



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *S. B. v. Canada Employment Insurance Commission*, 2017 SSTGDEI 39

Tribunal File Number: GE-16-3144

BETWEEN:

S. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Eleni Palantzas

HEARD ON: March 22, 2017

DATE OF DECISION: March 30, 2017

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Claimant, Mrs. S. B. attended the teleconference hearing with her husband, Mr. E. A. The Claimant stated that her husband would represent her if she had a communication problem. In the end, Mr. E. A. did not participate in the hearing but assisted the Claimant throughout the hearing with the documentation.

INTRODUCTION

[1] The Claimant initially applied for employment insurance regular benefits on April 12, 2014. She subsequently applied for benefits again on March 30, 2015 indicating that she was employed from June 23, 2014 until February 11, 2015. She was asked to retroactively complete claims reports for the prior year/claim for which she had already received benefits.

[2] On May 18, 2016, the Canada Employment Insurance Commission (Commission) advised the Claimant of its retroactive allocation of the unreported earnings to her prior (2014) benefit period. This resulted in an overpayment of benefits in the amount of \$3,673.00 (\$3528.00 + \$145.00). The Commission also concluded that the Claimant knowingly made 10 false representations when she did not report these earnings and therefore imposed a penalty of \$1,772.00 and issued a notice for a 'serious' violation.

[3] On June 6, 2016, the Claimant requested that the Commission reconsider its decisions regarding the penalty and violation and on July 13, 2016, the Commission reduced the penalty to 30% of the net overpayment or \$1063.00 given her financial situation and maintained the violation.

[4] On August 12, 2016, the Claimant appealed to the General Division of the Social Security Tribunal (Tribunal).

[5] This hearing was held by teleconference for the following reasons (a) the fact that the Claimant would be the one party will be in attendance and (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.

ISSUES

[6] The Member must decide whether a penalty should be imposed pursuant to section 38 of the *Employment Insurance Act* (EI Act).

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

EVIDENCE

[8] The Claimant applied for employment insurance regular benefits on April 12, 2014 (GD3-3 to GD3-10). She applied for benefits again on March 30, 2015 indicating that she was employed by CPI Canada Inc. from June 23, 2014 until February 11, 2015 and did not know if she was returning (GD3-11 to GD3-20).

[9] On April 10, 2015, the Claimant retroactively completed 10 claim reports for the weeks starting on July 27, 2014 to October 4, 2014 (GD3-43 to GD3-67), December 28, 2014 to January 10, 2015 (GD3-68 to GD3-74), and February 8, 2015 to April 4, 2015 (GD3-75 to GD3-105). The Claimant responded “no” to the question “Did you work or receive any earnings during the period of this report? This includes work for which you will be paid later, unpaid work or self-employment” for all the weeks up to October 4, 2014. Then for the week of December 28, 2014 to January 4, 2015 and the next 4 weeks of February 8, 2015 to March 14, 2015 the Claimant reported earnings. On April 19, 2015, the Claimant completed one more report for the period of March 22, 2015 to April 4, 2015 and indicated that she worked only the first week of this period (GD3-39 to GD3-105).

[10] On October 6, 2015, the employer provided payroll information that was different from what the Claimant had provided as earnings on her claim reports (GD3-21 and GD3-22).

[11] On February 23, 2016, the Commission requested that the Claimant provide clarification for the discrepancy between the earnings she reported and those reported by the employer. She had reported zero earnings for 13 weeks for which the employer reports she did have earnings

and one week reported (February 22, 2015) and earnings and the employer reported no earnings. On March 24, 2016, the Claimant confirmed that the amount of her earnings reported by the employer is correct for the period of July 27, 2014 to the week of March 29, 2015. The Commission's Integrity Unit received the Claimant's response on April 7, 2016 and again, the Commission stamped it 'received' on June 1, 2016 (GD3-23 and GD3-24).

[12] On May 11, 2016, the Commission determined that the Claimant knowingly failed to provide her earnings for 18 weeks and made 10 false representations. It noted that the Claimant had not responded to the request for clarification so it was assumed false statements were made knowingly. The Claimant accepted the Rights and Responsibilities when she filed her application for benefits and was aware all employment must be reported. No mitigating circumstances were identified however, since this was her first offence, a penalty of 50% of the net overpayment (\$1772.00) was imposed and a notice of a 'serious' violation was issued (GD3- 25 to GD3-30).

[13] On May 21, 2016, the Claimant was sent notices of debt for the overpayment and penalty of \$1772.00 (GD3-106 and GD3-107).

[14] On June 6, 2016, the Claimant requested that the Commission reconsider its decision noting that she worked casual hours and therefore, made a mistake. It was the first time in 25 years that she applied for benefits (GD3-31 to GD3-33). The Claimant she stated that she knows she made mistakes and will repay the overpayment but she is working two jobs and cannot afford the penalty. She didn't know how to properly report as this was her first time on benefits (GD3- 34).

[15] On July 13, 2016, the Commission noted that this was not the Claimant's first time on claim (also 2012). Plus, she started to report earnings as of January 2015, so she must have been aware of the requirement to do so. The Commission therefore did not find her explanation reasonable. It however, reduced the penalty to 30% of the net overpayment (\$1063.00) given her financial situation and maintained the violation (GD3-34 to GD3-38).

Testimony at the Hearing

[16] The Claimant testified at the hearing that she made a big mistake on the reports that she was provided to complete for the prior year. She was very apologetic stating that she got confused by the dates because she worked on and off on a casual basis. The Claimant confirmed that she completed the reports herself; that she was indeed working. She confirmed that this is the second time she is applying for benefits in 25 years (once before in 2012).

[17] The Claimant was referred to her responses on the reports (at GD3-44 for instance) and asked whether she knew she was working all those prior months. The Claimant stated that she did not intentionally provide misleading information and that she is “telling the truth”. She got confused by the dates. She testified that she realized her mistake only after she was told by the Commission.

[18] The Member asked the Claimant whether she completed reports for the months of October, November and December 2014 as these are not in the evidence. The Claimant could not recall and again, stated that she got confused.

[19] Regarding mitigating circumstances, the Claimant stated that she worked casually at two employers in 2015. Finally, six months ago (as of July 2016) she started working full-time and as of this month (as of March 2017) she is now permanent and entitled to benefits.

[20] The Claimant stated that she is presently paying \$150.00 per month toward the overpayment which she does not contest. She is appealing the penalties only.

SUBMISSIONS

[21] The Claimant submitted that she did not knowingly and intentionally provide false or misleading information on her on-line reports. She was a casual employee, got confused with the dates and made a big mistake. She is very apologetic noting that this is the first time this has happened in her 25 years of employment (GD2-7).

[22] The Commission submitted that it has met the onus of establishing that the Claimant knowingly made misrepresentations when she failed to report all her earnings from CPI Inc. while in receipt of benefits. It submitted that the Claimant knew she worked and had earnings

when she completed the reports. Further, by reporting her earnings in some weeks, demonstrates that she was aware of the requirement to do so and her ability to complete them accurately. The Commission submitted that the Claimant was given the opportunity to explain the discrepancies but failed to reply to the request for information and therefore assumed that false statements were made knowingly (GD3-26) and the Claimant has not since provided a reasonable explanation for not reporting her earnings accurately.

[23] The Commission submitted that it rendered its decision in a judicial manner when it determined the penalty amount to be \$1063.00 (30% of the overpayment) having considered the Claimant's financial situation and that this was her first offence. It also submitted that it exercised its discretion in a judicial manner when it issued a notice of violation.

ANALYSIS

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

[25] 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.

[26] According to paragraph 7.1(4)(a) of the EI Act, a claimant accumulates a violation if one or more penalties is imposed under section 38, 39, 41.1 or 65.1, the Commission issues a notice of violation to that claimant.

[27] 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).

[28] 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).

[29] In this case, it is undisputed evidence that the Claimant was employed by CPI Inc. and had earnings during the period under dispute from July 27, 2014 until the week of March 29, 2015. The Claimant does not dispute the amount of her earnings as reported by the employer for the said period (GD3-24). It is also undisputed that the Claimant, on 13 occasions responded “no” to the question “Did you work or receive any earnings during the period of this report? This includes work for which you will be paid later, unpaid work or self-employment” when in fact she had earnings during those weeks. It is also undisputed that she under reported her earnings three times (one was only off by one dollar) and over reported her earnings twice (GD3-43 to GD3-105). The Member finds therefore, that the Claimant failed to declare to the Commission all or some of her earnings and thus, misrepresented her employment and the earnings she received during the period of July 27, 2014 to the week of March 29, 2015.

Was the misrepresentation knowingly made?

[30] Having established that indeed a misrepresentation has been made by the Claimant, the Member next considered that in order for the Commission to impose a penalty and a notice of violation pursuant to section 38 and 7.1 of the EI Act, it must meet the onus placed upon it to prove that the Claimant knowingly made the false or misleading representations. In this case, the Member finds that the Commission did not meet that onus for several reasons.

[31] The Member finds that the circumstances of this claim are unusual in that the Claimant was asked to retroactively complete claim reports for the prior claim/benefit period for which she had already received benefits. On April 12, 2014, the Claimant had applied for regular benefits and a benefit period was established and paid however, there’s no evidence that the Claimant was required to complete claim reports at that time. When the Claimant applied for benefits on March 30, 2015, she reported that she was employed from June 23, 2014 until February 11, 2015 (GD3-13 and GD3-19). This likely prompted the Commission to request that she retroactively complete claim reports for the previous benefit period. On April 10 and 15, 2015, the Claimant complied and completed claim reports back to July 27, 2014 up to October 4, 2014 and then from December 28, 2014 to March 29, 2015 (GD3-43 to GD3-105).

[32] The Commission submitted that the Claimant knowingly made misrepresentations when she failed to report all her earnings while in receipt of benefits even though she knew she worked and had earnings when she completed the reports. The Member notes however, that the Claimant was not asked to complete the claim reports while she was in receipt of benefits. She completed (at least) 10 biweekly claim reports in April 2015 for weeks back to July 27, 2014 - it is noted that only those weeks where there was a discrepancy are provided herein as evidence. The Commission also submitted that by reporting her earnings in some weeks, demonstrates that she was aware of the requirement and was able to do so accurately. The Member notes that the Claimant does not deny knowing that she had to report her employment and earnings and she did so when asked on her second application form. Further, the Commission submitted that the Claimant was given the opportunity to explain the discrepancies but failed to reply to the request for information. It therefore assumed that false statements were made knowingly (GD3-26). The Member notes however, that the evidence shows that the Claimant did reply to the Commission's request (GD3-24) and she confirmed that the earnings reported by the employer for the given period were correct. The Member finds therefore, that the Commission made a false assumption given the evidence.

[33] On the other hand, the Claimant testified that she did not knowingly provide false or misleading information on the claim reports she was asked to retroactively complete. She submitted that she made a big mistake and was confused by the dates because she worked on and off on a casual basis. She testified that she can't remember whether she was asked to also retroactively complete claim reports for the months of October, November and December 2014 which are not in the evidence.

[34] The Member acknowledges that the questions in the claim reports are clear and that regardless of whether the Claimant was a casual employee, she is responsible for accurately reporting her earnings. The Claimant agrees, and testified that she is in the process of repaying (\$150/month) the overpayment of benefits. She also does not deny knowing that she had to report her employment and earnings however, when asked to do so; she got confused with the dates and thus, did not knowingly or intentionally make misrepresentations. The Member finds that the evidence supports her testimony. In March 2015, the Claimant was indeed forthcoming in reporting that she had employment in 2014 (GD3-13 and GD3-19) when asked upon

application. She however reported working from June 24, 2014 until and didn't know if was going to return to her employer (GD3-13) but then also indicated she worked from June 24, 2014 until February 11, 2015 (GD3-19). Then, a year later, on March 24, 2016, she confirmed that the employer accurately reported her employment and earnings from July 27, 2014 until March 29, 2015 (GD3-24). The evidence also shows that the Claimant did not report any earnings for the first 11 weeks, no discrepancies were reported by the Commission for the months of October, November and December 2014, and the week of December 28, 2015 is in the evidence and was not disputed i.e. was accurately reported (GD3-70); she over reported twice and she reported less earnings on three occasions (on one occasion by one dollar). The Member finds that although the evidence shows that Claimant did not accurately report her earnings for all those months, given the circumstances, it is understandable that the Claimant was confused by the dates. The Member finds therefore, that the Claimant met the onus placed upon her to provide a reasonable explanation to show that the misrepresentations were not knowingly made.

[35] The Member finds that, on a balance of probabilities, the Claimant did not have subjective knowledge that the representations that she made were false. The Member finds that, given the circumstances and the evidence in this case, the Commission has not met the onus of showing that the Claimant knowingly made false statements on her biweekly electronic reports when she did not report that she was working and had earnings for some weeks. The Member finds therefore that a penalty should not be imposed and she should not have accumulated a violation pursuant to sections 38 and 7.1 of the EI Act.

CONCLUSION

[36] The appeal is allowed for both issues.

Eleni Palantzas
Member, General Division - Employment Insurance Section

ANNEX

THE LAW

Penalty

Subsection 38(1) of the EI Act stipulates 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 received benefits; (Paragraph 38(1)(c) became inoperative effective 12 August, 2001.)

(d) made a claim or declaration that the claimant or other person knew was false or misleading because of the non-disclosure of facts;

(e) being the payee of a special warrant, knowingly negotiated or attempted to negotiate it for benefits to which the claimant was not entitled;

(f) knowingly failed to return a special warrant or the amount of the warrant or any excess amount of the warrant, as required by section 44;

(g) imported or exported a page issued by the Commission, or had it imported or exported, for the purpose of defrauding or deceiving the Commission; or

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

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

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

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

Notice of Violation

Subsection 7.1(4) of the EI Act stipulates that 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.

Subsection 7.1(5) of the EI Act stipulates 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 GD4-13 omissions on which it is based occurred before the person accumulated the other violation.