Citation: *Canada Employment Insurance Commission v BS*, 2025 SST 742

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	Canada Employment Insurance Commission
Representative:	Erin Tzetcoff
Respondent:	B. S.

Decision under appeal:	General Division decision dated April 11, 2025 (GE-25-322)

Tribunal member:	Stephen Bergen
Type of hearing:	Videoconference
Hearing date:	July 4, 2025
Hearing participants:	Appellant Respondent's representative
Decision date:	July 18, 2025
File number:	AD-25-331

Decision

[1] The appeal is allowed in part. The General Division made errors of fact, so I have made the decision the General Division should have made.

[2] The General Division did not consider whether the Commission made the penalty decision in a judicial manner, so I have made this decision as well. I found that the Commission did not make the decision judicially because it did not consider mitigating factors.

[3] Taking into consideration one mitigating factor that was raised before the General Division, I have reduced the penalty by 10% to $287.10.

Overview

[4] The Appellant is the Canada Employment Insurance Commission, which I will call the Commission. B. S. is the Respondent. I will call her the Claimant because this application is about her claim for Employment Insurance (EI) benefits.

[5] The Claimant left Canada during a period in which she was collecting EI benefits. She completed a claim report for that period, declaring that she was not outside Canada. When the Commission discovered this, it disentitled her to benefits for the period that she had been outside of Canada. It also imposed a penalty because it found that she knowingly made a false statement.

[6] The Claimant asked the Commission to reconsider the penalty, but it would not change its decision. So, she appealed to the General Division of the Social Security Tribunal. The General Division allowed her appeal. It found that she had not made a false statement knowingly. Because of this finding, the General Division did not decide whether the Commission properly imposed a penalty.

[7] The Commission appealed the General Division decision to the Appeal Division.

[8] I am allowing the Commission's appeal in part. The General Division did not consider all the evidence when it decided the Claimant had not made the false statement knowingly. It made a finding of fact without regard to contrary evidence.

[9] I am substituting my decision for that of the General Division. I find that the Claimant "knowingly" made her false statement, but I also find that the Commission did not act judicially when it imposed the penalty. I am reducing the penalty by 10% because of a mitigating circumstance.

Issues

The issues in this appeal are:

[10] Did the General Division make an error of law by relying on the Claimant's inattention without considering other relevant factors from case law?

[11] Did the General Division make an error of fact by,

- ignoring evidence that the Claimant failed to report an absence from Canada in a previous claim?
- ignoring evidence that the Claimant filed her report for the week in question on July 26, 2022?

Analysis

[12] The Appeal Division may only consider errors that fall within one of the following grounds of appeal:

a) The General Division hearing process was not fair in some way.
b) The General Division did not decide an issue that it should have decided. Or, it decided something it did not have the power to decide (error of jurisdiction).
c) The General Division made an error of law when making its decision.
d) The General Division based its decision on an important error of fact.[1]

[1] This is a plain-language version of the three grounds. The full text is in section 58(1) of the *Department of Employment and Social Development Act* (DESDA).

[13] The Commission has argued the grounds of appeal concerned with errors of law and of fact.

Error of law

[14] The General Division is bound to follow decisions of the Federal Court and Federal Court of Appeal, and it will make an error of law if it fails to do so.

[15] One of the Commission's arguments is that the General Division made an error of law by failing to follow the Federal Court of Appeal's decisions in *Bellil* and *Ftergiotis*.[2] It expanded on this to say that the General Division failed to consider relevant factors identified in those decisions.

[16] The courts acknowledge that a subjective test is used to determine whether a claimant's false statement was made "knowingly."[3] However, they have also held that it is not sufficient for a claimant to proclaim their ignorance. The General Division does not need to believe the claimant, and the Appeal Division need not always defer to the General Division when the General Division has accepted what a claimant says about their knowledge.

[17] When it comes to how a claimant incorrectly answers very simple questions, the onus is on the claimant to show that they did not know their statement was false.[4] Objective factors may be taken into account when evaluating what the claimant likely knew.[5]

[18] The *Bellil* decision suggests that education is one such factor, among others, and it did not accept that the claimant was excused by their inattention to the questions on the claim reports. In *Bellil*, the Court considered a set of circumstances that is similar to

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[2] See Canada (Attorney General) v. Bellil, 2017 FCA 104; Ftergiotis v. Canada, 2007 FCA 55.
[3] See *Mootoo v. Canada (Attorney General)*, 2003 FCA 206
[4] See *Canada (Attorney General) v. Gates (C.A.), 3* FC 17; Mootoo v. Canada *(Attorney General)*, 2003 FCA 206; and *Canada (Attorney General) v. Purcell*, [1996] 1 F.C. 644.
[5] Supra notes 2 and 3.

those of the Claimant: The claimant had not paid attention to the questions and had filled it out “mechanically.”

[19] In that appeal, the General Division had accepted the claimant’s explanation, and the Appeal Division agreed. But when the Court reviewed the decision, it decided the Appeal Division’s decision was unreasonable. It held that the Appeal Division should have found that the General Division failed to consider other evidence when it evaluated the claimant’s explanation. This included evidence that the claimant was outside Canada for seven claim report periods, and that he was filing reports stating he had not left Canada at the same time that he was outside the country.

[20] In *Ftergiotis,* the claimant made false statements on nine report cards that he was not working and that he had no earnings. These reports covered a period in which he was working and receiving substantial earnings. The claimant asserted that his statements were “unintentional,” resulted from a “human error,” that he was confused, and that his employer’s pay system was to blame in part.

[21] The analysis in the *Ftergiotis* decision is brief, but the Court appears to have been persuaded that the claimant should have at least reported that he was working, even if he was uncertain how much money he made. *Ftergiotis* did not accept that the claimant’s assertion that he was confused or that it was a human error meant that he had not knowingly made a false statement.

[22] The Commission appears to be interpreting the *Bellil* and *Ftergiotis* as decisions **requiring** the General Division to consider certain relevant factors. It believes the General Division failed to follow binding precedent, because it did not examine these factors.

[23] However, the Commission’s submissions also anticipated the possibility that the *Bellil* and *Ftergiotis* decisions might be distinguished on the facts. The claimants in those cases had made multiple false statements. In this case, the Claimant made only one false statement that she had been out of the country, on one claim report.

[24] The Commission referred me to three decisions in which the claimant was found to have knowingly made a false statement, despite having made that statement in only one claim report. It cited the Appeal Division decision in *Canada Employment Insurance Commission v G.O.,* as well as CUB 11584 and CUB 5916, which are decisions of the former Umpire.[6] None of these decisions are binding on the Tribunal, but they may be persuasive.

[25] In the *G.O.* decision, the Appeal Division found that the General Division had not considered the claimant's education, a factor which was identified as relevant in the *Bellil* decision. The Appeal Division said that the General Division "misapply[ied] binding jurisprudence," and it characterized this as an error of law.

[26] I would respectfully disagree with how *G.O.* characterized the error as one of law. In my view, *Belill* does not mean that a claimant, who says they did not know their statement was false, cannot be believed if they are educated or cannot be believed based solely on the existence of any other factor that was present in *Bellil*.

[27] The message in *Bellil* is that the General Division cannot simply accept the Claimant's assertion that they did not know they were making a false statement, without considering whether they are believable. It does not identify some particular factor or list of factors that are determinative.

[28] For example, *Bellil* made specific mention of the claimant's education. I agree that a claimant's level of education or sophistication may be relevant where the claimant asserts they did not understand the question. But this does not mean that such a claimant must, or may, be disbelieved just because they are well educated.

[29] The *Bellil* decision means only that the General Division must consider whatever other evidence is available of the circumstances surrounding the false statement.

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[6] Canada Employment Insurance Commission v G.O.2019 SST 1028, and CUB 11584 and 5916, respectively. The Umpire was the decision-maker in the final level of administrative appeal under a former appeal scheme. Decisions of the Umpire are reported in Canadian Umpire Benefit (CUB) reports.

[30] In CUB 11584, the claimant declared incorrect earnings information in his claim reports. He explained that he had not paid enough attention to the date on the cards. The Umpire found that the claimant made the false statement knowingly. It said the case was "strikingly" similar to CUB 5916. In CUB 5916, the Umpire also found that the claimant had knowingly made a false statement. The Umpire said that a Claimant may "knowingly" make a false statement deliberately or recklessly. He noted that the claimant admitted that there was a good chance his earnings information was incorrect, from which the Umpire inferred that the claimant was reckless in the fulfillment of his obligations.

[31] The Umpire in CUB 5916 confirmed that the claimant's knowledge is a "pure question of fact," and I agree. This means that the General Division was not bound to reach the same decision as *Bellil*, unless all the relevant factual considerations in *Bellil* were also present in this case.

[32] I recognize that many of the relevant "factors" considered by the Court in *Bellil* are also found in this case. For example, the Court appeared to infer a capacity to understand the claim report questions and the reporting process from the claimant's education. The Claimant in this case also appears to be educated. She works as an educator and has prepared thoughtful and coherent submissions.

[33] Additionally, *Bellil* referred to the numerous instructions and warnings found in the initial application. These direct claimants to declare absences from their area or residence and/or Canada, and warn about false representations. The Court noted that claimants cannot submit their claim reports without attesting that they are accurate. The same instructions and warnings and attestations were also present in this case.[7]

[34] However, *Bellil* also relied on evidence of relevant factors that are not found within the evidence in this case. *Bellil* referred to the fact that the claimant submitted reports that he had not left the country at a time when he was still outside of Canada. So, he was making the false statements at the very time that they were false. The Court

[7] See GD3-9, GD3-10, GD3-18, GD3-21.

also noted that the claimant falsely declared he had not been outside of Canada in seven claim reports. And it questioned why he had not understood the question when he first read it, since he was asserting that he completed all of the reports mechanically.

[35] Likewise, the claimant in *Ftergiotis* was claiming that he was not working at the very time that he was working, and he also made these statements over a number of reporting periods.

[36] *The* General Division did not make an error of law by failing to follow a legal test or principle laid down in *Bellil* or *Ftergiotis.* These decisions serve only to reinforce the broad principle that the General Division must consider all the evidence. In other words, the General Division must evaluate the claimant's explanation in light of all the evidence. If the General Division failed to do so, I would characterize this as an error of fact, as opposed to an error of law.

[37] And the General Division did not make an error of law because it reached a different result than that of *Bellil* or *Ftergiotis*. *Bellil* and *Ftergiotis* may be distinguished on the facts. Some of the factors which challenge the plausibility and/or credibility of the claimant's evidence in the *Bellil* and *Ftergiotis* decisions are not found in this appeal.

Error of fact

[38] The Commission argued that the General Division made an error of law by failing to consider relevant factors. I have found that this was not an error of law. However, the Commission also argued that the General Division made errors of fact by failing to consider relevant **evidence.**

[39] The Commission said that the General Division did not consider that the Claimant had failed to report her absence from Canada in a previous claim. It also noted that the General Division did not address a contradiction between her testimony and other file evidence about when she filed her claim report.[8]

[8] See AD1-7

[40] I agree that the General division made errors of fact.

– **Previous failure to report absence**

[41] The Commission noted that it had discussed with the Claimant how she had failed to report her absence from Canada in a previous claim.[9] It said she would have to be aware that she needed to report her absence.[10]

[42] In its submissions to the General Division, the Commission referred to this incident again. It said that the Claimant failed to report an absence from Canada in 2014. It also said that it had issued a penalty in connection with the incident, but rescinded it.

[43] At the Claimant's hearing, the General Division member asked her about this specifically. The Claimant acknowledged that what occurred in 2014 was similar to what happened in 2022.[11] She stated that it was her usual practice to click the question responses quickly and methodically when she completed the claim reports. She suggested that she had completed her reports in 2014 in a manner that was similar to how she completed them in this case.

[44] The General Division made an error of fact. It made no reference to the evidence of the prior incident, and this history is relevant to the General Division's assessment of the Claimant's subjective knowledge. The Claimant had been challenged once before for having made a false statement about not leaving Canada. This fact makes it less likely she would have completed her claim reports without thinking of that particular question or knowing that the question required a response other than the response generated by her usual practice.

– **When the Claimant filed her claim report**

[45] The Claimant acknowledged to the Commission that she was outside of Canada from July 17 to July 24, 2022. In her testimony to the General Division, she said she

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[9] See GD3-34.
[10] See AD3-5.
[11] Listen to the audio recording of the General Division hearing at timestamp 0:08:28.

filed her report for the week she was outside of Canada as part of four weeks worth of reporting. She said that she did not submit it until about two weeks after she had returned to Canada.

[46] The General Division accepted this as fact. However, it did not refer to the file information which indicated that the report for that week was actually filed July 26, 2022.[12]

[47] The length of time since her absence of Canada is relevant to the plausibility of her completing the reports without giving any consideration to her absence from Canada. She is more likely to have had her absence from Canada in mind and know that her reports cover the period of her absence, when she had only just returned to Canada.

[48] The General Division made an error of fact by not referring to this evidence and not addressing the contradiction between her testimony and the file evidence.

Summary

[49] I have found that the General Division made errors of fact. Now I must decide what I should do about the errors.

Remedy

[50] I have the power to send the matter back to the General Division to reconsider, or I may make the decision that the General Division should have made.[13]

[51] The Commission asks that I make the decision the General Division should have made. It suggests that I should find that the Claimant made a false statement knowingly.

[52] The General Division did not review whether the Commission acted judicially when it decided on the penalty. This is not surprising because it decided that the Claimant did not knowingly make a false statement—which would mean that she cannot

[12] See GD3-19.
[13] See section 59(1) of the DESDA.

be penalized. However, a decision which finds that a claimant has knowingly made a false statement is almost always associated with a penalty decision.

[53] Recognizing this, the Commission is asking me to also decide that the Commission made its penalty decision properly or "judicially," and uphold its penalty decision.

[54] The Claimant also says that I should make the decision, adding that she does not believe the penalty is fair.

[55] I agree that I can also make the decision on the false statement as well as a decision on how the penalty was decided. Although the General Division did not address whether the Commission decided on the penalty in a judicial manner, there is no new evidence to be considered, and the parties have now made their arguments.

– **Was the false statement made knowingly?**

[56] I find that the Claimant made the false statement knowingly.

[57] The Claimant's argument is that her regular job is seasonal and that she has filled out these reports in the same way for many years. Filling out the reports has become a routine task that she completes quickly and with little thought. She has often delayed in filing her reports, which means she has had to catch them up, filing reports for more than two weeks at once. As a result, she pays less attention to the reports, and she did not pay enough attention in this case.

[58] I appreciate that the Claimant was out of the country for one week, and thus the representation that she was not out of the country was only false on one report. I also recognize that she has filed these reports for a number of years, and it is understandable that she would pay less attention to the questions over time.

[59] I listened to the audio record of the General Division hearing and I have considered her testimony. I accept that it was her practice to complete her reports quickly and with little thought. I also accept that she often delayed filing her claim reports and then filed more than one claim report at a time. I have no reason to

disbelieve her when she says she filed claim reports for four weeks at once on this occasion.

[60] However, I do not accept her testimony that she delayed filing her reports until two weeks after her return - this time. I prefer the file evidence on this point. Canada Border Services Agency stated that she was out of Canada from July 17 – July 24, 2022.[14] The online report claim cards are dated, and the Claimant's report for the week of July 17 – July 23, was dated July 26, 2022. I accept this evidence. This means that she made the statement that that she had not been out of Canada within three days of the reporting period and within two days of her return to Canada—not two weeks later.

[61] Furthermore, the Claimant acknowledged that she had found herself in the same situation in 2014, where she made a statement on her claim report that she had not been outside of Canada when that was not true. She faced the same consequences at that time, although the Commission apparently did not impose a penalty in the end.

[62] I do not accept that she did not know that she would be misrepresenting her presence in Canada by completing her reports according to her usual practice.

[63] The Claimant made the false statement to the Commission in reports filed within days of her return to Canada. It is unlikely that she would have forgotten that she had been absent from Canada in the week that was immediately prior to her submitting a claim report for the same week.

[64] Given her past misrepresentation for a time that she was outside of Canada, the Claimant had to be aware that the claim reports included a question about this. And she had to know, from the Commission's earlier response, that it was important she answer it correctly. I find it incredible that this would not be on her mind when she completed her reports.

[65] As in other EI claims, the application and reporting process would have involved various warnings and confirmations or attestations. To claim that she had not been outside of Canada, the Claimant would have had to close her mind to all that she is

[14] See GD3-23.

reading or has read about EI benefits, including what she is acknowledging, choosing, and attesting.

[66] She says she followed her usual practice, which is to give no thought to the questions or their answers. Even if this were true, her practice demonstrates that she knew she had to file her reports so that the Commission would pay her benefits. So, she undoubtedly understood that the Commission would not pay those benefits without receiving her claim reports and considering the responses in those reports.

[67] The purpose of the questions is to obtain information so that the Commission can assess her ongoing entitlement. By answering the questions rotely, as she always did, the Claimant was essentially refusing to update the Commission on her circumstances.

[68] Some of the facts in this case are more supportive that she did not "know" she was making a false statement than were the facts in the *Bellil* case, such as the fact that she made only one false statement. Other facts are less supportive, such as the fact that she had once before made exactly the same false representation.

[69] Although the facts are not identical to the facts in *Bellil*, I have reached the same decision as *Bellil*, and for essentially the same reason. The Court in *Bellil* said: "A claimant cannot avoid an administrative penalty by relying on [their] own negligence under the cover of automatism."[15] In other words, I am not required to accept that the Claimant did not know she made a false statement just because she asserts she was not paying attention.

[70] I find that the Claimant made a false statement "knowingly." When I consider the context in which she made the false statement, I cannot accept her assertion that she did not know she had done so. In my view, this assertion is inconsistent with the "preponderance of probabilities that rationally emerge out of all the evidence in this case."[16]

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[15] Supra, note 2, at para 18.
[16] *Faryna v Chorny*, 1951 CanLII 252 (BC CA)

– **Did the Commission act judicially when it imposed a penalty?**

[71] I find that the Commission did not act judicially in how it assessed the Claimant's penalty. It did not consider mitigating factors.

[72] When a Claimant makes a false statement, the Commission may impose a penalty. Whether it imposes a penalty, and the amount of that penalty, is a discretionary decision.

[73] The law says that the Commission must act judicially when it makes a discretionary decision. This means that it cannot act out of bad faith or with an improper purpose and it cannot act in a discriminatory fashion. It also means that it must consider all the relevant factors and not consider any irrelevant factors.

[74] There is no evidence on which I might find that the Commission acted in bad faith, with an improper purpose, or in a discriminatory fashion. The question in this case is whether the Commission considered the relevant factors and not irrelevant ones, when it reconsidered.

[75] The law does not tell the Commission which factors are relevant. However, the Commission has a policy which outlines some factors which it considers relevant. The Digest of Benefit Entitlement Principles (Digest) is a statement of how the Commission interprets its legislative mandate. It includes its policy interpretations. Among those policies are the Commission's policy by which it assesses penalties.[17]

[76] Where the Commission has used its discretion to reconsider its own decisions, the Appeal Division has held that the Commission's policy is a relevant factor.[18] I accept that the Commission's policy would also be relevant to its penalty decisions.

[77] The Commission's penalty policies consider such factors as the amount of the net overpayment, and whether the Claimant made any other false statement within the past five years (and how many times). The penalty is subject to a cap set by legislation, and a "legal validation amount." In this case, the penalty was based on the net

[17] See Chapter 8 of the Digest found at Digest of Benefit Entitlement Principles—Canada.ca.
[18] See *Canada Employment Insurance Commission v MA*, 2022 SST 1018.

overpayment. The Commission's policy says that it must consider mitigating circumstances and reduce the penalty accordingly.[19]

[78] The Commission's policy is a relevant factor. That means that "mitigating circumstances" are a relevant factor.

[79] The Commission stated that there were no mitigating circumstances in this case. However, there is no suggestion that it actually evaluated the Claimant's particular circumstances. The Digest sets out a non-exhaustive list of mitigating circumstances. "Genuine regret," and whether the overpayment was already repaid are among the listed circumstances.[20]

[80] I do not accept that the Claimant is genuinely regretful, so I do not accept the Commission needed to consider this as a mitigating circumstance.

[81] The Claimant in this case did not express "regret" for making the false statement, in the sense that she was sorry for having deceived the Commission. This makes sense given that she has consistently maintained that her mistake was inadvertent and that she did not mean to deceive the Commission.

[82] The Claimant asserted that she should be excused from the consequences of her misrepresentation on the basis that she followed her usual practice of completing the statements rotely. She has said that this is the result of having filed the same reports over many years.

[83] I appreciate that the Claimant maintains that she had not meant to make a false report or obtain benefits to which she was not entitled. But even if she believes that to be true, she was reckless at best. She has not even expressed regret for her recklessness. The Claimant has not acknowledged that she should have taken time to understand, or to remind herself, of her obligations under the EI Act, or that she should have taken her attestations and acknowledgements seriously.

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[19] See section 18.5.1.3 and of the Digest.
[20] See the Digest of Benefit Entitlement Principles (Digest) found at Digest of Benefit Entitlement Principles—Canada.ca, at section 18.5.2.2.

[84] She has not apologized for frustrating the Commission's administration of her claims. The Commission needs regularly updated information so that it can properly assess her benefit entitlement. By her own admission, the Claimant has a years-long practice of ticking off answers to the questions on claim reports without thinking about whether her answers are correct.

[85] If the Claimant had repaid the benefits she should not have received, this would also be a mitigating circumstance.

[86] She did not repay the extra benefits before the Commission investigated. She says that this is because she did not realize what she had done until then. She also says that she acknowledged that she was not entitled to the benefits for that week once it was brought to her attention.

[87] The Commission did not dispute that she has been willing to repay those benefits since she learned of her mistake (although she thought the Commission was deducting it from other benefits owed to her).

[88] I find that the Commission should have considered that the Claimant was always willing to cooperate and to repay the overpayment as required. It failed to consider whether this mitigating circumstance applied in the Claimant's case.

[89] I do not see any other circumstance that mitigates the penalty. The penalty as assessed is relatively small, and there is no evidence of financial hardship. None of the other mitigating factors suggested in policy are applicable:

[90] While the factors described in policy are not all the factors that may be considered, I do not see that there is any other factor the Commission should have considered. Nor does the evidence suggest that the Commission consider irrelevant factors.

The penalty

[91] Mitigating circumstances aside, I agree with how the Commission calculated the penalty amount at $319.00. Her overpayment was $638.00, and the Commission was correct to discount this amount by 50% as a first level misrepresentation.

[92] The Commission says that I cannot substitute my opinion on the penalty when faced with the same facts. It cites the *Gagnon* decision as an authority.[21] However, *Gagnon* is referring to the "same facts" as those facts that were considered by the Commission. In *Gagnon*, the Commission had already reduced the penalty based on mitigating circumstances, and this had been reduced further on appeal without any new mitigating circumstances.

[93] *Gagnon* does not prevent me from reducing the penalty. The mitigating circumstances may not have changed, but the Commission did not consider any mitigating circumstance in its initial penalty decision.

[94] I am discounting the penalty by an additional 10% on a discretionary basis, based on the one mitigating factor. I accept that the Claimant always intended to repay the overpayment and that she has made good faith efforts to ensure the Commission is repaid.[22]

[95] The penalty is reduced to $287.10.

Conclusion

[96] The appeal is allowed in part. The General Division made errors which I have corrected by substituting my decision. I am making the decision that the General Division should have made, which includes making a decision on whether the Commission acted judicially in imposing a penalty.

[97] I have found that the Commission did not act judicially because it failed to consider or analyze mitigating factors. I have reduced the penalty to $287.10.

Stephen Bergen
Member, Appeal Division

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[21] See *Canada (Attorney General) v. Gagnon*, 2004 FCA 351.
[22] See GD3-32.