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

Citation: *Y A. v. Canada Employment Insurance Commission,* 2017 SSTGDEI 40

Tribunal File Number: GE-16-3500

BETWEEN:

**Y. A.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

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# SOCIAL SECURITY TRIBUNAL DECISION

## General Division – Employment Insurance Section

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DECISION BY: Charline Bourque

HEARD ON: March 23, 2017

DATE OF DECISION: March 30, 2017

## REASONS AND DECISION

### PERSONS IN ATTENDANCE

The Appellant attended the hearing by telephone, which was scheduled for March 23, 2017.

There was no one else in attendance.

### DECISION

**Penalty:**

The Tribunal finds that the Canada Employment Insurance Commission (the "Commission") has proven on a balance of probabilities that the Appellant had the requisite knowledge to be said to have made certain misrepresentations regarding his separation from employment "knowingly".

The Tribunal finds that the Appellant has not proven on a balance of probabilities that the Commission did not exercise its discretion properly when it assessed the amount of the penalty.

The appeal with respect to this issue is, accordingly, dismissed.

**Notice of Violation:**

The Tribunal finds that the Appellant has not proven on a balance of probabilities that the Commission did not exercise its discretion judicially when it issued the Notice of Violation.

The appeal with respect to this issue is, accordingly, dismissed.

**Misconduct:**

The Tribunal finds that the Commission did not reconsider this issue in its reconsideration decision. As such, the Tribunal recommends that the Appellant contact the Commission and file a new reconsideration decision of this issue so that it can be reconsidered by the Commission. If the Appellant is unsatisfied with the Commission's reconsideration decision on this issue, the Appellant can always file a new appeal with the Tribunal.

## INTRODUCTION

[1] The Appellant filed an initial claim for benefits on May 23, 2015 (GD3-12). The claim was established effective, May 17, 2015 (GD4-1).

[2] On May 24, 2016, the Canada Employment Insurance Commission (the "Commission") decided that it re-examined the Appellant's claim and that it was unable to pay him employment insurance benefits from May 17, 2015 because he lost his employment as a result of his misconduct. The Commission also decided to issue a penalty in the amount of $1,308.00 for 1 false representation and a Notice of Violation for a very serious violation. A Notice of Debt was issued in the amount of $12,644.00 (GD3-28 to 31).

[3] The Appellant filed a Request for Reconsideration of the Commission's decision. The Commission reconsidered its original decision on August 31, 2016 and decided to maintain it (GD3-35).

[4] The Appellant filed an appeal to the Tribunal on September 14, 2016 (GD2).

## FORM OF HEARING

[5] The hearing was heard by way of teleconference for the reasons indicated in the Notice of Hearing dated January 18, 2017.

## ISSUES

### Penalty:

[6] Whether or not the Appellant made false representations knowingly pursuant to section 38 of the Act and whether or not the Commission exercised its discretion judicially when it calculated the penalty amount.

### The Notice of Violation

[7] Whether or not the Commission exercised its discretion judicially when it decided to issue the Notice of Violation and whether or not the Act was correctly applied when it determined its classification.

## EVIDENCE

### Application for Benefits (May 23, 2015, GD3-3 to 13):

[8] The Appellant provided information when he filed a renewal claim. The Appellant advised that he had not worked since he completed his last application for employment insurance benefits (GD3-7).

[9] The Appellant advised that his highest completed level of education was high school and that he was not a member of a union of professional association (GD3-5).

[10] GD3-8 to GD3-10 of the Appellant's application for benefits, provides that the Appellant was required to report all of his employment and earnings, and notify the Commission regarding any separation from employment and the reasons for the separation and it warns against providing false information or the making of false statements.

### Record of Employment ("ROE")

[11] According to the record of employment ("ROE 1") dated May 21, 2015, the Appellant worked at "Sun" (the "Employer") from April 18, 2015 to May 12, 2015 as a "sales centre agent". The reason for issuing the ROE was listed as Code "M". The ROE also provides that the Appellant was paid monies on separation, including, March and April incentive bonuses (GD3-14).

[12] According to the record of employment ("ROE 2") dated May 27, 2015, the Appellant worked at the Employer from July 21, 2014 to April 17, 2015 as a "sales centre agent". The reason for issuing the ROE was listed as Code "K". The comment box provided, "change of service provid" (GD3-15).

[13] According to the record of employment ("ROE 3") dated June 22, 2015, the Appellant worked at the Employer from April 18, 2015 to May 12, 2015 as a "sales centre agent". The reason for issuing the ROE was listed as Code "M". The ROE also provides that the Appellant was paid monies on separation, including, March, April and May incentive bonuses. The ROE3 also provides that it replaces or amends ROE1 (GD3-16).

**Response to Request for Payroll Information**

[14] On or about January 18, 2015, the Commission received a response from a request for payroll information from the Employer, which showed that the Appellant was terminated with cause for breach of trust as he had provided a fraudulent doctor's note (GD3- 18 to 20).

**Medical Note:**

[15] GD3-21 is a medical note from the Hopital X, which was signed by "MP", it provided that the Appellant should be excused from work on account of illness and it was dated May 10, 2015 (GD3-21).

**E-Mail Communications:**

[16] By email dated May 9, 2015, DB the sales centre supervisor, wrote to others and advised that the Appellant came to see DB that morning to confess that it was in fact a fake doctor's note. DB repeated that the Appellant advised that he would be sending something to SDS and HR to apologize (GD3-22).

[17] By email dated May 9, 2015, the Appellant wrote to SDS and advised that he was making a formal apology and that the whole situation had been a nightmare for him and that he would like whatever decision is taken to be based on the truth. The Appellant called in sick on May 1, 2015 due to stomach issues. The Appellant was told that he needed a doctor's note. When the Appellant decided to visit the clinic, it was too late and they were full. The Appellant begged "her" to write the Appellant a letter and it was not possible because he had not checked into the clinic. That evening, the Appellant panicked and feared for his job. The Appellant remembered that he had a friend who worked at the hospital and he asked her if there was something with which she could assist him. The Appellant's friend then wrote the note, which he had provided to the Employer. The Appellant's friend said that the information on the paper is real but at this point, that is not what matters. The Appellant's fear and panic lead him to create a bigger mistake, which he regrets immensely. The Appellant apologized sincerely for his mistake (GD3-23).

**Commission's Conversations with the Appellant:**

[18] The Appellant called to request that the benefit period be terminated and that a new claim be made instead of the renewal that was made on May 23, 2015. The Appellant had worked about 1300 hours in the qualifying period and his rate was expected to be greater than the benefit rate of his current claim (Commission notes, June 1, 2015, GD3-17).

[19] The Appellant advised that he was not dismissed from his employment and that he quit his job. The Commission agent advised that she was aware of the email, which he had sent to apologize regarding that he had sent a fake medical note and that is the reason, why the Employer dismissed him. The Appellant explained that he had a deal "that this is internal". The Employer was not supposed to mention this reason on his ROE and was supposed to mention a lack of work because it was low season. The Appellant did not remember the date of the deal. The Appellant did not ask the Employer to draft the ROE in this manner. The Employer did offer to mention a lack of work. The Appellant did not want to tell the Commission the name of the person who made the deal with him because he did not want to get anyone in trouble. The Appellant was at work and had to get back to work. The Appellant requested that the Commission agent call him at home after 3:30pm and that this would give him time to think about whether or not he wanted to disclose the name (Commission notes, January 25, 2016, GD3-24).

[20] The Appellant telephoned the Commission agent and advised that he does not want to mention the name of the person at the Employer because he did not want to get anyone in trouble. The Appellant had only received the ROE, which mentioned that he had been laid off and had not received the ROE, which provided that the reason for separation was a dismissal. "F" is the person who produced the last ROE. F was not present when the Appellant had the talk with his manager. The Appellant did not want to mention the name of the manager. The Appellant was sick for one day and when he showed up at the clinic, they were not taking any patients. The Appellant's mother is a nurse so he asked her if she can do something so she provided him with a paper from the hospital. The Appellant provided the Employer with the paper and when the Employer advised that it would be calling to verify that he really went to the clinic, the Appellant told the Employer everything. The Appellant advised that he went to

the clinic and was unable to see a doctor. The Appellant asked his mother for a paper and she provided one to him. The Appellant never went to the hospital. The Appellant apologized in an email and spoke to his manager for a full week and they said that he would be laid off. The Appellant got the ROE with lay-off as a reason for separation and the Appellant claimed employment insurance benefits. The Appellant did not know about the other ROE3. The Appellant was aware that his behaviour with respect to the medical note was not right and he apologized. The Appellant thought that the matter would remain confidential. The Appellant was aware that his conduct caused the termination of his employment at the Employer because it was against the Employer policy (Commission notes, January 27, 2016, GD3-27).

**Evidence from the Notice of Appeal (GD2), Request for Reconsideration (GD3-32 to 35)**

[21] The Appellant was employed by CIBC and during the interview, the Appellant did not tell them that he had lost his job. The Appellant advised that he had quit. When the CIBC did the back check, they found out the truth. For fear of losing his job, the Appellant advised that he made a deal with the manager to claim insurance. This is not true. The Appellant was fired for lack of work, which is what was stated on the form (GD3-32 and 33).

[22] There was a lack of work at the Employer before the Appellant was dismissed because it was low season. The Employer was a vacation destination airline and when spring and summer come around, business drops. The Appellant provided a doctor's note that had not been signed by a doctor. The Appellant's supervisor told him that everything had been fine and that he would keep his job and then he was terminated for the same reason as everyone else, which was "not enough hours". After the termination, the Appellant telephoned the Commission to find out if he was eligible for benefits. The Commission agent did not ask the Appellant any questions. The Commission agent advised that he had the ROE on file, he counted the Appellant's hours and advised that the Appellant was eligible for benefits. A few months later, a bank to which the Appellant applied for work found out through a background check that the Appellant had been dismissed from the Employer. This caused the Appellant to lose his job at the bank. Given the information, which the Appellant had from the Employer, he was not aware of the reason for the termination of his employment. The Appellant did not know whether ROE 2 was a mistake or not. The Appellant only knows that he was provided with benefits because his ROE

did not mention any restraints on his ability to receive employment insurance. This is not the Appellant's fault as he was not aware of the existence of ROE3. The Appellant did not know that an Employer can file two different ROEs with 2 different kinds of information. The Appellant did not lie to anyone when he filed his application for benefits. The Appellant answered everything truthfully (GD2-4).

**Testimony Provided by the Appellant at the Hearing:**

[23] The Appellant testified under solemn affirmation.

[24] The Appellant testified that he intended to appeal all three grounds of the Commission's decision, which were: a disqualification from benefits (misconduct), the penalty and the Notice of Violation.

[25] The Appellant testified that he telephoned the Commission when he was still continuing the receive interest payment increases on his statements from the Commission after he filed his request for reconsideration and after he filed the Notice of Appeal. The Appellant confirmed to the Commission that he was also appealing the issue of misconduct.

[26] The Appellant testified that to his knowledge, the accumulation of interest was then stopped for the full amount.

[27] The Appellant testified that he had worked in the restaurant industry during his twenties and that he then decided that he wanted to try a "more corporate job" so he applied and worked at a company before taking the job at the Employer.

[28] The Appellant was then hired to work in the call center at the Employer in July 2014.

[29] The Appellant continued to work in this employment until May 2015. The Appellant was happy at work and worked without incident until May 2015.

[30] The Appellant understood that every spring, the Employer would lay off some of the employees because it was the Employer's slow season. The Appellant understood that he was 1 of approximately 4 people laid off that spring. There were approximately 50 people working in the office.

[31] When the Tribunal pointed out that the Appellant had been hired the year prior 2 months after the “lay off period”, the Appellant explained that that he was hired in July and underwent a two month training period so that he was ready to work during the September busy season.

[32] The Appellant recalled that one of his colleagues who got laid off right before him had asked the Employer to work 4 days instead of 5 days because she wanted to take courses. The Employer then decided to terminate the employment of this colleague. The Appellant could not recall why the other employees had been terminated.

[33] The Appellant assumed that the Employers were looking for any reason to lay people off because they were overstaffed at that time of year.

[34] The Appellant advised that he had a good relationship with his supervisor “D” and that SDS was the manager and D’s superior.

[35] The Appellant’s schedule changed regularly. He would sometimes work at the call center starting at 7am and he would sometimes start work at 2pm or 3pm.

[36] The Appellant testified that on or about May 1, 2015, the Appellant woke up and was feeling sick. His stomach hurt and he had to go to the bathroom a lot. The Appellant called in sick and was told by “D”, his supervisor that he had to provide a doctor’s note.

[37] The Appellant testified that he had been sick two or three times before since he started working in July 2014. The Appellant testified that he had not been told to bring doctor’s notes on those past occasions. The Appellant testified that he advised “D” that he did not think that he had to see a doctor and that he just had a bad stomach ache with frequent trips to the bathroom. “D” insisted that a doctor’s note was required.

[38] The Appellant testified that he went to the “X clinic” and that it was full. The woman who told him that the clinic was full also refused to supply him with a doctor’s note because he had not been seen by the doctor. The Appellant then went back home and telephoned his mother’s colleague who worked at the hospital and asked her to provide him with a doctor’s note.

[39] When the Tribunal queried why the Appellant did not just report to his Employer that the clinic was full and that he was unable to see a doctor, the Appellant said that he did not know the reason and that he was afraid of getting in trouble so he made a mistake and obtained a false doctor's note.

[40] After the Appellant submitted the note, the Employer advised that it would verify the validity of the note. The Employer also advised that it chose randomly which notes to verify and that his was selected for verification.

[41] The Appellant testified that he then panicked and emailed his supervisor and apologized and said that it was a mistake.

[42] The Appellant's supervisor advised that the Employer would not terminate the Appellant's employment over a "stupid note" and mistake and she counselled the Appellant to write the email to the manager and apologize for it.

[43] The Appellant assumed that because of what happened with the fake doctor's note, he was just put on a list of people who were slated for dismissal or employment termination.

[44] The Appellant never thought that he got fired because of the note or the breach of trust that was written on the documents.

[45] The Appellant testified that when he applied for benefits on May 23, 2015, he did not really understand the claim renewal process and he thought that he was making a new employment insurance claim.

[46] The Appellant testified that he answered "no" to the question, "have you worked since you completed your last application for Employment Insurance benefits" because he thought that the question pertained to whether or not he worked since his employment was terminated at the Employer (GD3-7).

[47] The Appellant testified that he did not understand why his new claim appeared to be based on his old insurable earnings so he contacted the Commission and spoke with an agent who told him to commence a new claim. The Appellant testified that this agent did not ask him regarding the reason for the separation from his employment and that he did not discuss this at

all with the agent. The Appellant testified that when he tried to discuss the hours, which he worked with the agent or anything about the employment, that the agent advised that it already had a copy of his information or record of employment from the Employer. The agent also advised that the Appellant was eligible to receive employment insurance benefits.

[48] The Appellant also testified that he did not remember filing any of his records of employment with the Commission and that he assumed that the Employer had filed and all of the records of employment with the Commission because the Commission agent advised the Appellant that it was in possession of a copy.

[49] In responding to the Tribunal's queries, the Appellant acknowledged that he may have received subsequent records of employment in the mail. The Appellant stated, however, that he did not understand the difference between the ROEs when the Tribunal took the Appellant through the copies of the ROEs at GD3-14 to 16.

[50] The Appellant testified that he did not know "F" who signed the ROEs and that she likely worked in Toronto.

[51] The Appellant advised that he was hired by CIBC and was working there when they decided to check his references. The Appellant had advised CIBC that his employment at the Employer was terminated because he decided to leave voluntarily to look for other employment. The Appellant testified that he did not want to tell CIBC that he had been laid off because he did not want to paint himself in a negative view.

[52] With respect to the Appellant's evidence at GD3-32 (on February 8, 2016) that he told CIBC that he had made a deal with his Employer to claim employment insurance and that this was not true, the Appellant testified that he never made a deal with his Employer to claim employment insurance benefits. The Appellant testified that he told this to the CIBC because he did not want to lose his job with the CIBC.

[53] When the Tribunal took the Appellant to GD3-24 (January 25, 2016) and GD3- 26, the Appellant confirmed that he first told the Commission agent that he quit his job. After the Commission agent advised the Appellant that it was aware of the medical note and his apology email and that this was the reason, which justified the Appellant's dismissal, the Appellant then

told the Commission agent that he had made a deal to claim employment insurance with the Employer because it was low season.

[54] When the Tribunal queried why the Appellant did not just explain that he did not understand the reason for his dismissal (as he explained in his testimony), the Appellant advised that he wanted to just be consistent with the story, which he provided to the CIBC so he stuck with his story because he wanted to keep his job at the CIBC.

[55] The Appellant confirmed that on January 27, 2016, (GD3-26), the Appellant explained the story regarding the fake medical note. The Appellant testified that he did not know which ROEs he had received or not received. The Appellant had assumed that his Employer advised that he had been laid off for a lack of work but he did not know where it would have said this on the ROE.

[56] With respect to the comment at GD3-27, "He is aware tha[t] this behavior caused the terminaison [sic] of his employment at [the Employer] because it is against the company Policy", the Appellant advised that he was not aware that his behaviour caused the dismissal until the Commission pointed this out to him.

[57] The Appellant testified that after his employment was terminated at the CIBC, he lived off of his credit cards and underwent a very stressful time and incurred a great deal of debt. The Appellant then worked at "A" and then worked at another employer as a brand manager and then went back to work at "A". The Appellant is also taking courses on-line to obtain his degree from CEGEP or his DEC.

**SUBMISSIONS**

[58] **The Appellant** submitted as follows:

a) The decision taken by the Commission agent was wrong and unfair (GD2-4);

b) The Appellant made a mistake and it was not his fault;

c) The Appellant filed a request for reconsideration of the 3 issues and not just 2 of the 3 issues;

d) The Appellant did not know that he had been dismissed for misconduct. The Appellant really thought that the real reason for his dismissal was a lay off because it was the Employer's slow season;

e) The Appellant does not know which ROEs he did or did not receive and he thought that the Commission had all of the relevant documents;

f) The Appellant only made up stories regarding collusion between him and the Employer because he thought that this would help him preserve his job at the CIBC; and,

g) The Appellant panicked and made a mistake when he submitted the doctor's note and when he made up stories to his new employer and repeated them to the Commission.

[59] The **Respondent** submitted as follows:

**Penalty:**

a) The Appellant omitted to report that he was dismissed from the Employer on May 12, 2015. ROE1 was issued on May 21, 2015 with the mention of "M" for dismissal. ROE2 was issued on May 27, 2015, with the mention "K" 'change of service provider". ROE3 was issued on June 22, 2015 because of modification to earnings paid to the Appellant on June 19, 2015. By obligation, the Appellant is required to forward ROE1 and ROE3 to the Commission (GD3-37, GD3-38, GD4-4);

b) The Appellant deliberately omitted to provide the information about ROE1 and ROE3 because it would have jeopardized the benefits, which he was receiving (GD3-37, GD3-38, GD4-4);

c) In the case at hand, the penalty was calculated pursuant to paragraph 38(1)(d) of the Act (GD3-37);

d) Under the current policy a penalty for a first offence, is 50% of the overpayment required. Three times the benefit rate was $1,308.00 and the maximum penalty amount was $5,000.00 (GD3-37);

e) A penalty equal to the legal validation was imposed within 36 months of the date of the offence (GD3-37);

f) Despite being fully aware of his rights and obligations (GD3-8 to 10), the Appellant made a representation that he knew or ought to have known was false or misleading (GD3-38);

g) There was no evidence of collusion between the Employer and the Appellant because ROE3 indicates that it was a dismissal for a breach of trust (GD3-19, GD4-2);

h) Pursuant to section 38 of the Act, the Commission may impose a penalty for any misrepresentation which is *knowingly* made by the claimant. *Knowingly* means the Commission can reasonably conclude the claimant knew the information was untrue when s/he provided it. There is no element of intent in this consideration (GD4-4);

i) For a finding of misrepresentation, claimants must have subjective knowledge that the representations made by them or on their behalf, were false. The Commission has to prove that the false statement was knowingly made. To establish that a false statement was knowingly made, the evidence must show: 1) an objectively false statement 2) that misleads the Commission, 3) resulting in the real or possible payment of benefits to which the claimant was not entitled, and 4) at the time of the statement, the claimant knew it did not accurately reflect the facts (*Mootoo* A-438-00; *Gates*, A-600-94) (GD 4-4);

j) The Commission has met the onus of establishing that the Appellant made a misrepresentation when the Appellant omitted to report the reasons for separation from his employment and when the Appellant failed to provide the ROEs (GD4- 4);

k) The amount of the penalty was calculated according to 3 times the benefit rate of $436.00 (GD3-37);

l) The Commission employs a policy when calculating the penalty. For a first misrepresentation, the penalty amount may be up to the number of misrepresentations multiplied by the maximum weekly rate in effect when the misrepresentation occurred (GD4-7);

m) The Commission policy of establishing guidelines to ensure a certain level of consistency and to avoid capriciousness in matters of penalties has been supported by the Federal Court of Appeal (*Gagnon* 2004 FCA 351)(GD4-5);

n) No court, Umpire, or Board of Referees is entitled to interfere with a Commission's ruling with respect to a penalty so long as the Commission can prove that it exercised its discretion in "a judicial manner". In other words, the Commission must demonstrate that it acted in good faith, taking into account all relevant factors and ignoring irrelevant factors (*Uppal* 2008 FCA 388; *Tong* 2003 FCA 281)(GD4-5 and GD4-6).

**Notice of Violation**

o) Once a decision has been made to impose a sanction because of a misrepresentation, the Commission must then determine whether or not to issue a Notice of Violation pursuant to subsection 7.1(4) of the Act (GD4-6);

p) The Commission exercised its discretion in a judicial manner when it issued the Notice of Violation. The Commission considered the overall impact to the claimant, mitigating circumstances and prior offences and the impact on the ability of the Appellant to qualify for future claims (GD4-6, GD3-38);

q) The penalty was over $500. The Commission considered the Appellant's ability to claim for employment insurance. The Appellant had 1431 insurable hours to establish his claim (GD3-38);

r) Section 7.1(5) of the Act categorizes the violation according to severity of the misrepresentation. The amount of the overpayment determines the classification. The Commission determined that a violation for a very serious violation was issued pursuant to subsection 7.1(5) of the Act (GD4-6);

s) In order to intervene with the Commission's decision, the Tribunal must determine that the Commission did not exercise its discretion in a judicial manner when it decided to issue the Notice of Violation (*Gill* 2010 FCA 182)(GD4-6);

t) The Commission's decision to impose a violation is justified and it exercised its discretion judiciously as all of the pertinent circumstances were considered prior to issuing the violation (GD4-6); and,

u) The purpose of section 7.1 of the Act is to deter abuse of the employment insurance scheme by imposing an additional sanction on claimants who attempt to defraud the system (*Gill* 2010 FCA 182)(GD4-6).

**ANALYSIS**

**Preliminary Matter: The Issue of Misconduct:**

[60] The Commission has not issued a reconsideration decision regarding the issue of misconduct. The Commission decided clearly at GD3-28 to 31 that it was unable to pay the Appellant benefits because he lost his employment as a result of his misconduct.

[61] At GD3-32, the Appellants argued in his request for reconsideration that he was contesting the decision at GD3-28. The Appellant contended that he "was fired for lack of work just like [sic] stated in the form".

[62] Instead of framing the request for reconsideration and the subsequent right of appeal therefrom, as including, the issue of misconduct, the Commission decided to reconsider only the issues of the penalty and the Notice of Violation in its reconsideration decision at GD3-35.

[63] The Tribunal has no knowledge as to the reasons why the Commission would have framed the Appellant's request for reconsideration so narrowly. Such a narrow framing of the

issues by the Commission amounts to a serious impediment to the Appellant's ability to access the justice system and creates serious procedural obstacles for the Appellant and the Tribunal. Correcting such a procedural error calls for a delay in the process or a bifurcation of the proceeding and a waste of the parties resources and the Tribunal's resources.

[64] During the hearing, the Appellant requested that the Tribunal hear all 3 issues. The Tribunal considered that proceeding to hear all 3 issues within this appeal, would cause little or no prejudice to the Commission because the issue of the penalty and the issue of the Notice of Violation already assume a finding of misconduct. The Tribunal also considered that there are substantial pieces of evidence and submissions on this issue from the Employer and the Commission and that it would be difficult for the Employer or Commission to argue that either of them were denied an opportunity to present their positions on this issue.

[65] The Tribunal also considered that sections 2 and 3 of the *Social Security Tribunal Regulations* (the "SST Regulations") require the Tribunal to proceed in a manner, which best promotes the objectives of efficiency, fairness, and natural justice.

[66] The Tribunal could not, however, ignore that it does not have clear jurisdiction over the issue of misconduct. This is because, pursuant to section 113 of the Act, the Tribunal is only able to decide appeals of the Commission's reconsideration decisions. Given that the Commission has not rendered a clear reconsideration decision with respect to the issue of misconduct, the Tribunal finds that this issue is outside of its jurisdiction (*Lapointe* 2011 FCA 66, *Read* A-371-93, *Hamilton* A-175-87 (1988), 91 N.R. 145) and that it would be more prudent to recommend that the Appellant file an additional request for reconsideration, which argues specifically, that the Appellant did not lose his employment as a result of his own misconduct. If the Appellant is not satisfied with the Commission's reconsideration decision, the Appellant may appeal the reconsideration decision to the Tribunal and the appeal would be heard at a later date.

**The Penalty**

[67] The Commission bears the burden of proving that the misrepresentations were made and were made knowingly on a balance of probabilities (*Purcell*, [1996] 1 FC 644).

[68] The Tribunal finds that the Commission has proven on a balance of probabilities that misrepresentations were made when the Appellant did not provide copies of the ROEs to the Commission as he was required to do pursuant to his obligations at GD3-8 to 10.

[69] The Tribunal finds further that the Commission has proven on a balance of probabilities that further misrepresentations were made when the Appellant lied to the Commission regarding the reasons for the separation from employment in January 2016 at GD3-24 and 26.

[70] The Appellant admitted and did not deny that he made the impugned representations with respect to the misrepresentations in January 2016. With respect to the allegations regarding the ROES, the Appellant testified that he had no specific recollection of having received ROE1, RORE2 or ROE3 (testimony at the hearing, GD2, GD3).

**Were the misrepresentations "*knowingly*" made?**

[71] The words "knew" or "knowingly" in section 38 imply that to prove that the misrepresentations were made knowingly, the Commission must apply a subjective test (*Ftergiotis* 2007 FCA 55; *Mootoo* 2003 FCA 206).

[72] This means that the facts and circumstances at the time that the Appellant made the representations may be taken into account in evaluating whether the Appellant knew that the statements were false. The Commission is not, however, required to prove that the Appellant had any intention to deceive in proving that the representations were knowingly made (*Gates* [1995] 3 F.C. 17 (C.A); *Purcell*, [1996] 1 FC 644).

[73] While the initial onus is on the Commission to prove subjective knowledge, the jurisprudence has held that once it appears from the evidence that the a claimant has wrongly answered a very simple question or questions on a report, the burden shifts to the claimant to explain why the incorrect answers were given (*Gates* [1995] 3 F.C. 17 (C.A); *Purcell*, [1996] 1 FC 644).

[74] Given that the information in the Appellant's application for benefits (GD3-8 to GD3-10) was clear, the Tribunal finds as a fact that in ordinary circumstances, the Appellant should have had actual knowledge that he was making misrepresentations to the Commission when he

failed to submit the ROEs and disclose all of the reasons for the separation from his employment. This is because the list of the rights and responsibilities and of the reporting obligations and consequences for misrepresentations were clear (*Gates* [1995] 3 F.C. 17 (C.A); *Purcell*, [1996] 1 FC 644).

[75] The Appellant is claiming, however, that he lacked subjective knowledge because he had been informed by a Commission agent that the Commission was in possession of the relevant documents and that he was eligible for benefits. The Appellant, accordingly, did not think that there was anything else to be provided to the Commission.

[76] The Tribunal finds that the Commission has not proven on a balance of probabilities its allegation at GD3-38 that the Appellant "omit [sic] deliberately to provide the information about [ROE1 and ROE3] because it would have jeopardized the benefit he was receiving."

[77] The Tribunal also finds that the Commission agent, "AD" referred to the wrong test at GD3-38 when AD stated, "despite being fully aware of his rights and obligations (GD3-8 to 10), the Appellant made a representation that he knew or ought to have known was false or misleading (GD3-38)". There is no question that at GD3-38, the agent should have referred to the subjective test.

[78] In applying the proper subjective test, the Tribunal found that the Appellant proved on a balance of probabilities that he did not understand how to read the ROEs, that he had no recollection of having received the ROEs and that he did not know that he had to provide the ROEs to the Commission because in his conversation with the Commission agent, the agent had advised that it had all of the required documentation from the Employer.

[79] The Appellant also proved on a balance of probabilities that he answered the question at GD3-7 incorrectly because he misunderstood the question.

[80] The Tribunal finds the Appellant's testimony on these points credible given his level of education and his apparent lack of understanding of the process and procedure and what was expected of him (Appellant testimony).

[81] The Appellant also did not appear to be 100% sure of the real reason for his dismissal. Although the Tribunal is not deciding the issue of misconduct, on the basis of the Appellant's evidence in the file, including, his testimony, the Tribunal finds that once the issue of misconduct is evaluated, the Appellant may be able to prove on a balance of probabilities that the Employer wanted to terminate the Appellant's employment in any event and that the allegation of misconduct was an excuse to justify the dismissal and that the dismissal was not the result of his misconduct (*Doucet* 2012 FCA 105; *McNamara* A- 239-06, 2007 FCA 107; CUB 38905; 1997).

[82] The Tribunal finds that the Appellant's explanations in this regard, amounted to a reasonable or credible explanation for the misrepresentations in his circumstances. The Tribunal does not find, accordingly, that the Appellant's omissions to file the ROEs were necessarily his fault or were subjectively known because the Appellant has proven that he may not have been in possession of the ROEs and he did not understand their significance until they were explained at the hearing by the Tribunal. The Appellant's evidence also suggested that he may not have known with any degree of certainty, what the real cause was for the dismissal.

[83] The Appellant accordingly, did not knowingly withhold any information from the Commission or make any misrepresentations knowingly prior to January 2016.

[84] With respect to the further misrepresentations at GD3-24 and GD3-26, however, the Tribunal finds that the Appellant made misrepresentations to the Commission deliberately and in a panicked effort to preserve his employment.

[85] The Tribunal does not find that the Appellant provided a reasonable or credible explanation for these misrepresentations. In fact, the Tribunal finds that the manner in which the Appellant presented himself to the Commission and the seemingly illogical statements which he made were consistent with his reactions to his Employer and his new employer when he was questioned regarding the termination of the employment. The Tribunal has no knowledge as to why the Appellant would have chosen to fabricate facts when he could have simply advised that he thought that the real cause of his dismissal was the shortage of work and the Employer's planned lay off.

[86] The Tribunal finds, accordingly, that the Commission has proven on a balance of probabilities that the Appellant had the requisite degree of knowledge or subjective awareness to have made the misrepresentations at GD3-24 and GD3-26 “knowingly”.

**Did the Commission Exercise its Discretion Judicially in Calculating the Penalty Amount?**

[87] The law is clear that the Commission has sole discretion to determine the appropriateness and amount of a penalty (*Dunham*, [1997] 1 F.C. 462 (F.C.A). The Tribunal may only intervene if it finds that the Commission did not exercise its discretion judicially when it imposed the penalty (*Purcell*, [1996] 1 FC 644).

[88] The Tribunal finds that the Appellant has not proven on a balance of probabilities that the Commission exercised its discretion judicially when it determined the amount of the penalty and that the Tribunal has no reason to intervene (*Purcell*, [1996] 1 FC 644; *Gray* 2003 FCA 464).

[89] The appeal on this basis, is accordingly, dismissed.

**The Notice of Violation:**

[90] The Notice of Violation is issued as an additional sanction and cannot be issued in absence of a monetary or non-monetary penalty (*Savard* 2006 FCA 327) (*Gill* 2010 FCA 182).

[91] In *Zora Gill* 2010 FCA 182, the Federal Court of Appeal held that in situations where a sanction has been imposed, the issuance of a Notice of Violation is neither mandatory nor automatic under subsection 7.1(4) but discretionary on the part of the Commission (*Inkell* 2012 FCA 290).

[92] Given that the Notice of Violation is triggered by a monetary or non-monetary penalty, and that the Tribunal finds that there should be a penalty, a Notice of Violation may be appropriate in these circumstances.

[93] Unlike the penalty amount, which can be reduced, the Commission and the Tribunal or reviewing court do not appear to have jurisdiction to alter the classification of the violation.

This is because the classification of the Notice of Violation is done automatically in accordance with the Act and on the basis of the overpayment amount (Paragraphs 7.1(5)(a) and 7.(6)(a) of the Act). The Tribunal can only set a Notice of Violation aside.

[94] The Tribunal finds, therefore, that the issue of the Notice of Violation should be revisited once the issue of misconduct and the final status of the overpayment are determined. At this juncture, the Tribunal cannot find that the Appellant has proven on a balance of probabilities that the Commission did not exercise its discretion judicially when it imposed the Notice of Violation and it finds that the Notice of Violation has been classified correctly as a very serious violation pursuant to subsection 7.1(5)(iii) of the Act (*Gill* 2010 FCA 182; *Dunham* A-708-95; *Purcell*, [1996] 1 FC 644; *Gray* 2003 FCA 464).

[95] The appeal on this basis is, accordingly, dismissed.

**CONCLUSION**

[96] For the foregoing reasons, the Tribunal has decided as follows:

a) With respect to the issue of misconduct, the appeal has not been heard and the Tribunal respectfully recommends that the Appellant file an additional request for reconsideration forthwith with the Commission;

b) With respect to the issue of the penalty amount, the appeal is dismissed; and,

c) With respect to the issue of the Notice of Violation, the appeal is dismissed. The Tribunal finds that this issue should be revisited at the reconsideration or appeal of the issue of misconduct.

Alyssa Yufe

Member, General Division - Employment Insurance Section

## ANNEX

## THE LAW

**7 (1)** Unemployment benefits are payable as provided in this Part to an insured person who qualifies to receive them.

**(2)** An insured person qualifies if the person

**(a)** has had an interruption of earnings from employment; and

**(b)** has had during their qualifying period at least the number of hours of insurable employment set out in the following table in relation to the regional rate of unemployment that applies to the person.

### TABLE

| Regional Rate of Unemployment | Required Number of Hours of Insurable Employment in Qualifying Period |
|---|---|
| 6% and under | 700 |
| more than 6% but not more than 7% | 665 |
| more than 7% but not more than 8% | 630 |
| more than 8% but not more than 9% | 595 |
| more than 9% but not more than 10% | 560 |
| more than 10% but not more than 11% | 525 |
| more than 11% but not more than 12% | 490 |
| more than 12% but not more than 13% | 455 |
| more than 13% | 420 |

**(3) to (5)** [Repealed, 2016, c. 7, s. 209]

**(6)** An insured person is not qualified to receive benefits if it is jointly determined that the insured person must first exhaust or end benefit rights under the laws of another jurisdiction, as provided by Article VI of the *Agreement Between Canada and the United States Respecting Unemployment Insurance*, signed on March 6 and 12, 1942.

**38 (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).