Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

[TRANSLATION]

Citation: *F. G. v Canada Employment Insurance Commission*, 2019 SST 42

Tribunal File Number: GE-18-2247
GE-18-2249
GE-18-2250

BETWEEN:

F. G.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Charline Bourque

HEARD ON: December 6, 2018

DATE OF DECISION: January 4, 2019

Canada

DECISION

[1] The appeal is allowed in part.

OVERVIEW

[2] An investigation by the Commission revealed the existence of an illegal time-banking system at the employer. This system allowed employees to obtain more insurable earnings so they could receive more Employment Insurance benefits. As a result, the Canada Revenue Agency (CRA) gave a decision about the insurable earnings and insurable hours of employment affecting three of the Appellant's periods of Employment Insurance benefits.

[3] Since the Appellant made misrepresentations, the Commission determined that it could reconsider the claims for benefits within 72 months. Therefore, the Commission changed the rate of benefits for the claim beginning September 4, 2011. Furthermore, the Commission imposed a penalty of $90 for the claim beginning September 15, 2013, and a penalty of $330 for the claim beginning September 7, 2014.

[4] The Appellant disagrees with those decisions. She submits that the penalty imposed does not consider all of the circumstances and has a disproportional effect on her. Furthermore, she indicates that the change to the rate of benefits for the September 4, 2011, claim does not adhere to the time limits for reconsideration. The representative is also asking the Tribunal to decide on the write-off issue.

PRELIMINARY MATTERS

[5] On December 4, 2018, the representative indicated that he was withdrawing certain appeals for the Appellant. However, the representative indicated that he was retaining certain issues from those appeals. Therefore, to avoid confusion, the Tribunal clarified the issues for each file during the hearing.

[6] The hearing was held on December 6, 2018. With the parties' agreement, a joint hearing was held for appellants P. P. (GE-18-2233, GE-18-2234, GE-18-2235, and GE-18-2236), C. M. (GE-18-1261, GE-18-1266, GE-18-1267, GE-18-1268, GE-18-1269, and GE-18-1270), F. G.

(GE-18-2247, GE-18-2249, and GE-18-2250), and M. F. (GE-18-2722, GE-18-2723, GE-18-2724, and GE-18-2725).

[7] The files were also joined for each appellant. As a result and despite the joint hearing, an individual decision has been written for each appellant. Furthermore, a request to remain anonymous was submitted to the Tribunal. The Tribunal considered the reasons the appellants cited and made the appellants, the employer, and the appellants' location anonymous when drafting the decisions.

[8] The representative is appealing the following issues for each file:

Tribunal file number:	Benefit period:	Issue:
GE-18-2247	September 4, 2011	Reconsideration period and write-off
GE-18-2249	September 15, 2013	Penalty and write-off
GE-18-2250	October 7, 2014	Penalty and write-off

[9] The representative also asked the Tribunal to decide on the issue of a write-off for each appellant.

ISSUES

Reconsideration period (file GE-18-2247)

[10] Did the Appellant make a false or misleading statement that would enable the Commission to reconsider its decision within 72 months after the benefits were paid or became payable?

[11] Did the Commission exercise its reconsideration power within the time allowed?

Penalty (files GE-18-2249 and GE-18-2250)

[12] Could the Commission have imposed a penalty on the Appellant?

Write-off

[13] Can the overpayment be written off?

ANALYSIS

Issue 1: Did the Appellant make a false or misleading statement that would enable the Commission to reconsider its decision within 72 months after the benefits were paid or became payable?

[14] The Tribunal is of the view that the Commission could reconsider the claim within 72 months.

[15] The Commission may reconsider a claim for benefits within 36 months after the benefits have been paid or would have been payable. However, if in the opinion of the Commission, a false or misleading statement or representation has been made in connection with a claim, the Commission has seventy-two (72) months within which to reconsider the claim (*Employment Insurance Act* (EI Act), sections 52(1) and 52(5)).

[16] To reconsider a claim within 72 months, the Commission does not have the burden of proving "that the claimant knowingly made false statements." The legislation requires only that "in the opinion of the Commission, a false or misleading statement … has been made." To reach this conclusion, the Commission must be satisfied that an appellant has made a false or misleading statement or representation in connection with a claim. Therefore, the mere existence of a false or misleading statement suffices, if the Commission is reasonably satisfied of this fact, for this section to apply, without the need to find intention in the person making the statement (*Canada (Attorney General) v Dussault*, 2003 FCA 372).

[17] The Appellant confirmed that a time-banking system existed at her employer. She testified in detail about the prevailing situation at the employer and explained the effects on her personal situation. Furthermore, the Canada Revenue Agency confirmed that the Record of

Employment issued by the employer was erroneous and determined insurable hours of employment as well as insurable earnings that were different from those the employer stated on the Record of Employment.

[18] The Commission in turn considers the claim made on September 2, 2011, and the false Record of Employment filed in support of that claim to be misrepresentations. The Commission gave its decision on March 1, 2017, for acts or omissions made on September 2, 2011, the date the claim was filed, that is, sixty-five (65) months after the misrepresentations. Furthermore, the Claimant was informed of the overpayment on March 4, 2017.

[19] Concerning the reconsideration of a claim, the Tribunal does not have to determine whether the omission was made with the intention of deceiving the Commission, but simply whether the Commission could reasonably consider it a false or misleading statement. The Tribunal is of the view that the Commission was reasonably satisfied as to the existence of those false or misleading statements to reconsider the claims within 72 months, as section 52(5) of the Act states.

[20] The Tribunal must therefore decide whether the Commission exercised its reconsideration power within the time provided by the Act.

Issue 2: Did the Commission exercise its reconsideration power within the time allowed?

[21] The Tribunal is of the view that the Commission did not exercise its reconsideration power within the time allowed. The Tribunal is of the view that the Commission completed the reconsideration process on April 25, 2018. As a result, it could reconsider the Appellant's claim starting on September 4, 2011, only as of April 26, 2012, meaning within the 72 months.

[22] The representative maintains that the Commission did not issue a decision in line with the change of the benefit rate for the claim starting September 4, 2011. Therefore, the representative maintains that, according to the case law of the Federal Court of Appeal, the decision-making process is not completed until the claimant has been informed of the decision and the statement of account. Although section 52(2) of the Act requires that a claimant be notified of the decision when the Commission employs its reconsideration power, in this case, the Commission did not

give a decision on the change to the benefit rate. The Commission can claim only the overpayment created by the deductions that arise from the earnings the Appellant supposedly did not declare. Additionally, the representative maintains that, if the Commission determined that it had the power to claim the overpayment arising from the change to the benefit rate by invoking the February 15, 2018, notification, he is of the view that the decision-making process would have been completed only on that date, that is when the Commission notified the Appellant of the new value. Consequently, the Commission could claim an overpayment only as of February 15, 2012.

[23] The case law has established that the decision-making process consists of four steps: “the reconsideration of the claim; the decision (which I will refer to as the overpayment decision) that the claimant received a sum to which he was not entitled; the calculation of that sum (which I will refer to as the overpayment calculation); and the notification to the claimant. The Court has also stated that these four stages should be completed within the thirty-six months stipulated” (*Brien Rajotte v Canada (Employment and Immigration Commission)*, FCA, A-426-93; *Brière v Canada (Employment and Immigration Commission)*, FCA, A-637-86; *Canada (Attorney General) v Laforest*, FCA, A-607-87).

[24] The Tribunal notes that the Commission established a claim for Employment Insurance benefits beginning on September 4, 2011. On September 7, 2016, after an investigation, the Canada Revenue Agency gave a decision on the number of insurable hours of employment and the Appellant’s insurable earnings for the period from April 3, 2011, to November 9, 2011 (GE-18-2247/GD3-19/20). On March 1, 2017, the Commission informed the Appellant that it had found that false and misleading statements had been made when she filed a claim for Employment Insurance benefits with a Record of Employment containing false information and did not accurately state her earnings for the period from September 4, 2011, to May 5, 2012. The Commission indicated that it had 72 months to reconsider the claim (GE-18-2247/GD3-25/26). On the same day, the Commission gave a decision and informed the Appellant that she had failed to provide information on two occasions—when she filed a claim for Employment Insurance benefits on September 4, 2011, containing false information concerning the period of employment and a Record of Employment containing false information, knowing that it did not

reflect reality. The Commission readjusted the earnings declared for the weeks between September 4, 2011, and April 29, 2012.

[25] The Tribunal notes that the screen showing the details of the notice of debt lists several overpayment amounts for which the explanation is [translation] “You did not declare your income properly, which caused an overpayment” or [translation] “A penalty has been established, which caused an overpayment” (GD3-31/32).

[26] On December 15, 2017, and May 8, 2018, the representative filed a request for a reconsideration that mainly concerns the penalty issues (GD3-38 to GD3-40 and GD3-51 to GD3-55).

[27] On April 25, 2018, after the representative’s questioning, the Commission sent a document explaining the overpayment (GD7-2 to GD7-15). The Commission indicated, for the September 4, 2011, claim that [translation] “following a new calculation of the claim, the rate of benefits changed from $228 to $199. The earnings were corrected based on the CRA’s decisions (see second table). A net overpayment of $1,749 was created for this claim. A non-monetary penalty has been imposed” (GD7-2). The Commission provided an explanatory table showing that the benefit rate had been changed from $228 to $199 (GD7-6).

[28] On June 8, 2018, the Commission gave the reconsideration decision (GD3-73). It indicated that its decision related to the establishment of a benefit period – insurability of the Record of Employment was unchanged and that the Record of Employment had been changed based on the insurability decision given by the Canada Revenue Agency. [Translation] “A new calculation has been done. This correction had an impact on your benefit rate, which has changed from $228 to $199, which explains part of your overpayment for this claim” (GD3-73).

[29] The Tribunal is of the view that the Commission did not inform the Appellant of a decision concerning the change to her benefit rate before April 25, 2018. In its March 1, 2017, decision, the Commission refers to the fact that the Record of Employment contained misinformation. The Commission did not even indicate that this could have an impact on the Appellant’s benefit rate and followed its decision by adjusting the earnings per week for the

period in question. The Commission then indicated that it was not issuing a penalty and explained that a notice of violation had been issued for the entire file (GD3-28).

[30] The Tribunal considers the fact that the Appellant received a notice of debt. The Tribunal takes into account the fact that a notice of debt is considered a decision from the Commission and that a claimant can use it to appeal the decision. Furthermore, the notice of debt enables the Commission to collect the related amounts (*Braga v Canada (Attorney General)*, 2009 FCA 167).

[31] However, the Tribunal is of the view that, contrary to the decisions the Commission usually gives, the Commission's decision does not imply that the benefit rate could be changed. Furthermore, the Tribunal relies on the sample decision the representative sent, which reflects the type of model decision that the Commission generally uses for benefit rates and the number of weeks of entitlement. The Commission generally words its decision in such a way that indicates the claim was recalculated after changes to the Record of Employment. [Translation] "The result is that your weekly benefit rate is now $290.00 instead of $468.00 and that the maximum number of weeks established for your claim is now 40 weeks instead of 39 weeks" (GD7A-45).

[32] Therefore, to ensure that the Commission carried out the reconsideration within the time allowed, the Commission must have informed a claimant of its decision as well as of the fact that there is a connected overpayment (*Brière*). Furthermore, the Commission must complete the reconsideration process, which has four steps ([translation] the reconsideration of the claim; the overpayment decision that the claimant received a sum to which they were not entitled; the calculation of the overpayment, and the notification of the claimant), within the time allowed (*Brien Rajotte*; *Brière*, *Laforest*).

[33] The Tribunal is of the view that the Commission did not notify the Appellant that a decision had been made about the benefit rate before April 25, 2018, when it explained the substance of the overpayment. Even when assisted by a representative, the Appellant was not able to find out that such a decision had been made against her. The Appellant was informed of an overpayment, but given the way in which the decision letter was written, she could not have

suspected that a decision had been given about the change to the benefit rate for her claim. The overpayment appears to be connected only to the change in earnings to which the Commission referred in its decision.

[34] The Tribunal is of the view that the Appellant was informed of the decision on the benefit rate when she received the explanatory overpayment tables. The Tribunal is of the view that no previous change occurred concerning this issue before that date. The Appellant asked for a reconsideration of the decision against her (allocation of earnings and penalty), but at no time could she have suspected that the benefit rate had changed in her case. The representative failed to make arguments about this matter because there was no indication that such a decision had been given. The Tribunal is therefore of the view that, even though the tables were intended to be an additional explanation for the representative and the Appellant, they are effectively the first notification to the Appellant of the decision on the benefit rate.

[35] The Tribunal is of the view that the Commission completed the reconsideration process on April 25, 2018, when it informed the Appellant of its decision on the issue of the benefit rate. The Commission therefore had 72 months as of that date to reconsider the claim. The Commission could have reconsidered the benefit-rate issue as of April 26, 2012.

[36] The explanatory overpayment table shows that the Appellant received Employment Insurance benefits for the period from September 4, 2011, to April 29, 2012. As a result, the Commission could not reconsider the benefit period before April 26, 2012, and cannot claim the overpayment connected with the benefit-rate change before that date.

[37] Finally, because the appellants' cases were heard together, the Tribunal cannot avoid remarking on their different treatment. In this case, the Commission considered the date of the notice of debt to have established the first notification, but in other cases, it considered it the decision date. This difference in treatment is noted for penalty issues as well, while for similar situations, the factors the appellants invoked were treated differently.

[38] As a result, the appeal is allowed in part on this issue.

Issue 3: Could the Commission have imposed a penalty?

[39] The Commission may impose on a claimant, or any other person acting for a claimant, a penalty for each act if the Commission becomes aware of facts that in its opinion establish that the claimant or other person has, in relation to a claim for benefits, made a representation that the claimant or other person knew was false or misleading (EI Act, section 38(1)(a)).

[40] The Commission may issue a warning instead of setting the amount of a penalty for an act or omission (EI Act, section 41.1).

[41] To determine this, the Tribunal must answer the following questions:

- Has the Commission proven that the Appellant made false or misleading statements?
- If so, were those statements made knowingly?
- If so, did the Commission exercise its discretion judicially in determining the amount of the penalty to be imposed?
- If not, what penalty should be imposed?

Has the Commission proven that the Appellant made false or misleading statements?

[42] The Tribunal is of the view that the Commission has proven that the Appellant made false or misleading statements.

[43] The Commission has the burden of proving that a claimant knowingly made false or misleading statements. The claimant must then explain why those statements were made (*Canada (Attorney General) v Purcell*, FCA, A-694-94).

[44] The Commission has the burden of proving, based on a balance of probabilities, which is not beyond all reasonable doubt, that the claimant made a misrepresentation or a statement that they knew to be false or misleading (*Canada (Attorney General) v Gates*, FCA, A-600-94).

[45] The Commission maintains that it has proven that the Claimant made false statements when she filed two claims (claims starting September 15, 2013, and September 7, 2014)

containing false information and when she produced Records of Employment that she knew were erroneous. Moreover, during the benefit periods, the Claimant reported that she did not work during certain weeks, which was false. The question posed is very clear and leaves no room for interpretation because she was asked whether she had worked, and the Claimant answered no, while the facts in the record show that she did work. The Commission maintains that the Claimant knew that the statements she made were false and that she made them with the intention of having more weeks of unemployment.

[46] The Tribunal is satisfied that the Commission has proven that the Appellant made false or misleading statements because she did not declare all of her earnings and declared that she did not work when that was not the case. As a result, the Tribunal must decide on the issue of whether those false or misleading statements were made knowingly.

Did the Appellant make those false or misleading statements knowingly?

[47] The Tribunal is of the view that, on a balance of probabilities, the Appellant knowingly made false or misleading statements.

[48] A claimant must not only make a false or misleading statement. They must also have done so knowingly. It is therefore necessary, on a balance of probabilities, for the claimant to have knowledge of the fact that they were making a false or misleading statement (*Mootoo v Canada (Minister of Human Resources Development)*, 2003 FCA 206).

[49] In deciding whether a claimant had subjective knowledge of the fact they were making a false or misleading statement, however, the Tribunal may consider common sense and objective factors. When a "claimant claims to be ignorant of something that the whole world knows, the fact finder could rightly disbelieve that claimant and find that there was in fact, subjective knowledge, despite the denial. Not to know the obvious, therefore, might properly lead to an inference that the claimant is lying. This does not make the test objective: it does, however, take into account objective matters in coming to a decision on subjective knowledge. If, in the end, the trier of fact is of the view that the claimant really did not know that the representation was false, there is no violation of subsection [38(1)]" (*Mootoo*).

[50] The Appellant explained that she did as her employer told her to do. Because of the limited employment opportunities in the region, she felt that she did not have a choice and that she could not do otherwise. The Appellant indicated that she went through the managerial transition from the father to the son, who put the time-banking system in place. She explained that she did what her employer told her to do. She understands now that it is an illegal, prohibited practice and is living with the consequences of her actions.

[51] The Tribunal is of the view that the Appellant must have known that she should declare all hours and earnings she received from her employer during her unemployment. This obligation is clearly identified in the [translation] “Your Responsibilities” section of the Employment Insurance claim. Furthermore, claimants are asked a clear question about hours worked and earnings when completing their weekly reports during their unemployment period.

[52] The Tribunal is of the view that, on a balance of probabilities, the Appellant knowingly made false or misleading statements because she must have known she was obliged to declare the hours worked and earnings she received from her employer, even if her employer had established a practice.

<u>Did the Commission exercise its discretion judicially when determining the amount of the penalty?</u>

[53] The Tribunal is of the view that the Commission did not exercise its discretion judicially when it imposed a penalty on the Appellant.

[54] It is trite law that an Umpire cannot interfere with the quantum of a penalty 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 (*Canada (Attorney General) v Uppal*, 2008 FCA 388).

[55] The Tribunal notes that the Commission imposed penalties of $90 (GE-18-2249) and $330. It explains that the penalty should have been $318 in this case (GE-18-2250/GD4-10).

[56] The Commission maintains that it exercised its discretion judicially because it thoroughly considered the relevant circumstances when it determined the penalty amount.

[57] The Tribunal notes that the Commission considered a number of mitigating factors and established a percentage connected with the following:

- The Claimant’s difficult financial situation at the time she made false statements: 5%
- Current difficult financial situation: 7.5%
- Regional economic situation: 5%
- Minimal education: 5%
- Regret: 2.5%
- Time-banking system imposed by the employer: 10%

[58] The Commission indicated that, in both files in question, the Commission reduced the penalty on the net overpayment by 35% after considering the mitigating circumstances, within thirty-six (36) months of the offence occurring, in accordance with sections 38(2) and (40) of the Act.

[59] The Tribunal notes that the Commission considered a number of mitigating circumstances and established the percentage of 35% in relation with them.

[60] The representative maintains that certain circumstances were not considered when the Commission gave its decision on the penalty. He would like the Tribunal to change the penalty to a non-monetary penalty or reduce it to a symbolic amount of $1.

[61] The representative raised the situation of the area where the Appellant lives and works. He referred to the regional county municipality’s overview of the social development situation, which explains the region’s specific situation as well as the level of economic poverty in the region. He raised the fact that the Appellant was not involved in setting up the time-banking system and that she was just an employee. Moreover, he explained the Appellant’s personal and familial situation and submitted documents to show the Appellant’s current level of insecurity (GD7A).

[62] The representative added that the Commission raised the fact that the Commission did not properly consider the Appellant's precarious financial situation and the impact repaying the overpayment would have. In addition, the representative raised the fact that the Commission was not consistent when determining the penalty. Some employees who also asked for a reconsideration of their files had their monetary penalties changed to warnings, despite personal situations very similar to the Appellant's. Finally, the representative raised the fact that the time-banking system was not to the Appellant's advantage because the Canada Revenue Agency determined a difference between the salaries paid and the insurable earnings. Therefore, for 2013 alone, the worker did not receive more than $400.00 for hours that she worked hard and that are now lost.

[63] The Tribunal considers the appellants' credible testimonies. The four appellants provided details and gave consistent, emotional testimonies.

[64] Without generalizing their situations, the Tribunal notes that certain common observations can be drawn from those testimonies. The employer was intimidating and authoritarian. He took over from his father and gradually established a time-banking system. The appellants have limited educations and, because of the economic difficulties in the region, could not refuse to work. They did not participate in setting up the time-banking system and did not understand the impact it would have when it was established. The consequences of the investigation were considerable for each of them, in terms of their health and financial difficulties. The situation is greatly affecting them and will continue to affect them in the short and long term because the debt is large in light of their precarious financial situations.

[65] Finally, the Tribunal notes that, despite similar situations related to the time-banking situation, the Commission did not consider the same factors or the same values for each appellant when determining each one's penalty amount.

[66] The Tribunal is of the view that the Commission did not exercise its discretion judicially when it imposed a warning on the Appellant because it did not consider all the mitigating circumstances related to the Appellant's situation. The Tribunal is of the view that the

Commission did not properly consider the difficulty the situation poses in light of the precariousness of the Appellant's situation, that of the region, and the impact on her health

What penalty should be imposed?

[67] The Tribunal is of the view that the penalty to be imposed is $1 for each file.

[68] The Commission may impose on a claimant a penalty for each false statement knowingly made (EI Act, section 38). The Commission may issue a warning instead of setting the amount of a penalty for an act or omission (EI Act, section 41.1(1)).

[69] A penalty must not be imposed under section 38 or 39 if a prosecution for the act or omission has been initiated against the employee, employer, or other person, or if 36 months have passed since the day on which the act or omission occurred (EI Act, section 40).

[70] The Tribunal notes that the Commission imposed a penalty equal to 50% of the overpayment amount from which it deducted 35% for mitigating circumstances. However, in light of the Appellant's special circumstances, her precarious situation, and the region's economic difficulties, as well as the Appellant's personal situation, the Tribunal is of the view that the penalty should be reduced to $1 for each file.

[71] As a result, because the Tribunal finds that the Commission did not exercise its discretion judicially, the Tribunal is of the view that the penalty imposed by the Commission should be reduced to $1 per file, because of the mitigating circumstances. Therefore, the penalty should be $1 for file GE-18-2249 and $1 for file GE-18-2250.

[72] The appeal is dismissed with modifications on this issue.

Issue 4: Can the overpayment be written off?

[73] The representative maintains that the case law of the Federal Court of Appeal and the Tribunal has established that the Tribunal can recommend to the Commission to write off an overpayment when exceptional circumstances justify it.

[74] A party who is dissatisfied with a reconsideration decision of the Commission may appeal the decision to the Social Security Tribunal (EI Act, section 113).

[75] A decision of the Commission made under the *Employment Insurance Regulations* respecting the writing off of any penalty owing, amount payable or interest accrued on any penalty owing or amount payable is not subject to review (EI Act, section 112.1).

[76] The Tribunal is of the view that it does not have the jurisdiction to give a decision on the issue of a write-off, as indicated by the representative, since the Act stipulates that write-off issues cannot be subject to review. The Appellant must therefore apply to the Federal Court about this issue after the Commission has given a decision on this matter.

[77] The representative and the appellants were aware of this situation. However, the representative wanted to receive a recommendation from the Tribunal that the overpayments should be written off. He wanted to mention the financial difficulties that this overpayment has created for the appellants, as well as their precarious financial reality.

[78] The Tribunal reminds the Commission that it has to power to give a write-off decision under section 56(1)(f)(iii) of the Regulations to write off the overpayment the Appellant owes, given the undue hardship that it imposes on her. The Commission must consider the Appellant's special circumstances related to her precarious economic situation, the lack of employment in the region, and the financial and health difficulties that the overpayment has created for the Appellant.

[79] The Tribunal can only recommend to the Commission, given the Appellant's precarious situation and the particular facts of her situation, that it consider the reimbursement claim so that the overpayment be written off (*JB v Canada Employment Insurance Commission*, 2018 SST 208).

[80] The appeal is dismissed on this issue.

CONCLUSION

[81] The appeal is allowed in part.

Charline Bourque
Member, General Division – Employment Insurance Section

HEARD ON:	December 6, 2018
METHOD OF PROCEEDING:	In person
APPEARANCES:	M. F., Appellant F. G., Appellant C. M., Appellant P. P., Appellant Richard-Alexandre Laniel (counsel), Representative for the Appellants