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

[TRANSLATION]

Citation: *L. B. v Canada Employment Insurance Commission*, 2019 SST 943

Tribunal File Number: GE-19-1813

BETWEEN:

L. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Lucie Leduc

HEARD ON: July 11, 2019

DATE OF DECISION: August 14, 2019

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant established an Employment Insurance benefit period on December 1, 2013. She submitted her reports online every two weeks and received benefits. Following an investigation, the Employment Insurance Commission (Commission) found that the Appellant had worked and received wages during the weeks of August 17, 2014; August 24, 2014; August 31, 2014; and September 7, 2014; but had not reported them. The Commission found that the salary the Appellant received constituted earnings within the meaning of the *Employment Insurance Act* and allocated it to the weeks worked, causing an overpayment of $1,528.

[3] The Commission also decided to impose a penalty on the Appellant for knowingly making false or misleading statements. However, the penalty is non-monetary and in the form of a warning.

PRELIMINARY MATTERS

[4] The Appellant has two appeal files with the Tribunal (GE-19-1812 and GE-19-1813). The files concern similar issues but different benefit periods. A single hearing was held for both appeals, but separate decisions were written for each appeal.

ISSUES

[5] The Tribunal must decide the following issues:

a) Do the wages the Appellant received from X for the period from August 17 to September 13, 2014, constitute earnings?

b) If so, did the Commission allocate the amounts properly?

c) Should a penalty be imposed on the Appellant for committing acts or omissions by knowingly making false or misleading statements?

ANALYSIS

Issue 1: Do the wages the Appellant received from X for the period from August 17 to September 13, 2014, constitute earnings?

[6] The general rule with Employment Insurance is that any amount considered earnings under the Act must then be allocated. It is section 35 of the *Employment Insurance Regulations* (Regulations) that sets out the rules for determining whether an amount constitutes earnings.

[7] Based on the evidence in this case, the Tribunal finds that the sums the Appellant received as wages constitute earnings.

[8] In this case, the Commission finds that the Appellant worked for and received $984.41 in wages from the company X for the weeks of August 17, 2014; August 24, 2014; August 31, 2014; and September 7, 2014. The issue therefore concerns those four weeks. At the hearing, the Appellant confirmed working for the company X and the dates of employment on file, that is from August 18, 2014, to December 12, 2015.

[9] When asked whether she could confirm receiving $984.41 weekly for the weeks at issue, the Appellant refused to answer directly and referred the Tribunal to GD3-73 and GD-10. However, GD3-73 is a table provided by the Commission detailing the Appellant's payment history. For the four weeks at issue (from August 17 to September 13, 2014), the table shows that code 80 is noted in the description with the words [translation] "Earnings reported – No benefits paid." As for GD-10, it is a letter from Service Canada dated May 29, 2019, indicating that the code 80 used as a description for the weeks from August 17 to September 13, 2014, means that a week of benefits or earnings were reported and that no benefits were paid. Since the Appellant refers to that document, the Tribunal finds that she admitted to receiving earnings.

[10] Furthermore, the employer stated in writing that the Appellant had received $984.41 in earnings for the weeks of August 17 to 23, 2014; of August 24 to 30, 2014; of August 31 to September 6, 2014; and of September 7 to 13, 2014. The Record of Employment also confirms this information.

[11] Having considered this evidence, the Tribunal finds that the Appellant did work for X between August 17 and September 13, 2014, and received wages of $984.41 per week for that work.

[12] Section 35(2) of the Regulations defines earnings in Employment Insurance. The concept has also been defined by case law. The Federal Court of Appeal considers amounts to be earnings if they are earned by an employee as a result of their work or in return for work or if a sufficient connection exists between the employment and the sum received (*Roch*, 2003 FCA 356).

[13] It has been established that the Appellant received $984.41 in wages for each of the four weeks at issue. Amounts that directly result from wages arising from employment clearly constitute a sum paid in return for work. These sums therefore constitute earnings within the meaning of the Act.

Issue 2: If so, did the Commission allocate the amounts properly?

[14] Regarding allocation, the Federal Court of Appeal has confirmed the principle that amounts that are earnings under section 35 of the Regulations must be allocated under section 36 of the Regulations (*Boone et al v Canada (Attorney General)*, 2002 FCA 257).

[15] Therefore, the Tribunal must determine how the sums paid to the Appellant should be allocated to her benefit period.

[16] The Tribunal finds that the Commission allocated the Appellant's earnings properly.

[17] According to section 36(4) of the Regulations, earnings that are payable to a claimant under a contract of employment for the performance of services must be allocated to the period in which the services were performed. In other words, the Commission must allocate the Appellant's earnings to each week that corresponds to the week for which she worked and earned those wages. In this case, the Tribunal finds that the Commission properly allocated the Appellant's weekly income from her employment with X, in accordance with section 36(4) and

corresponding to each of the Appellant's weeks of work (from the week of August 17, 2014, until that of September 7, 2014) according to undisputed figures provided by the employer.

[18] In this case, the distinctive feature of this appeal is that, in systematically referring the Tribunal to GD3-73, the Appellant appears to be insinuating that she previously reported her $984.41 per week in income from X and that she did not receive Employment Insurance benefits for the four weeks at issue.

[19] In response to the Appellant's claims, the Commission argues that the Appellant had not reported her wages for the four weeks at issue and did indeed receive benefits. The Commission pointed out that the record detailing the payments made to the Appellant (GD3-73) and indicating code 80 for the four weeks at issue was printed on February 25, 2019, following the Commission's amendments. Furthermore, the Commission submitted into evidence an attestation certificate showing the benefit status before the Commission made the necessary amendments. As a result, the payment history for those periods with the [translation] "Amended" box unchecked indicates that benefits were indeed paid. The payment history shows that, for the three reporting periods, a payment was issued on August 22, 2014, for the period from August 10, 2014, to August 23, 2014; that a payment was issued on September 5, 2014, for the period from August 24, 2014, to September 6, 2014; and that, on September 19, 2014, a payment was issued for the period from September 7 to 13, 2014. The attestation certificate also indicates that, for these three periods, no earnings were considered.

[20] Faced with two contradictory versions of events, the Tribunal finds the evidence submitted by the Commission to be more credible. The only evidence from the Appellant supporting the version that she reported her income is the table on file at GD3-73. However, the Commission's explanation refutes that evidence because the information was amended when it was printed, after the Commission's investigation and its adjustments. The Tribunal finds that the dates confirm that the Commission's explanation makes its version plausible. Since the Commission took action and decided to allocate the earnings on February 5, 2019, it is plausible that, when the benefit statement was printed on February 25, 2019, the information had been amended following the Commission's decision.

[21] The Tribunal is also of the view that, if the situation was such that code 80 had been applied long ago, this issue would be virtually null and void. Yet, the Commission did not concede the issue on the pretext of a simple error as the Appellant alleges. Instead, it provided a plausible explanation for the Appellant's confusion and maintains that the Appellant received benefits and did not report her earnings following specific questions from the Tribunal.

[22] The Tribunal acknowledges that the events occurred a few years ago, and recollections may be imperfect. However, the fact that the Appellant was never able to state in a compelling manner and with conviction that she had reported her income between August 10 and September 13, 2014, raises doubts about her credibility.

[23] The Tribunal assigns little weight to GD3-73 because the information does not reflect the Appellant's situation when she submitted her reports in 2014. All the evidence leads the Tribunal to find on the balance of probabilities that the Appellant received a weekly wage of $984.41 from X for the four weeks at issue and that these earnings were allocated properly to the weeks of work, in accordance with section 36(4) of the Regulations. The Appellant must therefore repay the overpayment of $1,528.

Issue 3: Should a penalty be imposed on the Appellant for committing acts or omissions by knowingly making false or misleading statements?

[24] Section 38(1) of the Act indicates that, if the Commission becomes aware of facts that, in its opinion, establish that a claimant has committed one of the acts or omissions cited in that section, the Commission may impose on the claimant a penalty for each of those acts (section 38(2)).

[25] In this case, the Tribunal finds that a non-monetary penalty should be imposed on the Appellant for the reasons that follow.

[26] To determine whether a penalty must be imposed, the Tribunal must address the following sub-questions:

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

- If so, were those false or misleading 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?

[27] First, regarding the existence of false or misleading statements, the Federal Court of Appeal in *Gates*, A-600-94, indicated that the burden of proof rests with the Commission to establish on a balance of probabilities that a claimant made a false or misleading statement. In this case, the Tribunal is of the view that the Commission succeeded in showing that the Appellant made false statements. The false statements result from the fact that the Appellant stated that she had not worked or received wages for the weeks between August 17 and September 13, 2014. She also did not report her employment earnings when she submitted her online reports for those same periods. The documentary evidence includes a copy of the Appellant's electronic reports, which show her responses to the questions posed in the online reporting form.

[28] However, as found for the second issue, the evidence shows that the Appellant received benefits during that period and that she worked for Foreign Affairs & International Trade. The employer confirmed the amounts the Appellant received. Since she did not report her employment and earnings, the Appellant's statements were in all likelihood false or misleading.

[29] The Federal Court of Appeal also stated in *Mootoo*, 2003 FCA 206 (*Mootoo*), that, for a penalty to be imposed, the claimant must have made the statement knowing that it was false or misleading. It must therefore be obvious that they intended to knowingly make a false statement or provide the Respondent with misleading information.

[30] In this case, the Commission argues that it has met its burden of proof and shown that the Appellant knew that she was providing incorrect information when she stated that she did not work or receive earnings for the weeks of August 17, August 24, August 31, and September 7, 2014. The Appellant neither confirmed nor denied that she made those statements.

[31] Interpreting the word "knowingly" must involve a subjective test for determining whether the required knowledge exists. The Federal Court of Appeal indicated that "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" (*Canada (Attorney General) v Bellil*, 2017 FCA 104). In the absence of a satisfactory explanation, the Tribunal finds that, in answering no to the question [translation] "Did you work or receive any earnings during the period covered by this report? This includes self-employment or employment for which you will not be paid or will be paid later," the Appellant had subjective knowledge that she was making a misrepresentation. She admitted that she worked for the employer, although the dates were unclear for her. Since the Appellant worked, the Tribunal wonders how she could not have known that she was incorrectly answering the questions in her reports. The Tribunal finds that the question is clear and that the fact she did not answer correctly corresponds to a false or misleading statement made knowingly, that is while in full possession of the facts.

[32] Concerning the amount of the imposed penalty, it is well established in case law that that is a discretionary decision that is solely within the jurisdiction of the Commission, not the Tribunal (*Uppal*, 2008 FCA 388 and *Gill*, 2010 FCA 182). Therefore, the Tribunal will not have the power to amend the Commission's decision unless it can be shown that the Commission exercised its discretionary power in a non-judicial manner or acted in a perverse or capricious manner without regard to the material before it (*Uppal*, 2008 FCA 388; *Mclean*, 2001 FCA 5; and *Rumbolt*, A-387-99).

[33] In this case, the Commission imposed a letter of warning because the act or omission occurred more than 36 months before its discovery. The Tribunal finds that the Commission exercised its discretionary power judicially when it imposed a non-monetary penalty in accordance with section 41.1 of the Act. The three acts or omissions occurred more than 36 months before the February 5, 2019, decision, but within the maximum 72 months allowed for the imposition of a penalty. In applying these norms, the Tribunal is forced to admit that the Commission exercised its power in good faith without any caprice. Furthermore, I see no circumstance that the Commission may have left out. I am satisfied that all the relevant evidence on file was considered in the determination of the penalty to be imposed on the Appellant (*Canada (Attorney General) v Uppal*), 2008 FCA 388).

CONCLUSION

[34] The appeal is dismissed.

Lucie Leduc
Member, General Division – Employment Insurance Section

HEARD ON:	July 11, 2019
METHOD OF PROCEEDING:	Videoconference
APPEARANCES:	L. B., Appellant