



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *G. S. v. Canada Employment Insurance Commission*, 2018 SST 357

Tribunal File Number: GE-17-3260

BETWEEN:

G. S.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Teresa Jaenen

HEARD ON: April 24, 2018

DATE OF DECISION: April 27, 2018

DECISION

[1] The appeal is dismissed. I find the Respondent properly imposed a modified penalty of \$3,803.00 and a notice of violation because the Appellant knowingly failed to report he had returned to work while he was receiving parental benefits.

OVERVIEW

[2] The Appellant established a claim for employment insurance and received 35 weeks of parental benefits. Following an investigation it was found that the Appellant had returned to work and earned income for 24 of those weeks. The Appellant did not advise Service Canada of this fact and kept 13 benefit payments. The Appellant stated his employer was pressuring him to return while he was on parental leave so he returned to work and continued to receive parental payments. He figured something was wrong and admitted he should have contacted Service Canada and he likely would have but he was stressed and busy with his family. He stated instead he put the money in a savings account knowing he would have to pay it back.

[3] The Appellant argues that having to repay the penalty would cause him stress and financial hardship. He explained his health issues over the years has contributed to his lack of savings/assets and he has incurred additional costs trying to get his wife permanent status. He further stated that his stress levels have become unmanageable following the birth of his child, his wife's mental health issues and his sister's illness. The Canada Employment Insurance Commission (Respondent) imposed a penalty and notice of violation on the premise that the Appellant did this knowing that he wasn't entitled to the money.

PRELIMINARY MATTERS

[4] The Appellant did not attend the hearing. Canada Post-delivery receipt shows that the Appellant's Notice of Hearing was signed and delivered successfully on March 15, 2017. The Appellant also contacted the Tribunal on March 15, 2017, confirming he had received the Notice of Hearing. The Tribunal was satisfied the party received their Notice of Hearing and proceeded with the authority allowed under subsection 12(1) of the *Social Security Tribunal Regulations*.

ISSUES

[5] Issue 1: Should a penalty be imposed on the Appellant?

- a) Did the Appellant make a false or misleading statement or representation? If so, was it made knowingly?
- b) Did the Commission exercise its discretion properly with respect to the penalty amount?

[6] Issue 2: Should a notice violation be issued?

ANALYSIS

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

Issue 1: Should a penalty be imposed on the Appellant?

[8] Yes, I find a penalty be imposed because the Appellant failed to advise Service Canada that he had returned to work. He conceded he knew he was receiving parental benefits he was not entitled to and he conceded he kept the money in savings account knowing he would have to repay it.

a) Did the Appellant make a false or misleading statement or representation? If so, was it made knowingly?

[9] Penalties may be imposed for false statements made "knowingly". "Knowingly" is determined on the balance of probabilities based on the circumstances of each case or the evidence of each case (*Gates A-600-94*).

[10] It is not enough for the representation to be false or misleading; for a penalty to apply it must be made by the claimant with the knowledge that it is false or misleading (*Mootoo A-438-02*). There is no requirement to show that there was a mental element, such as the intention to deceive, when concluding that a false statement was knowingly made (*Gates A-600-94*).

[11] The onus of proof is on the Respondent to show that the Appellant knowingly made a false or misleading statement or representation.

[12] The Tribunal finds the Respondent met the onus because it proved the Appellant made a misrepresentation when he failed to notify the Commission that he returned to work. The Appellant conceded that he did not contact Service Canada when he returned to work but instead kept the parental benefits in a savings account because he knew he was not entitled to them.

[13] The burden of proof now shifts to the Appellant to prove the withholding of information was not made knowingly and provide a reasonable explanation for the incorrect information.

[14] The Appellant argues that he had been told he would receive written communication at the end of his claim but didn't. He stated that had he received it, he would have known it was his responsibility to notify Service Canada he had returned to work earlier and taken action and avoided the penalty imposed.

[15] I considered the Appellant's argument that he may have been misinformed by the Service Canada agent; however it has been established in (*Granger A-684-85*) "It is equally certain that any commitment which the Commission or its representatives may make, whether in good or bad faith, to act in a way other than that prescribed by the Act would be absolutely void and contrary to public order."

[16] I must make a decision based on the facts presented in relation to the issue before it and finds the Appellant was not able to provide any reasonable explanation as to why he did not notify Service Canada he had returned to work. He failed to take the necessary steps to make sure he declared his situation (that he returned to work) as any reasonable person would have done in the same circumstances. The Appellant worked for 24 weeks while in receipt of parental benefits without advising Service Canada.

[17] I find the Appellant knowingly misrepresented himself because he conceded that he knew he had returned to work and continued to receive his parental benefits. He conceded that he put the money in a separate savings account because he knew something was wrong and that he knew he would have to repay the money. However he still failed to contact Service Canada any

time while receiving the benefits or even after his claim had ended. It wasn't until an investigation by the Respondent took place, 9 months later it was revealed.

[18] I find, on the balance of probabilities, had an investigation by the Respondent not taken place 9 months later, the Appellant would not have advised them on his own that he had received money he was not entitled to.

[19] I find on the balance of probabilities that the Appellant knew he had agreed to the Exemption Declaration and the rights and responsibilities; therefore it was his obligation to report he had returned to work on May 4, 2016.

b) Did the Commission exercise its discretion properly with respect to the penalty amount?

[20] Yes, I find the Commission exercised its discretion in respect to assessing the penalty because it considered the mitigating circumstances of the Appellant's health, personal and financial hardships and that the Appellant willingness to repay the money promptly were relevant to determining the amount of the penalty and modified to be further reduced by 20% of the net overpayment: $\$12,678.00 \times 30\%$ (50% - reduction of 20%) = $\$3,803.00$ (*Morin A-681-96*).

[21] If I maintain that a penalty is warranted, I must then determine whether the Commission exercised its discretion in a judicial manner when it determined the quantum of the penalty.

[22] There is no authority to interfere with discretionary decisions of the Commission unless it can be shown 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 (*Uppal 2008 FCA 388; Mclean 2001 FCA 5; Rumbolt A-387-99*).

[23] The amount of a penalty is a discretionary decision within the exclusive authority of the Commission (*Uppal 2008 FCA 388; Gill 2010 FCA 182*).

[24] The Respondent submits the Commission rendered its decision in this case in a judicial manner, as all the pertinent circumstances were considered when assessing the penalty amount (*Canada (AG) v. Uppal, 2008 FCA 388; Canada (AG) v. Tong, 2003 FCA 28*).

[25] The Respondent submits that the initial reduced penalty was calculated as \$5,000.00 - 20% = \$4,000.00 but following a review of the information in the Record of Decision (GD3-34 to GD3-35) the calculation of that penalty is incorrect. The penalty reduction of 20% was applied to the total penalty amount of \$5000.00 rather than the percentage “assigned” to the net overpayment amount.

[26] The Respondent requests the penalty amount be modified and is now \$3,803.00 the lesser of A, B, or C, and calculated as follows:

Number of false statements: 13 Net Overpayment Amount: \$12,678.00

A. 1st Level of Misrepresentation. Maximum Penalty Cap for this benefit period = \$5,000

B. Penalty of 50% applied to the net overpayment: $\$12,678.00 \times 50\% = \$6,339.00$

Specific Mitigating Circumstances recognized for Penalty Reduction: Health/ financial considerations/family and personal stressors. This was his first claim and he has expressed willingness to immediately repay the overpayment.

Therefore 50% of the overpayment to be reduced based on above circumstances by 20% of the net overpayment: $\$12,678.00 \times 30\%$ (50% - reduction of 20%) = \$3,803.00
Penalty

C. Legal Validation Amount - Section 38(2) of the Act: 3 X client’s Weekly Rate of Benefit (\$537.00) X Number of Misrepresentations (13) = \$20,943.00.

Issue 2: Should a notice violation be issued?

[27] I find that a notice of violation should be issued because the misrepresentation of the Appellant working while receiving parental benefits for 24 weeks resulted in an overpayment of \$12,678.00, and qualified as a serious violation.

[28] The purpose of section 7.1 of the Act is “to deter abuse of the employment insurance scheme by imposing an additional sanction on claimants who attempt to defraud the system” (*Gill v. Canada (AG)*, 2010 FCA 182).

[29] The Act states 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.

[30] The Respondent submits that the Commission exercised its discretion in a judicial manner when issuing the Notice of Violation. After considering the overall impact to the Appellant of issuing a Notice of Violation, including mitigating circumstances, prior offences and the impact on the ability of the Appellant to qualify on future claims, it is determined that a serious violation was applicable in this case and would be maintained.

[31] In order for me to intervene with the Commission’s decision, I must determine that the Commission did not exercise its discretion in a judicial manner when it decided to issue the Notice of Violation. The Appellant did not attend the hearing and provide any new or additional information to support there were mitigating circumstances the Commission failed to consider.

[32] I find that the Commission did exercise its discretion “in a judicial manner” when issuing the Notice of Violation, because they took into account the overall impact of the notice of violation on the Appellant including mitigating circumstances, prior offences, and the impact on the ability to qualify on future claims.

[33] I acknowledge the Appellant’s health, personal and financial situation and sympathize with the Appellant; however I do not have the authority to alter the requirements of the Act and must adhere to the legislation regardless of the personal circumstances of the Appellant (*Canada (AG) v. Levesque*, 2001 FCA 304).

[34] I find the Commission correctly determined that a penalty be imposed in accordance to section 38 of the *Employment Insurance Act* (Act) and that the monetary penalty be modified to \$3,803.00 and a notice of violation be issued pursuant to section 7.1 of the Act.

CONCLUSION

[35] The appeal is on both issues is dismissed,

Teresa Jaenen

Member, General Division - Employment Insurance Section

HEARD ON:	April 24, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	The Appellant did not appear.

ANNEX

THE LAW

Employment Insurance Act

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

7.1(4) An insured person accumulates a violation if in any of the of the following circumstances the Commission issues a notice of violation to the person:

- (a) one or more penalties are imposed on the person under section 38, 39, 41.1 or 65.1, as a result of acts or omissions mentioned in section 38, 39 or 65.1;
- (b) the person is found guilty of one or more offences under section 135 or 136 as a result of acts or omissions mentioned in those sections; or
- (c) the person is found guilty of one or more offences under the Criminal Code as a result of acts or omissions relating to the application of this Act.

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.