

Citation: *H. T. C. v. Canada Employment Insurance Commission*, 2014 SSTGDEI 95

Appeal #: GE-13-47

BETWEEN:

**H. T. C.**

Appellant  
Claimant

and

**Canada Employment Insurance Commission**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**General Division – Employment Insurance**

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SOCIAL SECURITY TRIBUNAL MEMBER: Eleni Palantza

HEARING DATE: August 21, 2014

TYPE OF HEARING: Teleconference

DECISION: Appeal is dismissed

## **PERSONS IN ATTENDANCE**

The Claimant, Mr. H. T. C. and Ms. Nga Bleach, Dixie Bloor Neighbourhood Centre attended the hearing by teleconference. Ms. Bleach acted as (Vietnamese) interpreter.

## **DECISION**

[1] The Member finds that the benefit period should be cancelled pursuant to sections 7, 9, 10, 48 and 49 of the *Employment Insurance Act* (EI Act).

[2] The Member finds that a penalty must be imposed because the Claimant knowingly made misrepresentations to the Canada Employment Insurance Commission (Commission) pursuant to sections 38 EI Act.

[3] The Member finds that a notice of violation must be imposed pursuant section 7.1 of the EI Act.

## **INTRODUCTION**

[4] On March 3, 2011, the Claimant applied for regular employment insurance benefits providing a record of employment from V. T. Flooring. A benefit period was established effective February 27, 2011.

[5] On December 6, 2012, the Claimant was advised by the Commission that based on their investigation, it has concluded that he knowingly submitted a record of employment that contained information that was false or misleading and therefore, retroactively cancelled his entire benefit period and imposed a penalty and issued a notice of violation.

[6] On January 21, 2013, the Claimant appealed to the Board of Referees however, having not received his docket, he missed that hearing. The Claimant requested that the hearing be reheard.

[7] On May 10, 2013 the file was transferred to the new Social Security Tribunal (Tribunal). The Claimant appealed late to the Tribunal. On July 10, 2014, the Tribunal allowed the extension of time (GD7).

## **FORM OF HEARING**

[8] After reviewing the evidence and submissions of the parties to the appeal, the Member decided to hold the hearing by way of teleconference for the reasons provided in the Notice of Hearing dated July 11, 2014.

## **ISSUES**

[9] The Member must decide whether the benefit period should be cancelled pursuant to sections 7, 9, 10, 48 and 49 of the EI Act.

[10] The Member must decide whether a penalty should be imposed pursuant to section 38 EI Act.

[11] The Member must decide whether a notice of violation should be issued pursuant to section 7.1 of the EI Act.

## **THE LAW**

### Benefit Period

[12] Section 7 of the EI Act sets out the requirements that a claimant must meet in order for benefits to be payable.

[13] Subsection 7(1) stipulates that unemployment benefits are payable as provided in this Part to an insured person who qualifies to receive them.

[14] Subsection 7(2) states that in order for a claimant, that is not a new entrant or a re-entrant to the labour force, to qualify for benefits, they must show that:

- (a) they have had an interruption of earnings from employment; and
- (b) they have acquired, during their qualifying period, at least the number of insurable hours of employment set out in the table provided in the subsection, in relation to their regional rate of unemployment where the claimant normally resides.

TABLE

Regional Rate of Unemployment Employment in Qualifying Period	Required Number of Hours of Insurable
6% and under	700
more than 6% but not more than 7%	665
more than 7% but not more than 8%	630
more than 8% but not more than 9%	595
more than 9% but not more than 10%	560
more than 10% but not more than 11%	525
more than 11% but not more than 12%	490
more than 12% but not more than 13%	455
more than 13%	420

[15] Subsection 7(4) of the EI Act stipulates that a new entrant or re-entrant to the labour force is a claimant that, during the last 52 weeks before their qualifying period, had fewer than 490

- (a) hours of insurable employment;
- (b) hours for which benefits have been paid or were payable to the person, calculated on the basis of 35 hours for each week of benefits;
- (c) prescribed hours that relate to the employment in the labour force; or
- (d) hours comprised of any combination of those hours

[16] Section 9 of the EI Act stipulates that when an insured person who qualifies under section 7 or 7.1 makes an initial claim for benefits, a benefit period shall be established and, once it is established, benefits are payable to the person in accordance with this Part for each week of unemployment that falls in the benefit period.

[17] Paragraph 10(6)(a) of the EI Act stipulates that once a benefit period has been established for a claimant, the Commission may cancel the benefit period if it has ended and no benefits were paid or payable during the period.

[18] Subsection 48(1) of the EI Act stipulates that no benefit period shall be established for a person unless the person makes an initial claim for benefits in accordance with section 50 and the Regulations and proves that the person is qualified to receive benefits.

[19] Subsection 48(2) of the EI Act stipulates that no benefit period shall be established unless the claimant supplies information in the form and manner directed by the Commission, giving the claimant's employment circumstances and the circumstances pertaining to any interruption of earnings, and such other information as the Commission may require.

[20] Subsection 48(3) of the EI Act stipulates that on receiving an initial claim for benefits, the Commission shall decide whether the claimant is qualified to receive benefits and notify the claimant of its decision.

[21] Subsection 49(1) of the EI Act stipulates that a person is not entitled to receive benefits for a week of unemployment until the person makes a claim for benefits for that week in accordance with section 50 and the regulations and proves that

(a) the person meets the requirements for receiving benefits; and

(b) no circumstances or conditions exist that have the effect of disentitling or disqualifying the person from receiving benefits.

### Penalty

[22] Subsection 38(1) of the EI Act stipulates that 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 received benefits; (Paragraph 38(1)(c) became inoperative effective 12 August, 2001.)

(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 of the warrant, as required by section 44;

(g) imported or exported a page 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).

[23] Subsection 38(2) of the EI Act states that 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 by which the claimant's benefits were reduced 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 benefits had not been reduced 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.

## Violation

[24] Subsection 7.1(4) of the EI Act stipulates that an insured person accumulates a violation if in any of the following circumstances the Commission issues a notice of violation to the person:

- (a) one or more penalties are imposed on the person under section 38, 39, 41.1 or 65.1, as a result of acts or omissions mentioned in section 38, 39 or 65.1; - 9 -
- (b) the person is found guilty of one or more offences under section 135 or 136 as a result of acts or omissions mentioned in those sections; or
- (c) the person is found guilty of one or more offences under the Criminal Code as a result of acts or omissions relating to the application of this Act.

[25] Subsection 7.1 (5) of the EI Act classifies violations and stipulates that Except for violations for which a warning was imposed, each violation is classified as a minor, serious, very serious or subsequent violation as follows:

- (a) if the value of the violation is
  - (i) less than \$1,000, it is a minor violation,
  - (ii) \$1,000 or more, but less than \$5,000, it is a serious violation, or
  - (iii) \$5,000 or more, it is a very serious violation; and
- (b) if the notice of violation is issued within 260 weeks after the person accumulates another violation, it is a subsequent violation, even if the acts or omissions on which it is based occurred before the person accumulated the other violation.

## **EVIDENCE**

[26] On March 10, 2011, the Claimant made an initial claim for regular employment insurance benefits after having been laid off from his employment with V.T. Flooring where he was employed from August 23, 2010 until February 25, 2011 and had accumulated 1080 hours of insurable employment. The record of employment (serial number E17133802) was completed by Ms. A. N. (GD3-3 to GD3-15).

[27] The Claimant submitted biweekly electronic claims reports for the period of February 27, 2011 until December 3, 2011 (GD3-16 to GD3-126).

[28] The Claimant accepted several direct deposit benefit payments from the Commission (GD3-127 to GD3-152).

[29] On May 22, 2012, the Commission's Investigators met with the owner of V.T. Flooring, Mr. V. T. He stated to the Investigators that in the flooring business there was more work in the summer than in the winter. He was asked about 10 individuals that had submitted records of employment via the internet that were issued under his company name, V. T. Flooring. Mr. V. T. confirmed that none of them worked for him including the Claimant with SIN XXX XXX XXX. He did not employ any woman (one record of employment was for a woman). Mr. V. T. also indicated that one individual 'may' have worked for him in the last year for part of the year and that he did pay two guys cash however, he did not have names, addresses or SIN numbers to identify either individual. He stated that P. N. was his bookkeeper (GD 3-154 and GD3-156).

[30] On August 21, 2012, the Claimant was advised that the validity of the record of employment was in question and was directed to bring all supporting documentation to an interview on September 5, 2012 (GD3-156). The Claimant failed to attend the interview. The Investigator attempted to call the Claimant but the number was not in service (GD3-158).

[31] On November 21, 2012, the Canada Revenue Agency (CRA) confirmed that the Claimant has not filed a 2011 tax return. There was T4 earnings on file for 2010 of \$10,080.00 (GD3-159).

[32] The Investigator's report indicated that A. N., a bookkeeper, is the subject of an ongoing Major Investigation involving false records of employment. The investigation has revealed that there are many claimants who did not work for 23 of this bookkeeper's employer/clients. In this case, the employer/owner of V. T. Flooring, Mr. V. T., stated that the Claimant did not work for him and that he is unaware how a record of employment was submitted with his business name and number. He confirmed that his books and records are



done by A. N. The Claimant was provided an opportunity to provide supporting documentation to substantiate his alleged employment with V.T. Flooring, but the Claimant failed to do so. Information from CRA could not substantiate his employment as there were no T4's issued to the Claimant in the years where the alleged work was performed nor were there any source deductions made (GD3-160 and GD3-161).

[33] On December 6, 2012, the Commission advised the Claimant that it has concluded that he knowingly submitted a record of employment that was false and that he knowingly provided false and misleading information on his application for benefits. It also concluded that the Claimant negotiated 12 warrants (direct deposits accepted) to which he was not entitled. As a result, the Claimant was advised that since the information from the record of employment cannot be used to establish his claim, the Commission has cancelled his claim retroactively. When determining the penalty, it cited no mitigating circumstances other than this being the Claimant's first instance of misrepresentation. The cancellation of the benefit period resulted in an overpayment of benefits \$12,765.00. Plus, a penalty of \$5,000.00 was imposed for making a total of 14 false representations and a notice of a 'very serious' violation was issued (GD3- 163 to GD3-171).

[34] On February 1, 2013, the Claimant provided copies of his identification (GD3- 176 to GD3-179), pay stubs for the periods September 4, 2010 to October 28, 2010 (GD3-180 and GD3-181) and a T4 statement for V.T. Flooring issued for 2010 (GD3- 182).

[35] At the hearing, the Claimant was asked by the Member what he did and where he worked for V.T. Flooring. The Claimant stated that he helped make floors. He stated that he does not remember the exact location because it was a new construction, an industrial area. He was asked whether it was a house or a building. The Claimant stated that he did not know whether it was a house or building; it was winter and there was snow around, therefore difficult to identify the location.

[36] The Member asked the Claimant whether he had any proof of his employment and referred him to the employer's statements to the Investigator. The Claimant testified that he works for "VT" and doesn't know the name of the employer. He only knows the person that introduced him to the work, a "Mr. Tu". He stated that this is his common name and does

not know whether this is his first or last name. He just knows him as “Tu”. The Claimant stated that it was Mr. Tu who took him to work and paid him every two weeks by cash. The Claimant testified that he worked for cash and whenever they asked him to work he went to work. The Claimant stated that he was “no idea how they worked; he was just a labourer”.

[37] The Claimant was referred to Exhibits GD3-180 to 183, the pay stubs and T4 and asked what they are if he was paid cash. The Claimant testified that Mr. Tu gave him these documents and he does not understand these pay stubs because he was paid only by cash. The Member asked when he was given these documents. The Claimant stated that after he was laid off, he was asked to sign documents but he doesn't know what he was signing.

[38] The Claimant was asked who faxed in his identification documents, pay stubs and T4 slip and was referred to Exhibits GD3-175 to 182. The Claimant stated that he has no idea who the person (A. R.) is that faxed in these documents. The Claimant stated that they were sent in by Mr. Tu and he does not know what was sent in because he does not know/understand English. The stated that Mr. Tu helped him apply and submit these documents.

[39] The Claimant repeatedly testified adamantly that all he knows is that he worked, he was just a helper, a labourer, and that he was paid cash and does not know any English.

[40] The Member referred the Claimant to Exhibit GD3-9 of his application form where it indicates that he completed his application form without assistance. The Claimant stated that Mr. Tu helped him with the application form and he signed it. He did not understand the meaning of it.

[41] The Claimant was asked whether he completed his 2011 tax return and was referred to Exhibit GD3-159, the discussion of the Investigator and the CRA. The Claimant stated initially that he worked at the end of 2010 and early 2011 and that yes, a tax preparer did it for him. The Member noted that the CRA, in November of 2012, indicated to the Investigator that he had not submitted an income tax return for 2011. The Claimant then stated that he did not complete his income tax return for 2011.

[42] The Claimant was asked again whether he had any proof that he worked for V.T. Flooring. The Claimant stated again that Mr. Tu took him to work, paid him cash; he has no idea who his employer is; has no name and has no proof. When asked when he worked for V.T. Flooring, the Claimant stated that he remembers it was the end of 2010 and early 2011 because it was winter when they laid him off.

[43] The Claimant testified that he does not know an A. N./P. N.

[44] The Claimant was referred to Exhibit GD3-15, the record of employment and advised that the Commission's position is that it is fraudulent and that it was completed by A. N. The Claimant testified that all he knows for sure is that he worked and when he was laid off; Mr. Tu gave him the record of employment, took him to the Service Canada office on Dixie Road and helped him submit his application form.

[45] The Member asked the Claimant whether he had anything to add to his testimony. The Claimant started to cry/sob loudly and spoke in Vietnamese at length. Ms. Bleach was also crying. He stated that he finds it totally unfair that he doesn't know English; didn't know how to apply for benefits and now it turns out that he committed "fraudulent" and he has to take all the blame. He stated (sobbing) that he would rather be put in prison because he does not have the money to pay back what he owes to the Commission. He stated that he worked hard for his family and now he's not going to get anything because of his lack of English understanding and his trust in other people to help him.

## **SUBMISSIONS**

[46] The Claimant submitted that:

- a) all he knows for sure is that he worked for V.T. Flooring and that he was taken to work and paid cash every two weeks; he has no idea who his employer is and has no proof of his employment or where he worked.
- b) he remembers he worked the end of 2010 and early 2011 because it was winter when they laid him off

- c) because of his lack of English skills he relied and trusted other people to help him; a Mr. Tu helped him with his application form, provided him with the record of employment under question and submitted all documents to the Commission;

[47] The Respondent submitted that:

- a) the evidence demonstrates that the Claimant's employment with VT Flooring never existed and as a result, the information on the Claimant's record of employment was false. Without the record of employment, the Claimant has not proven that he had accumulated the required hours of insurable employment and thus, has not met the minimal requirements of the legislation to establish a claim and the benefit period effective February 27, 2011 must be cancelled.
- b) it has met the onus of establishing that the Claimant knowingly made a misrepresentation when he provided a record of employment and an application for benefits that he knew was false; plus, he negotiated warrants to which he was not entitled and therefore, a penalty and notice of violation were judicially imposed.

## **ANALYSIS**

### Cancellation of Benefit Period

[48] The Member first considered that in order for the Claimant to receive regular benefits he must meet the requirements of section 7 of the EI Act. In this case, the Commission initially determined that the Claimant qualified for employment insurance regular benefits pursuant to section 7 of the EI Act having provided the requested information pursuant to section 48 of the EI Act. The Commission established a benefit period under section 9 of the EI Act and paid the Claimant regular employment insurance benefits effective February 27, 2011 until December 3, 2011. The Claimant completed 12 biweekly reports (GD3-16 to GD3-126) and accepted these benefits by direct deposit (GD3-127 to GD3-153).

[49] However, on December 6, 2012, the Commission cancelled the Claimant's benefit period pursuant to section 10 of the EI Act, after a lengthy investigation regarding the

records of employment issued by a bookkeeper, Ms. A. (P.) N., for V.T. Flooring and several other companies, including that which was issued to the Claimant. The Claimant's benefit period was cancelled pursuant to sections 10, 48 and 49 of the EI Act and an overpayment of \$12,765.00 resulted.

[50] The Member considered that paragraph 10(6)(a) of the EI Act stipulates that once a benefit period has been established for a claimant, the Commission may cancel the benefit period if it has ended and no benefits were paid or payable during the period.

[51] The Member also considered that section 48 of the EI Act states that a claimant is not entitled to benefits until he/she makes a claim for benefits and provides information in the form directed by the Commission who in turn, makes a decision on whether the claimant qualifies to receive benefits.

[52] Further, section 49 of the EI Act states that a claimant is not entitled to benefits until the claimant proves that he/she meets the requirements to receive benefits and that no circumstances exist to disqualify him/her from receiving the benefits. If such circumstances exist and they have the effect of disqualifying the claimant under section 30 or disentitling the claimant under sections 31, 32 or 33, the Commission will give benefit of the doubt to the claimant if the evidence on each side is equal.

[53] In this case, the Commission submits that as a result of an ongoing, larger investigation of the records of employment issued by Ms. A. N., for several of her clients/employers, there is sufficient evidence to prove that the Claimant's employment with V.T. Flooring never existed. It submits that it is investigating serious allegations of fraud involving several employers (it lists 23) and individuals, one of which is the present company, V.T. Flooring and the Claimant. It submits that all of the listed company owners have been interviewed (GD3-183 and GD3-184). It notes that as proof of employment, other claimants have been submitting fraudulent paystubs, T4's and proof of employment letters from their alleged employers in order to authenticate their employment. It submits that the CRA confirmed there were no T4's issued to individuals that had submitted records of employment signed by Ms. A. N. It further submits that upon receipt of a letter from the

Commission requesting an interview, claimants have been provided with fabricated pay stubs, T4's and proof of employment letters by Ms. A. N.

[54] The Member considered that, similar to the cases described by the Commission, the evidence in this case shows that on August 21, 2012, the Claimant was also directed to bring all supporting documentation to an interview in order to validate his record of employment. The Claimant however, did not attend the interview and his phone number was no longer in service. Second, the documentary evidence shows that the Claimant (or someone on his behalf) also submitted a T4 and pay stubs as proof of employment. Interestingly, as in the other cases, the evidence shows that neither the CRA nor the Claimant himself could substantiate the validity of these documents. At the hearing, the Claimant testified that a Mr. Tu gave him these documents after he was laid off and doesn't understand the pay stubs since he was only paid by cash every two weeks. His testimony actually, supports the Commission's position and investigative findings for other claims where unsubstantiated paystubs and T4's were also submitted, after the fact, to authenticate claimants' employment. Further, in this case, the Claimant could not explain what was sent in or how these documents were faxed to the Commission because a Mr. Tu sent them in on his behalf. Thirdly, the Member considered that the owner of V.T. Flooring confirmed that the Claimant did not work for him. At the hearing, the Claimant testified that he works for "VT" but does not know the name of his employer. He stated that he only knows a Mr. Tu who took him to work and paid him.

[55] Further, the Member noted that the Claimant was unable to provide any evidence of his employment at the hearing. Even when asked directly to provide details of his employment the Claimant repeatedly stated that he was simply a helper, a labourer, who went to work when asked and was paid cash; he didn't know the exact location of his employment or whether he worked in a house or a building; it was winter and that the snow made it difficult to identify his location. The Member noted that the Claimant was employed for this company for several months (from August 23, 2010 until February 25, 2011) and yet was unable to provide any details or substantive proof of his employment with V.T. Flooring.

[56] Finally, the Member considered the inconsistencies noted between the Claimant's testimony and other evidence in the file. For instance, the Claimant testified that he remembers working in late 2010 and early 2011 (that there was snow outside) and that he worked as needed until he was laid off in the winter. The pay stubs that he submitted however, indicated that he worked full-time hours in September and October and the T4 he submitted and record of employment would support more than casual hours worked. Plus, despite stating that he worked in early 2011, both he and the CRA confirmed that he did not complete an income tax return for 2011. Finally, his testimony of when he was hired to work contradicts the company owner's statements to the Commission's Investigator that in the flooring business they were busier in the summer than in the winter.

[57] Given all the evidence, and considering all the circumstances in this case, the Member gave less weight to the Claimant's inconsistent, unsupported evidence than on the cogent and supported evidence provided by the Commission. The Claimant's unwillingness to meet with the Commission's Investigator coupled with his inability to provide convincing evidence that his employment with V.T. Flooring was legitimate, the Member finds that the Claimant failed to (1) discredit the investigative findings of the Commission (2) prove that he met the requirements to receive benefits (3) provide information in the form directed by the Commission and (4) prove that no circumstances or conditions exist that would disentitle or disqualify him from receiving benefits pursuant to sections 48 and 49 of the EI Act respectively.

[58] The Member finds that the Claimant provided the Commission with fraudulent information upon which his claim was established and further finds that the Claimant's employment with V.T. Flooring did not exist. The Member finds that the Claimant has not met the burden of proof that he qualifies for benefits pursuant to section 7 of the EI Act and as a result, the Commission properly cancelled his benefits period pursuant to section 10 of the EI Act.

[59] This cancellation of the benefit period resulted in an overpayment of \$12,765.00 for which the Claimant is responsible and must return to the Commission in a manner agreeable to both parties. The Member understands that the Claimant is experiencing financial

hardship and feels that he is unable to pay these monies to the Commission, however; it is not within the Tribunal's jurisdiction to reduce, waive or write-off an overpayment of benefits owed to the Commission ((Muguette Filiatrault A-874-97, Gladys Romero A-815-96, Jean-Roch Gagnon A-676-96).

### Penalty

[60] Section 38 of the EI Act states that the Commission may impose a penalty on a claimant, or any other person acting for a claimant, for each of the acts or omissions stated in that section.

[61] The Federal Court of appeal has established that "knowingly" or having "knowledge of a falsity" does not necessarily include 'intent to deceive'. Further, the test is a subjective one where the decision-maker must determine, on the balance of probabilities, based on the circumstances and evidence of each case, whether the claimant has knowingly made a false or misleading statement (Gates A-600-94).

[62] The Federal Court of Appeal has also established that the initial onus is on the Commission to prove that a claimant knowingly made a false or misleading statement or representation. The onus then shifts to the claimant who must provide a reasonable explanation to show that the statement or representation was not knowingly made (Purcell A-694-94, Gates A-600-94).

[63] The Member therefore, first considered the Commission's submission that the Claimant knowingly made a misrepresentation when he (a) consciously filed a claim for benefits that contained misrepresentations and false statements that he was employed by V.T. Flooring since he also (b) submitted a record of employment (serial number E17133802), that he knew was false and (c) negotiated benefit warrants (through direct deposit) knowing that they were based on a fraudulent record of employment. In support of its position, the Commission provided evidence (noted above) regarding the illegitimacy of the Claimant's employment and consequently, the record of employment and electronic reports he submitted in order to establish a claim. It further submitted that the Claimant, on application accepted his rights and responsibilities and was advised every time he



completed his electronic reports, that false and misleading statements could result in an overpayment of benefits and severe penalties or prosecution. Further, the Commission submits that the Claimant made no attempts to voluntarily disclose his role in the scheme to fraudulently obtain the record of employment he used to establish a claim for benefits to which he was not entitled.

[64] The Member also considered whether the Claimant provided a reasonable explanation that would show that he did not knowingly make false representations to the Commission. The Claimant, throughout his testimony, repeatedly stated that all he knows is that he did work for V.T. Flooring and he was paid cash every two weeks. Further, because of his lack of English skills, he put his trust in other people, like Mr. Tu, who gave him the record of employment, helped him apply for benefits and submitted documents to the Commission on his behalf. The Member understands the Claimant's vulnerability given his very limited English skills noting that he may not have been fully aware of the repercussions of providing false information. Unfortunately, his lack of English skills does not absolve him from the responsibility of what was submitted to the Commission on his behalf.

[65] Further, the Member finds that the Claimant was provided plenty of opportunity to offer a reasonable explanation to rebut the Commission's submission that he knowingly provided false representations. The Claimant was provided an opportunity by the Commission to attend an interview in order to provide supporting documentation that would confirm the validity of his record of employment. The Claimant however, he did not attend the scheduled interview. The Member finds that despite the seriousness of the Commission's allegations and his lack of English skills, the Claimant made no effort to provide other documentary proof of his employment and made no other attempts to provide any details that would support the legitimacy of his employment. On the contrary, he was very vague in his responses at the hearing and claimed ignorance about anything to do with his employment including not knowing whether he worked in a house or a building. The Claimant testified that he did not know where he worked, that he had no idea who his employer was (except that he worked for 'VT'); that he had no name and no proof despite being allegedly employed by V.T. Flooring for several months. The Member therefore finds

that the Claimant was unable to provide a reasonable explanation that would show that he did not knowingly make false representations to the Commission.

[66] The Member therefore finds that, on a balance of probabilities, the Claimant knowingly made false representations to the Commission when he submitted the fraudulent record of employment, an application for benefits and several electronic reports containing false information. The Member therefore, concludes that a penalty should be imposed pursuant to section 38 of the EI Act.

[67] Finally, Member recognized that in determining the penalty amount and whether or not to issue a notice of violation, the Commission must exercise its discretion in a judicial manner. In other words, it must act in good faith, proper purpose and motive; must take into account any relevant factors; ignore any irrelevant factors and act in a non-discriminating manner (Dunham A-708-95, Purcell A-694-94). In a recent Federal Court ruling, it was concluded that the Commission has the discretion to determine whether or not to issue a notice of violation and that it is neither mandatory nor automatic under section 7.1(4) of the EI Act. Further, the Tribunal does have jurisdiction to set aside the notice of violation, but only if it determines that the Commission did not exercise its discretion judicially (GILL A-483-09).

[68] In this case, the Commission considered that this was the Claimant's first offence, the value of the overpayment and further, considered that the Claimant did not respond to invitations by the Commission to provide an explanation of his employment. It did not identify any mitigating circumstances and as a result, imposed a penalty at \$5,000.00.

[69] The Member therefore finds that the Commission exercised its discretion in a judicial manner when it imposed the penalty and therefore, cannot intervene in this decision.

#### Notice of Violation

[70] In a recent Federal Court ruling, it was concluded that the Commission has the discretion to determine whether or not to issue a notice of violation and that it is neither mandatory nor automatic under subsection 7.1(4) of the EI Act. Further, the Tribunal does

have jurisdiction to set aside the notice of violation, but only if it determines that the Commission did not exercise its discretion judicially (Gill A-483-09).

[71] In this case, the Commission submitted that it exercised its discretion in a judicial manner when it issued the notice of a ‘very serious’ violation having considered mitigating circumstances, prior offences and the impact on the ability of the Claimant to qualify on future claims. The Member finds that the Commission exercised its discretion in a judicial manner when it issued a notice for a very serious violation and therefore, cannot intervene in this decision.

## **CONCLUSION**

[72] The appeal is dismissed.

Eleni Palantzas  
Member, General Division

DATED: August 23, 2014