



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

[TRANSLATION]

Citation: *N. X. v Canada Employment Insurance Commission*, 2019 SST 543

Tribunal File Number: AD-18-864

BETWEEN:

N. X.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

DATE OF DECISION: June 3, 2019

DECISION AND REASONS

DECISION

[1] The Tribunal allows the appeal only on the issue of the notice of violation.

OVERVIEW

[2] The Appellant, N. X. (Claimant), worked as a receptionist and administrative assistant for two different employers. Between both, she experienced a period of unemployment. Following an investigation, the Employment Insurance Commission (Commission) determined that the Claimant had made false or misleading statements by failing to report her earnings while she was receiving benefits. It therefore imposed a penalty on her and issued a notice of violation.

[3] In the reconsideration request, the Claimant acknowledged her employment earnings and wished to pay back the benefits that she should not have received, but she disputed the penalty and the notice of violation, arguing that she had been misled by a Commission agent and that, therefore, she did not make her statements knowingly. The Commission informed her that it was upholding its initial decision.

[4] In its decision, the General Division found that it was unlikely that the Claimant did not know that her statements were false because she was receiving Employment Insurance benefits while she worked. It found that the Commission was justified in imposing a penalty on her but that the Commission had not exercised its discretion judicially in issuing her a notice of violation.

[5] The Tribunal granted leave to appeal. The Claimant submits that the General Division erred in law by failing to follow the Federal Court of Appeal's teachings on cases involving a penalty. The Claimant also submits that the General Division erred by misinterpreting the burden of proof regarding false statements. She argues that the General Division's findings do not consider the evidence that shows that she was misled by a Commission agent.

[6] The Tribunal must determine whether the General Division erred in law by failing to follow the Federal Court of Appeal's teachings on cases involving a penalty and by failing to consider the evidence before it.

[7] The Tribunal allows the Claimant's appeal only on the issue of the notice of violation.

ISSUES

[8] Did the General Division err in law by failing to follow the Federal Court of Appeal's teachings on cases involving a penalty and by failing to consider the evidence before it?

[9] Did the General division err by dismissing the Claimant's appeal on the issue of the notice of violation?

ANALYSIS

Appeal Division's Mandate

[10] The Federal Court of Appeal has established that the mandate of the Appeal Division is conferred to it by sections 55 to 69 of the *Department of Employment and Social Development Act* (DESD Act).¹

[11] The Appeal Division acts as an administrative appeal tribunal for decisions rendered by the General Division and does not exercise a superintending power similar to that exercised by a higher court.

[12] Therefore, unless the General Division failed to observe a principle of natural justice, erred in law, or based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it, the Tribunal must dismiss the appeal.

¹ *Canada (Attorney General) v Jean*, 2015 FCA 242; *Maunder v Canada (Attorney General)*, 2015 FCA 274.

Issue 1: Did the General Division err in law by failing to follow the Federal Court of Appeal’s teachings on cases involving a penalty and by failing to consider the evidence before it?

[13] The Claimant submits that the evidence before the General Division shows that she was misled by a Commission agent. The General Division allegedly misinterpreted and misapplied the legal test on the issue of the penalty because it allegedly did not consider her explanation. According to the Claimant, the evidence does not show that she had subjective knowledge that she had been making false statements, as is required by Federal Court of Appeal case law.

[14] According to the Commission, the evidence shows that the Claimant stated that she did not work and that she did not receive earnings during the period in question, even though she had worked and received earnings. The Commission submits that the Claimant knew that the information was false when she completed her reports. The Claimant answered no to the question: [translation] “Did you work or receive any earnings ...” when she completed her reports, even though she knew that she had worked. The Commission argues that the question is clear and unambiguous and that the Claimant therefore knew that she was not properly reporting the facts and that she was misleading the Commission.

[15] Parliament’s only requirement for imposing a penalty is that of knowingly—that is, with full knowledge of the facts—making a false or misleading representation. The absence of the intent to defraud is therefore of no relevance.²

[16] After considering the evidence and the Claimant’s testimony, the General Division found that the Claimant had knowingly made false or misleading statements by stating in her reports during the period in question that she had not worked or received any earnings.

[17] The Federal Court of Appeal has held that the burden of proof shifts as soon as a claimant wrongly answers a very simple question or questions on a report card. In this

² *Canada (Attorney General) v Bellil*, 2017 FCA 104.

particular case, the question the Claimant had to answer was very simple: [translation] “Did you work or receive any earnings during the period covered by this report?”³

[18] Therefore, it was up to the Claimant to explain why incorrect answers were given. She had to prove that she did not know that her answers were incorrect.

[19] As noted by the Federal Court of Appeal in *Gates*, the subjective knowledge test takes into account objective factors.

[20] Before beginning each report, the Claimant received a warning about false or misleading statements, and she confirmed that she read and understood the section on her rights and responsibilities. Furthermore, the Claimant confirmed that the answers provided in her reports were correct at the end of each report that she completed for each week of unemployment.

[21] The Claimant admitted that she received the employment earnings noted by the Commission. She acknowledged that her statements did not reflect reality when she answered no to the question [translation] “Did you work or receive any earnings ...” during the period in question.

[22] As is evident from the General Division decision, the General Division clearly did not give much weight or credibility to the Claimant’s account that a Commission agent allegedly told her that you do not have to report your employment earnings for the first three months of employment because it is a probationary period and your income is not insurable. The General Division found that there was no grey area in the questions asked on the electronic reports. Furthermore, the Claimant acknowledged that she had had doubts about the Commission agent’s opinion, considering she was employed.⁴

[23] The Tribunal is of the view that the General Division did not err by rejecting the Claimant’s explanation in light of all the evidence. It is clear to the Tribunal that the

³ *Canada (Attorney General) v Gates*, 1995 CanLII 3601 (FCA); *Canada (Attorney General) v Purcell*, 1995 CanLII 3558 (FCA).

⁴ GD3-79.

Claimant acted knowingly because she knew that she was working at the same time that she was receiving Employment Insurance.

[24] The Tribunal cannot allow the Claimant to avoid an administrative penalty when she knew that the statements she made were not consistent with reality.

[25] As stated during the appeal hearing, the Tribunal does not have the authority to retry a case or to substitute its discretionary power for that of the General Division. The Tribunal's jurisdiction is limited by section 58(1) of the DESD Act. Unless the General Division failed to observe a principle of natural justice, erred in law, or based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it, the Tribunal must dismiss the appeal.

[26] In this case, the General Division did not make an error of fact or an error of law. The General Division's decision is consistent with the evidence, the relevant legislative provisions, and case law.

[27] Therefore, it is appropriate to dismiss the appeal on the issue of the penalty.

Issue 2: Did the General division err by dismissing the Claimant's appeal on the issue of the notice of violation?

[28] Yes, the General Division erred by dismissing the Claimant's appeal on the issue of the notice of violation.

[29] The General Division dismissed the Claimant's appeal after it found that the Commission had not exercised its discretion judicially by issuing the Claimant a notice of violation.

[30] Therefore, it is appropriate to intervene to allow the Claimant's appeal on the issue of the notice of violation.

CONCLUSION

[31] The Tribunal allows the Claimant's appeal only on the issue of the notice of violation.

Pierre Lafontaine
Member, Appeal Division

HEARD ON:	May 21, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	N. X., Appellant Mathieu Fortier, Representative for the Appellant Manon Richardson, Representative for the Respondent