



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *A. I. v Canada Employment Insurance Commission*, 2017 SSTGDEI 200

Tribunal File Number: GE-16-3604

BETWEEN:

A. I.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Leila Handanovic

HEARD ON: March 22, 2017

DATE OF DECISION: April 28, 2017

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Appellant – A. I.

INTRODUCTION

[1] The Appellant's benefit period was established effective February 8, 2015. On May 17, 2016, the Canada Employment Insurance Commission (Commission) determined that the Appellant knowingly providing two false or misleading representations and imposed a penalty in the amount of \$875.00. The Commission also issued a notice of violation. The Appellant requested a reconsideration of these decisions. By correspondence dated September 1, 2016, the Commission changed the decision by reducing the penalty of \$875.00 to \$656.00, and overturning the violation decision. On September 22, 2016, the Appellant filed an appeal with the Social Security Tribunal (Tribunal).

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

- a) The fact that the credibility is not anticipated to be a prevailing issue.
- b) The form of hearing respects the requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

ISSUE

[3] Whether a penalty should be imposed pursuant to section 38 of the *Employment Insurance Act* (Act).

EVIDENCE

[4] A benefit period was established effective February 8, 2015. The Appellant submitted an application to reactivate his benefit period on November 13, 2015 (GD5-5 to GD3-14).

[5] In the application, when asked “Have you worked since you completed your last application for benefits?” the Appellant replied “No” (GD3-8).

[6] The Appellant made claims for benefits by completing reports by internet for the periods from November 1, 2015 to November 14, 2015; November 15, 2015 to November 28, 2015; and November 29, 2015 to December 11, 2015. Prior to beginning each report, he was warned against providing false information. According to the Agent Certification and Electronic Claimant’s Report Questions and Answers record, the Appellant was asked before filing each report “Is there any other money that you have not previously told about, that you received or will receive for the period of this report?” and he answered “No”. The reports included an acceptance statement, which stated that the Appellant was acknowledging that it was his responsibility to read and understand the information contained within each heading presented, and a confirmation statement, which stated that the answers provided to the questions are true to the best of his knowledge and that the Appellant understood that there are penalties for knowingly making false statements (GD3-23 to GD3-35).

[7] According to the overpayment calculation, submitted by the Commission, the Appellant was paid benefits weekly in the amount of \$524.00 from the week beginning November 1, 2015 to the week beginning December 6, 2015 (GD3-40).

[8] According to the Record of Employment (ROE), the Appellant worked from April 6, 2015 to October 29, 2015, and received \$2,399.93 in vacation pay as a result of his separation from employment (GD3-15). The employer told the Commission that this amount was paid to the Appellant on November 10, 2015 (GD3-38).

[9] On March 4, 2016, the Commission contacted the Appellant. According to the Commission’s record of that call, the Appellant confirmed that he did receive vacation pay from his employer. When asked by the Commission why he did not declare this vacation pay on his renewal application or his reports, the Appellant indicated that he believed it would be done “automatically” because the ROE is sent automatically (GD3-39).

[10] The Commission asked the Appellant if he noticed that he received benefit payments immediately after applying in November as opposed to all previous years in which he did not

receive payments until one or two weeks after his last day of work. The Appellant responded that he did not know that anything went wrong and that he answered the questions on the application. He stated that he does not have to start a new claim every time he is laid-off and sometimes he can restart an old one, and that he did not realize that there should have been a delay in the payment of benefits. The Commission also asked the Appellant why he answered “no” to the question “have you worked since you completed your last application for benefits” in his application for benefits. The Appellant answered that he does not know why that happened and he does not remember that question (GD3-39).

[11] According to the Overpayment Calculation document, the Commission determined that the vacation pay received by the Appellant upon separation from the employer constituted earnings and allocated the \$2,399.93 from the date of separation:

Week Beginning	Earnings (Appellant)	Benefit Paid	Earnings (Vacation Pay)	Benefits that should have been paid	Overpayment
November 1, 2015	\$0.00	\$524.00	\$1,474.00	\$0.00	\$524.00
November 8, 2015	\$0.00	\$524.00	\$701.00	\$173.00	\$351.00
				OVERPAYMENT	\$875.00

This created an overpayment of \$875.00 (GD3-40).

[12] According to the Commission’s Record of Decision dated May 17, 2016, the Commission determined that the Appellant had knowingly made false or misleading statements by failing to declare his period of employment on his renewal application for benefits submitted on November 13, 2015, and by failing to declare his vacation pay on the claimant report covering the period from November 1, 2015 to November 14, 2015. The Commission noted that by agreeing with the vacation pay information provided by the employer, the Appellant acknowledged that the statement provided on one report was false as he failed to report the vacation pay received. The Commission noted that the Appellant was a “frequent claimant” and had filed renewal applications in the past. The Commission noted that the Appellant did not

provide sufficient information to prove that the false statements were made due to an honest mistake (GD3-41).

[13] The overpayment was \$875.00, the Appellant did not present any mitigating circumstances and this was considered to be the Appellant's second incident of misrepresentation. The Commission determined that the penalty was 100% of the overpayment value, therefore \$875.00. The Commission noted that the legal validation amount, in accordance with section 38(2) of the Act was three times the benefit rate times the number of misrepresentations knowingly made, so \$3,144.00, and the maximum penalty amount for a second violation was \$8,000.00 less any previous penalty amounts, which in this case was \$0. (GD3-41).

[14] On May 17, 2016, the Commission notified the Appellant, by issuing a decision letter (GD3-42 to GD3-45), that:

- a) it adjusted the allocation of his earnings received as vacation pay, allocating \$1,474.48 to the week beginning November 1, 2015, and \$701.39 to the week beginning November 8, 2015;
- b) this was his second incident of improper reporting or of omitting to provide information. He was notified of the previous incident on March 15, 2013 (this letter was also provided to the Tribunal (GD3-3 to GD3-4));
- c) it was imposing a penalty in the amount of \$875.00, because the Appellant made 2 false representations by knowingly providing false or misleading information; and
- d) a notice of violation was issued.

[15] On June 1, 2016, the Appellant made a request for reconsideration. In his request the Appellant stated "By error, I did not declare vacation pay" (GD3-47 to GD3-48).

[16] On August 31, 2016, the Commission contacted the Appellant. According to the Commission's record of that call the Appellant stated that he had no intention to defraud the Commission. He stated that he filed his renewal application from home and did not answer that he had worked by mistake. He received his vacation pay around three weeks after he finished

work and that he did not pay attention to his bank accounts and did not realize his mistake. The Commission advised the Appellant that on all previous renewal claims he had correctly completed his application (GD3-49).

[17] According to the Commission's Record of Decision dated September 1, 2016, the Commission noted that the Appellant had been completing initial and renewal applications for several years. He had received warnings in the past and always provided the same explanations regarding the reasons why he committed the errors, which was that it was a mistake and he did not do it on purpose. The Appellant reported his vacation pay on his three previous renewal applications, in December 2014, November 2013, and October 2012 (GD3-50 to GD3-51).

[18] The Commission went on to note that when the Appellant answered "no" to the question "have you worked since you completed your last application for Employment Insurance benefits?" in his renewal claim on November 13, 2015, it could consider this a simple mistake. Since the Appellant answered "no" to the question of whether he had worked, the question asking if he had received any monies upon separation from employment was not asked. The Commission did not consider the omission of not reporting vacation pay on his renewal claim on November 13, 2015 as a false report made knowingly since the question was not asked. However, the Commission did consider the Appellant answering "no" to the question "Is there any other money that you have not previously told us about, that you received or will receive for the period of this report?" on November 25, 2015 to be a false report made knowingly. The Commission noted that this report covered the period from November 1, 2015 to November 14, 2015, and the employer had stated that the vacation pay was paid on November 10, 2015. So, when calculating the penalty amount the Commission considered one false report to have been made knowingly on November 25, 2015.

[19] The Commission noted that the Appellant had "certain language issues", and that he was contesting only the fraudulent aspect because he had no intention to defraud the Commission. The Commission considered that a language barrier constituted a mitigating circumstance and reduced the penalty to 75% of the net overpayment. The penalty amount was reduced to \$656.00 ($\$875 \times 100\% - 25\%$) (GD3-50 to GD3-51).

[20] On September 1, 2016 the Commission notified the Appellant, by issuing a reconsideration decision letter, that the penalty of \$875.00 was reduced to \$656.00, and that the violation decision was overturned (GD3-52 to GD3-53).

[21] During the hearing the Appellant testified that:

- a) he uses his home computer and sometimes when he clicks a button he could click the wrong button and it was not intentional. He thought that he reported the vacation pay, and believes the error could be from an error that occurred on his computer without him knowing it;
- b) he understood that the employer would also report the vacation pay; and
- c) the agent that spoke to him on March 4, 2016 (GD3-39) did not act in a professional manner and used a threatening tone with him.

SUBMISSIONS

[22] The Appellant submitted that

- a) he thought that he reported the vacation pay;
- b) his claim was incorrect due to an unintentional computer error he made when he was filling out the online forms. He unknowingly hit the wrong buttons; and
- c) the matter exerted extra pressure on him physically and mentally.

[23] The Respondent submitted that

- a) it has met the onus of establishing that that Appellant knowingly made a misrepresentation when he failed to declare the vacation pay he received on his claimant report. The Commission submits that the Appellant knew that he had received vacation pay upon his separation from employment and failed to notify the Commission; and
- b) the Commission followed this policy when calculating the penalty amount: for a second incident of misrepresentation, the penalty amount may be up to 100% of the overpayment

caused by the misrepresentation. This is the maximum, for a second offence, that the Commission established by policy and it is only after considering all mitigating circumstances that the penalty amount is calculated. This was considered a second incident of misrepresentation, as the Appellant was previously notified of a first incident of misrepresentation on March 15, 2013. The language barrier was a mitigating circumstance that was considered. As such, it rendered its decision in a judicial manner, as all the pertinent circumstances were considered when assessing the penalty amount.

ANALYSIS

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

[25] Section 38 of the Act states that the Commission may impose a penalty on a claimant, or any person acting on behalf of a claimant, where the Commission becomes aware of facts that in its opinion establish that the claimant has made a representation or provided information that the person knew was false or misleading.

[26] The Federal Court of Appeal has established that the test for “knowingly made” is a subjective one where the decision maker must decide whether, on a balance of probabilities, there was subjective knowledge by the party that made the false or misleading statement. (*Mootoo v. Canada (A.G.)*, 2003 FCA 206)

[27] The onus is on the Commission to prove that a claimant knowingly made the false or misleading statement. The onus then shifts to the claimant who must provide an explanation for the incorrect information.

[28] First, the Tribunal must consider whether the Appellant knowingly made a misrepresentation on his November 25, 2015, report when he answered “no” to the question “Is there any other money that you have not previously told about, that you received or will receive for the period of this report?” for the period from November 1, 2015 to November 14, 2015 (GD3-23).

[29] The Commission provided evidence showing that at the beginning of every report, the Appellant was instructed to review and confirm that the responses provided are true and was

warned at the end of every report that there are penalties for knowingly making false statements (GD3-23 to GD3-35). The Commission also submitted that the Appellant had previous knowledge and experience in submitting reports for claims and had reported his vacation pay on his three previous renewal applications in October 2012, November 2013, and December 2014. Finally, the Commission submitted that the Appellant had received warnings in the past and always provided the same explanations regarding the reasons why he committed errors, which was that it was a mistake and he did not do it on purpose.

[30] The Appellant submitted that he thought that he had reported the vacation pay and his claim was incorrect due to an unintentional computer error he made when he was filling out the online form.

[31] The Tribunal finds that the evidence shows that the Appellant was in receipt of vacation pay (GD3-40), which he received on November 10, 2015 (GD3-38), that he answered “no” to the question “Is there any other money that you have not previously told about, that you received or will receive for the period of this report?” for the period from November 1, 2015 to November 14, 2015 (GD3-23 to GD3-25). The Tribunal finds that the Appellant made a false representation to the Commission.

[32] The Tribunal must determine whether the Appellant made these misrepresentations “knowingly”. The Appellant submitted that he thought that he had reported the vacation pay. In this case, the Appellant had previous knowledge and experience in submitting benefit claim reports and renewal applications, he knew that he received vacation pay, and he had correctly reported vacation pay in the past.

[33] The Commission asked the Appellant if he noticed that he received benefit payments immediately after applying for benefits, as opposed to all previous years in which he did not receive payments until one or two weeks after his last day of work after reporting vacation pay. The Appellant responded that he did not notice and did not realize that there should have been a delay in the payment of benefits. The Tribunal finds it hard to believe that the Appellant, an individual who had filed claims a number of times in the past and was familiar with the EI system, did not know that declaring vacation pay would result in a delay of receiving benefits and that he did not realize that he was receiving payments immediately, rather than one to two

weeks after his last day of work, as had occurred when he had correctly reported his vacation pay in the past. The Tribunal also considered that the Appellant was instructed, when he submitted his bi-weekly benefit reports, to review and confirm that the responses provided are true. So, even if the Appellant hit the wrong button when submitting his reports, he had a responsibility to review and confirm that the responses provided were true. Had he done so, he would have caught any errors that he made.

[34] The Tribunal finds that, on a balance of probabilities, the Appellant knowingly made a false representation to the Commission when he failed to report that he received vacation pay on November 10, 2016.

[35] The Commission has sole discretion to determine the appropriateness and amount of a penalty (*Canada (A.G.) v. Uppal*, 2008 FCA 388). The Tribunal may only intervene if it finds 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 (A.G.) v. Uppal*, 2008 FCA 388; *Canada (A.G.) v. Mclean*, 2001 FCA 5; *Canada (A.G.) v. Rumbolt*, A-387-99).

[36] A discretionary power is not exercised judicially if it can be established that the decision maker acted in bad faith, acted for an improper purpose or motive, took into account an irrelevant factor, ignored a relevant factor, or acted in a discriminatory manner.

[37] In this case, the Commission considered that this was the Appellant’s second offence and initially determined that the penalty was 100% of the overpayment value, therefore \$875.00. The result was less than the maximum penalty amount set out in subsection 38(2) of the Act. Upon reconsideration of its decision, the Commission considered the language barrier constituted a mitigating circumstance and reduced the penalty to \$656.00 (75% of the overpayment). There were no other mitigating circumstances brought to the Commission’s attention that were not considered by the Commission. Also, at the hearing, no other mitigating circumstances were identified. The Tribunal therefore finds that the Commission exercised its discretion in a judicial manner when it imposed the penalty and therefore, cannot intervene in this decision.

CONCLUSION

[38] The appeal is dismissed.

Leila Handanovic

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).