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

[TRANSLATION]

Citation: *H. B. v. Canada Employment Insurance Commission*, 2016 SSTGDEI 88

Tribunal File Number: GE-16-222

BETWEEN:

H. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Charline Bourque

HEARD ON: June 14, 2016

DATE OF DECISION: June 29, 2016

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

[1] None of the parties attended the hearing held in Sainte-Foy by videoconference.

[2] Subsection 12 (1) of the *Social Security Tribunal Regulations* provides 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 the Notice of Hearing.

[3] The Tribunal notes that the claimant personally signed the mail delivery receipt on May 12, 2016. The claimant did not attend the hearing on June 14, 2016. The Tribunal gave two decisions in the claimant's two other cases on June 20, 2016. Later, on June 21, 2016, the Tribunal forwarded an investigation request and report to the Commission (GD5).

[4] On June 22, 2016, the claimant contacted the Tribunal to inform it that he had missed the hearing on June 14 because he thought it had been scheduled for June 15, 2016. On the same day, the claimant sent an email informing the Tribunal that he did not attend the hearing on June 14 because he thought it was scheduled for June 16, 2016.

[5] The Tribunal considered the fact that there was no indication that the claimant had reported for a hearing on June 15 or 16, although he says he thought the hearing was scheduled on or other of these dates. The claimant was to have a hearing by videoconference and therefore had to report to the Service Canada Centre in Sainte-Foy. The Tribunal notes that neither the Service Canada Centre nor the claimant contacted the Tribunal to inform it of the claimant's presence. Moreover, the claimant waited until June 22 to contact the Tribunal with this information.

[6] Lastly, the Tribunal notes that the claimant provided different dates that he had thought were the dates of the hearing. During his contact with the Tribunal, the claimant said he thought the hearing was on June 15, and in his email, he said he thought the hearing was on June 16, 2016.

[7] Lastly, as mentioned earlier, the Tribunal is satisfied that the claimant received notice of the hearing. First of all, the claimant received and signed the mail delivery notice. Secondly, he voluntarily confirmed receiving a hearing date.

[8] The Tribunal also considered the mistake that the claimant said he made in the hearing date. The Tribunal notes the contradiction between the claimant's statements since he said he thought the hearing was on June 15, and then June 16, 2016, which affects his credibility. In any event, despite this contradiction, the Tribunal considers it the claimant's responsibility to notify the Tribunal of this mistake as soon as he was aware of it. Therefore, the claimant would have known by June 16, 2016 at the latest that he had missed his hearing, and had to contact the Tribunal as soon as possible, but instead he waited six days. Furthermore, since the claimant had to go in person to the Service Canada Centre, he could have asked someone to immediately contact the Tribunal.

[9] Therefore, the Tribunal is satisfied that the claimant received notice of the hearing and that it was permitted to proceed in his absence.

INTRODUCTION

[10] The Appellant filed an employment insurance claim starting December 23, 2012. On October 20, 2015, the *Canada Employment Insurance Commission* (the "Commission") informed the claimant that it could not pay him employment insurance benefits starting August 18, 2013 because he had voluntarily quit working for the Groupe Qualitas inc. on August 21, 2013, without good cause within the meaning of the *Employment Insurance Act* (the "Act"). Furthermore, the claimant had reported only a portion of his income from Groupe Qualitas inc. as earnings and vacation pay. The Commission adjusted his income for the weeks of January 13, 2013 to August 25, 2013. The Commission also found that the claimant had made 7 false statements and imposed a penalty of $854.00. A notice of "serious violation" was also issued.

[11] On November 12, 2015, further to the claimant's request for a reconsideration review, the Commission informed him that it was maintaining the decision concerning his earnings. The decision sent on December 29, 2014 was therefore upheld. The amount for the week of January 13, 2013 was corrected. The income reported by the employer was $275 and by the claimant,

$142. Furthermore, as the employer mentioned, the claimant is considered to have worked full weeks from August 4, 2013 to August 11, 2013.

[12] The Commission also notes in connection with the parental leave that the decision forwarded on December 29, 2014 was changed. Based on information obtained from the Quebec parental insurance plan (*Régime québécois d'assurance parentale* (RQAP)), the claimant was on parental leave during the weeks of June 9, 2013, June 16, 2013 and June 23, 2013. He was therefore not entitled to Employment Insurance benefits.

[13] The Commission also said that decisions regarding the penalty and violation had been upheld.

[14] The claimant appealed that decision to the *Social Security Tribunal of Canada* (the "Tribunal") on December 11, 2015. The appeal was heard by the videoconference hearing method for the following reasons:

a) The complexity of the issue or issues;

b) The information in the file, including the need for additional information.

c) The availability of videoconferencing where the Appellant resides.

d) 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 GD-1 to GD-4).

ISSUES

[15] The claimed is appealing a decision concerning the allocation of earnings under sections 35 and 36 of the *Employment Insurance Regulations* ("the Regulations").

[16] The claimant appealed a disentitlement to Employment Insurance benefits pursuant to section 76.09 of the Regulations because he was entitled to benefits under the *Régime québécois d'assurance parentale* (the "RQAP").

[17] The claimant is also appealing the imposition of a penalty under s. 38 of the *Employment Insurance Act* ("the Act") for making a misrepresentation that he knew was false or misleading.

[18] Lastly, the claimant is appealing a notice of violation issued to him pursuant to section 7.1 of the Act.

THE LAW

[19] Section 12 of the *Social Security Tribunal Regulations* states:

(1) 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.

(2) The Tribunal must proceed in a party's absence if the Tribunal previously granted an adjournment or postponement at the request of the party and the Tribunal is satisfied that the party received notice of the hearing.

Earnings

[20] Subsection 35(1) of the Regulations [version covering 2012-12-09 to 2013-01-05] states:

(1) The definitions in this subsection apply in this section.

> 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,
> >
> > (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.

[…]

[21] Paragraph 35(2) of the Regulations states:

(2) 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 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 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; […]

[22] Subsection 36(4) of the (sic) Act [Regulations] states:

(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.

[23] Subsection 36(9) the (sic) Act [Regulations] states:

> (9) Subject to subsections (10) to (11), 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.

Parental Leave

[24] Section 76.09 of the Regulations states:

(1) Subject to subsection (2), every claimant is disentitled to be paid benefits under section 22 or 23 of the Act if they are entitled to receive provincial benefits under a provincial plan.

(2) Subsection (1) does not apply if, at the request of the claimant, it is determined by the Commission that the amount of provincial benefits the claimant is entitled to receive under the provincial plan is not substantially equivalent to or greater than the amount of benefits that they are entitled to receive under section 22 or 23 of the Act.

(3) Every claimant who has received, or has applied for and is entitled to receive, provincial benefits under a provincial plan in respect of any week is disentitled to be paid benefits in respect of that same week under

a) (a) Part I of the Act, other than benefits under section 22 or 23 of the Act; or

b) the Employment Insurance (Fishing) Regulations.

(4) For greater certainty, subsections (1) to (3) apply in respect of a claimant who has applied for and is entitled to receive provincial benefits under a provincial plan even if the claimant, after making that application, ceases to reside in the province where that plan was established.

(5) For greater certainty, if two persons are caring for the same child or children and one of them is a claimant referred to in subsection (4),

a) subsections (1) to (3) apply in respect of the other person if that other person is an insured person; and

b) subsections 76.36(1) to (3) apply in respect of the other person if that other person is a self-employed person.

Penalty

[25] Section 38 of the Act [version in force from 2011-01-01 to 2011-12-14] stipulates:

(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).

Violations

[26] Subsections 7.1(4) to (7) of the Act [version in force from 2012-12-14 to 2013-01-05] state:

(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.

EVIDENCE

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

a) Claimant's report cards from January 13, 2013 to January 26, and from June 9, 2013 to August 31, 2013 (GD3-23 to GD3-80).

b) The record of employment issued by Groupe Qualitas inc. indicating a separation from employment on August 21, 2013 for the reason "other." The employer said in its comments that the reason concerned a move (GD3-81).

c) The investigation report dated July 21, 2014 indicates that the employer confirmed that the employee quit his job because he was moving to X. The employee had a position as a work site technician for an hourly wage of $19.63. A normal work week is 37.5 hours. If the employee had not quit his employment, he could have continued to work, especially considering that the time of year in question was the period with the most

hours of work. The employee was replaced. A correction was made to the date of the first day worked in record of employment #X, which should read January 16, 2013 and not January 7, 2013. After receiving the earnings report, the Commission contacted the employer to ask whether the employee had received vacation pay. The employer said that the employee received a gross amount of $771.32 in vacation pay. This will therefore be added to box 17A of the record of employment #W29311440 (GD3-82).

d) The employer sent the investigator a breakdown of the claimant's weekly earnings for 2013 (GD3-83 to GD3-85).

e) Request for employment information. The claimant said he returned to work on call from June to August. He does not work full time all the time. He said he made a mistake because his work week begins on Thursday and ends Wednesday. He said he made mistakes in calculating his hours of work because his hours were spread among various work sites (GD3-86/87).

f) The investigation report dated July 21, 2014 indicates that the claimant made his reports himself by Internet. He thinks he mistakenly entered his hourly wage, not the total amount of his earnings, i.e., the hours multiplied by his hourly rate. He thought that the Internet would perform the multiplication. In January, however, he performed the calculation. He did not remember. He added that it was difficult to calculate his hours because his pay period is every 15 days, and not on a calendar basis. Therefore, he cannot rely on his pay stubs. He said he left X because the humidity and was causing problems for his wife and his two children, aged 3 ½ and 1 year. His spouse has asthma and the children are mildly asthmatic. He said he did not consult a physician in Quebec, but did so in Morocco, in April 2013. He said that the physician did not advise him to leave X and that he has no medical certificate to support the fact that he had to quit his job to move to X. He said he moved to X on August 24, 2013. He said he found an apartment in July, about a month before quitting his job. He said he did not find work here. His spouse entered Université Laval to complete a bachelor's degree in business administration. She had been turned down for admission to the HEC in X. He said he arrived in X in 2007. Concerning his job searches in X, he said he does not know any

civil engineering employers. He did not search for work. He said he obtained a degree in Morocco in civil engineering technology. He said he did not leave his employment voluntarily, which is why he reported it as a work stoppage. He said he had no choice because his spouse was entering Université Laval. He said both of his children are in day care near Place de la Cité (GD3-89).

g) Email exchange (GD3-106 to GD3-114).

h) On November 2, 2015, the claimant told the Commission that he did not quit his employment, but he moved from X to X and had his company file forwarded. He was not called back to work after he transferred his file, but said he did not leave his employment. He reported moving to follow his wife, who was pursuing her education in X. The claimant said he provided copies of the emails sent back and forth between him and his employer to show that he had transferred his file. The copy is still not in the record, and the Commission agent asked the claimant to send them to him directly (GD3-119).

i) Certificate confirming double payments for the weeks of June 9, 2013, June 16, 2013 and June 23, 2013 (GD3-120).

j) On November 4, 2015, the claimant confirmed that he received benefits from the RQAP for the weeks from June 9, 2013, June 16, 2013 and June 23, 2013. He said he did not report these RQAP benefits because he did not know he was receiving them. He explained that he left the country between March and May 2013, and notified the RQAP. He also gave notice that he would be working in June 2013, but the RQAP paid him anyway. He said that an RQAP review is in progress.

k) On November 10, 2015, the claimant informed the Commission that the mistake was made by the RQAP, and that he had asked for an administrative review. He said he has not yet received a written response. The Commission's agent explained to the claimant that if the RQAP changed its decision and the claimant had to repay monies received from the RQAP, he would have to let us know so that the overpayment decision could also be reviewed (GD3-123).

l) Report on the Commission's decision (GD3-124 to GD3-126).

m) Explanation of the overpayment (GD3-130).

PARTIES' ARGUMENTS

[28] The Appellant presented the following arguments:

a) The reasons that the Appellant gave on his notice of appeal are illegible (GD2-2).

b) In his reconsideration request, the claimant said he moved to X to follow his wife and children.

c) He said that the employer corrected his number of hours of work after 3 weeks.

d) The claimant indicated on one of his employer's time sheets that when he entered the hours specified for each site, the employer would check and correct the entries based on the work reports, if a mistake was made. When he exceeded 40 hours a week (from Wednesday to Thursday), his hourly wage was multiplied by 1.5. He therefore entered work hours, not salary, in the system (GD3-103).

e) He said that on January 13, 2013, his income was $274.82, not $751.

f) He said he did not commit a violation.

[29] The Respondent presented the following arguments:

Allocation of earnings

a) Subsection 35 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. The Regulations also specify what types of income constitute earnings. Section 36 of the Regulations explains how earnings are to be allocated once they have been established; in other words, during which week they constitute earnings for the claimant.

b) Monies received from an employer can be considered earnings. Such amounts must be allocated unless they are covered by the exceptions set out in subsection 35(7) of the Regulations or are not from employment.

c) In this case, the claimant received money from the Group Qualitas inc. This money was paid to the claimant as wages and vacation pay. The Commission holds that this money constitutes earnings within the meaning of subsection 35(1) of the Regulations because it was remitted to the claimant in payment for hours worked. Therefore, pursuant to subsection 36(1) of the Regulations, it properly allocated such earnings to the period in which the services were rendered.

d) Also, the $771 was remitted to the claimant as vacation pay upon his separation from employment. This amount was allocated over two (2) weeks, starting the week of August 18, 2013, pursuant to subsection 36(9) of the Regulations.

e) The Commission points out that it disqualified him from benefit for voluntarily leaving his employment without just cause in the week starting August 18, 2013, and the claimant is therefore disentitled from benefits commencing that day.

f) The Commission states that the jurisprudence supports its decision. Bordeleau J. upheld the principle whereby amounts received from an employer are considered earnings and must therefore be allocated unless they are covered by the exceptions set out in subsection 35(7) of the Regulations or are not from employment (CUB 79974).

RQAP Disentitlement

g) Since January 1, 2006, the Government of Quebec pays benefits under the RQAP to parents in Quebec on the birth or adoption of a child. Pursuant to subsection 76.09 of the Employment Insurance Regulations, a person who receives benefits under the RQAP cannot receive Employment Insurance benefits at the same time and for the same purposes as those provided under the Quebec plan.

h) Herein, the claimant received benefits under the RQAP from June 9, 2013 to June 29, 2013 (GD3-120).

i) Therefore, the Commission considers the claimant disentitled to Employment Insurance benefits in this same period.

j) The claimant alleges that the RQAP paid these benefits to him by mistake, and that he requested a review of his case.

k) The Commission cannot pay benefits for the weeks in which the claimant received RQAP benefits. The fact that the claimant asked the RQAP for a review does not alter the Commission's decision.

Penalty

l) Under section 38 of the Act, the commission may impose a penalty for any misrepresentation made knowingly by the Appellant. "Knowingly" means that the Commission can reasonably conclude that the claimant knew the information he was providing was wrong when he provided it or that he failed to report certain. information. There is no element of intent in this consideration.

m) The Commission has the initial onus to prove that misrepresentation took place. Once the Commission can reasonably conclude that benefits were paid as a result of an act or omission, the onus shifts to the claimant or the Employer to show that the events can be interpreted as having occurred unintentionally. An act or omission must be proved on a balance of probabilities standard. It is not enough to simply believe a claimant who proclaims his innocence. To conclude that a misrepresentation was made knowingly, the evidence must show that: (1) objectively, an act or omission occurred; (2) it misled the Commission; (3) it led to the payment of actual or potential benefits to which the claimant was not entitled, and (4) at the time of the representation, the claimant knew that he was not properly reporting the facts.

n) In this case, the Commission states that he proved that the claimant made six (6) misrepresentations concerning the earnings he received from the employer and his RQAP disentitlement. In the notice of decision, the Commission identified seven (7) misrepresentations because the claimant had also failed to report his separation from employment, the subject of another appeal before the Tribunal.

o) The claimant knew that he was receiving more than $19 in salary for the weeks of June 23, 2013 to August 11, 2013, when his earnings were higher each week.

p) He justified his action by saying that this was his hourly wage, and given that he reported the exact number of hours, he assumed the computer system would perform the multiplication.

q) The Commission claims that this argument lacks credibility, since it was the claimant's third (3rd) claim, and he should have been familiar with procedures. Furthermore, at the start of his benefit period and in the first week after the June 2013 renewal, he reported his earnings by entering the gross total amount of his earnings from employment, not his hourly wage.

r) The Commission claims that the case law supports its decision. The Federal Court of Appeal has affirmed the principle that a false or misleading statement is made only when claimants have subjective knowledge of the falseness of the information given or representations made by or about them (Mootoo v. Canada (AG), 2003 FCA 206, Canada (AG) v. Gates, A-600-94).

s) Herein, in the five (5) weeks that the claimant reported nothing but his hourly salary, he must have noticed that he was sometimes working full weeks and receiving almost full benefits for the same weeks.

t) If the Tribunal finds that a penalty is justified, it must then determine whether the Commission exercised its discretion judicially in setting the amount of the penalty.

u) The Commission explained that on June 1, 2005 it had instituted the following policy on calculating penalties: for the first misrepresentation, a penalty not

exceeding 50% of the overpayment resulting from the misrepresentation; for a second misrepresentation, a penalty not exceeding 100% of the overpayment amount; for a third misrepresentation or more, a penalty not exceeding 150% of the overpayment amount. The Commission stated that these penalties reflected maximum amounts instituted as a matter of policy, and calculated after thorough consideration of all the mitigating circumstances.

v) The Federal Court of Appeal confirmed that the Commission is justified in adopting its own guidelines on imposing penalties in order to guarantee some consistency nationally and avoid arbitrariness in such matters. (Canada (AG) v. Gagnon, 2004 FCA 351).

w) The Commission argues that it exercised its discretion judicially by thoroughly considering the relevant circumstances at the time it determined the amount of the penalty.

x) The Commission erred in its original penalty calculation. The penalty was assessed at $845 (GD3-95). The overpayment associated with the misrepresentations is $2,424, and the 50%penalty should therefore be $1,212.

y) However, given that the error was made by the Commission, the amount of the penalty will remain $854, because the error benefits the claimant.

z) The Commission claims that the case law supports its decision. The Federal Court of Appeal affirmed the principle that the Commission has sole discretion in imposing a penalty provided under subsection 38(1) of the Act. Furthermore, the Court stated that no court, umpire or tribunal is authorized to intervene in respect of 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 (*Canada (AG) v. Uppal*, 2008 FCA 388, *Canada (AG) v. Tong*, 2003 FCA 281).

Violation

aa) Since July 8, 2010, notices of violation are no longer sent automatically when the Commission imposes a penalty, issues a letter of warning or takes legal action. When a decision is made to impose a penalty resulting from a misrepresentation, the Commission must determine whether a notice of violation is required or not under subsection 7.1(4) of the Act. Depending on whether a decision is made to issue a notice of violation, mitigating circumstances must be considered. Another factor to consider is the overall impact of issuing a notice of violation to the claimant, including the claimant's ability to make a future claim for benefits.

bb) Herein, discovery of the misrepresentations generated an overpayment that the Commission assessed at $2,436 in its initial decision.

cc) Therefore, a notice of "serious violation" was also issued to the claimant. Subsection 7.1(5) describes violations according to the severity of the misrepresentation. The description of a violation depends entirely on the amount of the overpayment resulting from the misrepresentation in question. The amount of the penalty is not a factor in describing the violation.

dd) The Commission argues that it exercised its discretion judicially in this case when it decided to issue a notice of violation. After considering the overall impact of issuing a notice of violation to the claimant, as well as mitigating circumstances, previous violations and the impact of a notice of violation on the claimant's ability to qualify on future claims, it determined that a notice of violation was appropriate (GD3-126).

ee) In this case, the Commission argues that it proved that the claimant made six (6) misrepresentations concerning earnings he received from the employer and his RQAP disentitlement. In the notice of decision, the Commission identified seven (7) misrepresentations because the claimant had also failed to report his separation from employment.

ff) The claimant knew that he had received more salary than $19 for the weeks of June 23, 2013 to August 11, 2013, when his earnings were higher each week.

gg) The claimant excuses his mistake by saying that this was his hourly wage, and given that he reported the exact number of hours he worked, he thought that the computer system would perform the multiplication.

hh) The Commission contends that this argument lacks credibility, since it was the claimant's third (3rd) claim, and he should have been aware of procedures. Furthermore, from the start of his benefit period and in the first week after the renewal in June 2013, the earnings he reported reflected his gross earnings from employment, not his hourly wage.

ii) The Tribunal may not intervene in a decision by the Commission unless it determines that the Commission failed to exercise its discretionary authority judicially when it issued the claimant the notice of violation.

jj) The Commission contends that the case law supports its decision. The Federal Court of appeal has confirmed the principle that the purpose of s. 7.1 of the Act is to prevent abuses of the Employment Insurance system by imposing an additional penalty on claimants who try defrauding the system. The Court also stated that the Commission has sole discretion to issue a notice of violation pursuant to s. 7.1(4) of the Act. The Tribunal and the Umpire have jurisdiction to determine whether the Commission exercised its discretion judicially in deciding to issue a notice of violation (*Gill v. Canada (AG)*, 2010 FCA 182).

ANALYSIS

Earnings

[30] Subsection 35(2) of the Regulations provides that income arising from any employment, whether wages, benefits or other earnings, must be taken into account unless it falls within one of the exceptions provided in subsection 35(7) of the Regulations.

[31] In *McLaughlin*, the Federal Court of Appeal affirmed the principle by which "the entire income of a claimant arising out of any employment" is to be taken into account in calculating the amount to be deducted from benefits (*McLaughlin v. Canada* (Attorney General), 2009 FCA 365).

[32] The Federal Court of Appeal also confirmed the principle that any sums that constitute earnings under section 35 of the Regulations must be allocated under section 36 of the Regulations (*Boone et al v. Canada (Attorney General)*, 2002 FCA 257).

[33] The employer provided a breakdown of the earnings paid to the claimant in salary (GD3-130/131). The Tribunal notes that these payments are indeed remuneration within the meaning of section 35(2) of the Regulations, and must therefore be allocated.

[34] The Tribunal also notes that $771.32 in vacation pay was paid to the claimant (GD3-86). The Tribunal is therefore satisfied that the amount in question represents earnings from employment within the meaning of s. 35(2) of the Act and must be allocated.

[35] Subsection 36(4) of the Regulations provides 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.

[36] The statement of earnings forwarded by the employer confirms that the following amounts must be allocated over the weeks specified as follows:

In the week commencing:	Income is:
January 13, 2013	$275.00
January 20, 2013	$0.00
June 9, 2013	$736.00
June 23, 2013	$206.00
June 30, 2013	$285.00
July 21, 2013	$550.00
August 4, 2013	$736.00

August 11, 2013	$736.00
August 18, 2013	$530.00

[37] Therefore, as the Commission mentioned in its arguments on page GD4-5, the Tribunal believes that the amount to be allocated to the week of January 13, 2013 must be amended to $275.00 rather than $751.00.

[38] Considering the evidence and arguments submitted by the parties, the Tribunal is satisfied that the Commission properly allocated the amounts to the weeks in question between January 20, 2013 and the week commencing August 18, 2013. However, a change was made to the week of January 13, 2013 since the amount to be allocated is $275.00, not $751.00. The overpayment must be adjusted accordingly.

[39] Subsection 36(9) provides as follows:

> [14] Subsection 36(9) of the Regulations reads: “Subject to subsections (10) to (11), 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

[40] The employer that $771.32 was paid in vacation pay (GD3-86).

[41] The Commission confirmed that the claimant's regular weekly earnings were $736.13. It confirmed that $206.00 was allocated to the week of August 18, 2013 and a remaining amount of $565.00 was allocated to the week of August 25, 2013 (GD7-1).

[42] Considering the evidence and arguments submitted by the parties, the Tribunal is satisfied that the Commission properly allocated the vacation pay amounts.

Parental Leave (RQAP)

[43] Subsection 76.09 (3) of the Regulations states:

> Every claimant who has received, or has applied for and is entitled to receive, provincial benefits under a provincial plan in respect of any week is disentitled to be paid benefits in respect of that same week under
>
> a) (a) Part I of the Act, other than benefits under section 22 or 23 of the Act; or
>
> b) the Employment Insurance (Fishing) Regulations.

[44] The Commission's computer system shows that the claimant received provincial benefits for three weeks, namely, the weeks of June 9, 2013, June 16, 2013 and June 23, 2013 (GD3-120).

[45] The claimant confirmed that he received RQAP benefits for the weeks of June 9, 2013, June 16, 2013 and June 23, 2013, but did not report them because he did not know he was receiving them. He said he was out of the country between March and May 2013, and had notified the RQAP. He also gave notice that he would be working in June 2013, but the RQAP paid him nonetheless. He stated that an RQAP review is in progress.

[46] The Tribunal notes that the claimant did not provide additional information concerning this reconsideration request, and that, although he requested a review of his RQAP benefits, he could not receive Employment Insurance benefits at the same time as RQAP benefits.

[47] The Tribunal is satisfied that a disentitlement must be imposed from June 9, 2013 to June 9, 2013 because the claimant was receiving RQAP benefits.

Penalty

[48] Subsection 38(1) of the Act states:

> 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;[…]

[49] The claimant indicated on one of his employer's time sheets that when he entered the hours worked at each site, the employer would check and correct the entries based on work reports, if a mistake was made. When he exceeded 40 hours a week (from Wednesday to Thursday), his hourly wage was multiplied by 1.5. He therefore entered work hours, not salary, in the system (GD3-103). He said he did not commit a violation.

[50] The Commission argued that the claimant was shown to have made six (6) misrepresentations concerning the earnings he received from the employer and his RQAP disentitlement. In the notice of decision, the Commission identified seven (7) misrepresentations because the claimant had also failed to report his separation from employment, the subject of another appeal before the Tribunal.

[51] The Commission forwarded a copy of the report cards for the weeks of June 23, 2013 to August 11, 2013. The claimant stated that he received a salary of $19, when his earnings were higher. He also failed to mention that he had received RQAP benefits for the period from June 9, 2013 to June 9, 2013.

[52] The Tribunal is therefore satisfied that the Commission has proven that the claimant made false or misleading statements.

[53] Consequently, the Tribunal must consider whether these false or misleading statements were made knowingly.

[54] The Commission stated that the claimant knew he had received more than $19 in salary for the weeks from June 23, 2013 to August 11, 2013, when his earnings were higher in each week. He justified his actions by saying that the amount reflected his hourly wage, and given that he reported his exact number of hours, he believed that the computer system would perform the multiplication. The Commission contends that his argument lacks credibility since it was the claimant’s third claim, and he should have been familiar with procedures. Furthermore, from the start of his benefit period and in the first week after the renewal in June 2013, the earnings he reported reflected his gross earnings from employment, not his hourly wage.

[55] The onus is on the Commission to prove, based on a balance of probabilities, which is not beyond all reasonable doubt, that the claimant made a misrepresentation or a statement that he knew to be false or misleading (*Canada (Attorney General) v. Gates*, FCA #A-600-94).

[56] The onus is on the Commission to show that the claimant knowingly made false or misleading statements. The claimant must explain why those statements were made. (*Canada (Attorney General) v. Purcell*, FCA A-694-94).

[57] The jurisprudence also establishes that it is not enough for the claimant to make a false or misleading statement, but must also have done so knowingly. It is therefore necessary, on a balance of probabilities, for the claimant to have knowledge of the fact that he was making a false or misleading statement (*Mootoo v. Canada (Department of Human Resources Development)*, 2003 FCA 206).

[58] In *Gates*, the Court stated: "In deciding whether there was subjective knowledge by a claimant, however, the Commission or Board may take into account common sense and objective factors. In other words, if a claimant claims to be ignorant of something that the whole world knows, the fact finder could rightly disbelieve that claimant and find that there was in fact, subjective knowledge, despite the denial. To ignore the obvious might legitimately imply that the claimant is lying. This does not make the test objective: it does, however, take into account objective matters in coming to a decision on subjective knowledge. 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)." (*Canada (Attorney General) v. Gates*, FCA A- 600-94).

[59] In the Tribunal's opinion, the claimant cannot simply state that he thought the computer system would multiply the number of hours he worked by his hourly wage. The fact that this is his third claim for benefit supports the contention that he knew he should have entered the total amount of earnings received from his employer.

[60] Accordingly, on the basis of the evidence and the arguments submitted by the parties, the Tribunal believes that the claimant knowingly made false or misleading statements when he omitted to report the total earnings received from his employer. Therefore, in the Tribunal's opinion, a penalty may be assessed.

[61] In *Uppal*, the Court found that, "It is trite law that an Umpire cannot interfere with the quantum of a penalty unless it can be shown that the Commission exercised its discretionary power in a non-judicial manner or acted in a perverse or capricious manner without regard to the material before it" (*Canada (Attorney General) v. Uppal*, FCA #A-341-08).

[62] The Commission said that a penalty of $854 was imposed on the claimant (GD3-91). The Commission said it based its decision on the policy whereby the penalty for a first misrepresentation is no more than 50% of the overpayment generated by the misrepresentation.

[63] The Commission said that its initial calculation of the penalty was incorrect. A penalty of $854 was imposed. The overpayment associated with the misrepresentations is $2,424, and the 50%penalty should therefore have been $1,212. However, given that the error was made by the Commission, the penalty will remain at $845 because the error benefits the claimant.

[64] The Tribunal notes that the Commission took account of the policy it instituted to calculate penalties, and the fact that this was the claimant's first misrepresentation.

[65] The Commission considers the client's explanations to lack plausibility: considering that this was his third claim, he should know the procedures. In addition, at the start of his benefit period, he reported his earnings from employment by stating the total gross earnings from employment, not his hourly salary. For the weeks in which he reported only his hourly salary, he should have noticed that he was sometimes working full weeks, and receiving almost full benefits for the same weeks. The Commission believes that the claimant deliberately made misrepresentations to claim benefits to which he was not entitled. The claimant has no other mitigating circumstances (GD3-124).

[66] Therefore, based on the evidence and arguments submitted, the Tribunal is satisfied that the Commission exercised its discretionary authority judicially by imposing a penalty on the claimant for unreported earnings during the period from June 23, 2013 to August 11, 2013, including the period from June 9, 2013 to June 9, 2013 in which the claimant did not report RQAP parental benefits. Consequently, the Tribunal cannot change the amount of the penalty determined by the Commission.

[67] Nevertheless, because the Commission made an error in calculating the penalty, the Tribunal believes the amount should remain at $854.00 as established.

Violation

[68] The claimant argues that he did not commit any violation.

[69] The Commission states that the misrepresentations discovered generated an overpayment that it assessed at $2,436 in its initial decision.

[70] Therefore, a notice of serious violation was issued to the claimant. Subsection 7.1(5) describes the violation according to the seriousness of the misrepresentation. A description of the violation is based exclusively on the amount of the overpayment generated by the misrepresentation in question. The amount of the penalty is not a factor in describing the violation.

[71] The Commission argued that it exercised its discretion judicially in this case in reaching its decision to issue a notice of violation. After considering the overall impact of issuing a notice of violation on the claimant, including the mitigating circumstances, the previous violations and the impact of a notice of violation on the claimant's ability to qualify on future claims, it determined that a notice of violation applied in this case (GD3-126).

[72] Paragraph 7.1 (4) a) of the Act states that a violation accumulates when claimant receives a notice of violation because:

> 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;

[73] In this case, the Commission argues that it proved the claimant had made six (6) misrepresentations about earnings received from the employer and the RQAP disentitlement. In the notice of decision, the Commission identified seven (7) misrepresentations because the claimant had also failed to report his separation from employment.

[74] As determined earlier, the Tribunal believes that, on a balance of probabilities, the claimant knowingly made a false or misleading statement.

[75] The Tribunal has determined that the Commission exercised its discretion judicially when it issued the claimant a penalty and notice of violation.

[76] Therefore, Tribunal is also of the opinion that the Commission acted judicially in exercising its discretionary power and that, accordingly, the Tribunal may not intervene in the Commission's decision.

CONCLUSION

[77] Considering the evidence and arguments submitted by the parties, the Tribunal is satisfied that the Commission properly allocated the amounts received as salary to the weeks in question between January 20, 2013 and the week starting August 18, 2013. However, a change was made to the week of January 13, 2013 since the amount to be allocated is $275.00, not $751.00.

[78] Considering the evidence and arguments submitted by the parties, the Tribunal is satisfied that the Commission properly allocated the vacation pay amounts.

[79] The Tribunal is satisfied that a disentitlement must be imposed from June 9, 2013 to June 29, 2013 given that the claimant was receiving RQAP benefits at the same time.

[80] The Tribunal is satisfied that the Commission exercised its discretion judicially when it imposed a penalty and issued a notice of violation to the claimant for unreported earnings in the period from June 23, 2013 to August 11, 2013, including the period from June 9, 2013 to June 29, 2013, in which the claimant did not report receiving parental benefits from the RQAP. Therefore, the Tribunal cannot vary the amount of the penalty or the notice of violation issued by the Commission. Nevertheless, since the Commission committed an error when it calculated the penalty, the Tribunal believes that the amount should remain $854.00, as established.

[81] The appeal is dismissed, with amendments.

Charline Bourque
Member, General Division – Employment Insurance Section