



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *M. A. v. Canada Employment Insurance Commission*, 2017 SSTGDEI 41

Tribunal File Number: GE-16-2037

BETWEEN:

M. A.

Appellant

and

Canada Employment Insurance Commission

Respondent

and

Strathcona Cleaners Ltd

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Katherine Wallocha

HEARD ON: March 29, 2017

DATE OF DECISION: March 31, 2017

REASONS AND DECISION

PERSONS IN ATTENDANCE

Hearing January 18, 2017

M. A., the claimant, attended the hearing by personal appearance.

R. C. and S. C., the employers, attended the hearing by personal appearance.

Hearing March 29, 2017

M. A., the claimant, attended the hearing by personal appearance.

R. C., the employer and owner, attended the hearing by personal appearance with C. S. who is a partner in business development.

INTRODUCTION

[1] The claimant became unemployed on April 5, 2013. He filed for Employment Insurance (EI) benefits on April 9, 2013. An initial claim for EI benefits was established on April 7, 2013. The Canada Employment Insurance Commission (Commission) allowed the claim for EI benefits however, it was later learned that the claimant quit part-time employment at the same time as his full-time employment ended. The Commission denied the claim because it was determined that the claimant voluntarily left his employment without just cause. The claimant was further imposed a penalty and violation for having knowingly made one false representation. The claimant sought reconsideration of the Commission's decision, which the Commission maintained in their letter dated April 21, 2016. The claimant appealed to the Social Security Tribunal (SST).

[2] The hearing was held by In person for the following reasons:

- a) The complexity of the issues under appeal.
- b) The fact that more than one party will be in attendance.
- c) The information in the file, including the need for additional information.

[3] The employer was added as a party to this appeal at the Tribunal's initiative because the claimant alleges that he never worked for this employer and a cousin fraudulently worked using his name and his Social Insurance Number (SIN).

ISSUES

[4] The issues under appeal are:

1. whether the claimant should be assessed a penalty pursuant to section 38 of the *Employment Insurance Act* (EI Act) for making a misrepresentation by knowingly providing false or misleading information to the Commission.
2. whether the claimant should be assessed a very serious violation under section 7.1 of the EI Act.
3. whether the claimant had just cause for voluntarily leaving his employment pursuant to sections 29 and 30 of the *Employment Insurance Act* (EI Act).

EVIDENCE

[5] The claimant applied for regular EI benefits on April 9, 2013 stating that his last day of work was April 3, 2013 and he was no longer working due to a shortage of work. He confirmed that he did not have any additional periods of employment in the last 52 weeks (Page GD3-4 to GD3-16).

[6] Another employer submitted a Record of Employment (ROE) dated May 14, 2013 indicating that the claimant began working in janitorial on February 6, 2012 and he quit on April 5, 2013 accumulating 1310 hours of insurable employment (Page GD3-17).

[7] The employer was contacted by the Commission on May 12, 2014 to inquire about the reason the claimant quit his employment and the employer stated that she did not recall this employee and would have to look in her records. The employer was contacted again on May 20, 2014 and she stated that the claimant's supervisor stated he quit his job and went back to Africa. She further advised that the claimant's shift was 5:00pm to 10:00pm Monday to Friday (Pages GD3-18 and GD3-19).

[8] The claimant was contacted by the Commission on May 20, 2014 and identified the same address that the claimant provided on his EI application but provided a different phone number. The claimant confirmed his previous full-time employment. He further confirmed that he worked for the other employer until April 5, 2013 adding that it was part-time work. He was asked why he said he did not have any other employment within the last 52 weeks and he responded that it was because he had quit this job and EI did not accept it explaining that when one quits they are not allowed EI benefits. The claimant was asked why he quit and he stated that he did not quit; he took a vacation and he was laid off after. The claimant stated that the employer gave him only two weeks' vacation but he took another two weeks and he did not have permission for the other two weeks off. He stated that he was sick and he told the employer that he was sick but he only told the employer after the four weeks; the employer said they replaced him. The claimant stated that he did not contact the employer after two weeks because in some areas in Africa, they do not have a network; he confirmed that he remained in Africa for the extra two weeks and further confirmed that he had a return flight but cancelled it when he became sick (Page GD3-20).

[9] The claimant was informed that he completed his claimant reports online on April 20, 29 and May 11, 2013 and was asked why he could complete his reports while in Africa but could not contact his employer. The claimant did not appear to understand but then stated that he did his reports when he returned from Africa. The Commission stated that the claimant's last day of work was April 5, 2013 and that he said he had a two week vacation therefore it was reasonable that he went to Africa between April 6 and April 20, 2013; then if he stayed another two weeks that would take him to May 4, 2013 which means that two of his reports were completed while he was in Africa. It was also pointed out that the ROE was completed on April 14, 2013 with the reason for separation as quit and the Commission asked why the employer would have completed the ROE nine days after his last day as a quit if he was just supposed to be on vacation for two weeks; the claimant did not have a response (Page GD3-20 and GD3-21).

[10] The claimant stated that he is not sure exactly the dates of when he was in Africa and he will review his records and call back (Page GD3-21).

[11] The claimant's supervisor was contacted by the Commission on May 28, 2014 and he stated that the claimant quit because he was going to Africa. The Commission clarified that the

claimant actually said he was quitting and the employer stated that the claimant was not granted vacation time; he just quit (Page GD3-24).

[12] The claimant was contacted by the Commission on May 28, 2014 and identified the same address and phone number on the claimant's EI application. The claimant confirmed that the person the Commission spoke to was his supervisor. The claimant was informed of his supervisor's statements and he agreed that he quit to go to Africa but then stated that he did not end up going to Africa because there was fighting there. The claimant was asked if he tried to get his job back and he stated that he did try to get his job back about two weeks after he had quit but he was told that he had been replaced. The claimant stated that he returned to his full-time job but the Commission confirmed that he did not return to work until October 2013 (Page GD3-25).

[13] The claimant was asked if there were any circumstances that he would like the Commission to take into consideration and he stated that his brother was killed and that is why he was going to Africa. The claimant stated that his brother was killed in March 2013 adding that he asked for a leave of absence but the employer said no. He explained that he asked for a leave for three months but the employer said no, he stated that he asked for a shorter leave but the employer said they could not hold his job (Page GD3-25).

[14] The Commission sent a letter dated October 13, 2015 to a different address than the one on the claimant's EI application. This letter informed the claimant that he was unable to receive EI benefits starting April 7, 2013 because he voluntarily left his job on April 5, 2013 without just cause within the meaning of the EI Act. The claimant was further informed that the Commission imposed a penalty of \$2,475 for knowingly making one false representation. The claimant was sent a Notice of Violation classified as a very serious violation (Pages GD3-29 to GD3-31).

[15] The claimant was sent a Notice of Debt dated October 17, 2015 in the amount of \$9,547; \$2,475 in penalty and \$7,072 in overpayment due to a disqualification (Page GD3-32).

[16] The claimant submitted a letter with his Request for Reconsideration dated November 2, 2015 using the same address as the letter sent October 13, 2015 but identified the different telephone number used to contact the claimant on May 20, 2014. The claimant stated that he did

quit his job as he was laid off on March 30, 2014. He stated that there is misinformation from somewhere (Page GD3-35).

[17] The claimant contacted the Commission on November 30, 2015 asking for the original decision letter as it was not received; he moved and provided a change of address. This letter identified both telephone numbers; the one provided on the EI application for messages and the other as his home phone number (Page GD3-37).

[18] The claimant submitted a letter dated December 4, 2015 indicating that his appeal was late because he had moved. He stated that he received the Notice of Debt from the person who is renting his old place. He stated that the reason he quit his job was because his brother was killed in the conflict between South Sudan and Sudan in the month of February 2013. He stated that he quit his job for that reason and went back home in South Sudan to see his family. He further stated that he told his employer clearly the reason he was leaving his job but does not know why they did not provide the full information about why he quit his job (Page GD3-42).

[19] The claimant stated it is true that he did not claim that he quit the job because he has a lack of knowledge about EI regulations that you can still claim EI benefits even if you quit the job for your own issue. He stated that he did not have a clue that you can claim EI benefits for the job you quit and that is why he did not claim that job; if he knew, of course he would claim it because it is his right to do so. He added that his English is poor and he does not read English that much to review the EI Act (Page GD3-42).

[20] The claimant submitted another Request for Reconsideration date stamped received on December 17, 2015 stating that he left his job because his younger brother was killed in the war back home in South Sudan. He was going back to see his family and that was the reason he quit this job. He stated that he was not aware that with the EI system, you can still claim your benefit. The claimant explained that he did not receive the decision letter and when he contacted the Commission, he was informed that the debt was caused because he quit his full-time job and not his part-time job which is why he submitted his Request for Reconsideration again (Pages GD3- 43 and GD3-44).

[21] The claimant was contacted by the Commission on April 21, 2016 and he stated that his brother was killed in February 2013 and he left his part-time employment on April 5, 2013 so he could go home to see his family. The claimant stated he asked his employer for a leave of absence in February 2013 to go for two months but was denied and told he would have to quit if he left. The claimant stated that he gave them notice in March 2013 that he was resigning and then started to make arrangements for flights to Africa. The claimant stated that that he had booked a flight for May 9 or 10, 2013 but postponed it due to a war in Sudan as he did not feel it was a good time to go. The claimant stated that he went to Africa on August 30, 2013 and returned in late September 2013. He confirmed that he asked to return to his job when he decided he was not going to Africa but he learned that he had been replaced (Page GD3-45).

[22] The claimant confirmed that he did not include his employment on the EI application because he quit and he thought he was not eligible for EI so he did not include it on the application (Page GD3-45).

[23] The claimant stated that he quit on April 5, 2013 even though he was not travelling until May 9, 2013 because he had visitors that were heartbroken for him because of his brother's death and he was making arrangements to leave. He confirmed that he had not been looking for work between May and August 2013 because he knew he was leaving soon. He further confirmed that he had not looked for work between April 5 and May 9, 2013. The claimant was asked why he quit on April 5, 2013 and he stated that he was distraught at finding out about his brother's death; he learned of this around April 2, 2013. The claimant confirmed that his brother died in February 2013 and that he requested a leave of absence from his employer in February 2013. He was asked again why he decided to leave his employment on April 5, 2013 and he stated that it was because he had visitors and he could live on his savings for a while (Page GD3-45).

[24] The Commission sent the reconsideration decision letter dated April 21, 2016 however, the claimant contacted the Commission on May 11, 2016 stating that the address the Commission had on file belonged to his cousin. He stated that his cousin has been impersonating him using his SIN and working illegally. The indications in the file are that the letter was resent to the same address (Pages GD3-49 to GD3-54).

[25] The claimant submitted his Notice of Appeal to the SST date stamped received on May 26, 2016 indicating a different address but using the other phone number previously identified as a home phone number. The claimant stated that one of his cousins committed fraud by working and using his SIN. He stated that he does not know the time his cousin started working but he never worked with this employer. He stated that he worked in the far north in Fort McMurray with his full-time employer since 2011 to 2014. He stated that he called the police to report the fraud and one of his cousins' friends who is the supervisor at the employer's lied to the police that he was working there as well. However, he stated that they do not have any proof of him working there like two copies of his ID, address and signature but they had his cousins' ID and signature. He asked how he was doing two jobs in two different cities at the same time (Page GD2-4).

[26] The claimant submitted a letter dated June 7, 2016 stating that when he received the Notice of Debt from the Commission, he called his cousin to inform him that he will pay or the claimant will call the police. The claimant stated that his cousin asked him to not call the police because he will be in big trouble and to give him time to collect the money but his cousin was lying. He stated that the claimant made an appeal and pretended to be him; he knows all of his information because they are flesh and blood cousins (Page GD2A-6).

[27] The Commission provided an Attestation Certificate Full Text Screens Payments and an itemized statement of benefits paid showing the claimant served his waiting period from April 7 to April 20, 2013, he then received regular EI benefits from April 21 to August 17, 2013 (Pages GD3-55 and GD3-56).

Testimony at the Hearing on January 18, 2017

[28] The employer stated prior to the hearing that they did not receive a copy of the docket but confirmed that they were prepared to proceed with the hearing without having read the appeal docket.

[29] The claimant stated prior to the hearing that he received his docket the morning of hearing. Prior to the hearing, the claimant was given the opportunity to read the Commission's representations and he agreed that he was prepared to proceed with the hearing.

[30] The claimant testified at the hearing that he never worked for this employer and has never before seen the people who attended the hearing. He stated that he does not know where the employer is located and only knows that his cousin worked for this employer and he is friends with the employer's supervisor. He stated that when he found pay stubs in his name in his cousin's house, he confronted his cousin who told him that he was scared because the government wanted his income for child support payments and he could not afford to live and pay child support.

[31] The claimant stated that he told his cousin he would call the police and his cousin stated that he would pay the debt. He stated that because he was his cousin, who was like a brother to him, he did not call the police. He stated that his cousin was the one who spoke to the Commission and told them that he was going to Africa adding that he did not speak to the Commission. He stated that when the government started taking his paycheque, he realized that his cousin had not taken care of the debt and that is when he contacted the police. He explained that the police contacted the supervisor who told the police that the claimant was working there.

[32] The claimant stated that he needs the employer to provide any documentation with his signature or a video showing that he was working there. He stated that he was working in Fort McMurray, 600 KMs away and could not do both jobs therefore it was not him working with this employer.

[33] The claimant stated that he needed someone to check with the employer for something with his signature or a video of him working with the employer to show that he was there one day. He stated that it was not him who worked for this employer because he was working in Fort McMurray and he could not have been working in Calgary at the same time; he could not do both jobs.

[34] The claimant stated that he has his own address and his cousin gave his cousin's address to the Commission so he denies that he was ever working with this employer and he did not quit his job.

[35] The claimant stated that he worked for a company doing seismic testing explaining that he lived in Calgary but would travel to work. He stated that he would start working in October and would work until April every year. He stated that he would relocate to Fort McMurray and

would work 30 days and get two days off adding that he could ask for more time off if he wanted to. The claimant confirmed that he did occasionally ask for more time off to return home.

[36] The claimant stated that when he was working in the north, the company provided a hotel room or they lived in the camp. He stated that he is not able to provide any proof of accommodations while up north because the company paid for everything. He further added that he would travel up north by the company owned bus so he was unable to provide proof of his transportation to the north.

[37] The claimant stated that he did live with his cousin at one point adding that this is where his cousin got his information. He confirmed that the address on his application is his cousin's address and the employer confirmed that this is the address on the paycheques. The claimant confirmed that he has moved several times since then and further confirmed that the address the SST has on file is his current mailing address.

[38] The claimant stated that he does not have a brother in Africa nor did he have a brother who passed away in February 2013 adding that this story was just made up.

[39] The claimant confirmed that he did apply for EI benefits when he was laid off from his employer. He was shown the Request for Reconsideration and stated that he did not submit that form. The claimant confirmed that he did submit the Notice of Appeal and further confirmed that it is his signature on the Notice of Appeal.

[40] The claimant stated that he thinks he learned about his debt in 2014 and he confronted his cousin then. He stated that his cousin pleaded with him not to turn him in. He stated that his cousin treated him as though he was stupid. He stated that he is now trying to prove that it was not him that was working for this employer.

[41] The claimant stated that he contacted the employer in May 2016 but was told to contact the supervisor because they would not be able to help him. He explained that he contacted the supervisor and asked what the connection is and further asked what he told the police and the supervisor told him that he did not need to know. The claimant confirmed that he has never worked two jobs at the same time. He further confirmed that his full-time employer's main office was in Calgary but all of the work was done outside of Calgary in Fort McMurray, Cold

Lake, Lloydminster, Grande Prairie and other places in the oil field but not anywhere close to Calgary.

[42] The claimant stated that he would provide ID showing he was authorized to work in Cold Lake, Alberta and he would contact the company to see if there are any records that they could provide to show that he was working up north and was unable to work for this employer.

[43] The employers were asked if they recognized the claimant and they stated that they do not meet the employees as they have a supervisor who does the hiring for their company, who provides the employees with their paycheques and who deals with most of the staff issues. The employer stated that they do recognize some staff members who have been with them for a long time but they are a big company with over 50 employees and therefore, they do not recognize everyone or know all their names.

[44] The employer stated that they did not keep documents on file for their employees with pictures or signatures however since this happened, they are changing their policies and will be keeping some of that information now. It was further explained that they operate a janitorial company that cleans buildings like office buildings and apartment buildings so they do not have access to the videos. They added that the building that the claimant was allegedly working in was no longer under contract with the employer therefore they are unable to even attempt to access the video to see who was working there.

[45] The employer confirmed that a paycheque was provided every two weeks from February 15, 2012 to April 15, 2013 to a person with the claimant's name and that paycheque was cashed every two weeks however they stated that they are unable to confirm that the claimant was the same person who worked for them. The employer stated that she was planning on bringing the supervisor to the hearing but because they did not know what the hearing was about, they decided at the last moment not to bring the supervisor.

[46] The employer agreed to attend a future hearing with the supervisor as the supervisor would be able to identify the claimant if he in fact worked for this employer. The Tribunal adjourned the hearing to allow both parties the opportunity to provide further evidence.

Post-Hearing Documents

[47] The claimant provided a picture ID dated February 13, 2016 and explained that this evidence shows that he was working out of town in 2013 (Page GD8-1).

[48] The claimant provided an Hours Worked Report dated January 20, 2017 from the claimant's full-time employer for the period of December 21, 2011 to January 26, 2017. This report shows that the claimant worked from February 21, 2013 to April 3, 2013 in Cold Lake, Alberta and he worked almost every day on average 13 hours per day. He then returned to work on October 10, 2013 working in British Columbia, returning to work in Alberta on October 29, 2013 and continued working until January 28, 2014 (Pages GD9-1 and GD9-2).

Testimony at the Hearing on March 29, 2017

[49] The employer informed the Tribunal that the claimant's supervisor was unable to attend the hearing because he was no longer employed with them. She stated that their business has declined by 40 or 50% which required her to lay off the supervisor. She stated that she attempted to contact the claimant's supervisor prior to the hearing but he did not return her calls and therefore, she was unable to speak with him.

[50] The claimant stated that he submitted his ID from Cold Lake with the date February 13, 2016 explaining that this date is the expiry date. He stated that the ID was valid for three years confirming that he was given the ID in February 2013.

[51] The claimant stated that he submitted his hours from his full-time employer which shows that he started working on February 21, 2013 until his layoff on April 3, 2013. He explained that following the earlier hearing on March 18, 2017, he contacted his employer and they emailed him this copy of his hours worked.

[52] The Tribunal attempted to determine the timeline of when the claimant was living with his cousin and when he moved in order to understand how his cousin was able to access his SIN and to work under his name. The Tribunal informed the claimant that it is recognized that a lot of time has passed but wanted to determine the timeline to the best of his knowledge and with the information in the docket.

[53] The claimant stated that he does not know when his cousin took his SIN but found out after. He stated that he moved in with his cousin in 2010 but in December 2010 he moved to X, Alberta. He stated that he moved in with his cousin again in 2011 and moved out around December 2012.

[54] The claimant was asked to turn to the application for EI benefits in his docket. The claimant confirmed that the address provided in his application was the address that he lived at when he was living with his cousin. The claimant was asked about the phone number provided and he stated that he is not sure about that number as he no longer has that number confirming that it is not his cellphone number.

[55] The claimant was reminded that he applied for EI benefits in April 2013 and asked if he was still living with cousin at that time. He stated that he does not deny that he was living with his cousin but is unsure of the dates when he moved out. He confirmed that it is possible that he did not move out in December 2012 and maybe it was in 2013. He stated that he was new and sometimes he used his cousin's address even though he was not living there as an example, when he went to X he used his cousin's address. He stated that his cousin was older than him and had been in Canada longer and his cousin was showing him the system which is how his cousin got too far into his personal stuff.

[56] The claimant was asked when he found the pay stub from the employer with his name and SIN and he recalled that it was after he was living with his cousin. He stated that he went to visit his cousin and he found the pay stub. He stated that he trusted his cousin and would lend him his car and even his bank card. He stated that he found the pay stub and was angry and told his cousin that he was going to call the police. He stated that his cousin asked him not to call the police because he would then be in trouble. He stated that his cousin explained that the government wanted him to pay child support for his four kids but even if he worked overtime the government would take his money which is why he did this. The claimant stated he called members from his community and the advice he received was that if he repaid the money, then nothing would happen to him. The claimant stated that he told his cousin that he had to repay the money and his cousin said he would. He stated that he did not want to call the police because it was his cousin and he did not want to get him in trouble. He added that he put his

trust in his cousin that he would be responsible and repay the debt. The claimant stated that he received mail in 2015 telling him that he owed money so he made a photocopy of the letter and gave it to his cousin.

[57] The claimant stated that his cousin called EI and pretended to be him. He stated that his cousin submitted the Request for Reconsideration but then the claimant got a phone call that the decision was reconsidered but he would have to repay the money. The claimant stated that he called the police right away and told them that this guy copied his signature and pretended to be him. He stated that the police told him to call the company; he spoke with the owner who told him to speak with the supervisor. He stated that he called the supervisor who told him he did not want to talk to him. The claimant reiterated that he does not know the employer as it was his cousin who worked for them.

[58] The claimant was asked to turn to the interview with the Commission on May 20, 2014 in which the address provided for the claimant was the same address as the one given on his application for EI benefits. The telephone number documented is the same telephone number that the claimant provided to the SST which is also the same number identified as the home number. The claimant confirmed that this was his phone number adding that it was his home phone number. The claimant stated that he did not have this conversation with the Commission stating that his cousin is the one who spoke to the Commission.

[59] The claimant confirmed that he lived at the address where the decision letter dated October 13, 2015 was sent. He stated that he received the decision letter but was not living with his cousin at the time. He stated that this is when he talked to his cousin and his cousin agreed to pay so he would not call the police. His cousin stated that he wanted a copy of the letter but did not pay the money; instead he filed the Request for Reconsideration on November 2, 2015 pretending to be him. The claimant confirmed that the information regarding the address, telephone number and email address on the Request for Reconsideration did belong to him but denied that he completed the form requesting that the Commission reconsider their decision adding that his cousin did it pretending to be him. The claimant was asked to confirm if he wrote the letter that was submitted with the Request for Reconsideration and he stated that he did not. The claimant confirmed that by this time, he had already found the pay stub adding that

he thinks he found the pay stub around 2014. The claimant confirmed that his cousin stopped working for the employer in April 2013 and a year later he found the pay stub just lying around his cousin's house.

[60] The claimant confirmed that his address changed however he denied that he contacted the Commission to change his address on November 30, 2015. He stated that his cousin did this as he and his cousin were living together again and his cousin would get his mail before he did and his cousin would hide it or throw it out.

[61] The claimant confirmed that the second Request for Reconsideration date stamped received on December 17, 2015 was submitted by his cousin as he did not complete the form or write the letter that accompanied it.

[62] The claimant was asked if he spoke to the Commission on April 21, 2016 and he stated that he remembers that he called the police in May 2016. He confirmed that he learned he had money he had to repay in October 2015 but he thought that his cousin was repaying the debt. The claimant stated that he had an argument with his cousin and he moved to his current address in May 2016 when he called the police.

[63] The claimant confirmed that he was living with his cousin during the whole period that his cousin was working under his name and using his SIN. He was asked if he knew his cousin was doing this and he stated no. He was asked if he filed his taxes; he said he was but he was giving his information to his cousin and paid his cousin \$20 to do his taxes.

[64] The claimant stated that he is angry with the employer's supervisor because he is a member of his community. He stated that his cousin and the employer's supervisor were friends before his cousin started working there. He stated that his cousin put him in big trouble with this and he also opened a bank account in his name and then wrote fraudulent cheques against that account.

SUBMISSIONS

[65] The claimant submitted that:

- a) He never worked for the employer but his cousin did and committed fraud by working with his SIN. He reported the issue to the police but the supervisor told the police that he was working there as well. This is not true as he never worked with that company (Page GD2-6).
- b) He has not worked with this employer and he does not even know where they are located. He worked for another company outside of town and he could not be at both places at once.
- c) He did not help his cousin by giving him his SIN. He helped his cousin by not calling the police when he found out. He made a mistake by not calling the police right away but he did not help him by allowing him to work using his SIN.

[66] The employer submitted that the information they have on file is the information that was given to them at the time of hire. They have a name, a SIN and an address of where to send the paycheques and they do not have any way of knowing if the information given to them at the time of hire is accurate.

[67] The Commission submitted that:

Penalty

- a) It has met the onus of establishing that the claimant made a misrepresentation when he withheld his employment on his application for EI benefits and subsequently accepted nine payments to EI benefits which he was not entitled. The Commission submitted that the claimant has clearly stated on more than one occasion that he knew that if he included the employment and the reason for separation on his application that he would not qualify for EI benefits (Page GD4-6).
- b) The claimant argued upon appeal, that it was his cousin who worked for this employer under his SIN and that he has reported the matter to the Police. The claimant alleged that the employer lied to police and said that he had in fact worked there. The Commission does not find the claimant's argument plausible or credible. There is no evidence to

support the claimant's allegations that his cousin was impersonating him and that the employer lied when they confirmed that both the claimant and his cousin worked for them. The claimant states that he called his cousin when he was notified of the debt to inform him to pay or he will call the Calgary Police. The claimant states that his cousin told him not to call the police because he will be in big trouble and to give him time to collect money and pay it at once, but he was lying. The claimant also alleged that his cousin made an appeal and pretended to be him. The Commission submitted that the Notice of Debt was issued on October 17, 2015 and neither Request for Reconsideration mentions any fraudulent activity. The Commission noted that there was no mention of any fraudulent activity at any point during the investigation or even upon reconsideration. The Commission submitted that the first mention of his cousin using his SIN was not until May 11, 2016 shortly before he submitted the appeal to the SST (Page GD4-6).

- c) The claimant's explanation is not considered plausible or credible and is not supported by any evidence. The onus is on the claimant to prove that he had been impersonated by his cousin with no knowledge or awareness of the situation whatsoever. The overwhelming and consistent evidence is that the claimant knowingly withheld the employment because he knew that revealing it would result in a denial of benefits (Page GD4-7).
- d) The penalty amount was calculated as 50% of the net overpayment amount of \$7,072 as this was the claimant's first misrepresentation. The death of the client's younger brother was considered a mitigating circumstance [$\$7,702 \text{ overpayment} \times (50\% - 15\% \text{ mitigating circumstances})$] = \$2,475. The Commission submitted that it rendered its decision in this case in a judicial manner, as all the pertinent circumstances were considered when assessing the penalty amount (Pages GD4-7 and GD4-8).

Violation

- e) It is submitted that the Commission exercised its discretion in a judicial manner when issuing the Notice of Violation. After considering the overall impact to the claimant of issuing a notice of violation, including mitigating circumstances, prior offences and the impact on the ability of the claimant to qualify on future claims, it is determined that a violation is applicable in this case (Page GD4-8).

Voluntary Leaving

- f) The claimant did not have just cause for leaving his employment on April 5, 2013 because he failed to exhaust all reasonable alternatives prior to leaving. Considering all of the evidence, a reasonable alternative to leaving would have been to negotiate a leave or vacation with the employer or to have simply continued working and forgone travel plans to Africa. The claimant's reason for wanting to go to Africa is understandable but is considered personal. Consequently, the claimant failed to prove that he left his employment with just cause within the meaning of the EI Act (Page GD4A-5).
- g) It is generally expected that personal choices made by an employee will not compromise their employment. It is difficult for a person who voluntarily leaves employment because of circumstances resulting from a personal choice to fulfill the legislative test. In fact, a reasonable alternative in that instance would be not making the deliberate personal choice that leads the person to voluntarily quit their job. The Commission further contends that the claimant is simply not credible, as the claimant provided multiple contradictory statements regarding the circumstances surrounding the reason for separation (Page GD4A-5).
- h) The claimant argued upon appeal, that it was his cousin who worked under his SIN and that he has reported the matter to the Police. The claimant alleged that the employer lied to police and said that he had in fact worked there. The Commission does not find the claimant's argument plausible or credible. There is no evidence to support the claimant's allegations that his cousin was impersonating him and that the employer lied when they confirmed that both the claimant and his cousin worked for them. The claimant stated that he called his cousin when he was notified of the debt to inform him to pay or he will call the Police. The claimant stated that his cousin told him not to call the police because he will be in big trouble and to give him time to collect money and pay it at once, but he was lying. The claimant also alleged that his cousin made an appeal and pretended to be him. The Commission submitted that the Notice of Debt was issued on October 17, 2015 and neither Request for Reconsideration mentions any fraudulent activity. The Commission noted that there was no mention of any fraudulent activity at any point during the investigation or even upon reconsideration. The

Commission submitted that the first mention of his cousin using his SIN was not until May 11, 2016 shortly before he submitted the appeal to the SST (Page GD4A-5).

ANALYSIS

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

Penalty

[69] In order for the Commission to impose a penalty, the false or misleading statement must be made knowingly. Knowingly is determined on the balance of probabilities based on the circumstances of each case or the evidence of each case.

[70] The FCA decision in *Canada (Attorney General) v. Mootoo*, 2003 FCA 206 in which the court confirmed the principle that for a finding of misrepresentation, on the balance of probabilities, the claimant must have subjective knowledge that the report was false in order to penalize him or her.

[71] In this case, the Commission determined that the claimant withheld the information about his employment when he filed his application for EI benefits and this misrepresentation led the Commission to provide the claimant with nine months of EI benefits. The claimant stated that he did not work for this employer and it was his cousin who fraudulently used his name and SIN while employed explaining further that his cousin pretended to be him during the investigation conducted by the Commission.

[72] Following the hearing of January 18, 2017, the claimant submitted his ID and his hours worked for his full-time employer. The Tribunal accepts the claimant's testimony that following that hearing, he contacted the company and they emailed his hours to him. These hours show that the claimant was in Cold Lake, Alberta starting January 21, 2013 and he continued working up north until he was laid off on April 3, 2013. The Tribunal does not doubt the source of this information as it is quite detailed and from this, the Tribunal finds that the claimant did not work for the employer involved in this appeal and he did not voluntarily leave that employment on April 5, 2013.

[73] In cases where a claimant alleges that they have been the victim of fraud, the Tribunal is required to consider *Canada (Attorney General) v. Lylander*, 2008 FCA 365 and to answer two questions: whether a third party fraudulently caused the Commission to make the overpayments and if so, whether the fraud was committed with the claimant's knowledge and consent.

[74] The Tribunal is satisfied that the claimant was unable to work for the two employers at the same time as he was unable to be working in Calgary and Cold Lake concurrently. Consequently, the Tribunal finds that a third party fraudulently caused the Commission to make the overpayments. The next question before the Tribunal is whether the claimant knew that his cousin was using his name and his SIN while working for this employer.

[75] The claimant explained that he was new to Canada and his cousin was helping him with the system including assisting him with filing his income taxes and therefore gained access to his personal information. The claimant was asked directly, while under oath, if he knew his cousin was working under his name and using his SIN. He stated that he did not help his cousin to work fraudulently but he did help his cousin by not calling the police right away.

[76] The Tribunal attempted to create a timeline of events of when the claimant was living with his cousin and when he was not by using the information in the docket provided by the Commission including the telephone numbers used to contact the claimant during the investigation. However, while the Tribunal has identified some discrepancies and errors in the claimant's testimony dealing with the timeline, the Tribunal recognizes that this event occurred four years ago and since then the claimant has moved several times; sometimes living with his cousin and sometimes living separately from his cousin. The claimant is adamant that he did not know that his cousin was working under his name and using his SIN. He has repeatedly stated that he did not learn of this until later when he found a pay stub in his cousin's possession that was in his name, with his SIN from an employer that he did not work for. The claimant has repeatedly stated that his cousin was expected to repay the debt and when it was learned that this did not happen, he called the police but because the employer's supervisor was a friend of his cousin's, the supervisor lied and the police were unable to investigate further.

[77] Further, the hearing of January 18, 2017 was adjourned explicitly so the employer could attend a subsequent hearing with the supervisor. This would have been the simple solution to

determine if the supervisor recognized the claimant as the employer indicated that it was their supervisor who did the hiring and who dealt with staff issues. The Tribunal finds it suspicious that the employer terminated the supervisor's employment before the rescheduled hearing. While the Tribunal does recognize that the downturn in the economy has impacted all businesses, the employer has not gone out of business entirely and would therefore still require the services of their supervisor who dealt with the staff and, the employer was agreeable to having the supervisor attend the hearing thus it would have been reasonable for the employer to plan for this even if the supervisor had been laid off.

[78] The Tribunal is unable to conclude, on the balance of probabilities, that the third party, the claimant's cousin, committed this fraud with the claimant's knowledge and with his consent. The Tribunal recognizes that the claimant and his cousin were close however; the Tribunal finds that it is possible that the claimant was unaware that his cousin worked for this employer for over a year without his knowledge. Therefore, the Tribunal finds that the claimant did not knowingly provide misinformation to the Commission when he did not include this employment information on his application for EI benefits.

[79] While the Commission argued that the claimant did not mention the fraudulent activity until May 11, 2016, the Tribunal accepts the claimant's testimony that it was his cousin who submitted the Request for Reconsideration and the claimant was of the belief that his cousin was repaying the debt and therefore, it is reasonable that the claimant did not mention the fraudulent activity until just before he submitted his Notice of Appeal because his cousin was impersonating him until this point.

[80] For these reasons, the Tribunal concludes that the claimant did not provide misinformation or misleading information to the Commission. The Commission is not appropriate in imposing a penalty pursuant to section 38 of the EI Act.

Violation

[81] In order for the Commission to issue a Notice of Violation, the claimant must have committed one of the offences in section 7.1(4) of the EI Act and was imposed a penalty or issued a warning.

[82] The FCA decision in *Gill v. Canada (Attorney General)*, 2010 FCA 182 recognized that the Commission has the discretionary power to issue a Notice of Violation but established that it is not mandatory or automatic under subsection 7.1(4) of the EI Act. The Commission must exercise this discretion in a judicial manner.

[83] Given that the Tribunal determined that the claimant did not provide false or misleading information to the Commission and that a penalty was not warranted, the Commission is no longer in a position to impose a violation pursuant to subsection 7.1(4) of the EI Act.

Voluntary Leaving

[84] The question of just cause for voluntarily leaving employment requires an examination of whether having regard to all the circumstances, on a balance of probabilities, the claimant had no reasonable alternative to leaving his employment (*MacNeil v. Canada (Employment Insurance Commission)*, 2009 FCA 306); (*Canada (Attorney General) v. Imran*, 2008 FCA 17).

[85] In *Tanguay v. Canada (Canada Employment and Immigration Commission)*, A-1458-84 the Federal Court of Appeal (FCA) drew a distinction between a "good cause" and "just cause" for voluntary leaving.

[86] According to the FCA decision *Canada (Attorney General) v. Laughland*, 2003 FCA 129, the issue is not whether it was reasonable for the claimant to leave his employment, but whether the claimant's only reasonable alternative, having regard to all the circumstances, was to leave the employment. Reasonableness may be "good cause", but it is not necessarily "just cause".

[87] The claimant bears the burden of establishing just cause (*Canada (Attorney General) v. Patel*, 2010 FCA 95).

[88] In this case, the claimant has provided evidence, namely the Hours Worked Report, which clearly shows that he was employed in the north during the same period that he was allegedly working for this employer. The Tribunal is satisfied that the claimant has proven that he did not work for this employer, therefore the claimant is no longer required to prove just cause for voluntarily leaving that employment pursuant to section 29 and 30 of the EI Act.

CONCLUSION

[89] The appeal is allowed.

K. Wallocha

Member, General Division - Employment Insurance Section

ANNEX

THE LAW

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).

7.1 (1) The number of hours that an insured person requires under section 7 to qualify for benefits is increased to the number set out in the following table in relation to the applicable regional rate of unemployment if the insured person accumulates one or more violations in the 260 weeks before making their initial claim for benefit.

TABLE / TABLEAU

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

29 For the purposes of sections 30 to 33,

(a) *employment* refers to any employment of the claimant within their qualifying period or their benefit period;

(b) loss of employment includes a suspension from employment, but does not include loss of, or suspension from, employment on account of membership in, or lawful activity connected with, an association, organization or union of workers;

(b.1) voluntarily leaving an employment includes

(i) the refusal of employment offered as an alternative to an anticipated loss of employment, in which case the voluntary leaving occurs when the loss of employment occurs,

(ii) the refusal to resume an employment, in which case the voluntary leaving occurs when the employment is supposed to be resumed, and

(iii) the refusal to continue in an employment after the work, undertaking or business of the employer is transferred to another employer, in which case the voluntary leaving occurs when the work, undertaking or business is transferred; and

(c) just cause for voluntarily leaving an employment or taking leave from an employment exists if the claimant had no reasonable alternative to leaving or taking leave, having regard to all the circumstances, including any of the following:

(i) sexual or other harassment,

(ii) obligation to accompany a spouse, common-law partner or dependent child to another residence,

(iii) discrimination on a prohibited ground of discrimination within the meaning of the *Canadian Human Rights Act*,

(iv) working conditions that constitute a danger to health or safety,

(v) obligation to care for a child or a member of the immediate family,

(vi) reasonable assurance of another employment in the immediate future,

(vii) significant modification of terms and conditions respecting wages or salary,

(viii) excessive overtime work or refusal to pay for overtime work,

(ix) significant changes in work duties,

(x) antagonism with a supervisor if the claimant is not primarily responsible for the antagonism,

(xi) practices of an employer that are contrary to law,

(xii) discrimination with regard to employment because of membership in an association, organization or union of workers,

(xiii) undue pressure by an employer on the claimant to leave their employment, and

(xiv) any other reasonable circumstances that are prescribed.

30 (1) A claimant is disqualified from receiving any benefits if the claimant lost any employment because of their misconduct or voluntarily left any employment without just cause, unless

(a) the claimant has, since losing or leaving the employment, been employed in insurable employment for the number of hours required by section 7 or 7.1 to qualify to receive benefits; or

(b) the claimant is disentitled under sections 31 to 33 in relation to the employment.

(2) The disqualification is for each week of the claimant's benefit period following the waiting period and, for greater certainty, the length of the disqualification is not affected by any subsequent loss of employment by the claimant during the benefit period.