



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

[TRANSLATION]

Citation: *L. P. v Canada Employment Insurance Commission*, 2018 SST 1316

Tribunal File Number: GE-18-1476

BETWEEN:

**L. P.**

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: Josée Langlois

HEARD ON: November 15, 2018

DATE OF DECISION: November 21, 2018

## **DECISION**

[1] The appeal is dismissed. The Tribunal finds that a penalty on the Appellant's file was justified, that issuing a notice of violation is justified, and that the Commission exercised its discretion judicially.

## **OVERVIEW**

[2] The Appellant applied for benefits on February 14, 2017. On January 31, 2018, the Commission informed the Appellant that she had failed to report her employment income from April 9, 2017, to August 20, 2017, and that she had to repay the benefits she received to which she was not entitled. The Commission imposed a penalty and issued the Appellant a notice of violation. The Appellant admits receiving the earnings from her X employment during the period in question, but she challenges the penalty because she argues that she completed her reports without thinking and without reading the questions; she says that she did not intend to commit fraud. The Tribunal must determine whether a penalty should be imposed on the Appellant's file.

## **ISSUES**

[3] Should a penalty be imposed on the Appellant's file? To determine this, the Tribunal must address the following issues:

- Did the Appellant make false or misleading statements?
- If so, were these false or misleading statements made knowingly?

[4] The Tribunal must also address the following issues:

- Was issuing a notice of violation justified?
- Did the Commission exercise its discretion judicially when it imposed the penalty?

## ANALYSIS

[5] The Commission may impose a penalty on a claimant when they make a representation that they knew was false or misleading at the time of their application for benefits or even simply when a claimant makes a representation or provides information that they knew was false or misleading (section 38 of the Act).

[6] To assess whether a penalty should be imposed, the Tribunal must establish whether the Appellant knowingly made a false or misleading statement and, where applicable, whether the Commission properly exercised its discretion when calculating the penalty amount. The Tribunal must make this analysis based on the circumstances and on the balance of probabilities (*Gates*, A-600-94).

[7] To determine whether the Appellant knowingly made a false or misleading statement, it is necessary to look at when the statements were made. The Commission has the burden of proving that the Appellant had subjective knowledge that the statements were false (*Purcell*, A-694-94).

### **Were the false or misleading statements made knowingly?**

[8] The Commission states that the Appellant made 10 false statements when she answered no to the question [translation] “Did you work or receive any earnings during the period of this report?” The Commission argues that the questions in the reports refer to specific periods that are clearly identified at the beginning of the report and that are used precisely to determine whether a person is entitled for the period in question.

[9] The Appellant admitted to receiving earnings from her employer, X, each week during the period of April 9, 2017, to August 20, 2017, and to not reporting them. Given the evidence on file as well as the Appellant’s admission, the Tribunal finds that the Appellant received earnings during the period in question and that false or misleading statements were made.

[10] With these false statements established, the Appellant must show that her statements were not made knowingly by providing a reasonable explanation (*Miazga*, A-698-95).

[11] There is no false or misleading statement unless claimants subjectively know that the information they have given or the statements they have made were false (*Mootoo*, 2003 FCA 206 (CanLII)).

[12] The term “knowingly” refers to the idea that the Appellant wilfully made these statements with full knowledge of the facts. In this case, the Tribunal finds that the Appellant had subjective knowledge when she failed to report her employment income for the period of April 9, 2017, to August 20, 2017, because she received wages for full-time work as well as Employment Insurance benefits at the same time (*Mootoo v Canada (Attorney General)*, 2003 FCA 206; *Canada (Attorney General) v Gates*, A-600-94).

[13] At the hearing, the Appellant indicated that she had written down the answers to give when completing her reports; these were [translation] “no, no, yes.” She also indicated that she did not read the questions each time she completed a report.

[14] The Appellant argues that, during this period, her [translation] “mind was someplace else” because she was experiencing harassment at work and that she had symptoms of depression that got in the way of her understanding that she was not giving the right answers with full knowledge of the facts. The Appellant argues that she never intended to defraud the Commission.

[15] At the hearing, she explained that she took a leave of absence because of back pain in February 2017. She went back to work in April 2017, and she began to feel symptoms of depression because of the work climate. The Appellant argues that this work environment was full of harassment because her employer put a certain amount of pressure on her so that she would return to work. Moreover, when she returned, the employer had regular meetings with her to touch base. The Appellant did not feel comfortable in this work environment, and she testified that she had seen a doctor in April 2017 who gave her a sick-leave note, but she testified that she no longer had this evidence. However, she did not stop working; instead, she argues that, because of this, she was not thinking straight when she completed her reports for the Commission, that she was drinking alcohol, and that she did not read the questions and simply filled the questionnaire out online based on a note she had made.

[16] The Appellant stated to the Commission that she did not ask herself why she was receiving Employment Insurance while receiving a full-time income from the employer, and she repeated this statement at the hearing. At no point between April 9, 2017, and August 20, 2017, did the Appellant wonder why she was still receiving an amount in benefits that was similar to the amount she received when she was on leave of absence even though she was receiving wages for full-time work at X.

[17] The Commission states that the Appellant completed her reports online and that she had all the necessary time to read the on-screen questions. The Commission argues that this is not a mistake that happened once or twice, but that the Appellant received wages for 20 weeks of full-time work during which she was receiving the maximum rate of weekly benefits. In the Appellant's case, this rate was \$543. For this reason, the Commission says that the Appellant knew that she was making false statements because she was reporting that she did not work even though she was working full-time.

[18] The Tribunal shares this view. Although the Tribunal heard the Appellant's explanations at the hearing and understands that she was going through a difficult time and that she was depressed, there is no medical evidence on file that the Appellant did not have full knowledge of what she was doing. Despite the Appellant's difficulties, the Tribunal cannot exempt her from the Act.

[19] Even though she was receiving wages for full-time work, the Appellant completed Employment Insurance reports without reporting her earnings and received Employment Insurance benefits. Her argument that she did not read the reports each time because she was working from a reminder note has not satisfied the Tribunal that she did not know that the statements made were false. On the contrary, even though she was receiving wages for full-time work, she was also receiving Employment Insurance benefits.

[20] The Tribunal finds that the Commission has shown that the Appellant's statements were false, and it is of the view that the Appellant has not provided a sufficient explanation that would allow the Tribunal to find that she did not subjectively know that these statements were false. Instead, the explanations that the Appellant provided at the hearing support the version she gave

to the Commission, and, even though she regrets her action, these explanations show that she knew full well that she was making false statements when she failed to report her earnings (*Mootoo*, 2003 FCA 206 (CanLII)).

[21] Although the Appellant apologized for the situation and the Tribunal understands that she did not intend to commit fraud, the Tribunal notes that 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 (*Antonio*, A-743-97).

[22] The Tribunal finds that the Commission has met its burden of proving that the Appellant had subjective knowledge that the statements she made were false (*Purcell*, A-694-94). Indeed, the Tribunal is of the view that the Appellant knew that, by failing to report her employment income, she was making false statements. The Appellant received wages as well as Employment Insurance benefits during the period between April 9, 2017, and August 20, 2017. Although the Appellant regrets her action and the Tribunal understands that, when she made these false statements, she was experiencing difficulties, the Tribunal finds that she subjectively knew that she was making false statements when she failed to report her employment income (*Moretto*, A-667-96).

#### **Was issuing a notice of violation justified?**

[23] In situations that require imposing a penalty, a notice of violation is not required or automatic, and the Commission must exercise its discretion while considering the circumstances (*Zora Gill*, A-483-09).

[24] Mitigating circumstances must be considered in deciding whether to issue a notice of violation. Another factor to consider is the overall impact of issuing a notice of violation to the Appellant, including her ability to establish a future claim for benefits.

[25] The Commission argues that discovering false statements resulted in an initial overpayment amounting to \$10,049. Since this amount is over \$5,000, a notice of a very serious violation was issued. The Commission states that the violation is classified strictly on the basis of the

overpayment generated by the act or omission in question and that the amount of the penalty is not a factor in classifying the violation.

[26] The Commission argues that it exercised its discretion judicially in deciding to issue a notice of violation because it considered the extenuating circumstances as well as the previous violations.

[27] The Tribunal notes that the Commission also considered the impact of the notice of violation on the Appellant's ability to qualify for a future benefit claim. The Commission indicates that, despite having the notice of a very serious violation issued on file, the Appellant had accumulated 1,820 insurable hours of employment and that she would therefore not have any difficulty in establishing a benefit period in the future.

[28] The Tribunal shares the Commission's view and finds that the Commission considered all of the relevant circumstances and that it was justified in issuing a notice of violation to the Appellant. The Commission properly exercised the discretion to issue a notice of violation.

**Did the Commission exercise its discretion judicially when it imposed the penalty?**

[29] The Commission's discretionary decisions cannot be changed 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" (*Uppal*, 2008 FCA 388 (CanLII)).

[30] The onus is on the Commission to show that it exercised its discretion judicially in imposing a penalty (*Cou Lai*, A-525-97). Acting in a non-judicial manner may mean acting in bad faith with an improper purpose or motive, having regard to irrelevant factors, not having regard to a relevant factor, or acting in a discriminating manner (*Dunham*, A-708-95; *Purcell*, A-694-94).

[31] The Commission argues that it considered all of the circumstances when it imposed the penalty. It considered that the Appellant had written her answers down on a reminder note, that she did not have a doctor's note proving her state of health, and that, during the entire period, she received benefits while working full-time.

[32] The Commission established the penalty in this way:

Overpayment amount: \$10,049

Instance of act or omission: First instance 50% - 0% (no extenuating circumstance) x \$10,049 = \$5,025

Legal validation amount: 3 x \$543 x 10 = \$16,290

Penalty imposed: \$5,000

[33] The Commission argues that the penalty amount was imposed judicially because all the relevant circumstances were considered when it determined the penalty amount.

[34] The Tribunal shares this view and finds that the Commission used its discretionary power judiciously when it imposed a penalty on the Appellant because the evidence shows that the Commission considered all the factors relevant to the Appellant's situation (*Canada (Attorney General) v Uppal*, 2008 FCA 388; *Canada (Attorney General) v Tong*, 2003 FCA 281).

[35] After considering the evidence on file as well as the Appellant's testimony at the hearing, the Tribunal is satisfied that the Appellant knowingly made false statements in failing to report her employment income and that the Commission exercised its discretion judicially when it imposed the penalty and issued the notice of violation.



**CONCLUSION**

[36] The appeal is dismissed.

Josée Langlois  
Member, General Division – Employment Insurance Section

HEARD ON:	November 15, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCE:	L. P., Appellant