, did nothing to ensure that his spouse was held responsible for the false statements in his file;
- h) the Claimant then did nothing to change his access code or even to revert his bank account to a personal one. In doing so, he remained passive in the face of the Commission's accusations. It was only when he saw that the Commission was

upholding its position about his owing the debt that he finally decided to file a complaint against his former spouse;

- i) the Commission concluded that he had knowingly made false statements because the evidence in this case shows, objectively, that offences were committed in the Claimant's name, that the Commission was misled, that benefits were paid, and that, at the time of the declaration, the Claimant and/or his former spouse knew that he or she was not properly reporting the facts;
- j) for all these reasons, the Commission considers that the penalties are warranted.

ANALYSIS

Allocation of the earnings

[64] The evidence in the docket is clear. While he was receiving benefits, the Appellant was working without declaring his income:

- for FRONTENAC EXPRESS INC from September 2009 to January 2010;
- for 9137-7317 QUÉBEC INC. from January 2010 to November 2010; and
- for TRANSPORT EXPLORER from February 2011 to February 2012.

[65] The amounts paid to the Appellant by these three employers were wages that constituted earnings within the meaning of the Act. Consequently, this money must be allocated in accordance with sections 35 and 36 of the Regulations.

[66] I have not identified any errors in the allocation made by the Commission. As a result, I find that the Commission properly allocated the amounts to the weeks and periods in question.

[67] Section 43 of the Act provides that anyone who has received benefits to which they were not entitled must repay them. Consequently, reimbursement of the overpayment for each of these periods is warranted.

False or misleading statements and penalty

[68] At the outset, the Tribunal must reiterate certain case law principles regarding false statements.

[69] In order to be subject to a penalty under paragraph 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 (*Mootoo*, A-438-02).

[70] In *Canada (A.G.) v. Gates*, [1995] and *Canada (A.G.) v. Purcell*, [1996], this Court made clear that the knowledge of the applicant concerning the falsity of the offending statement had to be decided on a subjective basis. It is up to the trier of fact to assess the claimant's knowledge.

[71] If, in the end, the trier of fact is of the view that the claimant really did not know that the representation was false, there is no violation of subsection 33(1) of the Regulations (*Canada (P.G.) v. Purcell*, 1996).

[72] Did the Claimant knowingly make false or misleading statements within the meaning of the Act when filling out his Employment Insurance reports for the periods in question?

[73] The evidence in the docket shows that erroneous information was given on the report cards for all the periods in question in this case.

[74] The Appellant maintains that it was his former spouse who filled out his report cards without his noticing.

[75] What is more, he says that his former spouse did so from September 2009 until the end of 2010 and then again from February 2011.

[76] According to the Appellant, he never made false statements because his report cards were produced by a third party, without his knowledge.

[77] I note that the Commission met with the Appellant a first time in January 2011 for the purpose of investigating his report cards from 2009 to 2010.

[78] The Appellant said at first that he had filled out his report cards himself and not declared his earnings during this first investigation (page GD3-20).

[79] On February 6, 2013, an investigator again met with the Appellant to review his report cards, this time for the period from February 2011 to February 2012. It was only then that he said that he had been the victim of fraud by his former spouse.

[80] In the Appellant's new version, it was again the same person who had acted without his knowledge, made false statements and pocketed the money for all the periods in question.

[81] If the Appellant is to be believed, for almost three years, his wages as a truck driver and Employment Insurance benefits were simultaneously deposited into his bank account, but he was not aware of it because he never looked at his balance and never checked anything.

[82] I note that, following the first investigation in early 2011, the Appellant did not react or file a complaint. It was only in 2013 that he finally filed a fraud complaint.

[83] In the appeal file submitted to the Tribunal, I note a copy of a Sureté du Québec incident ticket (page GD2-13). A handwritten note identifies the ticket as a fraud complaint, but the ticket indicates nothing more than the name of a police officer, a telephone number and a file number. There is no indication that this ticket is related to a fraud complaint as the Appellant claims.

[84] Moreover, even if the Appellant had shown clearly that he had filed a fraud complaint, that does not prove that his complaint is founded or that he was indeed the victim of the fraud he describes.

[85] At the hearing, the Appellant stated that he had not received the police report proving that he had made a complaint against his former spouse.

[86] When the Appellant filed his appeal with the Tribunal in August 2013, the ticket was in the file. The hearing took place in May 2014, ten months later, and the Appellant still had no document or evidence of any kind to support his claim. At the very most, he can provide

the name of a police officer. In my view, that is clearly insufficient to support his testimony. And I consider that the Appellant had all the time he needed to put his evidence together.

[87] Having reviewed the documentary evidence and heard the Appellant's testimony, I dismiss his claims that he was an innocent victim and that false statements were made in his name without his knowledge.

[88] The story presented by the Appellant is farfetched, a story where the implausible gives way only to the fantastic. The Appellant did not convince me and I do not find him credible.

[89] The Appellant did not meet the burden of proof on him to demonstrate that he did not knowingly make false statements.

[90] The evidence is precisely to the contrary.

[91] The Court has established the principle according to which much more weight must be given to initial, spontaneous statements than to subsequent statements made following an unfavourable decision by the Commission (*Marc Lévesque*, A-557-96; *Clinique Dentaire O. Bellefleur*, 2008 FCA 13 – A-139-07).

[92] This is a principle of case law that I will apply here. I accept the original version of the statements that the Appellant made in an interview with a Commission investigator on February 9, 2011 (page GD3-20). The Appellant admitted then to having failed to declare his employment income in 2009 and 2010 because he needed money.

[93] I find that the same situation occurred with regard to his report cards in 2011.

[94] The Appellant knew that he needed to declare his earnings and he failed to do so. He knew subjectively that his report cards were false.

[95] The Tribunal finds that the Appellant knowingly made false statements during the above-stated periods and that they amount to acts or omissions within the meaning of section 38 of the Act.

Penalty

[96] Given that the Appellant knowingly made false or misleading statements, the imposition of a penalty is warranted.

[97] The Federal Court of Appeal has confirmed that the Commission has discretion to impose that sanction, but with limits on the meaning of the word discretion.

[98] In *Gagnon* (A-52-04), the Federal Court of Appeal confirmed that the Commission is justified in having its own guidelines on the imposition of penalties, in order to guarantee some consistency nationally and avoid arbitrariness in such matters. In *Gagnon* (FCA, A-52-04), paragraph 23 reads as follows:

The *Digest of Benefit Entitlement Principles, Chapter 18 - False or Misleading Statements*, which contains these guidelines, goes to some lengths to tell the employment insurance agents that the penalty amounts, 100%, 200% or 300% of the claimant's weekly benefit, should not be applied mechanically. On the contrary, it is stated that the Commission must exercise its discretion and consider the particular circumstances of each claimant: see *Canada (Attorney General) v. Schembri*, [2003] FCA 463, at paragraph 10, where this Court quotes the following extract from the Digest:

Finally, it cannot be overemphasized that all extenuating circumstances must be fully documented on the file. This information is essential for providing explanations to the claimant and, especially, for the purposes of an appeal. Although the Commission has the discretion to impose a penalty, it still has to demonstrate that it properly exercised its discretion in light of all relevant considerations.

[99] In this case, the Commission considered a number of factors in calculating the first penalty imposed, including the extenuating circumstances of the Appellant's financial situation (page GD4-9).

[100] In the calculation of the second penalty, no extenuating circumstances were taken into account (page GD4-6).

[101] The Tribunal finds that the Commission properly exercised its discretion in setting the amount of the penalties for the periods in question, given that it took all the relevant factors into consideration.

Notice of violation

[102] Subsection 7.1(4) of the Act provides that a notice of violation may be issued when a claimant commits an act or omission for which a penalty was imposed.

[103] The classification of the violation depends on the amount of the overpayment that resulted from the act or omission in question.

[104] In this case, the Commission pointed out that it considered the impact of a notice of violation on the Appellant and explained why the two notices of violation were issued (pages GD4-16 and GD4-17).

[105] The first notice of violation was classified as very serious given the amount of the overpayment to be considered, and the second notice of violation was classified as subsequent.

[106] Here again, the Tribunal is of the view that the Commission properly exercised its discretion by taking all the relevant circumstances into account in issuing the notice of violation.

DECISION

[107] The appeal is dismissed on all the issues, namely:

For the benefit periods between September 27, 2009, and November 9, 2010

- I. Allocation of earnings: Appeal dismissed
- II. Imposition of a penalty for knowingly making false or misleading statements: Appeal dismissed
- III. Notice of violation: Appeal dismissed

For the benefit period between February 25, 2011, and February 9, 2012

- IV. Allocation of earnings: Appeal dismissed

V. Imposition of a penalty for knowingly making false or misleading statements: Appeal dismissed

VI. Notice of violation: Appeal dismissed

CONCLUSION

[108] The appeal is dismissed.

Claude Durand

A handwritten signature in black ink, appearing to read 'C. Durand', with a stylized, cursive script.

Member, General Division

DATE OF REASONS: August 21, 2014