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

[TRANSLATION]

Citation: *A. L. v Canada Employment Insurance Commission*, 2019 SST 1024

Tribunal File Numbers: GE-17-384, GE-17-385, GE-17-386, and GE-17-387

BETWEEN:

A. L.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Normand Morin

HEARD ON: June 22, 2018 and May 10, 2019

DATE OF DECISION: May 31, 2019

DECISION

[1] The appeal is allowed in part.

[2] The Tribunal finds that the decision made by the Respondent, the Canada Employment Insurance Commission (Commission), to reconsider the Appellant's claims within 72 months, believing that a false or misleading statement was made, is justified under section 52 of the *Employment Insurance Act* (Act). In this case, the reconsideration concerns the claims beginning on February 22, 2009 (file GE-17-387); March 28, 2010 (file GE-17-386); and April 10, 2011 (file GE-17-384).

[3] The Tribunal finds that the Commission's decision to cancel the Appellant's benefit periods because he does not qualify to receive Employment Insurance benefits is justified under sections 7, 48, and 49 of the Act and section 14(1) of the *Employment Insurance Regulations* (Regulations) (files GE-17-384, GE-17-385, GE-17-386, and GE-17-387).

[4] The Tribunal finds that the imposition of a penalty on the Appellant, for committing an act or omission by knowingly making false or misleading statements, is not justified under section 38 of the Act (file GE-17-385). The Tribunal finds that the Commission did not exercise its discretion judicially in that regard, under section 38 of the Act. The penalty imposed on the Appellant in relation to his claim beginning on January 13, 2013, must be cancelled (file GE-17-385).

[5] The Tribunal finds that the issuing of a notice of violation to the Appellant, following a penalty imposed on him for committing an act or omission, is not justified under section 7.1 of the Act (file GE-17-385). The notice of violation issued to the Appellant in relation to his claim beginning on January 13, 2013, must be cancelled (file GE-17-385).

OVERVIEW

[6] This decision applies to four (4) appeal files (files GE-17-384, GE-17-385, GE-17-386, and GE-17-387). The Appellant stated that he completed several periods of employment in the construction industry from 2008 to 2013 inclusive, for which four (4) benefit periods were established and following which Employment Insurance benefits were paid to him.

[7] The Appellant stated that he worked for employers X, from November 17, 2008, to February 21, 2009, inclusive; X, from December 20, 2009, to March 27, 2010, inclusive and from January 3, 2011, to April 9, 2011, inclusive; and X, from September 23, 2012, to January 11, 2013, inclusive. In each case, the Appellant indicated that he stopped working because of a shortage of work.

[8] Following an investigation it led and based on the evidence it gathered, the Commission reconsidered the Appellant's claims beginning on the following dates: February 22, 2009 (file GE-17-387); March 28, 2010 (file GE-17-386); and April 10, 2011 (file GE-17-384).

[9] The Commission decided that the Appellant's four claims—those beginning on February 22, 2009; March 28, 2010; April 10, 2011; and January 13, 2013—had to be cancelled because the Canada Revenue Agency (CRA) had determined that he had not held insurable employment in relation to each of those claims (files GE-17-384, GE-17-385, GE-17-386, and GE-17-387).

[10] Based on information it obtained during its investigation, the Commission found that the Appellant had made false or misleading statements by submitting a Record of Employment containing false or misleading information from X (M. B.), with his claim, and a $1,002.00 penalty was imposed on him because of those statements. The Commission stated that it had also imposed on the Appellant a notice of violation classified as a "very serious violation" (file GE-17-385).

[11] The Appellant explained that he had worked for the employers concerned and paid for the work he had completed. He clarified that other employees with whom he had worked could confirm his attendance at work. The Appellant stated that he did not know that he was making

false or misleading statements when he filed his claim after working for the employer X. On January 23, 2017, the Appellant challenged the decisions after the Commission reconsidered them. Those decisions are the subject of this appeal before the Tribunal.

PRELIMINARY MATTERS

[12] The Tribunal states that the appeals with the file numbers GE-17-384, GE-17-385, GE-17-386, and GE-17-387 were joined under section 13 of the *Social Security Tribunal Regulations* because they raise common questions of law or fact, including those on the reconsideration of several of the Appellant's claims and the cancellation of his claims because the Commission determined that he was not entitled to receive benefits. These appeals also raise common questions of law or fact because they concern the same appellant.

[13] The June 22, 2018, hearing was adjourned. At that hearing, the Appellant's representative told the Tribunal that the Appellant had disputed the March 22, 2016, Canada Revenue Agency (CRA) decision about his employment with M. B. (X) from September 23, 2012, to January 11, 2013, to the Tax Court of Canada (TCC). In its March 22, 2016, decision, the CRA determined that the Appellant's employment was not insurable employment under sections 93(3) and 5(1)(a) of the *Employment Insurance Act.* In its decision, the CRA specified that, since the requirements of the contract of service had not been satisfied, there was no employer–employee relationship (GD3-51 and GD3-52 of file GE-17-385 and GD14-1 to GD14-15 of files GE-17-384, GE-17-385, GE-17-386, and GE-17-387).

[14] On June 25, 2018, the Tribunal placed the file in abeyance, pending the conclusion of the appeal process before the TCC and the receipt of a copy of its decision (GD20-1 and GD20-2 of files GE-17-384, GE-17-385, GE-17-386, and GE-17-387).

[15] On November 28, 2018, the Appellant's representative sent the Tribunal a copy of the TCC decision (file number: TCC: 2017-958(EI) APP), dated November 7, 2018). In that decision, the TCC denied the Appellant's application for an extension of time, under section 103(1) of the *Employment Insurance Act*, to file a notice of appeal related to a decision of the Minister of National Revenue sent on March 22, 2016, and confirming that, when he worked

for M. B. (X), the Appellant did not hold insurable employment (GD24-1 to GD24-7 of files GE-17-384, GE-17-385, GE-17-386, and GE-17-387).

[16] On January 3, 2019, the appeal was removed from abeyance, and the hearing resumed on May 10, 2019, after several successive adjournments.

ISSUES

[17] The Tribunal must determine whether the appeal of the Commission's decision has merit with regard to the following four issues:

a) The Tribunal must determine whether the Commission's decision to reconsider the Appellant's claims within 72 months, finding that a false or misleading statement was made, is justified under section 52 of the Act (files GE-17-384, GE-17-386, and GD-17-387);

b) The Tribunal must determine whether the Commission's decision to cancel the Appellant's benefit periods because he does not qualify for Employment Insurance benefits, is justified under sections 7, 48, and 49 of the Act and section 14(1) of the Regulations (files GE-17-384, GE-17-385, GE-17-386, and GE-17-387);

c) The Tribunal must determine whether the imposition of a penalty on the Appellant, for committing an act or omission by knowingly making false or misleading statements, is justified under section 38 of the Act (file GE-17-385);

d) The Tribunal must determine whether the issuing of a notice of violation to the Appellant, after a penalty was imposed on him for committing an act or omission, is justified under section 7.1 of the Act (file GE-17-385).

ANALYSIS

Claim Reconsideration

Was the Commission justified in reconsidering the Appellant's claims within 72 months, believing that a false or misleading statement had been made?

[18] Yes. The Tribunal finds that the Commission was justified in reconsidering the Appellant's claims beginning on February 22, 2009 (file GE-17-387); March 28, 2010 (file GE-17-386); and April 10, 2011 (file GE-17-384).

[19] Under section 52 of the Act, the Commission may reconsider a claim for benefits within 36 months after benefits have been paid or would have been payable to a claimant. However, under that section, if the Commission believes that a false or misleading statement or representation has been made in connection with a claim, it has 72 months after the benefits have been paid or would have been payable to reconsider the claim.

[20] In *Dussault* (2003 FCA 372), *Lemay* (2002 FCA 337), and *Langelier* (2002 FCA 157), the Federal Court of Appeal (Court) established that a false or misleading statement or representation does not have to have been made "knowingly" to give the Commission the right to reconsider a claim, but that it must simply show that it could reasonably have found that a false or misleading statement had been made in connection with a claim.

[21] This finding was restated in *PD v Canada Employment Insurance Commission* (May 2, 2016, Appeal Division of the Social Security Tribunal, file AD-15-1153), where the Tribunal's Appeal Division noted that, at the claim reconsideration stage, the Commission does not have to prove that the claimant made a false or misleading statement but that it merely has to believe that a false or misleading statement had been made.

[22] In *Brière* (A-637-86), the Court established that when the Commission exercises its power under section 52 of the Act, it also has the right to recover benefit amounts that were overpaid or impose an obligation to pay benefits that it had previously refused to pay, as the case may be.

[23] In files GE-17-384, GE-17-386, and GE-17-387, the Tribunal finds that the Commission proved that it could reconsider the Appellant's claims and that it had respected the 72 months it had to do so.

[24] In a letter dated March 13, 2015, the Commission informed the Appellant that it had reconsidered his claims beginning on February 22, 2009 (file GE-17-387); March 28, 2010 (file GE-17-386); and April 10, 2011 (file GE-17-384) (GD3-28 and GD3-29 of files GE-17-384, GE-17-386, and GE-15-387).

[25] In that letter, the Commission informed the Appellant that it believed that inaccurate statements or false or misleading representations had been made, chiefly concerning the fact that his benefit periods had been established based on Records of Employment containing false or misleading information. It indicated that, on February 20, 2015, the CRA had given decisions indicating that he had not held insurable employment with the following businesses: X and Les X (GD3-28 and GD3-29 of files GE-17-384, GE-17-386, and GE-15-387).

[26] The Appellant explains that he worked for the employers X and X during the years 2008 to 2011 and that he had reported the sums he had received from those employers in his tax returns (years 2008 to 2012) (GD33-2 to GD33-18 of files GE-17-384, GE-17-385, GE-17-386, and GE-15-387).

[27] The representative argues that the Commission's reconsideration period should be 36 months rather than 72 months, under section 52 of the Act, since there were no false or misleading statements when the Appellant made his claims for benefits and that he thought, in good faith, that he had held insurable employment with the employers concerned (X and X). The representative is asking for the overpayment arising from the benefit periods at issue to be cancelled because the Commission missed the deadline for cancelling those periods. According to the representative, the Commission has not assumed its burden of proof to justify the reconsideration of the Appellant's claims since it has not proven the existence of false or misleading statements (*Langelier*, 2002 FCA 157, *GL v Canada Employment Insurance Commission*, 2015 SSTGDEI 68; *CC v Canada Employment Insurance Commission*, March 29, 2018, General Division of the Social Security Tribunal, files GE-17-389 and GE-18-995,

reconsideration decisions given to the Appellant's co-worker), (GD17-4 to GD17-38, GD18-8 to GD18-13, GD36-3 and GD36-4 of files GE-17-384, GE-17-386, and GE-17-387).

[28] The representative argues that the evidence the Appellant presented shows that he did work during the periods at issue (for example, submitted Records of Employment, duration of periods of employment, wages paid, names of his superiors, the Appellant's previous statements, the Appellant's tax returns) and that he did report the employment he held with the employers in question (X and X). He notes that the Appellant gave credible testimony indicating that he had worked for the employers in question and specifying the nature of his various periods of work (for example, tasks completed and places where he worked). The representative explains that the statements made by one of the Appellant's employers during the periods at issue, X (GD18-1 of files GE-17-384, GE-17-386, and GE-17-387), as well as the statement of one of the Appellant's co-workers (X) (GD18-3 of files GE-17-384, GE-17-386, and GE-17-387) attested to the work that he did. He argues that, in its arguments, the Commission also confirmed that the Appellant had worked for the employers in question when it gave the following information: [translation] "Those businesses included 'X' Having worked there, the claimant [...]" (GD4-2 of the file GE-17-387).

[29] The representative explains that, when the Appellant made his claims, the CRA had not given a decision indicating that the employment he held was not insurable within the meaning of the Act. He notes that it was only after that that the CRA ruled that the Appellant's employment was not insurable. The representative argues that the mere fact that the CRA decided that the Appellant's employment was not insurable was insufficient for showing that he had made false or misleading statements. He argues that, in the decision letter sent to the Appellant and in its arguments, the Commission only alluded to the CRA's decision to justify the fact that there had been false or misleading statements (GD3-28, GD3-29, GD4-4, GD36-3, and GD36-4 of files GE-17-384, GE-17-386, and GE-15-387).

[30] The Tribunal cannot accept the arguments the representative presented to show that the Commission could not use its reconsideration power beyond the 36-month period, under section 52 of the Act, because there had been no false or misleading statements when the Appellant made his claims (*Langelier*, 2002 FCA 157, *GL v Canada Employment Insurance*

Commission, 2015 SSTGDEI 68; *CC v Canada Employment Insurance Commission*, March 29, 2018, General Division of the Social Security Tribunal, files GE-17-389 and GE-18-995).

[31] To take advantage of the extension of the time to reconsider a claim to 72 months, the Commission does not have to establish that a claimant knowingly made false or misleading statements but must only show that it could reasonably have found that a false or misleading statement was made in connection with a claim (*Dussault*, 2003 FCA 372; *Lemay*, 2002 FCA 337; *Langelier*, 2002 FCA 157; *PD v Canada Employment Insurance Commission*, May 2, 2016, Appeal Division of the Social Security Tribunal, file AD-15-1153).

[32] The Tribunal finds that this situation results in the Commission being able to take advantage of the 72-month period set out in section 52 of the Act to reconsider the Appellant's claims, even though it did not reach the conclusion that he had made false statements (*Dussault*, 2003 FCA 372; *Lemay*, 2002 FCA 337; *Langelier*, 2002 FCA 157; *PD v Canada Employment Insurance Commission*, May 2, 2016, Appeal Division of the Social Security Tribunal, file AD-15-1153).

[33] The fact that the Commission found that false or misleading statements or representations had been made because the Appellant's benefit periods had been established based on Records of Employment containing false or misleading information, following the decisions given by the CRA indicating that he had not held insurable employment for the businesses X and X, justifies the Commission's decision to reconsider his claims within 72 months (*Dussault*, 2003 FCA 372; *Lemay*, 2002 FCA 337; *Langelier*, 2002 FCA 157, *PD v Canada Employment Insurance Commission*, May 2, 2016, Appeal Division of the Social Security Tribunal, file AD-15-1153).

[34] The Tribunal finds that, in reading the decisions given by the CRA indicating that the Appellant had not held insurable employment with the businesses X and X, the Commission could reasonably have found that false or misleading statements had been made.

[35] The Tribunal is of the view that the Commission has explained to the Appellant why the statements he had made appeared false to it (*Langelier*, 2002 FCA 157).

[36] The Commission explained this to the Appellant when it informed him that it had reconsidered his claims because it found that inaccurate statements or false or misleading representations had been made, given that the Appellant's benefit periods had been established based on Records of Employment containing false or misleading information, since the CRA had given decisions indicating that he had not held insurable employment with the businesses X and X (GD3-28 and GD3-29 of files GE-17-384, GE-17-386, and GE-17-387).

[37] The Tribunal finds that, for each of the three claims at issue (files GE-17-384, GE-17-386, and GE-17-387), the Commission reconsidered within 72 months, that is from February 22, 2009, to March 13, 2015, for file GE-17-387; from March 28, 2010, to March 13, 2015, for file GE-17-386; and from April 10, 2011, to March 13, 2015, for the file GE-17-384.

[38] The appeal is without merit on this issue.

Cancellation of Benefit Periods

Was the Commission justified in cancelling the Appellant's benefit periods because he does not qualify to receive Employment Insurance benefits?

[39] Yes. The Tribunal finds that the Commission's decision to cancel the Appellant's benefit periods is justified because he does not qualify to receive benefits (files GE-17-384, GE-17-385, GE-17-386, and GE-17-387).

[40] Section 48(2) of the Act specifies that no benefit period shall be established unless the claimant supplies information in the form and manner directed by the Commission, giving the claimant's employment circumstances and the circumstances pertaining to any interruption of earnings, and any other information the Commission may require.

[41] Section 49(1) of the Act states that a person is not entitled to receive benefits for a week of unemployment until the person makes a claim for benefits for that week in accordance with section 50 of the Act and the Regulations and proves that, on the one hand, the person meets the requirements for receiving benefits and that, on the other, no circumstances or conditions exist that have the effect of disentitling or disqualifying the person from receiving benefits.

[42] Section 90(1)(d) of the Act states that the Commission can ask the Canada Revenue Agency to make a ruling on how many hours an insured person has had in insurable employment.

[43] Section 5(1)(a) of the Act indicates that insurable employment is employment in Canada by one or more employers, under any express or implied contract of service or apprenticeship, written or oral, whether the earnings of the employed person are received from the employer or some other person and whether the earnings are calculated by time or by the piece, or partly by time and partly by the piece, or otherwise.

[44] Section 14(1) of the Regulations states that a claimant has an interruption of earnings if they are laid off or separated from their employment and have a period of seven or more consecutive days during which no work is performed for their employer.

[45] In *Kassam* (2004 FCA 331), the Court reaffirmed the principle that the claimant has the burden of proving their entitlement to benefits within the meaning of the Act. In this case, the Court confirmed the conclusion the umpire reached in decision CUB 56329 where the umpire refused to overturn the Commission's decision to cancel the benefit period since it had been acknowledged that the claimant did not have insurable employment during his qualifying period based on the false Records of Employment and the decision of Revenue Canada (Canada Revenue Agency).

[46] In the matter of *Canada Employment Insurance Commission v SG* (2016 SSTADEI 519), the Tribunal's Appeal Division noted that the case law has established that the CRA has exclusive jurisdiction to determine the number of insured hours a person has for the purposes of the Act (*Romano*, 2008 FCA 117; *Didiodato*, 2002 FCA 345; *Haberman*, A-717-98).

[47] The Court has confirmed the principle that the requirements under section 7(2) of the Act do not allow any discrepancy and provide no discretion (*Lévesque*, 2001 FCA 304).

[48] In this case, the evidence on file shows that the Appellant did not accumulate any hours of employment during each of his qualifying periods, following decisions made by the CRA or the Tax Court of Canada (TCC).

[49] In similar letters dated February 20, 2015, the CRA informed the Appellant that the employment he held with the employers X, from August 13, 2017, to December 21, 2001, and from November 17, 2008, to February 21, 2009 (file GE-17-387); X, from December 20, 2009, to March 27, 2010, and from January 3, 2011, to April 9, 2011; and X, from September 23, 2012, to January 11, 2013, was not insurable employment because he did not have contracts of employment with those employers (GD3-24 and GD3-25 of file GE-17-384, GE-17-386, and GE-17-387, and GD3-25 and GD3-26 of file GE-17-385).

[50] On April 16, 2015, the CRA informed the Commission (Service Canada Centre) that appeals had been made to the Minister of National Revenue concerning the Appellant and the employers X (employment periods from August 13, 2007, to December 21, 2007, and from November 17, 2008, to February 21, 2009); X (employment periods from December 20, 2009 to March 27, 2010, and from January 3, 2011, to April 9, 2011); X ("807815873xxxxxx" – M. B., payer), (employment periods from September 23, 2012, to January 11, 2013), related to the decisions it gave in each case, on February 20, 2015 (GD3-46 of file GE-17-384, GE-17-386, and GE-17-387 and GD3-50 of file GE-17-385).

[51] In similar letters dated March 22, 2016, the CRA informed the Commission that the employment the Appellant held with the employers X, from August 13, 2007, to December 21, 2007, and from November 17, 2008, to February 21, 2009 (file GE-17-387); X, from December 20, 2009, to March 27, 2010, and from January 3, 2011, to April 9, 2011; and M. B. (X), from September 23, 2012, to January 11, 2013; was not insurable employment under section 93(3) and section 5(1)9a) of the *Employment Insurance Act*. The CRA specified that, since the requirements of the contract of service had not been respected, there was no employer-employee relationship (GD3-47 and GD3-48 from file GE-17-384, GE-17-386, and GE-17-387 and GD3-51 and GD3-52 of the file GE-17-385).

[52] In a decision given on November 7, 2018, the Tax Court of Canada (TCC) dismissed the Appellant's request for an extension of time to file, under section 103(1) of the *Employment Insurance Act*, a notice of appeal for a decision of the Minister of National Revenue on March 22, 2016, and confirming that the Appellant did not hold insurable employment when he

worked for M. B. (X) (GD24-3 to GD24-7 of files GE-17-384, GE-17-385, GE-17-386, and GE-17-387).

[53] For the other periods of employment at issue, the representative stated in an email sent to the Tribunal on August 1, 2018, that, after checking with the TCC and after obtaining confirmation from that body to that effect, there had been only one open appeal file, the one concerning the insurability of the Appellant's employment with the employer X concerning the period from September 23, 2012, to January 11, 2013 (GD21-1 to GD21-3 of files GE-17-384, GE-17-385, GE-17-386, and GE-17-387).

[54] The Appellant explains that he had worked for the employers concerned during the periods at issue.

[55] The representative argues that the Commission could not cancel the Appellant's benefit periods for which it could not reconsider its decisions, within more than 36 months, because it had not shown that he had made false statements (GE-17-384, GE-17-386, and GE-17-387), (GD36-4 of files GE-17-384, GE-17-386, and GE-17-387).

[56] The representative argues that the Commission's May 5, 2011, claim regarding the Appellant (Commission decision dated May 5, 2011, regarding a false statement—GD34-2 and GD34-3 of files GE-17-384, GE-17-385, GE-17-386, and GE-17-387) is additional evidence that corroborates the Appellant's position that he really was employed by the businesses X, X, and X. The representative noted that the Commission found that the Appellant had obtained earnings from X for the week of December 20, 2009, that is, during his first week of work for that business, as the Record of Employment issued by that employer indicates (GD3-15 of file GE-17-386), (GD34-2, GD34-3, GD36-3, and GD36-4 of files GE-17-384, GE-17-385, GE-17-386, and GE-17-387).

[57] As for the Commission, it explains that it was bound by the decisions given by the CRA indicating that the Appellant had not held insurable employment and that, for that reason, his benefit periods had been cancelled because he had failed to show that he had accumulated the required number of hours of insurable employment during his qualifying periods under section 7

of the Act (GD4-7 of file GE-17-384, GD4-5 of file GE-17-385, GD4-5 and GD4-6 of file GE-17-386, and GD4-6 of file GE-17-387).

[58] The Tribunal finds that, even though the Appellant stated that he had worked during the periods at issue and that he provided evidence to that effect (for example, Records of Employment issued by the employers concerned, the Appellant's tax returns, employers' and co-workers' statements indicating that he had worked for the employers in question), he failed to show that the employment he held with employers X, X, and X (M. B.) was insurable employment within the meaning of the Act. The fact that the Commission gave the Appellant a decision dated May 5, 2011, because he had failed to report that he had worked for one of the employers in question does not show that he held insurable employment within the meaning of the Act.

[59] In summary, based on the evidence on file, the Tribunal finds that the Appellant did not accumulate any hours of insurable employment during each of his qualifying periods for benefit periods to be established for him, since the CRA determined that he had not held insurable employment within the meaning of the Act.

[60] The Tribunal finds that the Appellant failed to show that he qualifies to receive benefits.

[61] Consequently, the Tribunal finds that the Commission is justified in cancelling the Appellant's benefit periods beginning on February 22, 2009 (file GE-17-387); March 28, 2010 (file GE-17-386); April 10, 2011 (file GE-17-384); and January 13, 2013 (file GE-17-385), under sections 7, 48, and 49 of the Act, as well as section 14(1) of the Regulations.

[62] On this issue, the appeal is dismissed.

False or Misleading Statements

[63] The Court confirmed the principle that there is no false or misleading statement unless the claimants subjectively know that the information they have given or the statements they have made or that concern them were false (*Mootoo*, 2003 FCA 206; *Gates*, A-600-94; *Purcell*, A-694-94).

[64] In *Gagnon* (A-52-04), the Court specified how the Commission may be justified in adopting its own guidelines on imposing penalties to guarantee some consistency nationally and avoid arbitrariness in such matters.

Did the Appellant make false or misleading statements?

[65] Yes. In this case, the Tribunal takes the position that several pieces of evidence show that the Appellant made two false or misleading statements in filing his claims (claim beginning on January 13, 2013—file GE-17-385) and in providing the Commission with a Record of Employment containing false or misleading information (*Mootoo*, 2003 FCA 206; *Gates*, A-600-94; *Purcell*, A-694-94).

[66] The Record of Employment issued by the employer X, dated January 14, 2013, indicated that the Appellant worked from September 23, 2012, to January 11, 2013, inclusive and that he completed 630 insurable hours during that period (GD3-16 and GD3-17 of file GE-15-385).

[67] The decisions given by the CRA dated March 22, 2016, and by the TCC dated November 7, 2018, show that the employment held by the Appellant with the employer X (M. B.), from September 23, 2012, to January 11, 2013, was not insurable employment within the meaning of the Act and that there was no employer–employee relationship because the requirements of the contract of service had not been respected (GD3-51 and GD3-52 of the file GE-17-385).

[68] In its arguments, the Commission stated that, in cases of claim cancellation, the filing of a false Record of Employment or one containing false or misleading information constitutes a case of a false statement knowingly made and that the filing of a claim constitutes a second false statement knowingly made (GD4-7 of file GE-17-385).

[69] Although the Appellant argues that he had worked during the period at issue and that he had witnesses that could prove it, the Tribunal takes the position that the evidence collected by the Commission shows that he does not meet the necessary conditions to establish a claim for Employment Insurance benefits and that he made false or misleading statements since the

Record of Employment he provided to the Commission contained false or misleading information.

Did the Appellant know that his statements were false or misleading?

[70] No. The Tribunal takes the position that the Appellant did not know that his statements were false or misleading when he filed his claim and provided a Record of Employment containing false or misleading information (*Mootoo*, 2003 FCA 206; *Gates*, A-600-94; *Purcell*, A-694-94).

[71] The Appellant explains that, when he filed his claim for benefits after he stopped working for the employer X (M. B.), he did not think that he was making false or misleading statements because he had worked for that employer. He notes that he did attend work. The Appellant argues that he had not wanted to take advantage of the Employment Insurance system when he filed his claim.

[72] The representative argues that, for 2013 (claim beginning in January 2013—file GE-17-385), the penalty imposed on the Appellant, as well as the notice of violation issued to him, should be cancelled because false or misleading statements were not knowingly made. He explains that the Appellant believed in good faith that he was entitled to Employment Insurance benefits because he had just worked enough insurable hours (full-time work with the employer X) to establish a benefit period and that it was only later that the CRA ruled on the insurability of his employment. The representative notes that the Appellant could not suspect that the CRA was going to decide some two years later that the statements he had made were false or misleading. He argues that the Commission has not proven that the Appellant made false or misleading statements because it relied solely on the CRA's decisions relating to the insurability of his employment to reach that finding (GD36-4 of files GE-17-384, GE-17-385, GE-17-386, and GE-17-387).

[73] The representative argues that, to find that the Appellant made false or misleading statements, he would personally have had to know that he was doing so, whereas that was not the case because he had always acted honestly. The representative also argues that the Appellant could not have anticipated that the CRA was going to consider whether his employment was

insurable when he made his claim (*Gates*, A-600-94; *Mootoo*, 2003 FCA 206; *Moretto*, A-667-96; *Demers*, A-171-98; *McDonald*, A-897-90; *ML v Canada Employment Insurance Commission* (October 31, 2018, General Division of the Social Security Tribunal, file GE-17-2530, decision CUB 68452A, decision CUB 66975B, reconsideration decision by the Commission for one of the Appellant's co-workers when he worked for the employer X), (GD17-43 to GD17-68, GD18-4 to GD18-7, and GD33-19 to GD33-33 of files GE-17-384, GE-17-385, GE-17-386, and GE-17-387).

[74] The representative also submits that the Commission's argument that the Appellant should reasonably have known that he had not held insurable employment since he had been paid in cash as part of that employment is not valid because it is not aligned with the TCC's case law on employment insurability (*Bolduc v MNR [Minister of National Revenue]*, 1999 CanLII 110 (TCC)). On this point, the representative notes that, even if the Appellant had been paid in cash, that situation did not necessarily mean that he had not held insurable employment and that he had intended to make false statements by filing his claim and providing a false Record of Employment (*Bolduc v MNR [Minister of National Revenue]*, 1999 CanLII 110 (TCC), (GD17-39 to GD17-42 of files GE-17-384, GE-17-385, GE-17-386, and GE-17-387).

[75] The Tribunal takes the position that, when the Appellant filed his claim for the period at issue, he could not have known that the Record of Employment he provided was erroneous, given the fact that, more than two years after that employment, the CRA found that it was not insurable employment within the meaning of the Act.

[76] The Tribunal does not accept the Commission's argument that the Appellant knew that the Record of Employment he had provided when filing his claim was a false Record of Employment and that the information in that document was erroneous because, in being paid in cash, he had not held salaried employment and the hours worked could not be insurable (GD4-7 of file GE-17-385).

[77] The Tribunal takes the position that the fact that the Appellant was paid in cash in no way changes the fact that he could not have known, when he filed his claim and provided a Record of Employment corresponding to his work term, that he was making false or misleading statements.

[78] The Tribunal is of the view that the Appellant did not wilfully mislead the Commission in filing a claim and providing it with a false Record of Employment. He could not have known that, at the time he filed his claim, he was not reporting the facts properly (*Purcell*, A-694-94; *Gates*, A-600-94).

[79] The Tribunal takes the position that the Appellant therefore could not have known that he was making false statements, with full knowledge of the facts, when he filed his claim. He did not subjectively know that his statements were false (*Mootoo*, 2003 FCA 206; *Gates*, A-600-94; *Purcell*, A-694-94).

[80] In summary, the Tribunal takes the position that the Appellant did not knowingly make false statements (*Mootoo*, 2003 FCA 206; *Gates*, A-600-94; *Purcell*, A-694-94).

Did the Commission exercise its discretion judicially when it imposed a penalty on the Appellant?

[81] No. The Commission did not exercise its discretion judicially when it imposed a penalty on the Appellant.

[82] The Court confirmed the principle that the Commission has discretion to impose the penalty set out in section 38(1) of the Act. Furthermore, the Court stated that no court, umpire, or tribunal is authorized to intervene in respect of a penalty decision by the Commission as long as the Commission can prove that it exercised its discretion "judicially." In other words, the Commission must show that it acted in good faith, considered all the relevant factors, and disregarded irrelevant factors (*Uppal*, 2008 FCA 388; *Tong*, 2003 FCA 281).

[83] On the issue concerning the imposition of a penalty, the Tribunal takes the position that the Commission decision on this issue is not justified in the circumstances (*Gagnon*, A-52-04).

[84] The Tribunal is of the view that the Commission gave the Appellant the opportunity to explain the false statements he was accused of making, after he filed his reconsideration request.

[85] However, despite the fact that it was not responsible for that situation, the Commission was not able to weigh the Appellant's credible testimony at the hearing to the effect that he did

not know that, when filing his claim in January 2013, he had made false or misleading statements by filing his claim and by providing the Record of Employment that his employer had issued to him.

[86] The Tribunal takes the position that the Commission was also not able to weigh the explanations of the Appellant's representatives on this point, which show that the Appellant did not make false or misleading statements knowingly.

[87] In this context, the Tribunal finds that the Commission did not exercise its discretion judicially, in giving its decision to impose a penalty on the Appellant, because it was not able to consider all the relevant facts in the file (*Uppal*, 2008 FCA 388; *Tong*, 2003 FCA 281).

[88] Those facts refer essentially to the Appellant's statements that he did not believe that, in filing his claim, he had knowingly made false or misleading statements because he had worked for the employer X, although the CRA found more than two years after that claim had been filed that it was not insurable employment within the meaning of the Act.

[89] On this issue, the appeal has merit.

Notice of Violation

Did the Commission exercise its discretion judicially when it issued a notice of violation to the Appellant?

[90] In this case, since the Tribunal has determined that the Appellant did not know whether the statements he made were false or misleading when he filed his claim, there is therefore no need to assess whether the Commission exercised its discretion judicially when it issued a notice of violation to the Appellant.

[91] The Tribunal finds that the notice of violation issued to the Appellant should not be upheld.

[92] On this issue, the appeal has merit.

CONCLUSION

[93] Regarding the four issues before it, the Tribunal finds as follows:

[94] On the Commission's decision to reconsider the Appellant's claims within 72 months, under section 52 of the Act, after finding that a false or misleading statement had been made, the appeal is dismissed (files GE-17-384, GE-17-386, and GE-17-387).

[95] Concerning the Commission's decision to cancel the Appellant's claims, under sections 7, 48, and 49 of the Act and section 14(1) of the Regulations, the Appeal is dismissed (files GE-17-384, GE-17-385, GE-17-386, and GE-17-387).

[96] Regarding the issue related to the imposition of a penalty on the Appellant under section 38 of the Act, for committing an act or omission by making false or misleading statements with full knowledge of the facts, the appeal is allowed. The penalty must be cancelled (file GE-17-385).

[97] Concerning the issue related to the issuing of a notice of violation to the Appellant following a penalty imposed on him for committing an act or omission under section 7.1 of the Act, the appeal is allowed. The notice of violation must be cancelled (file GE-17-385).

[98] The appeal on these issues has merit in part.

Normand Morin
Member, General Division – Employment Insurance Section

HEARD ON:	May 10, 2019
METHOD OF PROCEEDING:	Videoconference
APPEARANCE:	A. L., Appellant Richard-Alexandre Laniel, counsel (Ouellet, Nadon et associées), Representative for the Appellant