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

[TRANSLATION]

Citation: *S. A. A. F. inc. v. Canada Employment Insurance Commission*, 2017 SSTGDEI 53

Tribunal File Number: GE-15-4065

BETWEEN:

S. A. A. F. inc.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Charline Bourque

HEARD ON: January 24, 2017

DATE OF DECISION: April 20, 2017

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Appellant, the S. A. A. F. inc. (SAAF), was represented at the hearing by Mr. Jean-Guy Ouellet. The Appellant's co-shareholders, Mr. B. L., Mr. P. P. and Mr. S. S., attended the in-person hearing at the Trois-Rivières Service Canada Centre.

INTRODUCTION

[1] On November 25, 2014, the Canada Employment Insurance Commission (Commission) advised the company that the evidence on file and the information provided led it to conclude that the company had knowingly made false or misleading statements regarding the issuance of Records of Employment (GD3-411 to GD3-413).

[2] On November 20, 2015, following a request for reconsideration, the Commission indicated that the penalty amount had been reduced from $29,513.00 to $7,864.00 (GD3-425).

[3] In response to a request by the Social Security Tribunal of Canada (Tribunal), the Commission specified that 17 Records of Employment were still subject to a penalty. They are detailed as follows:

> [translation]
>
> **“B. L.**
>
> GD3-23 = A89061621 (January 21 to December 16, 2011)—Mr. B. L. worked from 26/12/10 to 01/01/11 and from 18 to 24/12/11, but these weeks do not appear on this Record of Employment (nor on the previous or next one).
>
> GD3-24 = K00030032 (January 19 to December 14, 2012)—Mr. B. L. worked from 16/12/12 to 22/12/12, but these weeks do not appear on this Record of Employment (nor on the previous or next one).
>
> GD3-25 = K01219177 (February 14 to December 13, 2013)—Mr. B. L. worked from 06/01 to 02/02/13 and from 15 to 21/12/13, but these weeks do not appear on this Record of Employment (nor on the previous or next one).
>
> **P. P.**
>
> GD3-22 = K01219176 (February 8 to December 13, 2013)—M. P. P. worked from 15 to 21/12/13, but these weeks do not appear on this Record of Employment (nor on the previous or next one).

S. S.

GD3-19 = K00030033 (January 19 to December 14, 2012)—Mr. S. S. worked from 16/12/12 to 22/12/12, but this week does not appear on this Record of Employment (nor on the next one).

GD3-20 = K00030021 (February 8 to December 13, 2013)—Mr. S. S worked from 15 to 21/12/13, but this week does not appear on this Record of Employment (nor on the next one).

S. B.

GD3-46 = A89061607 (May 2 to December 1, 2011)—Mr. S. B. worked from 24 to 30/04/11, but this week does not appear on this Record of Employment (nor on the next one).

GD3-47 = K00030045 (May 17 to November 30, 2012)—Mr. S. B. earned $665.60 from 27/05 to 02/06/12, but box 27 on the Record of Employment indicates only $185.60.

P. C.

GD3-41 = A89061631 (January 11 to December 8, 2011)—Mr. P. C. worked from 5 to 18/12/10, but these weeks do not appear on this Record of Employment (nor on the previous one).

GD3-43 = K01219182 (April 15 to December 13, 2013)—Mr. P. C. earned $414 from 16 to 22/06/13 and $456 from 23 to 29/06/13, but boxes 25 and 26 of the Record of Employment indicate $0.

M. D.

GD3-45 = K01219173 (April 29 to December 6, 2013)—Mr. M. D. worked from 8 to 28/12/13, but these weeks do not appear on this Record of Employment (nor on the next one).

M. M.

GD3-38 = A89061615 (January 5 to August 3, 2012)—Mr. M. M. earned $466 from 13 to 19/05/12, $700 from 20 to 26/05/12 and $700 from 27/05 to 02/06/12, but boxes 10, 11 and 12 of the Record of Employment indicate $0.

GD3-39 = K00030022 (August 13 to December 7, 2012)—Mr. M. M. worked from 9 to 22/12/12, but these weeks do not appear on this Record of Employment (nor on the next one).

M. R.

GD3-26 = K01219183 (April 19 to November 29, 2013)—Mr. M. R. worked from 2 to 22/12/12, from 7 to 13/04/13 and from 8 to 14/12/13, but these weeks do not appear on this Record of Employment (nor on the previous or next one).

C. S.

GD3-28 = K00030034 (May 25 to December 14, 2012)—Mr. C. S. worked from 16 to 22/12/12, but this week does not appear on this Record of Employment (nor on the next one).

GD3-29 = K01219185 (April 22 to December 19, 2013)—Mr. C. S. worked from 7 to 21/04/13, but these weeks do not appear on this Record of Employment (nor on the previous one).

D. T.

GD3-35 = K01219147 (April 22 to May 31, 2013) - Mr. D. T. worked from 31/03 to 13/04/13, but these weeks do not appear on this Record of Employment (nor on the previous one)." (GD11)

[4] On June 1, 2015, the Social Security Tribunal of Canada (Tribunal) allowed an adjournment. The company's representative, Mr. Jean-Guy Ouellet, had argued that he needed to obtain information from the Commission that was not on file, including identification of the Records of Employment for which a penalty had been maintained. This information was received from the Commission.

[5] A pre-hearing conference was held on October 4, 2015, by Tribunal member Claude Durand. During that pre-hearing conference, it was agreed that the Appellant's files would be joined. A separate decision would be rendered for each Appellant. The hearing and the evidence would be the same, but evidence specific to each of the Appellant's cases would also be presented.

[6] A common hearing for files GE-15-4065 (this case), GE-15-4048, GE-15-4049, GE-15-4051, GE-15-4052 (Mr. B. L.), GE-15-4053, GE-15-4054, GE-15-4055, GE-15-4057 (Mr. P. P.), GE-15-4059, GE-15-4061, GE-15-4062, GE-15- 4063 (Mr. S. S.) was held on January 24, 2017.

[7] The appeal hearing was held in person for the following reasons:

a) The fact that credibility may be a prevailing issue.

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

c) The fact that more than one participant, such as a witness, could be in attendance.

d) The fact that the Appellant or other parties are represented.

e) This form of hearing most effectively meets the parties' needs for accommodation.

ISSUE

[8] The employer is appealing the decision regarding the penalty that had been imposed on him under paragraphs 39(1)(*b*) and 39(4)(*a*) of the *Employment Insurance Act* (Act) for having committed an act or omission by knowingly providing false or misleading information.

EVIDENCE

[9] The following evidence is on file:

a) Business register for SAAF indicating that the company is owned by three companies: 9087-4017 Québec inc., 9087-4082 Québec inc. and 9087-4041 Québec inc. Each of the companies is the exclusive property of an administrator: B. L., P. P. and S. S. (GD3-3 to GD3-7).

b) Records of Employment for some of the company's employees (GD3-8 to GD3-47).

c) Employment Insurance claims from some of the company's employees (GD3-48 to GD3- 279).

d) Reports of the interview of the Commission's investigator with Mr. S. S. (GD3-280/281; GD3-284 to GD3-287) and Mr. B. L. (GD3-282/283).

e) Billing carried out by the company, weekly Hydro-Québec reports, pay stubs and invoices (GD3-288 to GD3-410).

[10] The evidence submitted at the hearing through the shareholder, Mr. B. L.'s, testimony is as follows:

a) He is the company's treasurer.

b) The company offers services in the forestry industry, including maintenance of the electricity network, based on bids obtained primarily from Hydro Québec.

c) During the off season, from November to April-May, unless it is a specific contract, the work is punctual and the maintenance of equipment must be done by professionals because certification is required. The work is predominantly related to emergency calls. They cannot work full-time and the weather influences their ability to work. The work is all aerial, compared to the summer when the work is both aerial and on the ground.

d) He had been contacted several times by the Canada Revenue Agency (CRA) regarding their company. He said that he had complied with the CRA's questions and requests. The documents show that he had been contacted several times regarding self-employment. He had always been granted his unemployment.

e) The three shareholders made the decision to pay themselves a salary of $150 per week during the off season. This salary does not vary based on the number of hours worked. During peak season, their salary is higher.

f) During the relevant periods, he was unable to rely on this work as his main source of income.

g) The claimant is going through a difficult personal situation. In September 2010, his wife was diagnosed with cancer. The medical follow-ups are usually in June and December, the same time that he issues the Records of Employment.

h) He uses a computerized pay system for the Records of Employment (Simply Accounting). He has training in forestry and has taken business management courses but has no specific training related to accounting. He prepares Records of Employment in advance based on employment end dates. There was a lack of communication in

some situations when Mr. S. S. was asked to do additional work, which may have changed his employment end date without his knowledge.

i) He stated that if there had been an additional week of work that was not covered by a Record of Employment, it was an error. Furthermore, he refers back to the new season to do the Records of Employment for the following year. It was not a wilful omission.

j) The Commission has made him ineligible because the company paid for an employee Christmas party (see invoice).

k) The number of hours declared during the off season is an average that includes all the work that was done. He thought they were right to do it this way. He had never been questioned on this despite the audits that had been done. In addition, all overtime was kept in the bank and paid after the working period, which meant that he delayed the date on which benefits could be applied for. For that reason, they do not all receive the maximum amount of benefits.

[11] The evidence submitted at the hearing through the testimony of shareholder Mr. S. S. revealed the following:

a) He is the vice-president of the company. He is the contact with Hydro-Québec.

b) He was contacted by officials about the company. The documents show that he was contacted numerous times between 2007 and 2014.

c) When he issued the invoices to Hydro-Québec, he thought that he should indicate one of the shareholders as team leader of the company. Therefore, even if a shareholder was not present on the ground, he could indicate their name. If the shareholder was present, their name is detailed on the invoice since the hours worked would be on it. He generally billed at the end of a job or every three weeks.

d) He received $150 per week, as had been decided for the off season. He is not owed any adjustment and the company does not owe him any additional amount. During the periods in question, he could not rely on the company as a principal source of income.

e) The Commission never mentioned to him that he could be considered a self-employed person. He had always received his Employment Insurance benefits and there was never an interruption in payment. His entitlement to unemployment is recognized by the Commission.

f) He considers himself an employee. They work in their work crews.

[12] The evidence submitted at the hearing through the shareholder Mr. P. P.'s testimony reveals the following:

a) He is responsible for safety.

b) Officials also contacted him several times about the company. He had never been informed that their way of operating was incorrect.

c) The company does not owe him any money other than the $150 per week.

d) He could not rely on the company as his principal source of income.

e) As of April 25, 2011, he confirmed that he was present at the work site. Before that time, the bulk of the work was done. His work consists of checking first-aid kits and the time is included in the hours of work declared.

PARTIES' ARGUMENTS

[13] The Appellant presented the following arguments:

a) The decision is unfounded in fact and in law regarding the fraudulent nature of the Records of Employment issued, especially regarding the burden of proof necessary to maintain the penalty.

b) In addition, the decision is unfounded in fact and in law with respect to maintaining the penalty amount of $7,804.00.

c) The representative referred to submissions regarding the reconsideration request from Mr. B. L.'s file.

d) The Commission referred to the CRA regarding its insurability assessment and referred to parts and invoices. The decision is in each file and the CRA recognizes the periods and amounts in each file. The Record of Employment shows that the claimant received $150 per week. So when the Commission indicated that the Records of Employment were inaccurate, the CRA became responsible for the periods and remuneration and the CRA looked at this period and determined that the amounts were adequate.

e) Even if periods were missing, the Records of Employment as issued were found to be valid.

f) The representative submitted an outline of his arguments for the claimant's files (GD16).

The following arguments were presented at the hearing for each of the files:

Reconsideration

g) It is clear that there was control on the part of the Commission.

h) The Commission's policy for the reconsideration process (chapter 17) states that the Commission intervenes for the future and not for the past. The current version of this policy was amended in June 2014.

> [translation] "the decision is corrected as of the current date, except in the following situations:
>
> - Cases where benefits were paid in violation of an explicit provision of the Act;

- Cases where benefits were paid in error, and the claimant should have known they were not entitled to them;

- Cases where benefits were paid following an observation or a false or misleading statement by a claimant, and a decision is amended;

- When a decision is contested and, in specific circumstances, the claimant or employer would like the decision to be revised. [*underline added by representative*] (*Digest of Benefit Entitlement Principles*, 17.1.3) (GE-15-4048/GD3-145/146).

i) Therefore, audits took place but the Commission did not take action. Officials called the appellants and verified their situation. He was aware of the situation. Claimants always reported their situation and the Commission had always indicated that he qualified for unemployment. If there was any question, the Commission could have taken action and the policy states that if the Commission had been able to audit, it should not be able to backtrack after recognizing their entitlement to unemployment.

j) There is evidence of the Commission stating that the claimants qualified for unemployment in November 2014. Therefore, it is against the Commission's own policies and therefore against the reconsideration policy as set out in jurisprudence:

- CUB 5664 approved by the Federal Court of Appeal (*Boucher v. Commission (Attorney General)* FCA A-580-79) (GE-15-4048/GD13-17/18): states the difference between what is structural and what is not. It is stated that if the Commission had the necessary information, it cannot revisit the exercise of discretion because a decision was made in favour of the claimant.

- CUB37680A (GD13-19 to GD13-23): refers to the previous decision and re-states the information. The debate is not the 36 or 72-month time limit, but the scope of power under 52. Under 52, can a file be retroactively considered when there is evidence that the Commission exercised its discretionary power and that entitlement to benefits was granted? In this case, in all the periods in question, there is evidence that an official verified and decided to grant entitlement to benefits.

- CUB19382 (GD13-24 to GD13-27): On the contrary, it is not a matter of discretion, but a structural issue that does not apply to the file.

- SSTAD 1239 (GD13-28 to GD13-31): This is an application of the reasoning submitted. The Commission had the opportunity to take action, but did nothing. Therefore, the Commission recommends allowing the appeal so that corrections may be made as of the current date. The Commission itself acknowledges that this is its policy (*C.S. v. Canada Employment Insurance Commission*, 2015 SSTAD 1239).

- *Brien-Rajotte* (GD13-32 to GD13-38): On the contrary, talks only about the notification, not about the power to reconsider. Therefore, this does not apply to the current file. In this case, the decision-making process had not been completed for a week (*Brien-Rajotte v. Canada Employment Insurance Commission*, A-425-96).

k) The decisions are all from December 2014 and the Commission says that the claimants perpetrated fraud or that their declarations were fraudulent in nature.

l) The representative reiterates the burden of proof and states that the Commission could not go back more than three years. Going back more than three years is contrary to the Commission's authority. The Commission presumes earnings over $150, but how is this declaration of $150 false? While unemployed, the claimants declare amounts while they consider themselves employees of the company. How is this declaration false?

m) The representative submits that while the Commission cites *Pilotte* (GD13-44/45), that decision cannot apply to the current file (*Canada (Attorney General) v. Pilotte*, FCA A-868-97).

n) Furthermore, the representative refers to *Carrière*, in which the Court states that it must be determined whether the claimant made a false representation. If she did not see herself as a worker, but as supporting her spouse, the Commission cannot go back more than 36 months (*Carrière v. Canada (Attorney General)*, FCA A-476-00) (GD13-46/47).

Earnings

o) According to *King*, earnings to be allocated under the Regulations are earnings that are received or payable. The Regulations are clear on this subject. Subsection 35(1) defines income that refers to received or payable amounts (*Canada (Attorney General) v. King*, FCA A-486-95) (GD13-50 to GD13-56).

p) The claimants did not receive more than $150 and were not entitled to more than $150.

q) In our case, there is no evidence that the claimants could ask for more than $150. That is a presumption that was made by the Commission.

r) The representative refers to the following jurisprudence:

- *Yannelis*: payable is not a technical word. An amount is payable when a person is required to pay it. It is payable when it can be required of the employer and the employer is obliged to pay it. In this case, it was not payable. There is a Board of Directors decision stating that the salary will be $150 per week (*Canada (Attorney General) v. Yannelis*, FCA A-496-94) (GD13-51 to GD13-63).

- CUB51045B: on the presumption of earnings. This case is not a matter of suspicion, but of clear evidence. The Commission recognizes that the claimants received $150, but says that they should have received more. The Commission says that the company should not have operated that way. There are no earnings to be allocated or penalty to be applied (GD13-64/65).

- SSTADEI 221: The Commission acknowledges that the amount was not payable and that the appeal should be allowed (*B.J. v. Canada Employment Insurance Commission*, 2016 SSTADEI 221) (GD13-66 to GD13-70).

- The Commission cites CUB 79974, but it does not apply. It was a case where there was a grievance filed and the claimant received an amount. That decision does not apply to this case (GD13-71/72).

- *McLaughlin*: states that insurability and remuneration must not be confused. In effect, the claimant received remuneration and if he received it, the amounts are applicable. However, the decision does not apply to the facts in this case (*McLaughlin v. Canada (Attorney General)*, FCA A-43-09) (GD13-73 to GD13-80).

- *Boone et al.*: The union received amounts following a grievance. That decision has nothing to do with this case (*Boone et al. v. Canada (Attorney General)*, FCA A-277-01) (GD13-81 to GD13-83).

- *Martens*: the time spent by other workers. No one is required to work in their own business (*Martens v. Canada (Attorney General)*, 2008 FCA 240.

Week of unemployment

s) The Commission finds that the number of hours usually worked corresponding to the regular full-time working week within the meaning of section 31 of the Regulations would be 36 hours at the SAAF. Proof that the number of hours retained corresponds to a full working week cannot be found in the file. In the absence of such evidence, that notion cannot be applied.

t) The evidence affirms that the number of hours worked in a week was less than the number of hours usually worked within the company.

- *Goulet*: on the unemployment status. The question that must be asked for the period in question is whether, in the context of participation in the company, this could have reflected his main income? During the periods in question, the company did work only

for emergencies and workers could not expect it to be their main source of income (*Canada (Attorney General) v. Goulet*, FCA A-352-11) (GD13-84 to GD13-88).

- *Jouan*: whatever the status of the other factors at play, the only thing that interests him is whether the time dedicated to the business constitutes a full week. It is understood that the time dedicated was 50 hours per week in *Jouan*, but the judge found that it could be different in the off season. That is the case for claimants with seasonal businesses (*Canada (Attorney General) v. Jouan*, FCA A-366-94) (GD13-89 to GD13-92).

- *Faucher*: refers to roofers and the Court will say that situation regarding the type of work must be taken into consideration *Faucher v. Canada (Attorney General)*, FCA A-56-96 (GD13-93 to GD13-95).

- *Proulx*: for periods in dispute, the work performed is between 10 and 15 hours per week. The claimant could not live off of it and is paid $150 per week. If we were talking about an employee of a business, section 31 would not be applied saying that he works a full working week (*Proulx v. Canada (Attorney General)*, FCA A-361-98) (GD13-96/97).

Penalty

u) The onus is on the Commission, and the claimants must have subjective knowledge that the statements made were contrary to the norms of unemployment.

v) The representative submits that the Commission did not meet its burden of proof because there were a number of exchanges with the three appellants to verify the accuracy of their answers. Regarding remuneration, there is no alleged act. A person cannot be accused of something that does not exist.The salary alleged by the public servant had never been paid and was never owed. When the claimant declared $150, he was not making a false declaration. The alleged act does not exist.

w) The penalty regarding the employer: The representative notes that the CRA confirmed that the Records of Employment did not contain false information concerning the period stated in the Record of Employment. The Commission accuses the claimants that periods are missing and that they cannot be found on previous or subsequent Records of Employment. A penalty is imposed when incorrect information would provide the claimant with a greater advantage, which is not the case here. The representative refers to the Commission's policy.

x) In this case, the number of hours is lower. Furthermore, with the overtime paid at the end of the work, the Commission did not lose anything, but rather gained an advantage.

y) Furthermore, postponing the overtime reduces earnings, because in all the Records of Employment, the benefit calculation was not influenced by the alleged missing data because the calculation was based on the best 14 weeks. The policy's objective is to penalize Records of Employment that seek to gain more benefits. In all cases, had there been errors, they did not have this effect; rather they had the opposite effect.

z) In the employer's file, in the Commission's observations at page GD4-4 (GE-15-4065), the Commission states that considering the fact that the files were verified and that neither the shareholders nor the employees were informed of any issue, the Commission reduced the penalty to 30%.

aa) All these considerations do not look like 30%, but the Commission recognizes that the claimants failed to notice the scope of the errors and that, for them, they had no bearing, while in fact the claimants penalized themselves because hours were missing on certain Records of Employment. There could have been more weeks of pay. The representative cites the following jurisprudence:

- *Caverly* on the burden of proof: In GD11, when we see that it is not on the previous or subsequent one, the Commission should provide the previous or subsequent one (*Caverly v. Canada (Minister of Human Resources Development)*, FCA A-211-01) (GD13-111 to GD13-113).

- *Tiessen Tuomi*: Regarding insurability, a priori, section 90 is clear and competence rests with the CRA, and in the files, the CRA states that the Records of Employment are correct (*Canada (Attorney General) v. Tiessen Tuomi*, FCA A-110-99) (GD13-114/115).

- CUB73984: penalties were imposed for the $150 versus the alleged earnings. The issue must be decided on this basis (GD13-116/117).

- *Mootoo*: on subjective knowledge (*Mootoo v. Minister of Human Resources Development*, FCA A-438-02). Mr. B. L. or Mr. S. S. did not have subjective knowledge that they were misleading the Commission when they produced the Records of Employment (GD13-118 to GD13-120).

- *Gates*: Mere scepticism is insufficient to meet the burden of proof (*Canada (Attorney General) v. Gates*, FCA A-600-94) (GD13-123 to GD13- 127).

- SSTAD357: states that an error not made knowingly. When the Commission reads at GD4-4, finds that the Commission recognizes that the errors were not made knowingly (*Les Industries Rogers Migneault inc. v. Employment Insurance Commission of Canada*, 2015 SSTAD 357) (GD13-128 to GD13-131).

- *Ftergotis*: the claimant acknowledges that he falsely represented his earnings. That does not resemble the situation in this case (*Ftergiotis v. Canada (Attorney General)*, FCA A-526-05) (GD13-132 to GD13-138).

- CUB51045D: the alleged earnings cannot give rise to a penalty (GD13-139/140).

- CUB71548: on the Records of Employment. Consider the responsibility of the CRA. The CRA acknowledges that the Records of Employment are correct for the periods in question (GD13-141 to GD13-146).

- CUB 66975A: refers to *Mootoo* and provides the benefit of the doubt to the claimant (GD13-147 to GD13-149).

- CUB68452A: the claimant's good faith was never in dispute. The Commission acknowledges the appellant's good faith in this appeal (GD13-150 to GD13-152).

- *9041-6868 Québec Inc.*: When Mr. B. L. was accused of not putting the date on the Records of Employment, they were commissions he had made and he was not paid for them. It was not an employment contract; it was not insurable (*9041-6868 Québec inc. v. Canada (Minister of National Revenue)*, FCA A-559-04) (GD13-153 to GD13-161).

- CUB42757: Alternatively, the policy provided states that the maximum penalty is three times the rate and the Commission decided on a rate of 30%. Why does it begin to calculate the penalty at three times the rate? In this case, it is clear that the Commission began with the maximum penalty, while the policy talks about the maximum taxable. Why does it talk about the maximum to then consider extenuating circumstances? The representative finds that the Commission did not meet its burden of proof. Mr. B. L. issued the Records of Employment in December when, during all the periods in question, he was dealing with much greater certain concerns whether he had the correct date on the Records of Employment. His circumstances were set out and the Commission was aware of them, but they were not recognized as extenuating circumstances. At worst, he should have received a warning (GD13-162 to GD13-164).

bb) Other jurisprudence submitted by the representative and not previously cited:

- *Canada (Attorney General) v. Langelier* FCA #A-140-01 (GD13-39 to GD13-43);

- CUB 47551 (GD13-48/49);

- CUB 32215 (GD13-98 to GD13-99);

- *Moretto v. Canada (Attorney General)* FCA #A-667-96 (GD13-121/122).

[14] The Respondent made the following submissions:

a) Subsection 39(1) of the Act states that the Commission may impose on an employer, or any other person acting for an employer or pretending to be or act for an employer, a penalty for each of the following acts or omissions if the Commission becomes aware of facts that in its opinion establish that the employer or other person has

> **(a)** made, in relation to any matter arising under this Act, a representation that the employer 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 employer or other person knew was false or misleading;
>
> **(c)** in relation to any matter arising under this Act, made a declaration that the employer or other person knew was false or misleading because of the non-disclosure of facts;
>
> **(d)** 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
>
> **(e)** participated in, assented to or acquiesced in an act mentioned in paragraphs (a) to (d).

b) It is not enough for an employer to claim that they made their statement "innocently" to conclude that a penalty is not justified. When there is no ambiguity in the employer's situation and it provides false answers to questions written in clear and simple language, it is pointless for the employer to say that it did not intend to make false statements.

c) The burden of proof that rests with the Commission includes establishing, on a balance of probabilities and beyond all reasonable doubt, whether the employer knowingly made a false or misleading representation, as was argued by the Court in *Gates* (A-600-

94) and *Purcell*. The initial onus is on the Commission to prove that the employer knowingly made a false or misleading statement, but once it has been established that the employer answered questions dishonestly or produced false documents, the onus is on the employer to justify its acts or explain why it provided incorrect answers.

d) In this case, the Commission submits that it demonstrated that the employer knowingly made false or misleading statements by issuing Records of Employment containing false information, because it had Hydro-Quebec bills with the name of the employee that had worked as well as the period in question. These facts could not have been ignored when filling out the Records of Employment. However, following the administrative review, the Commission found that SAAF made only 17 false statements within the 36-month timeframe, because several corrections were possible during the review of the 20 files in question.

e) The Commission submits that the jurisprudence supports its decision. The Federal Court of Appeal reversed CUB 52349 and confirmed the principle that when it is determined that the employer had subjective knowledge that the information provided was false, the Commission has the right to impose a penalty (*Canada (AG) v. Le Centre de valorisation des produits marins de Tourelle Inc.*, A-547-01).

f) If the Tribunal submits that there is reason to uphold the penalty, it must then determine whether the Commission exercised its discretion in a judicial manner when it determined the penalty amount.

g) In this case, the Commission argued that it had exercised its discretion judicially by considering all the relevant circumstances of the case at the time it determined the penalty amount.

h) The Federal Court of Appeal reaffirmed the principle that the Commission has sole discretion to impose a penalty under the Act. The Court also stated that no court, umpire or tribunal is authorized to interfere with a penalty decision by the Commission as long as the Commission can prove that it exercised its discretion judicially. The Commission

must demonstrate that it acted in good faith, took into account all the relevant factors and ignored irrelevant factors (*Canada (AG) v. Uppal*, 2008 FCA 388, and *Canada (AG) v. Tong*, 2003 FCA 281).

ANALYSIS

The relevant legislative provisions are reproduced in an appendix to this decision.

[15] Regarding the employer's file, the issue under appeal is related to the maintenance of the penalty imposed for the 17 Records of Employment (GE-15-4065/GD16-1).

[16] Subsection 39(1) of the Act specifies the following:

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) made, in relation to any matter arising under this Act, a representation that the employer 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) in relation to any matter arising under this Act, made a declaration that the employer or other person knew was false or misleading because of the non-disclosure of facts;

> (d) 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
>
> (e) participated in, assented to or acquiesced in an act mentioned in paragraphs (*a*) to (*d*).

[17] The burden of proof, which rests with the Commission, consists of establishing, on a balance of probabilities, that is not beyond a reasonable doubt that the claimant had made a false statement or representation that he knew was false or misleading (*Canada (Attorney General) v. Gates*, FCA #A-600-94).

[18] The Commission details the 17 Records of Employment that are subject to a penalty in document GD-11. The Commission alleges that some working periods are not shown on the Record of Employment, nor the previous or subsequent one, when in fact, these periods were working periods. The Commission also alleges that in the case of some of the Records of Employment, the employer gave inaccurate earnings. In all cases, according to the Commission, the amounts shown on the Records of Employment are less than what the employer should have entered.

[19] The Commission submits that it has shown that the employer knowingly provided false or misleading statements by issuing Records of Employment containing false information, because it had in its hands Hydro-Québec bills that indicated the name of the employee that was working and the period in question. He could not have been unaware of these facts when completing the Records of Employment. However, following the administrative review, the Commission found that SAAF had made only 17 false representations within the 36-month timeframe, because several corrections were possible during the review of the 20 files in question.

[20] The representative submits that even if periods were missing, the Records of Employment as issued had been accepted as valid by the Canada Revenue Agency (CRA).

[21] The Tribunal notes that the Commission alleges two types of errors on the Records of Employment issued by the employer: the fact that some dates worked are not shown on the Records of Employment and the fact that the earnings indicated Records of Employment differ from what the employee would have earned as a salary.

Dates specified on the Records of Employment

[22] The Tribunal notes that the claimants confirmed that they had made an error regarding the dates on the Records of Employment. They stated that the Records of Employment were issued in advance at the end of the season and that they issued new Records of Employment taking into account the start date of the new season. Thus, the weeks where hours were worked between the two seasons do not appear on the Records of Employment.

[23] The claimants stated that it was not a voluntary error because they issued the Records of Employment to the best of their knowledge and did not have specific training in accounting.

[24] Based on the evidence and the arguments presented by the parties, the Tribunal is satisfied that the Commission has shown that the employer made false or misleading statements in the Records of Employment.

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

[26] The Commission has the burden to demonstrate that the claimant had knowingly made false or misleading statements. Then, the claimant had to explain why these statements were made (*Canada (Attorney General) v. Purcell*, FCA A-694-94).

[27] Furthermore, the case law established that is not whether the Claimant made a false or misleading statement, but whether it was made knowingly. It is therefore necessary, on a balance of probabilities, for the claimant to have had the knowledge that he was making a false or misleading statement (*Mootoo v. Canada (Minister of Human Resources Development)* 2003 FCA 206).

[28] In *Gates*, the Court specified that "[i]n deciding whether there was subjective knowledge by a claimant, however, the Commission or Board May take into account common sense and objective factors. In other words, if a claimant claims to be ignorant of something that the whole world knows, the fact finder could rightly disbelieve that claimant and find that there was in fact, subjective knowledge, despite the denial. Not to know the obvious; therefore, might properly lead to an inference that the claimant is lying. This does not make the test objective: it does, however, take into account objective matters in coming to a decision on subjective knowledge. If, in the end, the trier of fact is of the view that the claimant really did not know that the representation was false, there is no violation of subsection 33(1)." (*Canada (Attorney General) v. Gates*, FCA #A-600-94).

[29] The claimants explained that their backgrounds were in forestry and not in accounting. They use software to do the accounting. They stated that there was a lack of communication between them, meaning that sometimes Mr. B. L., who is responsible for issuing the Records of Employment, was not informed by Mr. S. S. of the extension by a few days of certain jobs. Mr. B. L. noted that he prepared the Records of Employment in advance using the expected end date of the termination of the work. Furthermore, Mr. B. L. explained that the period in which he had to issue these Records of Employment was a particularly difficult one due to his personal situation. It was around the time that his spouse received the results of her yearly medical exams.

[30] The Tribunal finds that the claimants provided credible testimony that matched each other's as well as their previous statements.

[31] The Commission submits that it is not sufficient for an employer to claim that their statement was made "innocently" to conclude that a penalty should not be imposed. When the employer's situation is not ambiguous and they provide false answers to questions written in simple and clear language, it serves them no purpose to claim they did not intend to commit fraud.

[32] The Tribunal takes into consideration the fact that the Commission itself notes that the insurability and unemployment status were verified over several years in all these files and that neither the shareholders nor the employees were ever informed of any issue concerning their employment vs. Employment Insurance, the fact that this was a first-time offence, the confusion around their self-employed activities versus their employee status and the fact that the shareholders work in forestry and have no training in accounting or any form of clerical work (GD4-4). The Tribunal also takes into consideration that the Commission considers these factors in deciding on the imposition of a penalty of 30% of the overpayment.

[33] The Tribunal takes into consideration the explanations provided by the company's shareholders. The Tribunal finds that as employees, they declared working hours for several weeks for which they were receiving Employment Insurance benefits. Several of these weeks were disputed by the Commission because they did not appear on the Records of Employment. The Tribunal takes into consideration the fact that had the shareholders wished to hide these facts from the Commission, they would not have declared these hours themselves.

[34] The Tribunal also takes into consideration the fact that neither the employer nor their employees benefitted from the omission of this period on the Records of Employment. In effect, the Records of Employment indicated a shorter working period by a few days as well as less working hours. Furthermore, the employer paid the overtime after the season had ended, thus affecting Employment Insurance benefits by reducing the benefit rate (lower salary for some weeks) and perhaps even the length of these benefits. The Tribunal notes this situation, because it finds that an employer knowingly issuing false Records of Employment would do so only to benefit themselves or their employees.

[35] The Tribunal also takes into consideration the fact that the Records of Employment that were issued indicate actual working periods. It is often the weeks at the beginning or end of the season, when work is extended, that do not appear on file. Furthermore, the Tribunal notes the difficult situation of Mr. B. L. at the end of season due to his spouse's medical appointments.

[36] Thus, based on the evidence and the parties' arguments, the Tribunal is of the opinion that, on a balance of probabilities, the claimant did not knowingly make false or misleading statements. Therefore, the Tribunal finds that no penalty can be imposed with respect to the incorrect dates on the Records of Employment.

Earnings indicated on the Record of Employment

[37] Regarding the errors in earnings indicated on the Records of Employment, the Tribunal considers that three Records of Employment are at issue. According to the Commission's arguments at GD11, the following Records contain incorrect earnings:

> **S. B.**
>
> GD3-47 = K00030045 (May 17 to November 30, 2012) - Mr. S. B. earned $665.60 for the week of 27/05 to 02/06/12, but box 27 on the Record of Employment indicates only $185.60.
>
> **P. C.**
>
> GD3-43 = K01219182 (April 15 to December 13, 2013) - Mr. P. C. earned $414 for the week of 16 to 22/06/13 and $456 for the week of 23 to 29/06/13, but boxes 25 and 26 on the Record of Employment indicate $0.
>
> **M. M.**
>
> GD3-38 = A89061615 (January 5 to August 3, 2012) - Mr. M. M. earned $466 for the week of 13 to 19/05/12, $700 for the week of 20 to 26/05/12 and $700 for the week of 27/05 to 02/06/12, but boxes 10, 11 and 12 of the Record of Employment indicate $0.

[38] The Tribunal finds that the Commission provides little explanation of how it came to determine the amounts that should appear on the Records of Employment. It finds that [translation] "the Hydro-Québec bill is clear and unequivocal. It shows the name of the employee, their employment category which determines whether they have the qualifications required for the work, the number of hours worked per day and per week, the team leader's and group leader's signatures, the period in question which always ends on a Saturday and finally, the signature of the Hydro-Québec representative with the date. The employer confirms that all these

things are clearly identifiable on the bill and that the information should be correct or not far from reality. There could be a difference of one or two days; the Hydro-Québec representatives never signed a report before the work was completed. It guarantees that the number of hours billed is exact. They also confirm the name on the bill, because the employee must have the qualifications required to do the work, such as the safety course and training required (Hydro QC bills GD3-288 to GD3-363; pay, expenses, etc.) GD3-364 to GD3-410)" (GD4-3).

[39] The Tribunal notes that the Commission determined that the amount that should appear on Mr. S. B.'s Record of Employment for the week of May 27, 2012, is $665.60 and not $185.60. The Tribunal notes that this employee worked 10 hours based on the invoice dated May 28, 2012 (GD3-312), 10 hours on the invoice dated May 29, 2012 (GD3-313), 10 hours on the invoice dated May 30, 2012 (GD3-314) and 10 hours on the invoice dated May 31, 2012 (GD3-315), for a total of 40 hours.

[40] The Tribunal notes that the Record of Employment shows that the claimant had $185.60 in earnings in box 27 of the Record of Employment (GD3-47). The claimant's hourly rate of pay was $16.46 (insurable earnings of $17,445.60 ÷ the number of insurable earnings of 1060 = $16.46).

[41] The Tribunal finds it unlikely that the claimant earned only $185.60 for a 40-hour work week. Thus, the Tribunal is of the opinion that the amount shown on the Record of Employment for the week of May 27, 2012, is incorrect.

[42] The Tribunal notes that the Commission determined that the amount that should appear on Mr. P. C.'s Record of Employment for the week of June 16, 2013, is $414.00 and for the week of June 23, 2013, is $456.00. The Tribunal notes that the payroll for the weeks of June 17 and June 21, 2013, show that this employee earned $391.00 (GD3-361). For the week of June 23, 2013, the Tribunal was unable to determine the number of hours worked by the claimant. As mentioned above, the Commission provides few details explaining how it came to its conclusion about the amount that the claimant should have declared. For that week, the Tribunal notes that the invoice for the period ending on June 29, 2013 (GD3-360) shows that this employee worked only one hour. Nevertheless, because the period when that hour was worked is not specified, the

Tribunal cannot attribute it to the week in question and cannot conclude that that hour of work is not contained in the payroll appearing at page GD3-361. Furthermore, it notes that the pays stubs on file for this employee do not correspond to those for the period covered by the Commission (GD3-370 to GD3-377).

[43] The Tribunal finds that the Record of Employment shows that the claimant had $0 earnings in box 26 of the Record of Employment (GD3-43). The claimant's hourly rate of pay was $13.16 (insurable earnings of $19,550.00 ÷ the number of insurable hours of $1,485.00 = 13.16$).

[44] The Tribunal finds it unlikely that the claimant had received $0 when the pay report for the week of June 16, 2013, indicates a salary of $391. Thus, the Tribunal is of the opinion that the amount shown on the Record of Employment for the week of June 16, 2013, is incorrect.

[45] The Tribunal notes that the Commission determined that the amount that should appear on Mr. M. M.'s Record of Employment for the weeks of May 13, 2012, and May 20, 2012, is $466.00 and $700.00 for the week of May 27, 2012. The Tribunal notes that this employee worked 10 hours based on the invoice dated May 17, 2012 (GD3-308), 10 hours based on the invoice dated May 14, 2012 (GD3-317) and 10 hours based on the invoices dated May 22, 2012 (GD3-319) and May 23, 2012 (GD3-320). The invoices dated May 28, 2012 (GD3-321) and May 29, 2012 (GD3-322) each show 10 hours of work. Finally, 10 hours of work is shown on the invoice dated May 30, 2012 (GD3-323).

[46] The Tribunal notes that the Record of Employment shows that the claimant had $0 in earnings in box 10, 11 and 12 (GD3-38). The claimant's hourly rate was $20.12 (insurable earnings of $8,449.60 ÷ the number of insurable hours of 420 = $20.12).

[47] The Tribunal finds that it is unlikely that the claimant received a salary of $0 for the week of May 13, 2012, because, based on the invoices on file, he had worked 20 hours that week. Furthermore, the claimant had worked 20 hours during the week of May 20, 2012, and 30 hours during the week of May 27, 2012. Thus, the Tribunal finds that the amounts shown on the Records of Employment for the weeks of May 13, 20 and 27, 2012 are incorrect.

[48] Based on the parties' evidence and arguments, the Tribunal finds that, on a balance of probabilities, the employer knowingly made false or misleading statements. Therefore, the Tribunal finds that a penalty may be established due to the incorrect earnings indicated on the three above-mentioned Records of Employment.

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

[50] The Commission finds that this was a first offence: the 29 Records of Employment are within the limitation period for a monetary penalty of 3 X $514 (benefit rate in effect in 2014) X 29 infractions = $44,718.

[51] Although the company is in a very good financial position and also able to pay a penalty commensurate with the alleged acts, the sanction is a deterrent and not a punitive measure, which means that a penalty of $29,513 was imposed (GD3-411 to GD3-413). GD4-3 Then, considering the fact that the insurability and the unemployment status were verified over several years in all these files and that neither the shareholders nor the employees were ever informed of any problem regarding their employment vs. Employment Insurance, considering that it was a first offence, considering the confusion around the self-employed work vs. their employee status and considering that that shareholders work in forestry and have no training in accounting or in any form of clerical work, the Commission is of the opinion that the penalty may be reduced to 30% of $26,214. The new penalty amount is therefore (30% X $26,214) $7,864 (GD3-425 to GD3-426).

[52] The representative submits that all the considerations taken into account by the Commission do not add up to 30%, especially since the Commission recognizes that the claimants did not realize the scope of their errors.

[53] The representative submits that all the considerations taken into account by the Commission do not add up to 30%, especially since the Commission recognizes that the claimants did not realize the scope of their errors.

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

[55] Nevertheless, the Tribunal notes that the Commission imposed a penalty on the basis that 29 Records of Employment were incorrect when the Tribunal determined that only three of them could be subject to a penalty.

[56] Furthermore, even though the Tribunal states that several factors were taken into consideration during the reconsideration stage because the Commission had reduced the penalty to 30% of the overpayment, the Tribunal finds that the Commission did not consider the personal situation raised by Mr. B. L., who was responsible for issuing the Records of Employment. Thus, the Tribunal cannot conclude that the Commission exercised its discretion judicially by imposing a penalty on the claimant.

[57] Therefore, and considering the evidence and the parties' submissions, the numerous factors taken into consideration by the Commission, including the fact that the insurability and the unemployment status were verified over several years and in all these files and that neither the shareholders nor the employees were ever informed of any problem with their job vs. Employment Insurance, that this was a first offence, that there was confusion about self-employed work and the shareholders' employee status and that the shareholders do forestry operations and have no training in accounting. Furthermore, the Tribunal considers the shareholders' testimony credible and Mr. B. L.'s personal situation while he was issuing the Records of Employment.

[58] Thus, considering the credible testimony of the claimants and the evidence and submissions presented by the parties, the Tribunal finds that the penalty must be reduced to $1 for the three Records of Employment that contained false or misleading statements.

CONCLUSION

[59] Thus, based on the evidence and the parties' arguments, the Tribunal is of the opinion that, on a balance of probabilities, the claimant did not knowingly make false or misleading statements when he indicated the periods of work on the Records of Employment. Therefore, the Tribunal finds that no penalty can be imposed with regard to the incorrect dates indicated on the Records of Employment.

[60] Regarding the earnings indicated on the Records of Employment, the Tribunal finds that the penalty must be reduced to $1 for the three Records of Employment that contained false or misleading statements, because the Tribunal determines that the Commission failed to exercise its discretion judicially.

[61] The appeal is allowed in part.

Charline Bourque
Member, General Division—Employment Insurance Section

ANNEX

THE LAW

Employment Insurance Act

39(1) The Commission may impose on an employer, or any other person acting for an employer or pretending to be or act for an employer, a penalty for each of the following acts if the Commission becomes aware of facts that in its opinion establish that the employer or other person has

> **(a)** made, in relation to any matter arising under this Act, a representation that the employer 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)** in relation to any matter arising under this Act, made a declaration that the employer or other person knew was false or misleading because of the non-disclosure of facts;
>
> **(d)** 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
>
> **(e)** participated in, assented to or acquiesced in an act mentioned in paragraphs (*a*) to (*d*).

(2) The Commission may set the amount of the penalty for each act at not more than nine times the maximum rate of weekly benefits in effect when the penalty is imposed.

(3) If the Commission becomes aware of facts that in its opinion establish that a corporation has committed an act described in subsection (1) and that any officer, director or agent of the corporation has directed, authorized, assented to, acquiesced in or participated in the act, the Commission may impose a penalty on the officer, director or agent, whether or not a penalty has been imposed on the corporation.

(4) Notwithstanding subsection (2), if the act involves the provision of information about any matter on which the fulfilment of conditions for the qualification and entitlement for receiving or continuing to receive benefits depends, the Commission may set the amount of the penalty at not more than the greater of

> **(a)** $12,000, and
>
> **(b)** the amount of the penalty imposed under section 38 on any person who made a claim for benefits based on the information provided. - 32 -

(5) Notwithstanding subsection (2), the Commission may set the amount of the penalty at an amount required or authorized by the regulations if the act is a major contravention, as defined under the regulations.