



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *B. R. v. Canada Employment Insurance Commission*, 2016 SSTGDEI 161

Tribunal File Number: GE-16-1973

BETWEEN:

B. R.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Eleni Palantzas

HEARD ON: November 22, 2016

DATE OF DECISION: December 31, 2016

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Claimant, Mr. B. R., did not attend the scheduled hearing.

INTRODUCTION

[1] On December 18, 2014, the Claimant applied for, and subsequently received employment insurance regular benefits.

[2] On January 25, 2016, the Claimant was advised that he had declared only some of his earnings for the week of August 9, 2015. The Commission adjusted the allocation of his total earnings for that week which resulted in an overpayment of \$194.00. Further, since he did not reply to the Commission's request for clarification of the discrepancy, he was deemed to have knowingly made a false representation. The commensurate penalty imposed was calculated at 150% of the overpayment amount (\$291.00) because the Claimant had 3 prior incidents of improper reporting. The Commission also issued a notice for a 'subsequent' violation.

[3] On February 22, 2016, the Claimant requested that the Commission reconsider its decision. On April 14, 2016 however, the Commission maintained its decision.

[4] On May 16, 2016 the Claimant appealed to the General Division of the Social Security Tribunal (Tribunal).

[5] The hearing was held by teleconference for the following reasons: (a) The fact that the appellant will be the only party in attendance (b) The form of hearing respects the requirement under the Social Security Tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

[6] On August 10, 2016, the Claimant was sent the first Notice of Hearing (NOH). On September 14, 2016, the package sent to the Claimant was returned to the Tribunal as "unclaimed". On September 15, 2016 the Tribunal left the Claimant a voicemail message advising of the returned NOH and to update his contact information with the Tribunal. On September 27, 2016, the Tribunal spoke to the Claimant who confirmed his address to be correct and a second NOH was sent to him.

[7] On October 31, 2016, according to Canada Post, the Claimant “refused” the NOH and docket (package) sent to him and he did not pick it up at the post office. It was sent back to the Tribunal.

[8] On November 10, 2016, the Tribunal left the Claimant a message on his “personal” voicemail advising him that two attempts have been made to send him the NOH and the second time he refused it. He was specifically advised of the November 22, 2016 hearing date and that he must call the Tribunal to discuss how the NOH can be sent to him.

[9] The Claimant did not show up for the November 22, 2016 hearing and he has yet to contact the Tribunal to enquire about his hearing or the status of his appeal.

[10] The Member noted that the Claimant confirmed his address to be correct (the same throughout the file) and was aware the Tribunal was attempting to provide him with notice of the hearing. On the Tribunal’s second attempt to send him notice of the hearing and docket, he refused to accept the package. The Tribunal therefore, advised him of the hearing date on his personal (not generic) voice mail, that he has responded in the past, and directed him to call the Tribunal for details.

[11] The Member is satisfied that the Claimant received notice of the hearing scheduled for November 22, 2016, even though he refused to accept the “Notice of Hearing” sent to him. The Member therefore proceeded in the Claimant’s absence under the authority of section 12 of the *Social Security Tribunal Regulations* (SST Regulations).

ISSUES

[12] The Member must decide whether the wages that the Claimant received for the week of August 9, 2015 are considered earnings and whether they were properly allocated pursuant to sections 35 and 36 of the *Employment Insurance Regulations* (Regulations).

[13] The Member must decide whether the Claimant knowingly made a false statement or misrepresentation and whether as a result, a penalty should be imposed pursuant to section 38 of the *Employment Insurance Act* (EI Act).

[14] The Member must decide whether a notice of violation should be issued pursuant to section 7.1 of the EI Act.

EVIDENCE

[15] On December 18, 2014, the Claimant applied for and received Employment Insurance regular benefits (GD3-3 to GD3-12).

[16] On his claim report for the week of August 9, 2015 to August 22, 2015, the Claimant indicated that he worked 29 hours that week and earned \$639.00 the first week and 88 hours the second week earning \$2284.00 (GD3-14 to GD3-21).

[17] The Commission requested that the Claimant provide an explanation for the discrepancy in the earnings reported by him and his employer. The form shows that the employer reported he had earned \$1122.00 the week of August 9, 2015. The Claimant did not respond to that request (GD3-22 and GD3-23).

[18] On January 25, 2016, the Commission advised the Claimant that since he had declared only some of his earnings for the week of August 9, 2015, it adjusted the allocation of his earnings for that week which resulted in an overpayment of benefits. Further, since he did not reply to the Commission's request for clarification of the discrepancy in earnings, he was deemed to have knowingly made a false representation. The Commission imposed a penalty calculated at 150% of the overpayment amount (\$291.00) because the Claimant had 3 prior incidents of improper reporting. Thirdly, since one prior notice of violation had been issued, the Commission also issued a notice for a 'subsequent' violation (GD3-24 to GD3-26).

[19] The Claimant was sent a notice of debt that indicated an overpayment of \$194.00 and the penalty amount of \$291.00 totalling \$485.00 (GD3-27).

[20] On February 22, 2016, the Claimant requested that the Commission reconsider its decision noting that he inadvertently lost track of the one day he worked the week of August 9, 2015. He indicated that the payroll department had withheld that cheque for a month waiting for a safety form. He attempted to call the Commission on his lunch breaks but he was unsuccessful and then forgot. He figured he'd remedy the error on the 'request for clarification letter' which he received on November 17, 2015 however; due to his personal issues and state of mind at the time, he intended, but forgot to return the form. The Claimant provided proof of his divorce documents (GD3-29). The Claimant indicated that even if he reported his earnings for that one day (i.e. reported \$1122 instead of \$639) he still would not have received benefits for

that week because he earned too much. His mistake did not cause an overpayment and there was no form of fraud (GD3-28 to GD3-31).

[21] On April 4, 2016, the Commission left a message for the Claimant on his voice mail. On April 5, 2016, the agent called the Claimant again and left another message. The Claimant called back within a few minutes but when the agent answered, he hung up (GD3-33). A letter was sent to him requesting that he contact the Commission within 10 business days (GD3-33). On April 8, 2015, the Claimant left a message stating that he knows the agent is only in the office Monday to Thursday, but thought he'd call on Friday and requested a call back providing his phone number. On April 12 and 13, 2015 the Commission agent called and left the Claimant two messages.

[22] On April 14, 2016, the Commission maintained all its decisions noting that the Claimant has had two prior incidents of improper reporting and that this is his third misrepresentation with a monetary penalty and the second time a notice of violation has been imposed. In the present case, the Commission indicated that the Claimant admitted to knowing he did not declare all his earnings and that he received the 'Request for Clarification of Employment Information' form but did not return it. The Commission noted that the Claimant's lack of effort to respond to voicemail messages and letters (calling back only once when he knew the agent was not there) shows an indifference and lack of concern regarding the issue. The Commission maintained the penalty and violation noting that the Claimant was well aware of the importance of reporting accurately or to correct any errors in a timely manner given his two prior incidents. No mitigating circumstances were identified (GD3-35 to GD3-38).

[23] On January 3, 2017, the Member under the authority of section 32 SST Regulations requested the following from the Commission:

1. The Claimant indicated that he was not overpaid benefit \$194.00 for the week of August 9, 2015(GD3-30) given the earnings he reported for that week. Could you please provide (a) evidence from the employer of the wages received by the Claimant for the week of August 9, 2015 and (b) evidence of the benefits paid to the Claimant for the week of August 9, 2015?
2. How were the wages allocated to the Claimant's benefit period? Please provide weekly rate and confirm whether/amount of the overpayment?

3. Could you please confirm, given any changes to the overpayment, the penalty amount?

[24] The Commission immediately responded by providing two ROEs from the employer indicating that the Claimant was employed on August 12, 2015 and again from August 13 to 27, 2015 (GD6-3 and GD6-4). The Commission showed that the Claimant had \$1122.00 total gross earnings for the week of August 9, 2015 to August 15, 2015 which was allocated to the week of August 9, 2015. The Claimant's weekly gross benefit rate was \$514.00 and since he had declared \$639.00, half of that (\$320.00) had been deducted from these weekly from his benefit rate ($\$514 - \$320.00 = \$194.00$) so he received \$194.00 in benefits the week of August 9, 2015. The Commission provided evidence that the Claimant was paid \$194.00 in benefits for the week of August 9, 2015 on September 14, 2015 (GD6-8). Further, the Commission upon review of the evidence found that in fact, this incident of underreporting was a second misrepresentation (not third) and therefore, submits that the penalty amount should have been 100% of the net overpayment thus, \$194.00, not \$291.00 (GD6-1).

SUBMISSIONS

[25] The Claimant submitted that he did not consciously misrepresent his earnings for the week of August 9, 2015 noting that due to a delay in his pay cheque, he forgot to report one day of pay on his report. He attempted to call the Commission but could not get through and although he intended to then remedy the error on the form he received from the Commission, he inadvertently forgot due to his personal issues. The Claimant further submitted that even if he reported his earnings for that day, it would not have made a difference because he did not receive benefits for that week so there is no overpayment and therefore, no fraud (GD2-4).

[26] The Commission submitted that the monies received by the Claimant in the form of wages, constitute 'earnings' and they were properly allocated pursuant to subsections 35(2) and 36(4) of the Regulations.

[27] The Commission also submitted that it has met the onus of establishing that the Claimant knowingly made one misrepresentation because he knew his earnings were much higher than the \$639.00 he reported. Given his prior offence(s), he is well aware of the importance of accurate reporting. The Commission submitted that the Claimant did not make a

concerted effort to contact Service Canada to correct his report or to contact the reconsideration agent. The Commission submitted that it would have taken very little time to respond to the request for clarification letter or even to call the direct telephone number (not a general enquiry line) for assistance. The Commission therefore submitted that the penalty and violation are warranted. Further, it has exercised its discretion judiciously when setting the penalty amount and when it issued the ‘subsequent’ violation having considered the overall impact to the Claimant, including mitigating circumstances, prior offences and the impact on the ability of the claimant to qualify on future claims. The Commission submitted that the penalty amount should be correct to be 100% of the net overpayment thus, \$194.00 (not \$291.00) because in fact, this was the Claimant’s second misrepresentation (GD6-1).

ANALYSIS

[28] The relevant legislative provisions are reproduced in the Annex to this decision.

Allocation of Earnings

[29] In many cases, and for various reasons, a claimant may be in receipt of monies during a benefit period. Consideration therefore, has to be given to whether the monies received are considered ‘earnings’ and whether these earnings should be allocated to the benefit period. Sections 35 and 36 of the Regulations define what monies are considered ‘earnings’ for the purposes set out in section 35 and how these earnings are to be allocated to the benefit period.

[30] In this case, it is undisputed evidence that the Claimant was in receipt of wages from his employer during the week of August 9, 2015 to August 15, 2015 (GD6-3 and GD6-4). He reported that he worked 29 hours and earned \$639.00 for that week (GD3-16). The Claimant also indicated in his request for reconsideration that he forgot to include one day of work that week and he did not dispute the accuracy of the \$1122.00 reported by employer (GD3-30). The ROE issue September 9, 2015 shows that the indeed the Claimant had worked on August 12, 2015 and earned \$444.36 (GD6-3).

[31] Section 35(1) defines “income” as any monetary or non-monetary income that is or will be received by a claimant from an employer or any other person, including a trustee in bankruptcy. The Member finds that in this case, the Claimant was in receipt of wages for work

performed from his employer which is considered ‘income’ pursuant to subsection 35(1) of the Regulations.

[32] Further, subsection 36(4) of the Regulations states that the 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. The Member therefore, finds that the Commission correctly allocated the income that the Claimant received for August 9, 2015 to August 15, 2015 to that same period pursuant to subsection 36(4) of the Regulations because that’s when the work was performed. Accordingly, the Commission allocated \$1122.00 total gross earnings to the week of August 9, 2015. The Member notes that it is not within the Commission’s discretion to move, postpone or otherwise allocate earnings other than as prescribed in the Regulations.

[33] The Member considered that the Claimant had submitted that even if he reported his earnings for the day he had forgotten to do so, it would not have made a difference because he did not receive benefits for that week so there is no overpayment and therefore, no fraud (GD2-4). The Commission submitted evidence of its payment screens showing that the Claimant had been paid \$194.00 for the period of August 9, 2015 (GD6-8). In the absence of evidence to the contrary, the Member accepts the Commission’s documentary evidence and finds that the Claimant was paid \$194.00 in benefits for that week.

[34] The Member finds therefore, that the wages that the Claimant received for the week of August 9, 2015 are earnings and they were properly allocated to his benefit period pursuant to section 35 and 36 of the Regulations. The Claimant is therefore responsible for repayment of \$194.00 in benefits that he received and to which he was not entitled. Penalty and Violation

[35] Section 38 of the EI Act states that the Commission may impose a penalty on a claimant, or any other person acting for a claimant, for each of the acts or omissions stated in that section.

[36] The Federal Court of appeal has established that “knowingly” or having “knowledge of a falsity” does not necessarily include ‘intent to deceive’. Further, the test is a subjective one where the decision-maker must determine, on the balance of probabilities, based on the

circumstances and evidence of each case, whether the claimant has knowingly made a false or misleading statement (Gates A-600-94).

[37] The Federal Court of Appeal has also established that the initial onus is on the Commission to prove that a claimant knowingly made a false or misleading statement or representation. The onus then shifts to the claimant who must provide a reasonable explanation to show that the statement or representation was not knowingly made (Purcell A-694-94, Gates A-600-94).

[38] In this case, it is undisputed evidence that the Claimant did not report all his earnings for the week of August 9, 2015 (GD3-16). The Commission provided evidence that the Claimant actually earned \$1122.00 for the same week (GD6-3 and GD6-4). The Member finds therefore, that the Claimant misrepresented his earnings for the week of August 9, 2015.

Was the misrepresentation knowingly made?

[39] The Member considered that the onus is initially on the Commission to prove that the Claimant knowingly made a false or misleading statement in order to impose a penalty pursuant to section 38 of the EI Act. The Commission submitted that the penalty and violation are warranted because the Claimant was well aware of the importance of accurate reporting his earnings given his prior similar incident. The Commission also noted that the Claimant admitted to knowing that he earned more than he reported and that he received the 'Request for Clarification of Employment Information' form but did not return it because he put aside and forgot (GD3-30). The Commission submitted that by not taking the little time required to respond to the clarification letter and/or call the direct line provided therein, the Claimant showed that he was not eager to correct his reported earnings. Further, his lack of a concerted effort to respond to the reconsideration agent's calls and letter showed an indifference and lack of concern regarding the issue.

[40] The Member considered that, on the other hand, the Claimant indicated in his only written submission (GD3-30 or GD2-4) that because he was really busy at work so he forgot to report the one day of work. The Claimant submitted that because the payroll department was late in giving him his cheque for that week. When he attempted to contact the Commission by phone, he couldn't get through so he gave up calling and figured he'd remedy the problem

when he received the request for clarification form. Then, when he received the form, he was going through a divorce, so the form was a “casualty” of his mindset at the time. He submitted that even if corrected his mistake, there was not overpayment thus, no fraud whatsoever (GD3-30).

[41] The Member also considered that the Claimant was advised every time he completed his electronic reports, that false and misleading statements could cause penalties or prosecution (GD3-11 and GD3-20). Further, at the beginning of every report he acknowledged responsibility to read and understand the information within that report (GD3-14). The Member noted that the Claimant, on application, confirmed that he read, understood and accepted his rights and responsibilities, one of which is to report all employment and all employment earnings (GD3-5 to GD3-7).

[42] The Member agrees with the Commission, and finds that the Claimant admittedly did not report accurately and further, given his past similar incident, knew the importance of doing so, or at least, he knew the importance of correcting the misrepresentation in a timely manner. As part of his explanation, the Claimant anticipated receipt of the request for clarification form to remedy the problem (GD3-30) which is further evidence that he knew he underreported, knew that he had to correct it and how to do so either by phone or using the form. Although the Member understands that mistakes can happen, the Claimant’s explanation that his mistake did not result in an overpayment any way so there was no fraud, is a conscious deferral of his responsibility to report accurately.

[43] The Member finds therefore that, on a balance of probabilities, the Claimant knowingly made a false representation to the Commission when he did not report his full earnings for the week of August 9, 2015. The Member therefore finds that a penalty must be imposed pursuant to section 38 of the EI Act.

[44] The Member recognized that in determining the penalty amount and whether or not to issue a notice of violation, the Commission must exercise its discretion in a judicial manner. In other words, it must act in good faith, proper purpose and motive; must take into account any relevant factors; ignore any irrelevant factors and act in a non-discriminating manner (Dunham A-708-95, Purcell A-694-94).

[45] In this case, the Commission initially concluded that although the overpayment is relatively minor, this is the Claimant's third offence of improper reporting of his earnings so the penalty was set at 150% of the overpayment as per its established policy. Since the Claimant did not reply to the Commission's request for clarification, phone messages and letter, no mitigating circumstances were taken into account. The penalty imposed therefore, set at (150% of \$194.00) \$291.00 (GD3-35 and GD3-36). The Commission has since indicated that in fact, this is the Claimant's second offence and accordingly the penalty should have been set at 100% of the overpayment or \$194.00 (GD6-1 and GD6-2).

[46] The Member considered the Claimant's submission that when he was asked to complete the request for clarification form in November 2015, he was going through a divorce (granted January 2016, GD3-29) stating that he was depressed and unable to focus (GD3-30). The Member finds however, the misrepresentation was made on September 13, 2015, he had several months to correct the information and he was gainfully employed. Although understandably distracted, the Member finds that his circumstances were not such, that they mitigated his ability to report accurately or prevented him from correcting the misrepresentation. The Member agrees with the Commission consideration that there were no mitigating circumstances and with the manner that it set the penalty.

[47] The Member therefore finds that Commission exercised its discretion in a judicial manner when it set the penalty amount and accepts its recommendation to correct the penalty to \$194.00.

Violation

[48] Finally, in a recent Federal Court ruling, it was concluded that the Commission has the discretion to determine whether or not to issue a notice of violation and that it is neither mandatory nor automatic under section 7.1(4) of the EI Act. Further, the Tribunal does have jurisdiction to set aside the notice of violation, but only if it determines that the Commission did not exercise its discretion judicially (GILL A-483-09).

[49] In this case, the Commission submitted that it exercised its discretion in a judicial manner when it issued the notice for a 'subsequent' violation having considered the overall

impact to the Claimant, including mitigating circumstances, prior offences and the impact on the ability of the claimant to qualify on future claims (GD3-36). The Member agrees that there are no mitigating circumstances to consider, this is a subsequent offence and, since the Claimant continues to be gainfully employed it is unlikely that the issuance of a 'subsequent' violation will greatly impact his ability to qualify for future claims. The Member finds therefore that the Commission exercised its discretion in a judicial manner when it issued a 'subsequent' notice of violation and therefore, cannot intervene in this decision.

CONCLUSION

[50] The issue regarding the allocation of earnings is dismissed.

[51] The issue regarding the imposition of a penalty is dismissed with modification to the amount.

[52] The appeal regarding the issuance of a 'subsequent' violation is dismissed.

Eleni Palantzas
Member, General Division - Employment Insurance Section

ANNEX

THE LAW

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

Subsection 12(2) of the SST Regulations stipulates that 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.

Allocation of Earnings

Subsection 35(1) of the Regulations defines "income" to mean any monetary or non-monetary income that is or will be received by a claimant from an employer or any other person, including a trustee in bankruptcy.

Paragraph 35(2)(a) of the Regulations is subject to the other provisions of this section and states that 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 amounts payable to a claimant in respect of wages, benefits or other remuneration from the proceeds realized from the property of a bankrupt employer.

Subsection 36(1) of the Regulations is subject to subsection (2), and sets out how the earnings, as determined under section 35 shall be allocated to weeks in the manner described in this section and, for the purposes referred to in subsection 35(2), shall be the earnings of the claimant for those weeks.

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

Penalties

Subsection 38(1) of the EI Act states that the Commission may impose on a claimant, or any other person acting for a claimant, a penalty for each of the following acts or omissions if the Commission becomes aware of facts that in its opinion establish that the claimant or other person has

- (a) in relation to a claim for benefits, made a representation that the claimant or other person knew was false or misleading;
- (b) being required under this Act or the regulations to provide information, provided information or made a representation that the claimant or other person knew was false or misleading;
- (c) knowingly failed to declare to the Commission all or some of the claimant's earnings for a period determined under the regulations for which the claimant claimed benefits;
- (d) made a claim or declaration that the claimant or other person knew was false or misleading because of the non-disclosure of facts;
- (e) being the payee of a special warrant, knowingly negotiated or attempted to negotiate it for benefits to which the claimant was not entitled;
- (f) knowingly failed to return a special warrant or the amount of the warrant or any excess amount, as required by section 44;
- (g) imported or exported a document issued by the Commission, or had it imported or exported, for the purpose of defrauding or deceiving the Commission; or

(h) participated in, assented to or acquiesced in an act or omission mentioned in paragraphs (a) to (g).

Subsection 38(2) of the EI Act states that 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.