



[TRANSLATION]

Citation: *SL v Canada Employment Insurance Commission*, 2021 SST 249

**Social Security Tribunal of Canada
General Division – Employment Insurance Section**

Decision

Appellant: S. L.
Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (393743) dated September 22, 2020 (issued by Service Canada)

Tribunal member: Normand Morin

Type of hearing: Videoconference
Hearing date: May 4, 2021
Hearing participant: Appellant
Decision date: May 14, 2021
File number: GE-21-498

Decision

[1] The appeal is allowed in part.

[2] I find that the imposition of a penalty on the Appellant for knowingly making false or misleading statements is justified.¹

[3] I find that the issuing of a notice of violation to the Appellant, after he received a penalty for committing an act or omission, was not justified.²

Overview

[4] On June 19, 2018, the Appellant applied for Employment Insurance (EI) benefits. A benefit period was established effective June 3, 2018.

[5] On March 4, 2020, the Canada Employment Insurance Commission (Commission) told the Appellant that, according to its files, he had failed to inform it of all his income from the employers X and X, as wages. The Commission told him it had concluded that he knowingly made 11 false statements in 11 reports he submitted to claim benefits. The Commission told him that, as a result, a penalty of \$4,618 was being imposed on him. It also told him that a notice of “very serious” violation was being issued to him.³

[6] On September 22, 2020, after a request for reconsideration, the Commission told the Appellant that it was upholding the March 4, 2020, decision.⁴

[7] The Appellant submits that he did not make false or misleading statements to the Commission. He says he did not complete his claimant reports for the period from August 5, 2018, to January 5, 2019. The Appellant says that he was a victim of personal information or identity theft and that someone else used his information to complete his claimant reports in his place. He says that he completed his claimant reports after he applied for benefits in June 2018 but that he stopped completing them when he started

¹ See section 38 of the *Employment Insurance Act* (Act).

² See section 7.1 of the Act.

³ See GD3-92 to GD3-94.

⁴ See GD2-9, GD3-102, and GD3-103.

working full-time or taking paid training provided by his employer on August 14, 2018. The Appellant says he therefore failed to report that he had started working. He says he did not realize that benefits had been paid into his bank account after he started working on August 14, 2018. On March 23, 2021, the Appellant disputed the Commission's reconsideration decision. That decision is now being appealed to the Tribunal.

Issues

[8] In this file, I 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.⁵

[9] To determine this, I must answer the following questions:

- Did the Appellant make false or misleading statements?
- If so, did the Appellant know that his statements were false or misleading?
- Did the Commission exercise its discretion judicially when it imposed a penalty on the Appellant?

[10] I must also determine whether the issuing of a notice of violation to the Appellant, after he received a penalty for committing an act or omission, is justified.⁶

[11] To determine this, I must answer the following question:

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

⁵ See section 38 of the Act.

⁶ See section 7.1 of the Act.

Analysis

False or misleading statements

[12] Federal Court of Appeal (Court) decisions have confirmed the principle that a false or misleading statement is made only where claimants have subjective knowledge of the falsity of the information given or representations made by or about them.⁷

[13] The Court informs us that the onus is on the Commission to establish, on a balance of probabilities and not beyond a reasonable doubt, that a claimant made false or misleading statements.⁸ This means that the Commission must show that it is more likely than not that a claimant made false or misleading statements.

[14] The Court also tells us how the Commission may have just cause for setting guidelines for the imposition of penalties to guarantee some consistency nationally and avoid arbitrariness in such matters.⁹

Issue 1: Did the Appellant make false or misleading statements?

[15] In this case, I find that the Appellant made false or misleading statements by indicating that he did not work and did not earn wages during the period from August 12, 2018, to January 5, 2019, despite his claims that he did not complete his claimant reports for that period.

[16] According to the Appellant, he was a victim of personal information or identity theft, and someone else completed his claimant reports for the period in question. According to him, this situation explains his alleged false statements.

[17] The evidence gathered by the Commission shows that the Appellant worked for the entire period in question but that the income or wages he earned were not reported on his claimant reports.¹⁰

⁷ The Court established or reiterated this principle in the following decisions: *Mootoo*, 2003 FCA 206; *Gates*, A-600-94; and *Purcell*, A-694-94.

⁸ The Court established this principle in *Gates*, A-600-94.

⁹ The Court established this principle in *Gagnon*, A-52-04.

¹⁰ See GD3-17 to GD3-72.

[18] The information the Commission obtained from the employers X and X¹¹ indicates that the Appellant worked for these employers from August 12, 2018, to January 5, 2019.¹²

[19] The Appellant submits that he did not knowingly make false or misleading statements. His testimony and statements to the Commission indicate the following:

- a) The Appellant says he applied for benefits on June 19, 2018, after which benefits were paid to him. He says he received an access code. It was the same access code as for his previous claims. The Appellant says he did not voluntarily disclose or share this code with anyone else.¹³
- b) The Appellant completed his claimant reports himself, but he stopped as of August 14, 2018, when he started working full-time for the employer X or started taking paid training with that employer.¹⁴
- c) The Appellant says he failed to inform the Commission that he had started working or taking paid training as of August 14, 2018. He says he did not complete his claimant reports for the period from August 5, 2018, to January 5, 2019,¹⁵ including those where he could have reported that he had worked or earned wages as of August 14, 2018.¹⁶ The Appellant says he did not make that statement because he had no assurance that he would be able to continue working or taking his training with the employer. He says he also felt a bit of mental and emotional instability related to his work.
- d) The Appellant says that, at the beginning of summer 2019, the Commission contacted him to inform him that he had not reported the earnings that the

¹¹ In its submissions, the Commission explains that the company X is a division merged with the company X—GD4-5.

¹² See GD3-85 to GD3-88 and GD3-92 to GD3-94.

¹³ See GD3-3 to GD3-12 and GD3-89 to GD3-91.

¹⁴ See GD3-89 to GD3-91. The Appellant mentions that the employer X and X represent the same employer. He explains that the company X acquired the company X around 2018 and that the two companies were merged at that time.

¹⁵ See GD3-17 to GD3-72.

¹⁶ See the claimant reports from August 5, 2018, to August 18, 2018, and completed on August 22, 2018—GD3-18 to GD3-22.

employers X and X reported having paid him for the period from September 30, 2018, to January 5, 2019.¹⁷ He says he was [translation] “surprised” that the Commission was contacting him. In the document “Request for Clarification of Employment Information” that the Commission sent him on June 4, 2019, and that he completed on July 9, 2019, the Appellant said he agreed with the information in the document about the earnings that the employers in question said they paid him. The Appellant says he has reported nothing and given no information on his change in employment status since the end of August 2018. He says he was a victim of information and identity theft. He also says he did not read the letters from the Commission (Service Canada) until July 8, 2019, given the issues with his mail service.¹⁸

- e) The Appellant says he realized he had been a victim of personal information or identity theft in July 2019, after the Commission had contacted him about the overpayment of benefits resulting from the earnings he had received in 2018.¹⁹ According to him, this theft was from his computer. He says he had issues with his computer starting in summer 2018. When he started it and used a browser (for example, Internet Explorer or Google Chrome) or a search engine (Google) to consult webpages, an unsecure page with a specific Internet address or link would appear (Savesurf.net). He had his computer repaired to fix this issue. The Appellant learned that there were two viruses on his computer, which he mentions in his notice of appeal.²⁰ According to the Appellant, it was when he purchased software or antivirus that he [translation] “got scammed.” The Appellant says that the site he was on or the link he used when he had an issue with his computer (Savesurf.net) is a site or a link leading to a “highjacker.” According to him, from this link or this address (Savesurf.net), the “highjacker” took control of each of the

¹⁷ See the document entitled “Request for Clarification of Employment Information,” sent to the Appellant on June 4, 2019—GD3-85 to GD3-88.

¹⁸ See GD3-85 to GD3-88.

¹⁹ See GD2-5, GD2-10, and GD2-11.

²⁰ See GD2-5 and GD2-10.

browsers installed on his computer, controlled the webpages, and recorded all the searches made. According to the Appellant, this [translation] “scam” resulted in all his searches or all the pages he used being recorded with the information they contained.²¹

- f) The Appellant says that, due to the theft of his personal information or identity, someone used his personal information to make his claimant reports.²²
- g) The Appellant says that his bank account, of which he is the only holder and the only one with access, was not affected by this theft, however.²³ Benefits were deposited (direct deposit) into this account for the reporting periods from August 5, 2018, to January 5, 2019.²⁴ He says that the benefit amounts paid into his account were not diverted to someone else. In his August 6, 2019, statement to the Commission, in response to a question asking him what were the benefits for a scammer of completing EI reports if the benefits were paid into the victim’s account, the Appellant said that that is what scammers do.²⁵
- h) The Appellant says that, after the theft of his personal information or identity, someone also made a purchase on the online shopping site eBay, and the payment was made through his PayPal account. The payment for this purchase, which the Appellant did not receive, was billed by PayPal on his credit card. It was a Visa credit card from the same financial institution where he has a bank account into which his benefits were paid. After the eBay transaction, which he did not make, and after realizing that his personal information may have been used fraudulently, the Appellant did not alert the

²¹ See GD2-5, GD2-10, and GD3-96.

²² See GD3-89 to GD3-91.

²³ See GD3-89 to GD3-91.

²⁴ See the documents from the Commission (for example, attestation certificate and table describing the weeks where the Appellant received benefits during the period from June 3, 2018, to January 5, 2019) indicating that benefits were paid into the Appellant’s account for the period from August 5, 2018, to January 5, 2019—GD3-73 to GD3-84 and GD3-105.

²⁵ See GD3-89 to GD3-91.

credit card company, either to dispute this transaction or to explain that it could be a theft of personal information. He says he has always [translation] “sorted out” his [translation] “issues.” The Appellant notes that, if a purchase had been made directly with his credit card that he did not make, he would have contacted the credit card company. He says he contacted PayPal and changed his password with it. He also contacted eBay several times, but this did nothing. The Appellant closed his eBay account. The Appellant also did not report the incident to police. He says that the amounts on his PayPal account were less than \$100. He also mentions receiving bills from Canada Post and Shaw.²⁶

- i) The Appellant says he did not notice that deposits for benefit payments had been made into his account over several months, including the period from August 2018 to January 2019. The Appellant says he did not check the withdrawals and deposits for this account. He says he was not [translation] “diligent” or [translation] “present” to do this type of check. The Appellant still makes his payments by Internet but does not check his account balance afterward and does not do a monthly review of his purchases. He is not [translation] “to the nearest penny” in his accounts.²⁷
- j) It was not until spring 2020, during the period from March to May 2020, when lockdown measures due to the COVID-19 pandemic²⁸ were in effect, that the Appellant checked his bank account. He had more time to do it then. It was during this period that he became aware of all the benefit deposits that had been made into his account.²⁹
- k) The Appellant says he agreed to reimburse the overpayment amount that he owed from the amounts that were paid to him in benefits. He specifies that he

²⁶ See GD3-89 to GD3-91.

²⁷ See GD2-5, GD2-10, and GD3-89 to GD3-91.

²⁸ Coronavirus disease 2019.

²⁹ See GD2-5 and GD2-10.

disputes the penalty that was imposed on him and the notice of violation issued to him.³⁰

[20] In this case, I find that the evidence gathered by the Commission shows that the claimant reports indicating that the Appellant did not work and did not earn wages during the period from August 12, 2018, to January 5, 2019, are false or misleading.³¹

[21] The Appellant acknowledges that he failed to report that he had started working and receiving earnings or taking paid training full-time on August 14, 2018. I note that, after that omission, the Appellant did not take the initiative to report this fact to the Commission, even several months after that date.

[22] I am not persuaded by the Appellant's explanation that he stopped completing his reports when he started working or taking training with the employer because he had no assurance that he would be able to continue working and because this situation had made him feel mentally and emotionally unstable.

[23] I find that, on a balance of probabilities, the Appellant completed his claimant reports himself during the period from August 12, 2018, to January 5, 2019.

[24] I find that the Appellant has not provided conclusive evidence that his bank account was hacked after a theft of his personal information or identity from his computer.

[25] I cannot trust the Appellant's explanations that, according to him, after this hacking, another person allegedly completed his claimant reports for the period in question in his place, but without that person receiving the benefits.

[26] I do not find credible the Appellant's arguments that a personal information or identity theft is the reason for his alleged false statements. The evidence that he has submitted is not conclusive.

³⁰ See GD2-1.

³¹ See GD3-17 to GD3-72.

[27] The Appellant gives several explanations about how the hacking of his computer could have happened. He also refers to software or malicious sites that could have resulted in his personal information being stolen from his computer or identity theft.

[28] However, despite all the information he provided about this, he does not show that he was a victim of computer hacking. His explanations also do not show that someone other than him continued to complete his claimant reports after he started working or taking training with the employer on August 14, 2018.

[29] The same is true for the Appellant's statements that he was billed for purchases made without his knowledge on the online shopping site eBay and paid through PayPal with his credit card.

[30] I find contradictory the Appellant's statement that, despite being a victim of personal information or identity theft, he did not report this problem, either to police or to his credit card company. It was from this credit card that the purchases on eBay and paid through PayPal were billed to him.

[31] Despite the Appellant's statements that he was a victim of computer hacking, the fact is that he continued to collect benefits for the period in question, since benefits continued to be deposited into his bank account. No one other than the Appellant received the benefits that were paid to him.

[32] I also do not find credible the Appellant's statement that he did not check his bank account for several months, despite the fact that he was receiving both wages from the employers X and X and Employment Insurance benefits.

[33] I find that the Appellant himself made false or misleading statements by indicating in his claimant reports that he had not worked or earned wages during the period from August 12, 2018, to January 5, 2019.

[34] These false statements misled the Commission and resulted in the Appellant receiving benefits he was not entitled to.

Issue 2: Did the Appellant know that his statements were false or misleading?

[35] I find that the Appellant knew that he was making false or misleading statements when he reported that he had not worked or earned wages during the period from August 12, 2018, to January 5, 2019.

[36] I find that the Appellant has not provided a satisfactory explanation for his alleged false statements.

[37] The Court tells us that, when a claimant indicates in their reports that they did not work or get paid during the reporting period, and this is false, it is reasonable to conclude, in the absence of a satisfactory explanation, that the claimant knew that their statement was false.³²

[38] Despite the Appellant's explanations for his alleged false statements, I find that, when he completed his claimant reports, he knew that he had worked and that he had received or would receive wages for each of the weeks in question. I note that the Appellant acknowledges that he failed to report that he had started working and receiving earnings or taking paid training full-time of August 14, 2018.

[39] On multiple occasions, when he completed his claimant reports, the Appellant answered "no" to an unambiguous question asking him: "Did you work or receive any earnings during the period of this report? This includes work for which you will be paid later, unpaid work, or self-employment."³³

[40] I find that the Appellant knew that, by indicating that he had not worked or received wages during the period in question, he was misleading the Commission.

[41] I am of the view that the Appellant must have known that he was knowingly making false statements. He knew subjectively that his statements were false.

³² The Court established this principle in *Donnelly*, A-343-98.

³³ See script number 1650—GD3-17 to GD3-72.

[42] I find that the Appellant had the required knowledge about his responsibility to report that he had worked and report that he had or was going to receive wages for that work.

[43] The Court tells us that the Commission is not required to establish the existence of an “intention to deceive” to prove that a claimant knowingly made a false or misleading statement.³⁴

[44] In summary, I find that the Appellant knowingly made false statements.

Issue 3: Did the Commission exercise its discretion judicially when it imposed a penalty on the Appellant?

[45] I find that the Commission exercised its discretion judicially when it imposed a penalty on the Appellant.

[46] The Court tells us that the Commission has the discretion to impose the penalty under the Act.³⁵ Furthermore, the Court notes that no court, Umpire, or Tribunal is authorized to interfere with a decision of the Commission about a penalty, unless it can be shown that the Commission exercised its discretionary power in a “non-judicial manner.” In other words, the Commission must demonstrate that it acted in good faith, taking into account all relevant factors and ignoring any irrelevant factors.³⁶

[47] Regarding the issue of the imposition of a penalty, I find the Commission’s decision on this matter to be justified.

[48] I find that the Commission attempted to obtain explanations from the Appellant about his alleged false statements. It made its decision based on the information that the Appellant provided it and on information obtained from the employers the Appellant worked for.

³⁴ The Court established or reiterated this principle in the following decisions: *Purcell*, A-694-94; and *Gates*, A-600-94.

³⁵ See section 38(1) of the Act.

³⁶ The Court established or reiterated this principle in the following decisions: *Uppal*, 2008 FCA 388; and *Tong*, 2003 FCA 281.

[49] The Commission indicates that it exercised its discretion judicially because it thoroughly considered the relevant circumstances when it assessed the penalty against the Appellant. It says that the Appellant told it he had been a victim of identity theft but that he did not prove that his bank account had been hacked. The Commission also notes that it was the Appellant's first offence.³⁷

[50] I am of the view that the Commission gave the Appellant the opportunity to provide explanations for his alleged false statements after he made his reconsideration request.

[51] I find that the Commission exercised its discretion judicially because, in making its decision to impose a penalty on the Appellant, it was able to take into account all the relevant facts in the file.

[52] These facts refer to evidence indicating that the Appellant said he was a victim of computer hacking to explain that he did not complete his claimant reports himself and that, therefore, he did not make false statements.

[53] I find that the Appellant has not introduced new evidence that could be considered extenuating circumstances in his case.

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

Notice of Violation

Issue 1: Did the Commission exercise its discretion judicially when it issued a notice of violation to the Appellant?

[55] I find that the Commission did not exercise its discretion judicially when it issued a notice of violation to the Appellant.

³⁷ See GD4-5 and GD4-6.

[56] I am of the view that the Commission's decision to issue a notice of violation to the Appellant,³⁸ after a penalty was imposed on him for committing an act or omission, was not justified in the circumstances.

[57] The Court tells us that, in situations that require imposing a penalty, a notice of violation is not required or automatic,³⁹ and the Commission must exercise its discretion while considering the circumstances.⁴⁰

[58] To assess whether it was appropriate to issue a notice of violation, I find that I must consider the mitigating circumstances similar to those involved in determining the amount of a monetary penalty.

[59] In this case, I find that the Commission issued a notice of violation to the Appellant without a compelling reason to do so.

[60] The Appellant says he disputes the notice of violation issued to him but does not present a specific argument on this point.

[61] I am of the view that the Commission has not shown that it exercised its discretion judicially since, after it imposed a penalty on the Appellant, it issued a notice of violation to him without providing any explanation justifying the imposition of such a measure.

[62] I find that the Commission does not identify any relevant circumstances justifying the imposition of an additional penalty on the Appellant, on top of the penalty it imposed on him for his false statements, which means that the notice of violation was issued automatically.

[63] I find that, in exercising its discretion, the Commission took into account facts that were not relevant to making its decision on this issue.

³⁸ See section 7.1 of the Act.

³⁹ See section 7.1(4) of the Act.

⁴⁰ The Court established this principle in *Gill*, 2010 FCA 182.

[64] The Commission identifies several circumstances, like the fact that it considered the extenuating circumstances that may apply to the Appellant, the Appellant's past violations, and the impact of the notice of violation on the Appellant's ability to qualify for future benefit claims.⁴¹ However, the Commission does not explain how these circumstances justify issuing a notice of violation.

[65] Instead of explaining why issuing a notice of violation (in addition to the penalty that was imposed on him) could be justified, the Commission simply indicated that a notice of "very serious" violation was issued to the Appellant because of an overpayment of \$9,325.⁴²

[66] By mentioning that section 7.1(5) of the Act classified the violation based on the seriousness of the act or omission and that the classification of the violation was based strictly on the overpayment generated by the act or omission in question, the Commission only points out a characteristic of the notice of violation without showing the relevance of imposing such a measure.⁴³

[67] Despite its clarifications about the nature of the notice of violation, its general characteristics, and despite saying that this measure was justified, the Commission does not determine how the issuing of such a notice is appropriate in this case.

[68] I am of the view that the Commission did not exercise its discretion judicially when it decided to issue a notice of violation. The Commission based its decision on irrelevant factors that do not show that issuing this notice of violation could be justified.

[69] I find that the notice of violation issued to the Appellant must not be upheld.

[70] The appeal has merit on this aspect.

⁴¹ See GD4-6.

⁴² See GD3-95 and GD4-6.

⁴³ See GD4-6.

Conclusion

[71] On the issue of the imposition of a penalty on the Appellant for committing an act or omission by knowingly making false or misleading statements, the appeal is dismissed.

[72] Regarding the issue of the notice of violation that was issued to the Appellant after he received a penalty for committing an act or omission, the appeal is allowed.

[73] The appeal is allowed in part.

Normand Morin
Member, General Division – Employment Insurance Section