



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *G. D. v. Canada Employment Insurance Commission*, 2018 SST 998

Tribunal File Number: GE-17-4011

BETWEEN:

**G. D.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**General Division – Employment Insurance Section**

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DECISION BY: Teresa Jaenen

HEARD ON: May 16, 2018

DATE OF DECISION: May 23, 2018

## **DECISION**

[1] The appeal is dismissed. The Tribunal finds the Commission properly imposed a penalty because the Appellant knowingly made a false or misleading statement when he filed his Teledec report and failed to report that he worked and earned money. The Tribunal finds the Commission exercised its discretion in a judicial manner when it imposed a subsequent notice of violation as the Appellant had been issued a previous notice of violation within the past 260 weeks.

## **OVERVIEW**

[2] The Appellant established a claim for employment insurance benefits after being laid off from his job. Following an investigation by the Canada Employment Insurance Commission (Commission) it was revealed that the Appellant had failed to declare his employment from First Canada ULC while on claim for benefits which created an overpayment. The employer and Appellant both confirmed that the Appellant did work and earn money from the week's starting December 5, 2016, to April 13, 2017. The Commission determined the Appellant knowingly made false or misleading statements and issued a penalty and notice of violation. The Appellant appealed the decisions stating that he is being harassed and he has proof that he does not owe employment insurance any money. He stated that for 12 years the government had taken his income tax refunds, GST and Saskatchewan Low Income Credit and wants it back plus interest. He is claiming \$5000.00 in compensation.

## **PRELIMINARY MATTERS**

[3] The Appellant did not attend the hearing. A Canada Post-delivery receipt shows that the Notice of Hearing was delivered and signed on March 15, 2015. The Tribunal is satisfied that the Appellant received the Notice of Hearing and proceeded with the authority allowed under subsection 12(1) of the *Social Security Tribunal Regulations*.

## **ISSUES**

[4] Should a penalty be imposed on the Appellant?

[5] Did the Appellant make a false or misleading statement? If so, was it made knowingly?

[6] Did the Commission exercise its direction properly with respect to the penalty amount?

[7] Did the Commission exercise its discretion properly when it imposed a notice of violation?

## **ANALYSIS**

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

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

[9] Yes, the Tribunal finds a penalty is warranted because on the balance of probabilities the Appellant knowingly made false or misleading statements to the Commission when he failed to declare on his reports that he worked and earned money.

[10] 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*).

### **Issue 2: Did the Appellant make a false or misleading statement? If so, was it made knowingly?**

[11] Yes, the Tribunal finds that the Appellant knowingly made a false or misleading statements when he answered "No" to the question "Did you work or receive earnings during the period of this report?" between the weeks starting December 5, 2016, and April 13, 2017.

[12] The Tribunal finds the Teledec reports prove the Appellant knowingly made the false and misleading statement.

[13] 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*).

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

[15] The Commission submitted evidence of the Teledec reporting system questions asked and the answers made by the Appellant proving that the Appellant knowingly made a false or misleading statement (*Lavoie* A-83-04); (*Caverly* A-211-0).

[16] The Tribunal finds the Commission met the onus because it proved the Appellant made false statements when he completed his reports for weeks starting on December 5, 2016, to April 13, 2017. He was asked the simple question: "Have you worked or earned money during the period of these reports," to which he responded: "No". The Tribunal finds on the balance of probabilities the Appellant knew he worked and was earning money during these report periods.

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

[18] The Tribunal finds on the balance of probabilities that the Appellant would have known he was not answering the questions correctly because he conceded that he worked and earned money.

[19] The Appellant agreed with the amount of earnings that were reported by the employer for the period starting the week December 5, 2016, and ending on April 15, 2017. He was not able to provide a reason why he did not report his work/earnings for these periods.

**Issue 3: Did the Commission exercise its discretion properly in determining the amount of the penalty?**

[20] Yes, the Tribunal finds the Commission exercised its discretion properly when it determined the amount of the penalty because it considered the Appellant's financial hardship and health issues he was experiencing.

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

[22] The Tribunal can only determine if the Commission correctly assessed the penalty and finds the Commission did exercise its discretion when it imposed a monetary penalty of \$997.00. The Commission considered the following:

(1) Level of Misrepresentation Second Level: 100% minus 0% for mitigating circumstances X 1,944.00 = \$ 1,944.00.

(2) Legal Validation Amount (Section 38(2) of the Act): 3 X 382.00 X 8 = \$ 9,168.00.

(3) Maximum Penalty Amount: Second Level = \$8,000 - \$1,160.00= \$6,840.00.

[23] The Commission also considered the penalty accurately reflects the seriousness of the misrepresentation, and the final penalty amount is not harsh or excessive. This was the Appellant's second misrepresentation and given that the Appellant is in severe financial hardship the penalty was reduced by 50% to \$997.00 (100% - 50% for mitigating circumstances x \$1,944.00).

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

[25] 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).

[26] The Tribunal finds the Commission exercised its discretion in a judicial manner because it considered the Appellant reasons that existed at the time and the mitigating circumstances to be considered that were relevant to determining the amount of the penalty be further reduced (*Morin* A-681-96).

[27] Unfortunately, the Appellant did not attend the hearing and provide the Tribunal with any new information or mitigating circumstances that the Commission would not have considered at the time they imposed the warning or they acted in a non-judicial manner.

[28] The Tribunal finds the Commission correctly determined that a penalty be imposed in accordance to section 38 of the Act.

**Issue 4: Did the Commission exercise its discretion properly when it imposed a Notice of Violation?**

[29] Yes, the Tribunal finds the Commission exercised its discretion when it imposed the notice of violation because it considered the mitigating circumstances, prior offences and the overall impact the violation would have on the Appellant to establish a claim in the future pursuant to subsection 7.1 of the Act. The Tribunal finds that the Appellant received a notice of violation on January 12, 2017, and because it was within the past 260 weeks a second notice of violation a subsequent violation will be imposed.

[30] The Tribunal has the jurisdiction to determine whether the Commission has exercised its discretion in a judicial manner when issuing the Notice of Violation (*Gill v. Canada (AG)*, 2010 FCA 182). In order for the Tribunal to intervene with the Commission's decision, the Tribunal must determine that the Commission did not exercise its discretion in a judicial manner when it decided to issue the Notice of Violation.

[31] The Commission submits that the Appellant was previously notified of a violation on January 12, 2017, which is within the past 260 weeks. There is no provision in the legislation for relief from a subsequent violation and the Commission does not have the ability to exercise discretion with respect to subsequent violations. Therefore a subsequent violation will be imposed.

[32] The Commission contends therefore that its decision to issue a subsequent violation is justified and that it has exercised its discretion judiciously as all the pertinent circumstances were considered.

[33] 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". The Court further reaffirmed that the power to issue a Notice of Violation as provided under subsection 7.1 of the Act is a discretionary power that belongs to the Commission.

[34] The Tribunal considered the Appellant's arguments that he has the right to appeal and believes he has been harassed by employment insurance as he does not agree with what he is being accused of and wants \$5,000.00 in compensation.

[35] The Tribunal only has the jurisdiction to render a decision on the issue under appeal, which in this case is a penalty and notice of violation. Based on the facts presented there is no evidence to support that he was treated unfairly by the Commission. The Appellant conceded that he did not report that he worked and had earnings and therefore received money he was not entitled to which created an overpayment of benefits he is obligated to pay back. And by not correctly reporting he made false and misleading statements that created the imposition of a penalty and notice of violation. The Tribunal has no jurisdiction to award the Appellant any type of compensation.

[36] The Tribunal has no authority to exempt a claimant from the qualifying provisions of the Act no matter how sympathetic or unusual the circumstances (*Levesque* 2001 FCA 304; *Pannu* A-147-03).

### CONCLUSION

[37] The Tribunal concludes that the Appellant be imposed a penalty in accordance with subsection 38 of the *Employment Insurance Act* (Act) and the Commission exercised its discretion in a judicial manner when it imposed a subsequent notice of violation pursuant to section 7.1 of the Act.

[38] The appeal is dismissed.

Teresa Jaenen

Member, General Division - Employment Insurance Section

HEARD ON:	May 16, 2018
METHOD OF PROCEEDING:	Teleconference

## ANNEX

### THE LAW

#### Employment Insurance 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

**(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.

**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

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