Citation: *O. B. J. v. Canada Employment Insurance Commission,* 2014 SSTGDEI 37

Appeal #: GE-13-2504
GE-14-496
GE-14-498

BETWEEN:

O. B. J.

Appellant
Claimant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance

SOCIAL SECURITY TRIBUNAL MEMBER:	Alyssa Yufe
HEARING DATE:	May 1, 2014
TYPE OF HEARING:	Teleconference
DECISION:	Appeal dismissed in part

PERSONS IN ATTENDANCE

The Appellant attended the hearing by way of telephone conference. No one else was in attendance.

DECISION

Overpayment Amount

[1] With respect to the alleged overpayment amount, the Member of the Social Security Tribunal, General Division, Employment Insurance Section (the "Tribunal") finds that the amounts in question should be allocated in accordance with sections 35 and 36 of the *Employment Insurance Regulations*, SOR /96-332 (the "Regulations"). The Appeal with respect to this issue is, accordingly dismissed.

Penalty

[2] With respect to the issue of the penalty amount, the Tribunal finds that the Appellant did not knowingly make false representations when he completed his reports. His appeal with respect to this issue is allowed.

Notice of Violation

[3] With respect to the issue of the Notice of Violation, the Tribunal notes that this issue was withdrawn by the Appellant at the hearing and that the Tribunal accepted the withdrawal pursuant to section 14 of the *Social Security Tribunal Regulations*, SOR/2013-60 (the "Regulations").

INTRODUCTION

[4] The Appellant filed an initial claim for benefits on June 30, 2010 (Exhibit GD3-9). The Appellant's claim was effective June 27, 2010 (GD4-1).

[5] The Canada Employment Insurance Commission (the "Commission") decided on September 18, 2013, that following its letter to the Appellant on April 10, 2012, it found that he did not declare the earnings which he received as salary from his employer (GD3-

19). The Commission also determined that the Appellant knowingly made 15 false representations and it issued a penalty in the amount of $1,219.00 and a Notice of Violation for a serious violation (GD3-22).

[6] The Notice of Debt dated February 7, 2014, at GD3-23 provides that the Appellant owes $1,219.00 as a penalty; and $1,993.00 + $445.00 because he misrepresented his earnings and this caused an overpayment. The total amount owing was $3,657.00.

[7] The Appellant filed a Request for Reconsideration with the Commission on October 21, 2013 (GD3-24). The Commission decided on November 13, 2013, to maintain its original decision (GD3-26) save and except for the following: 1) the Commission overturned its decision with respect to this issue and cancelled the Notice of Violation; and, 2) the Commission reduced the penalty amount to $450.00, which represented approximately 18.5% of the overpayment amount (GD3-95 and 96).

[8] The Appellant filed an appeal to the Tribunal on December 16, 2013 (GD-2).

[9] By notice dated, March 21, 2014, the Tribunal decided on its own initiative to deal with file GE-13-498 (issue of penalty), file GE-14-496 (issue of the Notice of Violation) and file GE-14-2504 (issue of the overpayment amount) jointly pursuant to section 13 of the *Social Security Tribunal Regulations*, SOR/2013-60.

[10] At the hearing, the Appellant provided notice that he wanted to withdraw the appeal with respect to the Notice of Violation (File GE-14-496) and the Tribunal accepted his withdrawal pursuant to section 14 of the Regulations.

FORM OF HEARING

[11] The hearing was heard in via teleconference for the reasons indicated in the Notice of Hearing dated March 21, 2014.

ISSUE

Overpayment

[12] Whether or not the Appellant's earnings should be allocated pursuant to sections 35 and 36 of the Regulations?

The Penalty

[13] Whether or not the Commission exercised its discretion judicially when it decided to impose the penalty and when it calculated the amount.

THE LAW

Authority to re– assess:

[14] Section 43 of the *Employment Insurance Act*, S.C. 1996, c. 23 (the "Act") provides as follows:

43. A claimant is liable to repay an amount paid by the Commission to the claimant as benefits

(*a*) for any period for which the claimant is disqualified; or

(*b*) to which the claimant is not entitled.

[15] Section 52 of the Act provides as follows:

52. (1) Despite section 111, but subject to subsection (5), the Commission may reconsider a claim for benefits within 36 months after the benefits have been paid or would have been payable.

(2) If the Commission decides that a person has received money by way of benefits for which the person was not qualified or to which the person was not entitled, or has not received money for which the person was qualified and to which the person was entitled, the Commission must calculate the amount of the money and notify the claimant of its decision.

(3) If the Commission decides that a person has received money by way of benefits for which the person was not qualified or to which the person was not entitled,

(*a*) the amount calculated is repayable under section 43; and

(*b*) the day that the Commission notifies the person of the amount is, for the purposes of subsection 47(3), the day on which the liability arises.

(4) If the Commission decides that a person was qualified and entitled to receive money by way of benefits, and the money was not paid, the amount calculated is payable to the claimant.

(5) If, in the opinion of the Commission, a false or misleading statement or representation has been made in connection with a claim, the Commission has 72 months within which to reconsider the claim.

Income:

[16] Income is defined in subsection 35(1) of the Regulations as follows:

"income" means any pecuniary or non-pecuniary income that is or will be received by a claimant from an employer or any other person, including a trustee in bankruptcy.

Earnings:

[17] Subsection 35(2) of the Regulations provides as follows:

35(2) Subject to the other provisions of this section, the earnings to be taken into account for the purpose of determining whether an interruption of earnings under section 14 has occurred and the amount to be deducted from benefits payable under section 19, subsection 21(3), 22(5), 152.03(3) or 152.04(4) or section 152.18 of the Act, and to be taken into account for the purposes of sections 45 and 46 of the Act, <u>are the entire income of a claimant arising out of any employment</u>, including

a) amounts payable to a claimant in respect of wages, benefits or other remuneration from the proceeds realized from the property of a bankrupt employer; [Emphasis added]

[18] Subsection 35(7) sets out certain items which are not included as income. It provides as follows:

35(7) That portion of the income of a claimant that is derived from any of the following sources does not constitute earnings for the purposes referred to in subsection (2):

(*a*) disability pension or a lump sum or pension paid in full and final settlement of a claim made for workers' compensation payments;
(*b*) payments under a sickness or disability wage-loss indemnity plan that is not a group plan;
(*c*) relief grants in cash or in kind;
(*d*) retroactive increases in wages or salary;
(*e*) the moneys referred to in paragraph (2)(*e*) if
(i) in the case of a self-employed person, the moneys became payable before the beginning of the period referred to in section 152.08 of the Act, and
(ii) in the case of other claimants, the number of hours of insurable employment required by section 7 or 7.1 of the Act for the establishment of their benefit period was accumulated after the date on which those moneys became payable and during the period in respect of which they received those moneys; and
(*f*) employment income excluded as income pursuant to subsection 6(16) of the *Income Tax Act*.

Allocation:

[19] Subsections 36(1) and (4) of the Regulations provide as follows:

36**.** (1) Subject to subsection (2), the earnings of a claimant as determined under section 35 shall be allocated to weeks in the manner described in this section and, for the purposes referred to in subsection 35(2), shall be the earnings of the claimant for those weeks.

[…]

(4) Earnings that are payable to a claimant under a contract of employment for the performance of services shall be allocated to the period in which the services were performed.

Penalty:

38. (1) The Commission may impose on a claimant, or any other person acting for a claimant, a penalty for each of the following acts or omissions if the Commission becomes aware of facts that in its opinion establish that the claimant or other person has

(*a*) in relation to a claim for benefits, made a representation that the claimant or other person knew was false or misleading;

(*b*) being required under this Act or the regulations to provide information, provided information or made a representation that the claimant or other person knew was false or misleading;

(*c*) knowingly failed to declare to the Commission all or some of the claimant's earnings for a period determined under the regulations for which the claimant claimed benefits;

(*d*) made a claim or declaration that the claimant or other person knew was false or misleading because of the non-disclosure of facts;

(*e*) being the payee of a special warrant, knowingly negotiated or attempted to negotiate it for benefits to which the claimant was not entitled;

(*f*) knowingly failed to return a special warrant or the amount of the warrant or any excess amount, as required by section 44;

(*g*) imported or exported a document issued by the Commission, or had it imported or exported, for the purpose of defrauding or deceiving the Commission; or

(*h*) participated in, assented to or acquiesced in an act or omission mentioned in paragraphs (*a*) to (*g*).

(2) The Commission may set the amount of the penalty for each act or omission at not more than

(*a*) three times the claimant's rate of weekly benefits;

(*b*) if the penalty is imposed under paragraph (1)(*c*),

(i) three times the amount of the deduction from the claimant's benefits under subsection 19(3), and

(ii) three times the benefits that would have been paid to the claimant for the period mentioned in that paragraph if the deduction had not been made under subsection 19(3) or the claimant had not been disentitled or disqualified from receiving benefits; or

(*c*) three times the maximum rate of weekly benefits in effect when the act or omission occurred, if no benefit period was established.

EVIDENCE

[20] The Appellant filed an initial claim for benefits on June 30, 2010 (GD3-9).

[21] GD3-6 of the Appellant's application for benefits, provides that the Appellant was required to report all of his employment and earnings and it warns against providing false information or making of false statements.

[22] According to the record of employment ("RO E") dated June 30, 2011, the Appellant worked as a "teacher" at the "EMSB" (the "Employer) from October 6, 2010 to June 23, 2011 and accumulated 409 insurable hours. The reason for issuing the ROE was listed as Code "A" for "end of work/end of contract or season (GD3-11).

[23] On or about December 15, 2011, the Commission received a response from a request for payroll information from the Employer, which showed that the Appellant received various amounts for the weeks from October 3, 2010 to April 24, 2011 (GD3-12 to 14).

[24] On or about December April 20, 2012, the Appellant confirmed that he received the amounts alleged at GD3-17. He also attached a letter, which advised as follows: What he did was the result of misunderstandings and misinformation; He has rarely gone on unemployment and is not well versed in it; Until July 2010, he was teaching as a teacher at Lower Canada College ("LCC"); He decided that he wanted more of a challenge and he went to teach in an outreach alternative school for troubled teens; He told the principal at the EMSB that he would even sweep floors just to get a job at the outreach schools; A few months later, he got a part time job tutoring troubled teens in Math for 3 hours a week and substitution whenever needed; The payroll clerk told him that he could work and earn up to 25% of the employment insurance amount; He did the math and saw that he was earning well below the allowable amount without needing to declare his earnings; He thought that the payroll clerk's advice might have been inconsistent with what he understood from the telephone reporting; He went to Decarie square and asked the agent if

he should quit his benefits; He responded that he should not quit for that amount of money; He now understands everything, based on his conversation of the same date with the Commission agent (GD3-18).

[25] On October 21, 2013, the Appellant provided the following evidence in in his Request for Reconsideration: He was told by "Admin." That he could work up to 25% of his employment insurance claim without needing to declare; It was a naïve mistake and not intentional and certainly his first (GD3-24).

[26] On November 12, 2013, the Commission agent noted that the Appellant gave the following additional evdience: An overpayment was established because the Appellant did not report earnings from October 3, 2010 to April 24, 2011; This is the first time in 3 years that he has a full time job, which pays $48,000.00 a year; Because his work was irregular and he was not employed full time, he incurred debts; He is married and has 3 children; He has remorse for his actions and is ashamed and would like the Commission to reconsider the overpayment, the penalty and the violation; This is his first offence and he would like the Commission to reduce the amount owed on this basis (GD3-25).

[27] At GD3-12 and GD3-15, the Commission agent certified copies of the Telephone E-Report Questions and answers for the period from October 3, 2010 to December 11, 2010 (GD3-19 to 39) (the "Telephone Reports") and the Internet E-Reporting Questions and Answers for the Appellant for the period from December 12, 2010 to April 30, 2011 (GD3-40 to GD3-79) (The "Internet Reports") (the Telephone Reports and the Internet Reports are referred to collectively herein as the 'E-Reports'). These reports show that the Appellant reported that he did not work or earn any wages or receive or expect to receive any money for the periods in question. In the Telephone Reports, the Appellant verified and confirmed his answer after each question and was provided with a warning that providing false information was punishable by law. In the Internet Reports, the Appellant was required to confirm his answers at the end of the report.

[28] In the Notice of Appeal, the Appellant gave the following evidence: I made a stupid mistake and I would like to be forgiven the penalties based on the nature of my job and the fact that I am a "first time offender" (GD2).

Testimony at the hearing:

[29] The Appellant testified under solemn affirmation.

[30] The Appellant advised that he would like to withdraw his appeal regarding the Notice of Violation because he recognized that the Commission decided this issue in his favour. He also advised that he did not intend for the Tribunal to interpret that he was appealing all three issues when he sent in all three decision letters.

[31] The Appellant started working at sixteen years of age and has very little experience with employment insurance benefits since that time.

[32] The Appellant worked in business and in business management during the first part of his career. In or around the year 2000 or 2002, the Appellant commenced teaching. After his job ended in June 2010, he decided that he would attempt to gain entry into the outreach school system.

[33] He became very passionate about and committed to helping teenagers at risk. He really wanted to obtain full time employment at the outreach school and he started working towards that goal by accepting part time employment.

[34] He explained that the job was extremely stressful. He would receive calls at 2.00am on a regular basis and he would have to go out and rescue children from crack houses and other situations in the middle of the night.

[35] Through his efforts and hard work, he pioneered a new program and the Minister of Education has instituted the program in the school system. He explained that if he did not help the children at risk, they would have been on the street, in great danger, or in jail.

[36] He spoke about the cost of rehabilitating or imprisoning people and he argued that through the work that he did, all levels of government saved a great deal of money.

[37] He did not realize that he made any representations, which were not true or accurate until he received the Notice of Debt. When he saw it, he felt as though "his heart went in his throat". After he spoke with the Commission agent, he understood what went wrong and was embarrassed by the mistake.

[38] The Appellant repeated the information in his file at GD3-18 and GD3-24 to 25 and advised that his misunderstanding was based on the advice, which he received from the payroll clerk that he could work and earn up to 25% of the employment insurance amount. The Appellant explained that he understood this to mean that he did not have to report his earnings,, unless they were over 25% of the amount, which he was receiving from employment insurance. The Appellant explained that he attempted to verify the payroll clerk's advice when he went to the Commission office on Decarie and spoke to an agent (GD3-18). When the agent told him that he did not have to stop receiving benefits because the amount he was earning was low, the Appellant took that to mean that he did not have to report the low amount of earnings either.

[39] The Appellant also explained that the work, which he was doing for the outreach school consumed him and was stressful and overwhelming and it prevented him from focusing or concentrating to the extent required in other areas of his life, including, when he was completing his employment insurance reports. He also explained that not having a full time or secure job also caused him a great deal of stress.

[40] The Appellant also advised that this was his first full time job in 3 years. He has no job security because he has no seniority and because of the youth of the program and his entry position. He has no idea whether he will be rehired for the following year.

[41] With respect to his financial situation and ability to pay, the Appellant advised that he incurred a great deal of debt when he was not working full time. He recently reconciled with his spouse and he has 3 children. He has always supported his children.

He said that while he is not on the verge of bankruptcy, it will be challenging for him to repay the amount.

SUBMISSIONS

[42] The Appellant submitted that the amount should not be allocated in the manner proposed by the Commission for the following reasons:

a) The work that he has done in helping to educate children and rescue them from the streets and dangerous situations should be recognized. That he used the employment insurance funds to sustain himself to do this work should be a factor for the Tribunal's consideration of whether or not he has to pay the overpayment amount (his testimony);

b) That he made a mistake when he reported his earnings and he is embarrassed and ashamed of this. This shame and remorse should be taken into account in deciding whether he should be required to repay the overpayment amount (his testimony, GD3-25, GD2);

c) The overpayment amount should be written off by the Tribunal because paying this amount would cause him and his family undue hardship (his testimony);

[43] The Respondent submitted as follows:

Overpayment (File GE-13-2504)

a) The Appellant did not declare any earnings for the weeks between October 3, 2010, and April 30, 2011 (GD4-1);

b) Sums received from an employer are presumed earnings and must therefore be allocated unless the amount falls within an exception in subsection 35(7) of the Regulations or does not arise from employment (CUB 79974)(GD4-3);

c) Section 35 of the Regulations defines income as "any pecuniary or non-pecuniary income that is or will be received by a claimant from an employer or any other person, including a trustee in bankruptcy" (GD4-30);

d) The money, which the Appellant received from the Employer constituted "earnings" because the money was paid as wages to compensate the Appellant for his work (GD4-x);

e) The "entire income of a claimant arising out of any employment" is to be taken into account in calculating the amount to be deducted from benefits (*McLaughlin*, 2009 FCA 365)(GD4-3);

f) Monies which constitute earnings under section 35 of the Regulations must be allocated pursuant to section 36 of the Regulations (*Boone*, 2002 FCA 257)(GD4-3);

g) As such, the money had to be allocated pursuant to subsection 36(4) of the Regulations to the period in which the services were performed (GD4-3);

Penalty (File GE-13-498)

h) All claimants are required to make their claim for benefits by completing claimant reports in order to prove their entitlement to benefits for each and every week. In the case at hand, the Appellant completed his reports by phone for the period from October 3, 2010 to December 11, 2010 and by Internet for the period from December 11, 2010 to April 30, 2011 pursuant to section 91 of the Regulations (GD3-19 to GD3-79).

i) The Appellant did not report any earnings from October 3, 2010 to April 30, 2011 (GD3-19 to GD3-79);

j) The Appellant knowingly made 15 false representations. The penalty of $1,219 represents 50% of the overpayment amount of $2,438.00 (GD4-2)(GD3-88)(GD3-90)(GD3-92);

k) Where a claimant has received benefits to which s/he is not entitled or has not received benefits to which s/he is entitled, Section 52 of the Act gives the Commission the authority to reconsider the individual's claim for benefits within 36 months after the benefits have been paid or would have been payable (GD4-2);

l) According to section 91 of the Employment Insurance Regulations, false information provided electronically constitutes an act or omission for the purposes of section 38 of the Act (GD4-3); and,

m) Upon reconsidering its decision, the Commission maintained its decision but reduced the penalty to $450.00 from $1219.00 on account of mitigating circumstances (GD4-2)(GD3-95 and 96).

[The Tribunal notes that it has omitted intentionally to provide the Respondent's submissions with respect to the Notice of Violation issue].

ANALYSIS

Overpayment Amount:

[44] The Tribunal finds that the Commission has the authority to reconsider the Appellant's entitlement to the amount of benefits, which he received pursuant to sections 43 and 52 of the Act.

[45] The Tribunal finds that the Regulations dealing with earnings and allocation have been drafted and interpreted broadly, to include the "entire income of a claimant arising out of any employment" (*McLaughlin* 2009 FCA 365).

[46] It is a long standing principle and consistent with the Act and Regulations that sums received from an employer are presumed to be earnings and must be allocated unless the amount falls within an exception in subsection 35(7) of the Regulations or the sums do not arise from employment (*Ledzy Lam* Cub 51191)(Cub 27140).

[47] On this basis, the Tribunal finds that any amounts, which the Appellant received from the Employer for the hours, which he worked, are income and earnings for the purpose of section 35.

[48] Section 36 of the Regulations describes how those earnings are to be allocated and in which weeks they will be considered to have been earned by the claimant *(Boone* 2002 FCA 257).

[49] The Tribunal finds that any amounts, which were earned by the Appellant under a contract of employment must be allocated to the period in which the services are performed pursuant to subsection 36(4) of the Regulations.

[50] The rationale for the allocation of the earnings, which a claimant received while on benefits is the avoidance of double-compensation. In *Attorney General of Canada v. Walford*, A-263-78, December 5, 1978, Justice Pratte stated:

> "The purpose of the scheme is obviously to compensate unemployed persons for a loss; it is not to pay benefits to those who have not suffered any loss. Now, in my view, the unemployed person who has been compensated by his former employer for the loss of his wages cannot be said to suffer any loss. A loss which has been compensated no longer exists. The Act and Regulations must, therefore, in so far as possible, be interpreted so as to prevent those who have not suffered any loss of income from claiming benefits under the Act."

[51] These dicta were repeated and relied upon in subsequent decisions, including, in *Chartier* 2010 FCA 150.

[52] With respect to the burden of proof, it is the Appellant who must prove, on a balance of probabilities that the amount paid or payable is not earnings within the meaning of the Act. The Appellant is also obligated to disclose all of the amounts received (*Ledzy Lam* CUB 51191, CUB 27140, *Déry* 2008 FCA 291, Cub 70735, Cub 11077, *Romero*, 1997 CanLII 6067 (FCA) (A-815-96).

[53] The Tribunal finds that the amounts, which the Appellant is alleged to have received by his employer at (GD3-18), do not fit within any of the exceptions in subsection 35(7) of the Regulations.

[54] The Tribunal finds, therefore, that the Amounts constitute "earnings" of the Appellant for the purpose of the Act and Regulations and that they must be allocated pursuant to subsection 36(4) of the Regulations.

[55] The Appellant has a right to contest the Notice of Debt at GD3-153. This is because notices of debt are decisions of the Commission pursuant to section 52(2) of the Act and are susceptible to appeal before the Tribunal (*Braga* (A-522-08) 2009 FCA 167, *Steel* 2011 FCA 153).

[56] When the notice of debt is appealed, the Appellant has the burden of proving that the amount is not accurate or is based upon erroneous calculations (*Harjinder Sahota*, [2000] CUB 48293, *Braga* 2009 FCA 167).

[57] The Tribunal finds that the Appellant has not disputed the Commission's calculations. The Appellant has argued instead that the amount should be written off by the Tribunal for the following reasons: 1) because of the nature and extent of the work he was doing; and, 2) because paying it back would amount to undue hardship for him and his family.

[58] With respect to the Appellant's first submission that the Tribunal should write off the amount because of the nature and extent of his work with the outreach schools, with the greatest respect, the Tribunal does not agree.

[59] After hearing the Appellant describe what he has accomplished with the outreach program, the extent of his efforts, and his passion and commitment, the Tribunal does not doubt the sincerity of his efforts or the value of his work. The Tribunal even accepts that in keeping adolescents at risk inside the classroom and under the guidance of people like him, he is not only saving lives and making a meaningful contribution in many ways, but he is also likely saving all levels of government a lot of money. The Tribunal, cannot,

however, find that it would ever have the jurisdiction to write off the amounts owing in the Notice of Debt on this basis.

[60] This is because the law is not clear as to whether the Tribunal has the jurisdiction to write off the amount owing in any circumstances (*Steel* 2013 FC 111; *Bernatchez* 2013 FC 111; *Surdivall* v. *Ontario (Disability Support Program*), 2014 ONCA 240) and also because the reason which he puts forward is not supported by the principles or policy of the Act. To hold otherwise, would amount to the assumption of jurisdiction, which has not been conferred on the Tribunal by any Act and it would be outside of the principles of the Act and the employment insurance scheme. It would in essence, amount to an indirect subsidy of his work or of the outreach program itself (CUB 69666 (2007); CUB 65721). Notwithstanding the able and novel arguments of the Appellant and his sympathetic and circumstances and valuable work, the Tribunal is bound and compelled to do otherwise (*Granger,* A-684-85).

[61] With respect to the Appellant's second submission, the Tribunal finds that the Commission has not made a decision on this issue and the Tribunal's consideration of this question would, therefore, be premature. This is because it is not clear from the Appellant's submissions in the Request for Reconsideration (GD3-24) or the Appellant's discussion with the Tribunal in the context of the Request for Reconsideration (GD3-25), whether he asked the Commission to write off the overpayment amount. The Tribunal acknowledges that the Commission does have jurisdiction to write off certain amounts when the Appellant can prove undue hardship pursuant to section 56(1)(f) of the Regulations. The Tribunal does not find, however, that it has jurisdiction to make this decision at this time.

[62] The Tribunal also acknowledges that the idea that the Tribunal has jurisdiction over questions of debt write off was rejected under the former legislative scheme and on the basis of the language in the former Act. (*Cornish-Hardy,* [1979] 2 F.C. 437; aff'd 1980 CanLII 187 (SCC), [1980] 1 S.C.R. 1218; *Filiatrault* (1998), 235 N.R. 274; *Steel* 2013 FC 111; *Bernatchez* 2013 FC 111; *Gladys Romero* A-815-96; *Jean-Roch Gagnon* A-676-96). (CUB 73394(2009) (CUB 74303A 2010), (CUB 76890 2011).

[63] While it is arguable that the Tribunal may accept jurisdiction to make this decision under the new Act and Social Security Tribunal, (*Steel* 2013 FC 111; *Bernatchez* 2013 FC 111; *Surdivall* v. *Ontario (Disability Support Program*), 2014 ONCA 240), the Tribunal would be unable to assume jurisdiction in any event regarding this case, because of its finding that the Commission has not yet decided this issue and that it is premature.

[64] As such, the Appellant may make a formal request to have the Commission write off all or part of the amount owing on the basis that paying it back would cause him undue hardship pursuant to paragraph 56(1)(f) of the Regulations. If the Appellant is not satisfied with the Commission's decision, it appears that on the basis of the most recent binding decision (as far as the Tribunal is concerned), the Federal Court of Canada would have jurisdiction to review the Commission's decision or that this Tribunal *may* have jurisdiction to review it on the basis of several non-binding decisions analogous and non-binding commentary (*obiter dicta)* (*Steel* 2013 FC 111; *Bernatchez* 2013 FC 111; *Surdivall* v. *Ontario (Disability Support Program*), 2014 ONCA 240).

[65] In these circumstances, the Tribunal respectfully recommends that the Commission consider the Appellant's request made herein to write off all or part of the amount owing on the grounds that it causes him undue hardship. The Tribunal also recommends that the Appellant contact the Commission as soon as possible regarding this issue.

THE PENALTY:

[66] The Commission bears the burden of proving that the misrepresentations were made and were made knowingly on a balance of probabilities (*Purcell*, [1996] 1 FC 644).

[67] The Tribunal finds that the Commission has proven that the misrepresentations were made on a balance of probabilities (the E Reports). The Appellant admitted and did not deny that he made the impugned representations (GD3-24, GD2, his testimony at the hearing).

[68] The Tribunal finds that the Commission also had the authority to consider the imposition of a penalty because the Appellant answered his reports via Telephone and Internet and section 91 of the *Employment Insurance Regulations*, provides that false information provided electronically constitutes an act or omission for the purposes of Section 38 of the Act.

Were the misrepresentation *"knowingly"* made?

[69] The words "knew" or "knowingly" in section 38 imply that to prove that the misrepresentations were made knowingly, the Commission must apply a subjective test (*Ftergiotis* 2007 FCA 55; *Mootoo* 2003 FCA 206).

[70] This means that the facts and circumstances at the time that the Appellant made the representations may be taken into account in evaluating whether the Appellant knew that the statements were false. The Commission is not, however, required to prove that the Appellant had any intention to deceive in proving that the representations were knowingly made (*Gates* [1995] 3 F.C. 17 (C.A); *Purcell*, [1996] 1 FC 644).

[71] While the initial onus is on the Commission to prove subjective knowledge, the jurisprudence has held that once it appears from the evidence that the a claimant has wrongly answered a very simple question or questions on a report card, the burden shifts to the claimant to explain why the incorrect answers were given (*Gates* [1995] 3 F.C. 17 (C.A); *Purcell*, [1996] 1 FC 644).

[72] Given the information on the Appellant's application for benefits (GD3-6) and that the questions posed in the E-Reports were quite simple, the Tribunal finds as a fact that in ordinary circumstances, the Appellant should have had actual knowledge that he was making misrepresentations to the Commission when he failed to report his earnings and that he was working while he was on benefits. This is because the list of the rights and responsibilities and of the reporting obligations and consequences for misrepresentations were clear (*Gates* [1995] 3 F.C. 17 (C.A); *Purcell*, [1996] 1 FC 644).

The Appellant is claiming, however, that he lacked subjective knowledge during the time period in which he completed his reports. The Appellant had advised throughout that he had an erroneous understanding of his reporting obligations, which was based upon advice which he received from his payroll clerk, which he thought that he had confirmed with the Commission agent on the office on Decarie. The Tribunal finds that it appears from the Appellant's testimony and submissions in the file that he did not understand that he was to report all amounts of income earned and not just the amounts which were over 25% of his benefit

amount. The Tribunal finds that while it makes sense that the Appellant appeared to have been confused, it does not make sense why he would have extended the Commission agent's broad advice that he should not quit his benefits because his earnings were too low to mean that he should not report those earnings either. The Tribunal finds that it is arguable that his continued misunderstanding of his reporting obligations may appear to be a form of "wilful blindness" in the sense that it appears that he disregarded or ignored any doubts which he had or should have had and continued on with his misunderstanding because it suited him to so do (*Gates* [1995] 3 F.C. 17 (C.A); *Purcell*, [1996] 1 FC 644; (CUB 75715, 2010)(*Donnelly*, A-434-98)(CUB 56708, 1997)(*Brouillette*, CUB 60462). The Tribunal finds, however, that this is not the case because of the additional subjective factors, which must be taken into consideration.

[73] The Appellant testified that he was overwhelmed when he first started working at the outreach program on a part time basis. He described that he would be called out of bed regularly to run and meet adolescents who were in dangerous situations in the middle of the night. He was also extremely stressed about not having a stable and sufficient income. He described the stressful nature of his environment and how it impacted his ability to recognize the discrepancy between his understanding of his reporting obligations and the straightforward nature of the questioning on his reports.

[74] In light of the Appellant's own testimony regarding the effects of the stress of his job and lack of regular income on his awareness of his actions, the Tribunal is able to understand why he was not able to have made the representations knowingly. In this regard, the Tribunal finds that the Appellant has provided a reasonable and credible explanation for the misrepresentations.

[75] In this regard, The Tribunal finds that the Appellant cannot be said to have made the impugned statements knowingly (*Gates* [1995] 3 F.C. 17 (C.A).

[76] Given the foregoing findings, the Tribunal finds that the appeal with respect to the penalty should be allowed (*Gates* [1995] 3 F.C. 17 (C.A).

[77] Given this finding of the Tribunal, the Tribunal does not have to consider whether the Commission exercised its discretion judicially when it determined the penalty amount (*Dunham*, [1997] 1 F.C. 462 (F.C.A); *Purcell*, [1996] 1 FC 644).

CONCLUSION

[78] For the foregoing reasons, the Tribunal has decided as follows:

a) With respect to the question of the overpayment amount, the appeal is dismissed with a recommendation.

b) With respect to the question of the penalty amount, the appeal is allowed.

Alyssa Yufe
Member, General Division

DATED : May 5, 2014