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

[TRANSLATION]

Citation: *MS v Canada Employment Insurance Commission*, 2019 SST 1756

Tribunal File Number: GE-19-1265

BETWEEN:

M. S.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Catherine Frenette

HEARD ON: July 19, 2019

DATE OF DECISION: July 23, 2019

Canada

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant made an initial claim for regular benefits on May 13, 2016, and it was approved. The Appellant worked for the employer between February 27, 2017, and April 28, 2017.

[3] After an investigation, the Canada Employment Insurance Commission (Commission) discovered that the Appellant had not reported the hours worked for the employer or his earnings. The Commission therefore determined that the Appellant had made three false or misleading statements. As a result, it imposed a penalty and a notice of violation on the Appellant.

[4] The Tribunal has to decide whether the Appellant made false or misleading statements. If so, the Tribunal has to decide whether the Commission acted judicially when it imposed a monetary penalty and a notice of violation on the Appellant.

ISSUES

[5] Did the Appellant knowingly make three false or misleading statements between February 19, 2017, and April 15, 2017?

[6] If so, did the Commission act judicially when it imposed a penalty on the Appellant?

[7] Did the Commission act judicially when it imposed a notice of violation on the Appellant?

ANALYSIS

Did the Appellant knowingly make false or misleading statements between February 19, 2017, and April 15, 2017?

[8] The Commission may impose a penalty on a claimant if the claimant has made a statement that they knew was false or misleading in relation to a claim for benefits (section 38(1) of Canada's *Employment Insurance Act* (Act)). So, before imposing a penalty on a claimant, the Commission has to find that the claimant made a false or misleading statement.

[9] For a statement to be false or misleading, the claimant must have subjective knowledge of the fact that they were making a false or misleading statement (section 38(1) of the Act; *Mootoo v Attorney General of Canada*, 2003 FCA 206; *Attorney General of Canada v Purcell*, [1996] 1 FCR 644).

> When it comes to the interpretation of the word "knew", this Court has specified that a subjective test should be used to determine whether the required knowledge exists. The issue is therefore not whether the claimant ought to have known that his representation was false or misleading; a false but innocent representation does not give rise to penalties. That being said, it is not sufficient to proclaim one's ignorance to avoid sanctions; it is permissible to consider common sense and objective factors to decide whether a claimant had subjective knowledge of the falsity of his or her representations. (*Attorney General of Canada v Bellil*, 2017 FCA 104)

[10] This subjective test should be considered by taking into account objective factors and common sense. As a result, the Tribunal could disbelieve a claimant who denies a well-known fact and find that the claimant subjectively knew what they stated was false (*Purcell*, *supra*).

[11] The Commission has the burden of proving that the claimant knowingly made a false or misleading statement (*Purcell*, *supra*). If the Commission meets its burden, it is up to the claimant to explain why they answered incorrectly (*Purcell*, *supra*).

[12] To begin with, the Tribunal is of the view that the Commission has shown that the Appellant made three false or misleading statements. The Commission filed into evidence later reports from the Appellant, completed between February 19, 2017, and April 15, 2017. Three times, the Appellant answered "NO" to the question: "Did you work or receive any earnings during" the period of the report?

[13] However, the Record of Employment and the Appellant's testimony show that the Appellant worked for the employer between February 19, 2017, and April 28, 2017. Furthermore, the question the Appellant was asked in the reports was clear and left no room for interpretation.

[14] According to the Commission, the Appellant must have been aware that he was making a false statement, and he deliberately misled the Commission to get benefits. The Appellant knew that he had worked or received earnings during the period in question and, as a result, that he was not properly reporting the facts.

[15] The Tribunal compares the facts of this case to those in *Ftergiotis v Attorney General of Canada*, 2007 FCA 55. In that case, the claimant worked during the benefit period and failed to report his earnings in nine later reports because of—according to him—human error. The Federal Court of Appeal did not accept the claimant's argument, since it found that he knew he was working and, as a result, he knew that his statements were false.

[16] Therefore, the Tribunal agrees with the Commission: The Appellant knew that he had worked during the weeks in question, and he knew that his statements were false (*Purcell*, *supra*; *Ftergiotis*, *supra*).

[17] So, it was up to the Appellant to explain why he had answered incorrectly (*Purcell*, *supra*).

[18] At the hearing, the Appellant explained to the Tribunal that, when he started making reports in February 2017, there was an issue with his employer regarding the payment of overtime. The Appellant's contract stated that he could work 40 hours per week. Since he worked for a placement agency and the business hiring his services had not authorized his overtime, he did not know whether he would be paid for those hours.

[19] As a result, the Appellant explained that he initially answered "YES" to the question of whether he had worked or received earnings during the period in question. But, at the end of the report, the Appellant answered that he had received $0 because he did not know what amount to report due to the overtime issue. The Appellant explained that his report was rejected, since he

could not have earned $0 if he had worked. Because of this issue, the Appellant answered "NO" to the question of whether he had worked. In addition, the Appellant explained that there was a message at the end of the report saying that, if he had made a mistake in his report, he could report the mistake by telephone to a Service Canada agent. So, the Appellant intended to report the mistakes later.

[20] In this regard, the Appellant testified that he had contacted the Commission in April 2017 to disclose these mistakes. However, he backtracked, saying rather that he had contacted the Commission in July 2017, when he resolved his issue with the employer.

[21] The Tribunal does not accept the Appellant's explanation, since it is implausible.

[22] First, the Tribunal finds the Appellant's explanation implausible because he could have reported his regular hours worked when making his report. The issue revolved only around the payment of overtime. In addition, the Appellant testified that he did not work overtime every week, as the Record of Employment shows (GD3-30). Consequently, the Appellant had no reason not to report his hours worked and his earnings for the weeks he did not work overtime.

[23] Second, the Tribunal finds the Appellant's explanation implausible because the evidence shows that he could have contacted the Commission well before July 2017. The Appellant testified that he contacted the Commission when he resolved the situation with the employer. But the employer issued the Record of Employment on May 8, 2017, two months before the Appellant's alleged phone call to the Commission. Therefore, the Appellant knew the amounts he had received as early as May.

[24] Furthermore, when he submitted the report, the Appellant did not contact an agent to inform the Commission of the issue, even though he knew that he had to inform it of the mistakes in his report.

[25] In fact, the Tribunal does not believe that the Appellant tried to disclose his mistakes to the Commission in July 2017. To begin with, the Commission mentioned that an investigation of the Appellant had been started because he had contacted the Commission, saying that he had not

been paid for the week of July 23 to July 29, 2017, even though he had worked. The Commission contacted the Appellant as part of that investigation.

[26] When the Commission spoke with the Appellant, he said that he had properly reported his earnings. The Appellant mentioned that the evidence obtained from the employer was inaccurate, and he demanded that the Commission provide him with proof of the reports and of the payment of benefits. The Appellant even went to a Service Canada office in an effort to obtain such evidence. The Appellant's reaction to the Commission's investigation is completely at odds with his claim that he informed the Commission of his mistake. If the Appellant had tried to contact the Commission to disclose his mistakes, he would not have denied the irregularities and would not have asked for additional proof; he would have agreed.

[27] The Tribunal is of the view that the Appellant has not met his burden of explaining the false or misleading statements, since he knew that he had worked for the employer and that he was making false or misleading statements during the periods in question (*Purcell*, *supra*; *Ftergiotis*, *supra*).

[28] Consequently, the Appellant had subjective knowledge that his statements were false (*Ftergiotis*, *supra*; *Purcell*, *supra*; *Mootoo*, *supra*).

[29] The Tribunal is therefore of the view that the Appellant knowingly made three false or misleading statements to the Commission.

If so, did the Commission act judicially when it imposed a penalty on the Appellant?

[30] The Tribunal has to decide whether the Commission acted judicially in exercising its discretion (*Purcell*, *supra*). Therefore, the Commission must not have:

a) acted in bad faith;

b) taken into account an irrelevant factor or ignored a relevant factor; or

c) acted in a discriminatory manner (*Purcell*, *supra*).

[31] The Tribunal cannot interfere with the penalty amount 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" (*Attorney General of Canada v Uppal*, 2008 FCA 388; *Attorney General of Canada v Tong*, 2003 FCA 281).

[32] The Federal Court of Appeal has agreed to the Commission's using guidelines to quantify the penalty to impose (*Attorney General of Canada v Gagnon*, 2004 FCA 351). Therefore, if the Commission relies on these guidelines and on all the mitigating circumstances on file, the Tribunal should not intervene (*Gagnon*, *supra*).

[33] The Commission argues that it exercised its discretion judicially, given that it took into account all the relevant circumstances on file when setting the penalty amount. The Commission considered that the Appellant had failed to raise any mitigating circumstances.

[34] The Commission relied on its guidelines that require imposing a penalty of 50% of the overpayment on a claimant for their first act or omission. Therefore, multiplying the overpayment of $2,430 by 50% amounts to a penalty of $1,215.

[35] The Tribunal is of the view that it does not have to intervene regarding the penalty amount (*Uppal*, *supra*; *Tong*, *supra*).

[36] The Commission did not act in bad faith or in a discriminatory manner in imposing a penalty on the Appellant. In addition, the Commission considered all the relevant facts on file, including the fact that this was the Appellant's first false statement and that he had made repeated omissions. Furthermore, the Commission validly determined that there were no mitigating or aggravating circumstances on file (*Purcell*, *supra*).

[37] The Tribunal is of the view that the Commission acted judicially regarding the imposition of the penalty (*Uppal*, *supra*; *Tong*, *supra*; *Purcell*, *supra*). The appeal is dismissed on this issue.

Did the Commission act judicially when it imposed a notice of violation on the Appellant?

[38] The Commission has the discretion whether to issue a notice of violation to a claimant who has made a false or misleading statement (sections 7.1(4) and 38(1); *Gill v Attorney General of Canada*, 2010 FCA 182).

[39] Therefore, the Commission must not have acted in bad faith or for an improper purpose or motive, taken into account an irrelevant factor or ignored a relevant factor, or acted in a discriminatory manner (*Purcell*, *supra*).

[40] The violation is minor if its value is less than $1,000, serious if its value is [between] $1,000 and $5,000, and very serious if its value is $5,000 or more (section 7.1(5) of the Act). In this case, the value of the violation is the amount of the overpayment to the Appellant (section 7.1(6)(a) of the Act).

[41] In this case, a notice of serious violation was imposed on the Appellant, since the amount of the overpayment was $2,430.

[42] The Commission is of the view that it exercised its discretion judicially when it decided to issue the notice of violation, since it took into account all the circumstances. The Commission considered the overall impact of issuing a notice of violation to the Appellant, as well as mitigating circumstances, previous violations, and the impact of a notice of violation on the Appellant's ability to qualify on future claims. According to the Commission, the Appellant has not raised any mitigating circumstances.

[43] First, the Tribunal has already found that the Appellant made three false or misleading statements.

[44] Second, the Tribunal is of the view that it does not have to intervene in the imposition of the notice of violation (*Gill*, *supra*). The evidence shows that the Commission took into account all the circumstances. Furthermore, the evidence does not show that the Commission acted in a discriminatory manner, in bad faith, or for an improper purpose. Lastly, the evidence on file does not show any mitigating circumstances.

[45] The Commission acted judicially when it imposed a notice of violation on the Appellant (*Purcell, supra*; *Gill, supra*). The appeal is dismissed on this issue.

CONCLUSION

[46] The appeal is dismissed.

Catherine Frenette
Member, General Division – Employment Insurance Section

HEARD ON:	July 19, 2019
METHOD OF PROCEEDING:	Videoconference
APPEARANCE:	M. S., Appellant