Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

[TRANSLATION]

Citation: *A. C. v. Canada Employment Insurance Commission*, 2016 SSTGDEI 65

Tribunal File Number: GE-15-3047

BETWEEN:

A. C.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Normand Morin

DATE OF HEARING: May 4, 2016

DATE OF DECISION: May 6, 2016

REASONS AND DECISION

PERSON IN ATTENDANCE

[1] The initial hearing scheduled for January 26, 2016 was postponed, as was the hearing scheduled for March 29, 2016. A new hearing date was set for May 4, 2016.

[2] The Appellant, A. C., was present at the telephone hearing (teleconference) held on May 4, 2016.

INTRODUCTION

[3] December 23, 2013, the Appellant filed an initial claim for benefits that took effect on December 22, 2013. The Appellant reported having worked for the Employer, Sécurité des Deux-Rives Ltée, from September 1, 2013 to December 20, 2013 inclusive (Exhibits GD3-3 to GD3-11).

[4] On June 1, 2015, the Canada Employment Insurance Commission (the "Commission") notified the Appellant that it had reconsidered his claim for benefits for which the start date was December 22, 2013. It informed the Appellant that it could not pay him regular employment insurance benefits as of March 30, 2014 because he had voluntarily stopped working for the Employer, Sécurité des Deux-Rives Ltée, on April 4, 2014, without just cause under the *Employment Insurance Act* (the "Act"). The Commission concluded that the Appellant had knowingly made a false representation and it had imposed a penalty of $1,362.00 on him. The Appellant was also sent a Notice of Violation in which the violation was classified as "very serious" (Exhibits GD3-46 to GD3-48).

[5] On July 10, 2015, the Appellant filed a Request for Reconsideration of an Employment Insurance Decision (Exhibit GD3-53).

[6] On August 14, 2015, the Commission notified the Appellant that it was upholding the decision in his case dated June 1, 2015 regarding the penalty that had been imposed on him and the Notice of Violation that had been issued (Exhibits GD3-62 and GD3-63).

[7] On September 22, 2015, The Appellant filed a Notice of Appeal to the Employment Insurance Section of the General Division of the Social Security Tribunal of Canada (the "Tribunal") (Exhibits GD2-1 to GD2-5).

[8] This appeal was heard by teleconference for the following reasons:

a) The fact that the Appellant will be the only party present at the hearing;

b) This method of proceeding respects the requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit (Exhibits GD1-1 to GD1-4).

ISSUES

[9] The Tribunal must determine if the appeal of the Commission's decision has merit with regard to the following two issues:

a) The imposition of a penalty on the Appellant under section 38 of the Act for having committed an act or omission by knowingly making false or misleading representations;

b) The issuing of a notice of violation to the Appellant after a penalty was imposed on him for having committed an act or omission and issued to him under section 7.1 of the Act.

THE LAW

[10] With respect to the imposition of "penalties", section 38 of the Act states as follows:

> . . . (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 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*). . . . (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 of the deduction from the claimant's benefits 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 deduction had not been made 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).

[11] Concerning the increase in the "number of hours that an insured person" requires, subsection 7.1(1) provides as follows:

> (1) The number of hours that an insured person requires under section 7 to qualify for benefits is increased to the number set out in the following table in relation to the applicable regional rate of unemployment if the insured person accumulates one or more violations in the 260 weeks before making their initial claim for benefit. . . . (2) The number of hours that an insured person who is a new entrant or re-entrant to the labour force requires under section 7 to qualify for benefits is increased if, in the 260 weeks before making their initial claim for benefit, the person accumulates (*a*) a minor violation, in which case the number of required hours is increased to 1,138 hours; (*b*) a serious violation, in which case the number of required hours is increased to 1,365 hours; or (*c*) a very serious violation, in which case the number of required hours is increased to 1,400 hours. . . . (2.1) A violation accumulated by an individual under section 152.07 is deemed to be a violation accumulated by the individual under this section on the day on which the notice of violation was given to the individual. . . . (3) A violation may not be taken into account under subsection (1) or (2) in more than two initial claims for benefits under this Act by an individual if the individual who accumulated the violation qualified for benefits in each of those two initial claims, taking into account subsection (1) or (2), subparagraph 152.07(1)(*d*)(ii) or regulations made under Part VIII, as the case may be.. . . (4) 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. . . . (5) 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. . . . (6) 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. . . . (7) 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.

TABLE

Regional Rate of Unemployment / Taux régional de chômage	Violation			
	minor / mineure	*serious* / grave	*very serious* / très grave	*subsequent* / subséquente
6% and under/ 6 % et moins	875	1050	1225	1400
more than 6% but not more than 7%/ plus de 6 % mais au plus 7 %	831	998	1164	1330
more than 7% but not more than 8%/ plus de 7 % mais au plus 8 %	788	945	1103	1260
more than 8% but not more than 9%/ plus de 8 % mais au plus 9 %	744	893	1041	1190
more than 9% but not more than 10%/ plus de 9 % mais au plus 10 %	700	840	980	1120
more than 10% but not more than 11%/ plus de 10 % mais au plus 11 %	656	788	919	1050
more than 11% but not more than 12%/ plus de 11 % mais au plus 12 %	613	735	858	980
more than 12% but not more than 13%/ plus de 12 % mais au plus 13 %	569	683	796	910
more than 13%/ plus de 13 %	525	630	735	840

EVIDENCE

[12] The evidence in the file is as follows:

a) A record of employment dated January 13, 2014 indicates that the Appellant worked as a “security guard” for the Employer, Sécurité des Deux-Rives Ltée, from August 26, 2013 to December 20, 2013 inclusive and that he stopped working for that Employer for an “other” reason (Code K – Other) (Exhibit GD3-12).

b) A record of employment dated May 8, 2014 indicates that the Appellant worked as a "security guard" for the Employer, Sécurité des Deux-Rives Ltée, from January 13, 2014 to April 4, 2014 inclusive, and that he stop working for that employer as a result of a dismissal (Code M – Dismissal) (Exhibit GD3-13).

c) In an undated document titled, "Full Text Screen – Electronic Report – Internet Reporting Certification," the Commission pointed out that claimants who use the Internet Reporting System to file their reports receive written instructions on how to access the system, how to complete the reports and how to correct them when necessary (Exhibits GD3-14 to GD3-17).

d) On October 6, 2015, the Commission indicated that, for the period from March 23, 2014 to April 19, 2014, the Appellant's electronic Internet reports and the certification given by a Commission officer (copies of the questions and answers provided by the Appellant were reproduced on April 5 and 19, 2014) show that the Appellant reported not having stopped working for an employer during the period in question (Exhibits GD3-18 to GD3-32).

e) On May 5, 2014, the Appellant reported having worked 24 hours during the week of April 6 to 12, 2014 and not having worked or received earnings during the week of April 13 to 19, 2014. The Appellant answered "No" to the following question: [translation] "Did you stop working during the period covered by this report /these reports?" (Exhibits GD3-to GD3-35).

f) In a document titled "Request for Payroll Information / Demande de renseignements - Registres de paie", completed on September 12, 2014, the Employer, Sécurité des Deux-Rives Ltée, reported having paid amounts to the Appellant as earnings for the weeks beginning March 9, 2014 ($372.83), March 23 ($522,51) and March 30, 2014 ($389.04). The Employer indicated that the Appellant has been hired on June 5, 2012 and that his employment had terminated on April 4, 2014 (Exhibits GD3-36 to GD3-37).

g) In two similar letters, one dated December 9, 2014 and the other January 8, 2015, the Commission notified the Appellant that the information he had provided regarding his

earnings and the reason for his separation from employment did not correspond to the information that it had received from the Employer, Sécurité des Deux-Rives Ltée, for the work weeks beginning September 2, 2012 and October 7, 2012. The Commission asked the Appellant to provide it with a form explaining the reason why he had not reported all of his earnings and the reason for his separation from employment by December 24, 2014 in one case (letter of December 9, 2014) and by January 22, 2015 in the other case (letter dated January 8, 2015). The Appellant did not respond to these requests (Exhibits GD3-38 to GD3-45).

h) In a document dated June 6, 2015 and reproduced on October 6, 2015 providing details on the notice of debt (DH009), the total amount of the Appellant's debt was established as $13,810.00 (Exhibit GD3-49).

i) An undated document regarding the rationale used to support the decision concerning the penalty, the Commission explained the elements that it had taken into consideration and the calculations made to establish the amount of the penalty imposed on the Appellant as $1,362.00. The Commission explained that the amount of the penalty that it can impose for each act or omission may not exceed three times the rate of the claimant's weekly benefits under subsection 38(2) (a) of the Act. The Commission mentioned that the Appellant had no history of false representations (Exhibit GD3-50).

j) In an undated document providing the rationale for its decision on the violation, the Commission explained that the Appellant had not provided valid reasons to explain his false representation and no additional condition or factor appears in the file. The Commission also stated that it had exercised its discretion judicially in issuing the Notice of Violation to the Appellant because it had taken into consideration all of the circumstances and factors related to the case. It indicated that it did not consider the decision to be excessive or too severe (Exhibit GD3-51).

k) On July 10, 2015, the Appellant explained that he had not left his employment voluntarily but rather had been dismissed by his employer, Sécurité des Deux-Rives Ltée, on December 9, 2014. He indicated that he had been suspended by the Bureau de la sécurité privée on April 4, 2014 (Exhibit GD3-53).

l) On August 12, 2015, the company Gardaworld (Groupe de Sécurité Garda Inc.) sent the Commission a copy of the following documents:

i. Letter from the Bureau de la sécurité privée (BSP), addressed to the Appellant and dated March 14, 2014, notifying him that it planned to proceed with the cancellation of his security guard licence under subsection 30(2) of the *Private Security Act* (PSA) (Exhibit GD3-55);

ii. Letter from the Bureau de la sécurité privée (BSP), addressed to the Employer, Sécurité des Deux-Rives Ltée, dated April 4, 2014, notifying it that the Appellant's security guard licence had been cancelled (Exhibit GD3-56);

iii. Letter from the Employer, Sécurité des Deux-Rives Ltée, addressed to the Appellant and dated April 7, 2014, notifying him that his employment was being terminated as of April 7, 2014 since his security guard licence had been cancelled by the Bureau de la sécurité privée since April 4, 2014 (Exhibits GD3-57 and GD3-58).

[13] The following evidence was adduced at the hearing:

a) The Appellant explained that in April 2014 his security guard licence had been suspended for a period of one year by the Bureau de la sécurité privée (BSP) because of personal problems (Exhibits GD3-55 and GD3-56). A few days after his licence had been suspended, he filed a request for an appeal to the BSP to obtain a reconsideration of his file and to have his licence reinstated. He indicated that he had complied with the 20-day period allocated to appeal the decision by the BSP and that he had called regularly to determine the status of his file. He indicated that a hearing had taken place in July 2014 and that he had been told at that time that he would find out the results in about three weeks, given that the school year was about to start. He explained that he had waited 89 days before being able to obtain a response to his request for reconsideration but that the response had been negative (Exhibits GD3-59 to GD3-61).

b) He explained that when his licence suspension was lifted on December 12, 2014, he contacted the Employer (Mr. B. L.) to inform him that he was ready to return to work.

The Appellant stated that he had learned at that time that his file had been closed and that he was no longer employed by this employer. He explained that he subsequently received a letter from Employment Insurance notifying him that he had made a false representation because he had not indicated that he had stopped working for this employer. The Appellant stated that his employer had asked him to come into the office to open his file but that that action had not resulted in him being rehired and he had found other employment (Exhibits GD3-59 to GD3-61).

c) The Appellant stated that he did not remember having reported to the Commission that he had received his record of employment (Exhibits GD3-13 and GD3-59). He said that he did not receive his record of employment but that it had been sent directly by the Employer to the Commission. The Appellant said that he did not really understand how he could have told the Commission that he had "definitely received" his record of employment but he did not have it with him (Exhibit GD3-59). He indicated that he did not remember making such a statement. The Appellant underscored that even if he had received it, he had not paid attention to this document and had not seen the "box checked" (i.e.: dismissal).

d) Concerning the deposit of his vacation pay ($1,482.46) in his bank account after his dismissal, the Appellant indicated that he could not say what it was. He explained that he goes into his account, he takes out money or pays his bills and, as for the rest, he lives on it (Exhibits GD3-13 and GD3-59 to GD3-61).

e) The Appellant stated that he had not received the letter of termination of employment dated April 7, 2014 sent to him by the Employer (Exhibit GD3-57). He pointed out that he had not communicated with his employer during the period from April 14, 2014 to December 12, 2014. The Appellant clarified that the address on the letter was correct (Exhibits GD3-57 and GD3-59 to GD3-61).

f) He indicated that he had received the letter from the Bureau de la sécurité privée (BSP) notifying him that his licence was going to be suspended (advance notice of cancellation dated March 14, 2014). He explained that it was that letter that enabled him to appeal to have his licence reinstated (Exhibit GD3-55).

g) The Appellant stated that he had not responded to the letters sent to him by the Commission, those of December 9, 2014 and January 8, 2015, in which it asked him to clarify the reasons for his separation from employment with the Employer, Sécurité des Deux-Rives Ltée, because he had not received them (Exhibits GD3-38 to GD3-45 and GD3-59 to GD3-61).

h) He indicated that he had not reinstated his licence because he did not have the heart or the courage to take the necessary action. He stated that he had had too many misadventures related to his licence and that his situation had demoralized him and gotten him down.

PARTIES' ARGUMENTS

[14] The Appellant made the following observations and submissions:

a) The Appellant indicated that, with the cancellation of his security guard licence, he was no longer able to work as a security guard or in that field of employment. He stated that, to his knowledge, despite the cancellation of his licence by the Bureau de la sécurité privée (BSP) on April 4, 2014, he was still employed with the Employer, Sécurité des Deux-Rives Ltée. The Appellant explained that the BSP issues the security guard licence but that it is a security agency that hires the agents which, in his case, was the Employer, Sécurité des Deux-Rives Ltée. The Appellant pointed out that he was waiting to see if he would be able to have his licence reinstated and to continue to work up until he obtained a response in December 2014 to his request for reconsideration (Exhibits GD3-59 to GD3-61).

b) The Appellant stated that he really did not know that he had been dismissed by his employer. He did not learn of it until December 2014 when the Commission communicated with him to explain that he had been dismissed by his employer. He argued that even though he was unable to work for it, he believed that he was still employed by the company and did not think that his file had been closed and that he would not be able to return to work for that employer. He stated that, in his mind, he was still an employee of Sécurité des Deux-Rives Ltée and that he was waiting for a decision

from the court to have his licence reinstated and return to work. He stated that he had not received the written notice of termination of employment (Exhibit GD2-3).

c) The Appellant argued that he had not indicated that he had stopped working for an employer on his reports because he did not believe that that was the case since he was contesting the decision by the Bureau de la sécurité privée (BSP). The latter had suspended his security guard licence and he believed that he was still employed by the Employer, Sécurité des Deux-Rives Ltée (Exhibits GD2-3 and GD3-59 to GD3-61).

d) The Appellant explained that he had answered "No" to the question: [translation] "Did you stop working during the period covered by this report/these reports?" in the declarations made to a Commission officer on May 5, 2014 because he had misinterpreted this question, had not thought about it before answering, had answered automatically and had always answered the same thing without giving the question much thought. He mentioned that it was a matter of a lack of attention on his part. He stated that [translation] "a lack of attention is expensive" (Exhibits GD3-33 to GD3-35).

e) He explained that he had not reported the vacation pay he had received ($1,482.46) because he was not aware that that sum had been deposited in his bank account. He stated that he did not know that he had been paid vacation pay (Exhibits GD3-59 to GD3-61).

f) The Appellant stated that he had worked for the Employer, Sécurité des Deux-Rives Ltée, for a period of six years. He explained that, believing he was still an employee of that employer, he had answered the questions on his reports as he had been doing for six years, at the same times and according to the following cycle: work, separation from employment, unemployment, return to work, call, sending of the separation from employment. He stated that he had continued to follow the same routine. He explained that he received his separation from employment at the same time every year and that he had not paid attention to the questions he had been asked and to the representations he may have made, and he believed that he was still employed by his employer. The Appellant argued that this was not a voluntary act on his part, while indicating that he had not paid attention to his affairs and should have informed himself.

[15] The Commission made the following observations and submissions:

a) It explained that, under section 38 of the Act, it may impose a penalty for any false representation made knowingly by the claimant. The Commission specified that "knowingly" means that it can reasonably conclude that the claimant knew that the information he was providing was false when he provided it or that he failed to report certain information. It submitted that there is no element of intent in this consideration (Exhibit GD4-5).

b) The Commission explained that the onus was on it to prove that there was a misrepresentation. It explained that once it can reasonably conclude that benefits were paid as a result of an act or omission, the onus then shifts to the claimant or the employer to prove that events can be interpreted as having occurred unintentionally. The Commission specified that the act or omission must be proven on the balance of probabilities standard. It submitted that it is not enough simply to disbelieve a claimant who claims to be innocent. The Commission explained that to reach the conclusion that there was a false representation made knowingly, the evidence must show that (1) objectively there was an act or omission, (2) the false representation mislead the Commission, (3) that false representation led to the payment of actual or potential benefits to which the claimant was not entitled, and (4) at the time that the representation was made, the claimant knew that he was not properly reporting the facts (Exhibit GD4-5);

c) It submitted that it had demonstrated that the Appellant made a false representation when he completed his report for the period from March 23 to April 5, 2014 indicating that he had not stopped working (Exhibits GD3-19 to GD3-27 and GD4-5).

d) The Commission stated that while the notice of dismissal had been sent to the Appellant on April 7, 2014, he had known that his licence would be cancelled because he stated that he had contested the cancellation (Exhibit GD3-59). It explained that the Appellant could not have indicated that he had stopped working on his next report, for the period from April 6 to 19, 2014, because he had not reported earnings and the question as to

whether he had stopped working was not asked (Exhibits GD3-27 to GD3-32 and GD4-5).

e) It stated that the Appellant had, however, contacted it on May 5, 2014 to correct his report for the period from April 6 to 19, 2014. The Commission underscored that the Appellant had then had the opportunity to inform it that he had stopped working but he had answered "No" to question: [translation] "Did you stop working during the period covered by this report/these reports?" (Exhibit GD3-34). It explained that, by then, the Appellant had not been working for a month and he had to have known that he had stopped working. In the Commission's view, even though the Appellant had claimed that he thought he had only been suspended (Exhibit GD3-59), the fact remains that he had stopped working. It underscored that he had not been asked if he had been dismissed but if he had stopped working, to which he should have answered "Yes" (Exhibit GD4-5).

f) The Commission argued that the Appellant knew that he was making a false representation by answering that he had not stopped working. It explained that, when he made his claim, the Appellant had been told to "notify us of any separation from employment and reason for the separation" (Exhibit GD3-7). The Commission mentioned that the Appellant had also been told that "If you knowingly withhold information or make a false or misleading statement, you have committed an act or omission that could result in an overpayment of benefits as well as severe penalties or prosecution" (Exhibit GD3-8). It stated that the Appellant had accepted his rights and responsibilities after having read and understood them (Exhibit GD3-8) (Exhibit GD4-6).

g) It added that, if the Tribunal finds that a penalty is justified, it must then determine whether the Commission exercised its discretion judicially when setting the amount of the penalty (Exhibit GD4-6).

h) The Commission explained that, as of June 1, 2005, it had adopted the following policy regarding the calculation of penalties: for a first act or omission, the amount of the penalty may be up to 50% of the amount of the overpayment arising from that act or

omission. For a second act or omission, the amount of the penalty may be up to 100% of the overpayment. For a third and subsequent act or omission, the amount of the penalty may be up to 150% of the overpayment. The Commission explained that these are maximums that it has set by policy and that the amount of the penalty is calculated only after considering all of the mitigating circumstances (Exhibit GD4-6).

i) It indicated that, as of June 1, 2015, it had adopted the following policy for calculating penalties when a benefit period could not be established or was cancelled because the record of employment was inaccurate: for a first act or omission, the amount of the penalty may be up to one time the number of acts or omissions multiplied by the maximum benefit rate in effect at the time the act or omission was committed. For a second act or omission, the amount of the penalty may be up to two times the number of acts or omissions multiplied by the maximum benefit rate in effect at the time the act or omission was committed. For the third or subsequent act or omission, the amount of the penalty may be up to three times the number of acts or omissions multiplied by the maximum benefit rate in effect at the time the act or omission was committed. It explained that these are maximums that it has set by policy and that the amount of the penalty is calculated only after considering all of the mitigating circumstances (Exhibit GD4-6).

j) The Commission argued that it had exercised its discretion judicially given that it had considered all of the circumstances relevant to the case at the time it set the amount of the penalty. It indicated that the amount of the net overpayment was $12,347.00 (all benefits that the Appellant had received since the effective week of his dismissal). The Commission stated that this was the Appellant's first act. It explained that the penalty could have been set at 50% of the overpayment or $6,174.00, but that the maximum for a first act or omission is $5,000.00. The Commission explained that paragraph 38(2)(a) of the Act states that the penalty that it can impose for each act or omission may not exceed three times the claimant's rate of weekly benefits: one false representation X (3 X the rate of $454.00) = $1,362.00. The Commission indicated that, under paragraph 38(2)(a) of the Act, the penalty imposed on the Appellant was $1,362.00 (Exhibit GD3-50) (Exhibit GD4-7).

k) It also explained that as of July 8, 2010, a notice of violation is no longer automatically issued when it imposes a penalty, issues a letter of warning or undertakes prosecution. The Commission stated that when the decision is made to impose a penalty because of a false representation, it must determine if a notice of violation must be issued or not pursuant to subsection 7.1(4) of the Act. It explained that all mitigation circumstances should be considered when making the decision to issue a notice of violation. It added that, another element to be considered is the overall impact of issuing a notice of violation to the Appellant, including his ability to make a future claim for benefits (Exhibits GD4-7 and GD4-8).

l) The Commission explained that in this case, the discovery of a false representation led to an overpayment of $12,347.00 (Exhibit GD3-49) and consequently, notice of a very serious violation was issued to the Appellant. It stated that subsection 7.1(5) of the Act classifies violations based on the severity of the act or omission and that the violation is classified strictly on the basis of the amount of the overpayment arising from the act or omission in question. The Commission underscored that the amount of the penalty is not taken into consideration when classifying a violation (Exhibit GD4-8).

m) It argued that it had exercised its discretion judicially by making the decision to issue a notice of violation. The Commission stated that after considering the overall impact of issuing a notice of violation to the Appellant, including the mitigating circumstances, previous violations and the impact of the notice of violation on the Appellant's ability to qualify for future benefit claims, it determined that a notice of violation was applicable in this case (Exhibit GD3-51) (Exhibit GD4-8).

n) The Commission argued that to interfere in its decision, the Tribunal must determine that it did not exercise its discretion judicially when it issued the Notice of Violation to the Appellant (Exhibit GD4-8).

o) The Commission indicated that the Notice of Decision sent to the Appellant on June 9, 2015 [sic] [June 1, 2015] contained a writing error (Exhibits GD3-46 to GD3-48). It explained that that document stated: [translation] "We have reconsidered your claim for which the start date was December 22, 2013, but we are unable to pay

you regular employment insurance benefits as of March 30, 2014 because you voluntarily stopped working for Sécurité des Deux-Rives Ltée on April 4, 2014 without just cause under the Employment Insurance Act. It is our view that leaving your employment voluntarily was not the only reasonable alternative in your case" (Exhibit GD3-46), but that it should have read: "We have reconsidered your claim for which the start date was December 22, 2013, but we are unable to pay you regular employment insurance benefits as of April 6, 2014 because you were dismissed by the Employer, Sécurité des Deux-Rives Ltée, on April 7, 2014 due to your misconduct under the Employment Insurance Act." The Commission explained that in Desrosiers (A-128-89), the Federal Court of Appeal (the "Court") affirmed the principle established by the Umpire in the decision in CUB 16233 that a writing error which does not cause prejudice to the claimant is not fatal to the decision under appeal and confers on the Tribunal the right to maintain the Commission's decision (Exhibits GD4-2 and GD4-3).

ANALYSIS

Penalties

[16] The Court has affirmed the principle that a false or misleading representation is made only where claimants have subjective knowledge of the falsity of the information given or representations made by or about them (***Mootoo*, 2003 FCA 206; *Gates*, A-600-94**).

[17] In ***Gagnon* (A-52-04)**, the Court specified how the Commission may be justified in adopting its own guidelines on the imposition of penalties in order to guarantee some consistency nationally and avoid arbitrariness in such matters.

[18] The Court also confirmed the principle that the Commission has the discretion to impose a penalty under subsection 38(1) of the Act. Further, the Court stated that no court, umpire or tribunal is authorized to interfere with a penalty decision by the Commission as long as the Commission can prove that it exercised its discretion "judicially". In other words, the Commission must show that it acted in good faith, considered all the relevant factors and disregarded irrelevant factors (***Uppal*, 2008 FCA 388; *Tong*, 2003 FCA 281**).

[19] The evidence in the file shows clearly that the Appellant did not report that he had stopped working for the Employer, Sécurité des Deux-Rives Ltée, on April 7, 2014 (Exhibits GD3-13 and GD3-57).

[20] The Appellant indicated that he had received a letter from the Bureau de la sécurité privée (BSP), dated March 14, 2014, indicating that he no longer appeared to meet the legal conditions for the issuing of a security guard licence. In that letter, the Appellant was notified that the BSP intended to cancel his licence under section 30 of the *Private Security Act* (Exhibit GD3-55). The Appellant explained that, in the days following receipt of that letter, he had sought remedy in order to contest the decision that the BSP was going to make in his case.

[21] The Appellant also indicated that he had not communicated with the Employer between his last day of work on April 4, 2014 (Exhibits GD3-13 and GD3-37) and December 12, 2014, the date on which he learned that his file had been closed by that employer and that he was no longer employed by it.

[22] When his made his report on April 5, 2014, the Appellant answered in the negative the clear question that asked him [translation] "Did you stop working for an employer during the period from March 23 to April 5?" (script number 6101) and he confirmed his response to that effect (script number 6352) (Exhibit GD3-25).

[23] Moreover, in a declaration made to the Commission on May 5, 2014, the Appellant also answered "No" to the following question: [translation] "Did you stop working during the period covered by this report/these reports?" (Exhibit GD3-34).

[24] At that time, the Appellant had to have known that he had stopped working for the Employer, Sécurité des Deux-Rives Ltée, about a month earlier, when he answered this question in the negative. Furthermore, the Appellant had not been in communication with that employer since April 4, 2014.

[25] The Tribunal must reject the Appellant's argument that he believed that he was still employed by the Employer, Sécurité des Deux-Rives Ltée, even though his security guard licence had been cancelled since April 4, 2014 (Exhibits GD3-56 and GD3-57).

[26] The Tribunal does not consider credible the Appellant's explanation that he had answered "No" to the question [translation] "Did you stop working during the period covered by this report/these reports?" because he had misinterpreted the question, had not thought before answering, answered automatically or because of a lack of attention on his part. The Tribunal is of the view that the question is not unclear and does not leave room for interpretation.

[27] The Tribunal does not consider credible the Appellant's explanation that he had not reported the vacation pay he received because he was unaware that the amount had been deposited to his bank account or that he was unaware that a payment of that nature had been made to him (Exhibits GD2-3 and GD3-59 to GD3-61). At the hearing, the Appellant further indicated that he was unable to say what had happened in this regard.

[28] The Tribunal also finds contradictory the Appellant's statement that he had not received the record of employment from his employer, which indicates that he had been dismissed (Exhibit GD3-13). In a statement made to the Commission in May 2014, the Appellant said that he had "definitely received" this document but that he did not have it with him (Exhibit GD3-59). At the hearing, the Appellant said that he did not remember making such a statement and questioned the report to that effect (Exhibit GD3-59). The Tribunal considers that such a contradiction undermines the credibility of the Appellant's testimony.

[29] The Tribunal also finds contradictory the Appellant's statements concerning the cancellation of his security guard licence and the instructions issued by the Bureau de la sécurité privée in this regard (Exhibits GD3-55 and GD3-56).

[30] At the hearing, the Appellant stated that his licence had been suspended on April 4, 2014 for a period of one year. During the hearing, the Appellant stated that when his suspension had been lifted, in December 2014, he had contacted his employer with the goal of returning to work. The Appellant also explained that he had had to wait almost three months (89 days) to find out the result of his request for reconsideration from the Bureau de la sécurité privée, but that the reply had been negative.

[31] On this element, the Tribunal points out that none of the letters sent by the Bureau de la sécurité privée, either to the Employer or to the Appellant, make mention of a one-year

suspension (Exhibits GD3-55 and GD3-56). In this context, the lifting of his suspension in December 2014, mentioned by the Appellant at the hearing, does not appear likely, particularly since he himself indicated that he had been unable to have his licence reinstated.

[32] In the letter addressed to the Employer and dated April 4, 2014, the Bureau de la sécurité privée informed it that the Appellant's licence had been cancelled on April 4, 2014 and that the latter was now prohibited from performing private security activities (Exhibit GD3-56).

[33] In a letter addressed to the Appellant, dated April 7, 2014, the Employer notified him that his employment was terminated as of April 7, 2014 since his security guard licence had been cancelled by the Bureau de la sécurité privée since April 4, 2014 (Exhibit GD3-57).

[34] It is the view of the Tribunal that even if he did not receive the letter from his employer, dated April 7, 2014, the Appellant had the knowledge required concerning his responsibility to report that he had stopped work (Exhibits GD3-25 and GD3-34).

[35] In the Tribunal's opinion, the Appellant was well aware that he had to complete his reports accordingly, and it finds that he cannot avoid responsibility for the actions alleged against him. Subjectively, he knew that his representations were false (***Mootoo*, 2003 FCA 206; *Gates*, A-600-94**).

[36] When he filled out his reports, the Appellant received a message informing him that he should answer the questions posed to him correctly and also informing him that providing false information is fraud and that such action is punishable under the Act (Exhibits GD3-20 and GD3-29).

[37] When he made his claim for benefits, the Appellant also received the following message: "As a claimant of EI benefits, your responsibilities include: . . . notify us [the Commission] of any separation from employment and the reasons for the separation" (Exhibits GD3-6 and GD3-7).

[38] In short, the Tribunal believes that the Appellant knowingly made a false or misleading representation. The Tribunal also points out that ". . . the word "knowingly" is used to indicate only that the maker of the false statement must know it to be false" (***Gates*, A-600-94**).

[39] Furthermore, the case law holds that the Commission is not required to establish the "intent to deceive" to prove that a claimant knowingly made a false or misleading statement.

[40] The Commission explained that it had not accepted any mitigating circumstance in establishing the amount of the Appellant's penalty (Exhibit GD3-50).

[41] With respect to the issue of the imposition of a penalty under section 38 of the Act for having committed an act or omission by knowingly making a false or misleading representation, the Tribunal is of the opinion that the Commission's decision on this issue was warranted (Exhibits GD3-50 and GD4-5 to GD4-7) (***Gagnon*, A-52-04**).

[42] It is the Tribunal's view that the Commission exercised its discretion judicially because, in making its decision to impose a penalty on the Appellant, it took into account all of the relevant facts in the file (***Uppal*, 2008 FCA 388; *Tong*, 2003 FCA 281**).

[43] The appeal is without merit on this issue.

Notice of Violation

[44] In ***Gill*** (**2010 FCA 182**), based on its analysis of subsection 7.1(4) of the Act, the Court determined that in situations that require imposing a penalty, a notice of violation is not required or automatic under subsection 7.1(4) of the said Act, and the Commission may exercise its "discretion" in these circumstances.

[45] The Tribunal considers that the Commission's decision to issue a notice of violation to the Appellant under section 7.1 of the Act, following a penalty imposed on him for having committed an act or omission, is unwarranted in the circumstances.

[46] The Tribunal considers that it must give consideration to mitigating factors, similar to those considered in the determination of the amount of a monetary penalty to assess, in order to determine the relevance of issuing a notice of violation (***Gill*, 2010 FCA 182**).

[47] In this case, the Tribunal considers that the Commission issued the Notice of Violation to the Appellant without further reason.

[48] Rather than explaining why issuing the Appellant a notice of violation could be warranted in the circumstances, in addition to the penalty imposed, the Commission simply stated that a notice of violation, classified as "very serious", had been issued to the Appellant because of an overpayment of $12,347.00 (Exhibit GD4-8).

[49] By mentioning that subsection 7.1(5) of the Act classified the violation based on the seriousness of the act or omission and that the classification of the violation was based strictly on the amount of the overpayment arising from the act or omission in question, unless it is a subsequent letter of warning or violation, the Commission simply explained a characteristic of the notice of violation without showing the appropriateness of imposing such a measure (Exhibits GD3-51 and GD4-8).

[50] It explained that after considering the overall impact of issuing a notice of violation on the appellant, including the mitigating circumstances, previous violations and the impact of the notice of violation on the Appellant's ability to qualify for future benefit claims, it determined that a notice of violation (very serious violation) was applicable in this case (Exhibits GD3-51 and GD4-8).

[51] The Tribunal is of the view that even though the Commission found that the Appellant [translation] "had not given valid reasons to explain his false representation and no additional condition or factor appears in the file" (Exhibit GD3-51), it did not explain why its decision to issue a notice of violation was [translation] "not . . . excessive or too severe" (Exhibit GD3-51). The Tribunal also points out that the Commission indicated that it had taken into account the mitigating circumstances and that no evidence showed that there were "previous violations" by the Appellant. The Commission also stated that it was the "first act or omission" by the Appellant (Exhibit GD4-7).

[52] Despite the Commission's clarifications concerning the nature of the notice of violation, the general characteristics of such a notice and the fact that such a measure could be applicable to the Appellant, the Commission did not show how issuing such a notice was appropriate in this case.

[53] The Tribunal considers that in deciding to issue a notice of violation, the Commission did not exercise its discretion judicially. The Commission did not consider all of the facts relevant to the case when it decided to issue a notice of violation to the Appellant in addition to imposing a monetary penalty on him.

[54] In the view of the Tribunal, the Notice of Violation issued to the Appellant must not stand.

[55] On this issue, the appeal has merit.

CONCLUSION

[56] With respect to the two (2) issues brought before it, the Tribunal concludes as follows.

[57] With respect to the imposition of a penalty on the Appellant under section 38 of the Act for committing an act or omission by knowingly making a false or misleading representation, the appeal is dismissed.

[58] With respect to the matter of the Notice of Violation issued to him under section 7.1 of the Act, after a penalty was imposed on his for committing an act or omission, the appeal is allowed.

Normand Morin
Member, General Division – Employment Insurance Section