



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

[TRANSLATION]

Citation: *R. S. v Canada Employment Insurance Commission*, 2018 SST 1169

Tribunal File Number: GE-14-2676

BETWEEN:

R. S.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Manon Sauvé

HEARD ON: July 26, 2018

DATE OF DECISION: August 28, 2018

DECISION

[1] The appeal is allowed in part.

OVERVIEW

[2] The Appellant is a service provider in schools. He has been on leave from work since February 4, 2013. He received wage-loss insurance payments. On June 21, 2013, he stopped receiving payments.

[3] On June 21, 2013, he applied for Employment Insurance sickness benefits from the Commission.

[4] The Appellant knowingly made false statements and provided false medical documents to the Commission to receive Employment Insurance sickness benefits.

[5] The Commission is seeking to recover \$7,515 in benefits it overpaid the Appellant. It imposed a \$3,758 penalty and issued a notice of a very serious violation.

[6] The Appellant does not dispute the Commission's decisions concerning the false statements and the submission of false medical documents. He recognizes that he must pay back the overpayment.

[7] However, the Appellant disputes the penalty and the notice of violation that the Commission imposed.

[8] The Appellant believes the Commission did not exercise its discretion judicially. The Commission did not consider the relevant factors when it imposed the penalty and the notice of a very serious violation. Therefore, the Commission did not consider the Appellant's personal problems and his psychological state, among other factors.

[9] In the Commission's view, it considered all the relevant factors. There were no mitigating circumstances. It followed its policy and the case law to establish a penalty of \$3,758 and the notice of a very serious violation.

ISSUES

- 1) Did the Commission exercise its discretion judicially when it imposed the penalty?
- 2) Is the notice of violation justified?

ANALYSIS

[10] The relevant statutory provisions appear in the annex of this decision.

[11] The Tribunal notes the Appellant's testimony and his representative's statements that he admits he made false statements and provided false medical documents to the Commission.

[12] The remaining issues concern the penalty and the notice of a very serious violation.

Issue 1: Did the Commission exercise its discretion judicially when it imposed the penalty?

[13] The Tribunal "cannot interfere with the quantum of a penalty unless it can be shown that the Commission exercised its discretion 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*, 2008 FCA 388).

[14] The Appellant submits that the Commission did not exercise its discretion judicially. It should have imposed a symbolic penalty of \$1, given his situation.

[15] In the Commission's view, there are no mitigating circumstances in the Appellant's file.

[16] The Tribunal notes that the Commission calculated the penalty amount according to its policy. It set the penalty amount at the maximum for a first offence, which is 50% of the overpayment. The Commission therefore established the overpayment in the following way:
 $7,515 (15 \text{ weeks of benefits paid at the weekly rate of } \$501) \times 50\% = \$3,758.$

[17] The Tribunal finds that the Commission did not consider all the relevant circumstances. The Commission cannot simply state that it considered all the relevant circumstances.

[18] The Tribunal notes the evidence on file and the Appellant's testimony that he experienced a turbulent period after the death of his partner and children in a motor vehicle accident in 2011. The Appellant told the Commission about this.

[19] The Tribunal notes the Appellant's testimony that he had a dysfunctional relationship with a new partner during his turbulent period. He was also treated at Institut Pinel and incarcerated in a provincial institution. The Commission was also informed of these facts.

[20] The Tribunal notes the evidence on file that the Appellant threatened to commit suicide during a telephone call with one of the Commission's agents (GD3-52). The Commission took steps.

[21] The Tribunal also notes the evidence on file that the Appellant brought up his situation during a meeting with one of the Commission's agents. He mentioned taking medication. He was experiencing difficulties (GD3-148 and GD3-149).

[22] The Tribunal also notes that the Appellant needed to take medication for physical and mental health issues.

[23] The Tribunal notes that the Commission did not consider these circumstances when determining the penalty imposed on the Appellant.

[24] In this context, the Tribunal is of the view that the Appellant's financial and health issues are factors that should be considered when the penalty is determined. As a result, after considering all the circumstances, the Tribunal finds that imposing a penalty of \$150 ($\$7,515 \times 2\%$) on the Appellant for making false statements to the Commission is justifiable.

Issue 2: Is the notice of a very serious violation justified?

[25] The Federal Court of Appeal has recognized that the Commission has the discretion to issue a notice of violation. The Court has also established that the notice of violation is not automatic or mandatory under section 7.1(4) of the Act. The Commission must exercise its discretion judicially (*Gill v Canada (Attorney General)*, 2010 FCA 182).

[26] The Commission submits that it exercised its discretion judicially. In the Commission's view, the Appellant [translation] "did not give well-founded reasons to explain his false statements and there are no additional factors or conditions in the file."

[27] The Tribunal is of the view that the Commission did not exercise its discretion judicially. The Commission did not consider the Appellant's health and his personal and financial difficulties.

[28] The Tribunal also notes his testimony that he is still unsettled in the different areas of his life because of his physical and mental health problems.

[29] As a result, the Tribunal finds that a notice of violation is not justified in the circumstances.

CONCLUSION

[30] The Tribunal finds that the Appellant knowingly made false statements to the Commission.

[31] The Tribunal finds that the Commission did not exercise its discretion judicially by imposing a penalty of \$3,758. The Tribunal considered all the circumstances, and a penalty of \$150 is justified.

[32] The Tribunal finds that the Commission did not exercise its discretion judicially when it imposed a notice of a very serious violation. In the circumstances, the Tribunal finds that a notice of violation is not justified.

[33] The appeal is allowed in part.

Manon Sauvé
Member, General Division – Employment Insurance Section

HEARD ON:	July 26, 2018
METHOD OF PROCEEDING:	In person
APPEARANCES:	R. S., Appellant Jean-Guy Ouellet (counsel), Representative for the Appellant

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

(2) [Repealed, 2016, c. 7, s. 210]

(2.1) A violation accumulated by an individual under section 152.07 is deemed to be a violation accumulated by the individual under this section on the day on which the notice of violation was given to the individual.

(3) A violation may not be taken into account under subsection (1) in more than two initial claims for benefits under this Act by an individual if the individual who accumulated the violation qualified for benefits in each of those two initial claims, taking into account subsection (1), subparagraph 152.07(1)(d)(ii) or regulations made under Part VIII, as the case may be.

(4) An insured person accumulates a violation if in any 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.

(5) Except for violations for which a warning was imposed, each violation is classified as a minor, serious, very serious or subsequent violation as follows:

(a) if the value of the violation is

(i) less than \$1,000, it is a minor violation,

(ii) \$1,000 or more, but less than \$5,000, it is a serious violation, or

(iii) \$5,000 or more, it is a very serious violation; and

(b) if the notice of violation is issued within 260 weeks after the person accumulates another violation, it is a subsequent violation, even if the acts or omissions on which it is based occurred before the person accumulated the other violation.

(6) The value of a violation is the total of

(a) the amount of the overpayment of benefits resulting from the acts or omissions on which the violation is based, and

(b) if the claimant is disqualified or disentitled from receiving benefits, or the act or omission on which the violation is based relates to qualification requirements under section 7, the amount determined, subject to subsection (7), by multiplying the claimant's weekly rate of benefit by the average number of weeks of regular benefits, as determined under the regulations.

(7) The maximum amount to be determined under paragraph (6)(b) is the amount of benefits that could have been paid to the claimant if the claimant had not been disentitled or disqualified or had met the qualification requirements under section 7.

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).