

Citation: *H. B. v. Canada Employment Insurance Commission*, 2015 SSTGDEI 96

Date: May 27, 2015

File number: GE-14-4653

GENERAL DIVISION - Employment Insurance Section

Between:

H. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

**Decision by: Joseph Wamback, Member, General Division - Employment
Insurance Section**

Heard In person on May 19, 2015, Toronto, Ontario

REASONS AND DECISION

PERSONS IN ATTENDANCE

H. B., the Appellant.

Richard Bowers, the Appellant's representative.

Chris Leeders, the Appellant's representative.

INTRODUCTION

[1] The Appellant filed for and received maternity and parental benefits on 3 occasions commencing December 7 to October 24, 2009, March 16, 2010 to March 14, 2011 and April 15 to September 8, 2012. The Respondent stopped payments to the Appellant on September 20, 2012 as there was an investigation started and therefore no payments were issued after September 9, 2012. The Respondent determined as a result of their investigation that the Appellant used false records of employment to obtain benefits she was not entitled to and issued a notice of debt, a cancellation of benefits a violation and penalties. The Appellant requested reconsideration and her request was denied by the Respondent at the reconsideration level. The Appellant filed an appeal with the Tribunal and a hearing was scheduled.

[2] The hearing was held in-person to review the Appellant's evidence, and also due to the fact that credibility was determined to be a prevailing issue all as noted in the Notice of Hearing dated March 4, 2015.

ISSUES

[3] **Issue 1:** The Appellant is appealing the cancellation of benefit periods pursuant to sections 7, 48 and 49 of the *Employment Insurance Act* (Act) and subsection 14(1) of the *Employment insurance Regulations* (Regulations)

[4] **Issue 2:** The Appellant is appealing the imposition of penalties pursuant to section 38 of the Act for making misrepresentations by knowingly providing false or misleading information to the Respondent.

[5] **Issue 3:** The Appellant is appealing the Notice of Violation issued pursuant to section 7.1 of the Act.

THE LAW

[6] Subsection 7(1) of the Act states:

Unemployment benefits are payable as provided in this Part to an insured person who qualifies to receive them.

[7] Subsection 7(2) of the Act states:

An insured person, other than a new entrant or a re-entrant to the labour force, qualifies if the person

- (a) has had an interruption of earnings from employment; and

- (b) has had during their qualifying period at least the number of hours of insurable employment set out in the following table in relation to the regional rate of unemployment that applies to the person:

[8] Subsection 7(3) of the Act states:

An insured person who is a new entrant or a re-entrant to the labour force qualifies if the person

- (a) has had an interruption of earnings from employment; and

- (b) has had 910 or more hours of insurable employment in their qualifying period.

[9] Subsection 7(4) of the Act states:

An insured person is a new entrant or a re-entrant to the labour force if, in the last 52 weeks before their qualifying period, the person has 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 employment in the labour force; or
- (d) hours comprised of any combination of those hours.

[10] Subsection 7.1(4) of the Act states:

An insured person accumulates a violation if in any of the following circumstances the Respondent 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;
- (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.

[11] Subsection 7.1(5) of the Act states:

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.

[12] Section 38 of the Act states:

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

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

(c) knowingly failed to declare to the Respondent all or some of the Appellant's earnings for a period determined under the regulations for which the Appellant received benefits;

(Paragraph 38(1)(c) became inoperative effective 12 August, 2001.)

(d) made a claim or declaration that the Appellant 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 Appellant 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 Respondent, or had it imported or exported, for the purpose of defrauding or deceiving the Respondent; or

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

(2) The Respondent may set the amount of the penalty for each act or omission at not more than
(a) three times the Appellant's rate of weekly benefits;

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

(i) three times the amount by which the Appellant's benefits were reduced under subsection 19(3), and

(ii) three times the benefits that would have been paid to the Appellant for the period mentioned in that paragraph if the benefits had not been reduced under subsection 19(3) or the Appellant 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.

[13] Section 48 of the Act states:

(1) 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.

(2) No benefit period shall be established unless the Appellant supplies information in the form and manner directed by the Respondent, giving the Appellant's employment circumstances and the circumstances pertaining to any interruption of earnings, and such other information as the Respondent may require.

(3) On receiving an initial claim for benefits, the Respondent shall decide whether the Appellant is qualified to receive benefits and notify the Appellant of its decision.

[14] Section 49 of the Act states:

(1) 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.

(2) The Respondent shall give the benefit of the doubt to the Appellant on the issue of whether any circumstances or conditions exist that have the effect of disqualifying the Appellant under section 30 or disentitling the Appellant under section 31, 32 or 33, if the evidence on each side of the issue is equally

(3) On receiving a claim for benefits, the Respondent shall decide whether benefits are payable to the Appellant for that week and notify the Appellant of its decision.

[15] Section 112 of the Act states:

(1) A Appellant or other person who is the subject of a decision of the Respondent, or the employer of the Appellant, may make a request to the Respondent in the prescribed form and manner for a reconsideration of that decision at any time within

(a) 30 days after the day on which a decision is communicated to them; or

(b) any further time that the Respondent may allow.

(2) The Respondent must reconsider its decision if a request is made under subsection (1).

(3) The Governor in Council may make regulations setting out the circumstances in which the Respondent may allow a longer period to make a request under subsection (1).

[16] Subsection 14(1) of the Regulations states:

Subject to subsections (2) to (7), an interruption of earnings occurs where, following a period of employment with an employer, an insured person is laid off or separated from that employment and has a period of seven or more consecutive days during which no work is that employment, other than earnings described in subsection 36(13), are payable

EVIDENCE

[17] The Appellant filed an initial claim for maternity/parental employment insurance benefits effective November 23, 2008 (GD3-4 to GD3-20) and received 25 payments from December 7, 2008 to October 24, 2009 by warrants that were sent to her by mail (GD3-22 to GD3-46).

[18] The Appellant filed an second initial claim for maternity employment insurance benefits effective May 16, 2010, (GD3-47 to GD3-61) and received 26 payments from May 30, 2010 to May 14, 2010 by warrants that were sent to her by mail and direct deposit (GD3-66 to GD3-91).

[19] The Appellant negotiated 12 payments for parental benefits and received benefits from April 15, 2012 to September 8, 2012 by direct deposit (GD3-110 to GD3-121). On September 20, 2012 a stop payment was placed on the claim as the Respondent had initiated an investigation and therefore no payments were issued after September 9, 2012.

[20] A lengthy investigation conducted by Service Canada Integrity officers revealed that the records of employment issued by Mr. R. S. (the Appellant's employer) were suspect and this included the records of employment used by the Appellant. (GD3-122 to GD3-123). The Respondent's investigation determined that the Appellant's employer had issued approximately 44 records of employment linked to 15 employers. ABC Financial Solutions Inc. is owned by Mr. R. S.. All the records of employment that were issued to individuals from ABC Financial that were woman who filed for maternity/parental benefits. For privacy reasons the employer names and information not associated with this appeal were vetted (GD3-124 to GD3-128).

[21] Mr. R. S. met with investigators on February 2, 2013 (GD3-142 to GD3-161). Mr. R. S. explained his business. He indicated it was he and one girl working with him at any specific time (GD3-148). He sometimes got the girls from Humber College. He liked to have someone helping him out; sometimes it was his kids, his sister or one person. They would do some data, getting phone calls checking up on T4's when taxes were done and make sure the numbers were punched in correctly. The investigators advised Mr. R. S. one of the businesses he deals with confessed that Mr. R. S. issued fraudulent records of employment in their company name. Mr. R. S. indicated the owner was scared of the investigators. Mr. R. S. was asked about ABC Financial Solutions (GD3-151 to GD3-161). Mr. R. S. indicated the Appellant worked the longest for him; she worked three times and has three children. Mr. R. S. explained that each girl worked before going off on maternity. He was asked what they did and Mr. R. S. indicated they would check data and sort papers. Mr. R. S. was asked to explain and he stated they would make copies so he would have two sets of papers one for the client and one for him. The employee would then file the papers. Mr. R. S. was asked what else they did to get 40 hours of work per week. He indicated they answered the phones and cleans the office. Mr. R. S. indicated sometimes they worked less than 40 hours.

[22] Mr. R. S. was asked specifically about the Appellant (GD3-177). Mr. R. S. was shown the three Record of employment and he confirmed he signed them and issued pay cheques. Mr. R. S. indicated the Appellant was still working for him. Mr. R. S. was shown the pay stubs and from March 2008 to October 2008, she was paid \$14.00 per hour. From October 2009 to May 2010 she was paid \$15.00. From August 2011 to December 2011 she was paid \$15.50 and in January 2012 to March 2012 the rate went back to \$15.00. Mr. R. S. was asked why the rate went down and he stated she was working extra time so she got 50 cents more. When questioned he stated the Appellant was cleaning the washroom so he paid her 50 cents more. Mr. R. S. was questioned why an employee would earn more than he did and he indicated that was unusual. Mr. R. S. was asked how he is compensated for his work and he said he tried to reduce his losses that he's invested. Mr. R. S. was advised there had been many confessions from his clients indicating their records of employment were fraudulent as well as the individuals that bought the record of employment had confessed.

[23] The Appellant met with investigators on November 7, 2012 (GD3-201 to GD3-202). The Appellant was asked about her job with ABC Financial in 2008, 2009/10 and 2011/12 and stated she did office work, data entry, filing, phone calls, faxing & photocopying, paying HST, doing general administrative work. She also does the paperwork for life insurance and RESP issues for the office. She works in the basement of Mr. R. S.'s home. The Appellant offered unsolicited that the office had 2 desks, 2 offices, a staff room and a separate entrance. The Appellant advised she got the job through her husband as Mr. R. S. was her husband's accountant for many years. She worked Monday to Thursday from 8:30 am to 4:30 pm and works 31-32 hours per week

[24] She only worked with Mr. R. S. The Appellant stated Mr. R. S. had a large number of clients. The Appellant was asked for the names and she gave 3 company names. The Appellant was advised she worked there for about 4 years yet she could only recall 3 clients and she indicated she could not remember the other clients. ABC Financial has been her only employment in Canada. The Appellant stated her mother in law watches the children while she works. The Appellant was asked who did the job at ABC Financial before or after her and she stated she did not know and stated she has not kept in touch with Mr. R. S. The Appellant was paid monthly by cheque and she deposited it into her personal bank account. The Appellant stated at one point she was paid bi-weekly. The Appellant was asked how it came about when she returned to ABC Financial in October 2009 and she stated she phoned Mr. R. S. and advised him she was ready to return. She waited longer to return in May 2010. The Appellant was asked why was it she returned to work when she was a few months pregnant each time and the Appellant stated that was just the way it turned out. The Appellant was advised to submit all her bank records. The Appellant supplied her bank information from BMO and CIBC plus her Visa statements. CIBC supplied clarification that was requested (GD3-203 to GD3-325).

[25] The Appellant was asked what the value of ABC Financial is and she indicated she did not know. She was asked how many clients he had and she answered lots of them. The Appellant was asked how much he charged a business client and she did not know. The Appellant was asked if she typed out the invoices and she did not reply. The Appellant was asked how much Mr. R. S. charges her family to do their taxes and she did not know as her husband takes care of it. The Appellant was asked for a client list. She was asked if the investigator contacted one of

the employers on the list that they would know her. The Appellant stated she didn't deal with the companies, Mr. R. S. gave her the paper work and then she would work on it. The Appellant was asked if she deposited her cheque in the bank and she stated yes. She was asked why there were cash amounts being withdrawn for around the same amount of the cheques and she stated it was to pay bills that she gives to her husband. It was explained that individuals who confessed that they never worked would deposit the cheques and then withdraw the amount and give it back. The Appellant stated it was her money to do what she wanted. The Appellant was asked would it not be easier to put the cheque in the account the bills/ mortgage came out of instead of taking out cash. The Appellant stated she put the cheque in her personal account. The Appellant was asked who "R. S." was as there was a cheque made out of \$400.00 from July 25, 2011 to June 2012. The Appellant did not know. Attached is the client list, drawing of the basement layout and pay stubs (GD3-349 to GD3-381).

[26] The Respondent notified the Appellant on May 22, 2014 that they determined that she knowingly submitted false records of employment and notices of debt will be issued along with penalties. (GD3-389 through 397)

[27] The Appellant requested reconsideration of the Respondent's decision to cancel her benefit periods; to impose penalties under section 38 of the Act; and to issue a Notice of Violation under section 7.1 of the Act. In support of her request for reconsideration, the Appellant argued she provided all the required documents (GD3-398). She disagrees with the decision because she really works for a living and has provided all the supportive documents to show she worked for this employer. She would like the decision reconsidered as she has provided true information.

[28] The Respondent advised the Appellant on October 14, 2014 that the evidence out ways her statement. She has no proof she was employed other than the ROE, cheques and pay stubs that the Respondent has determined are fraudulent. The Appellant was advised in one of the interviews she said she did not know how much her employer charged his clients or how much he made per year. She was also asked her if one of the companies she gave on her client list would know her and she had told the investigator no. The Appellant advised she gave the investigator a list of clients. The Appellant was told that we do have that list but there are only 11

names on the list. The Appellant was advised she has not supplied any new information. The Appellant wanted to know what new information she could provide. The Appellant was advised whatever documents she had to prove she worked. The Appellant stated she provided everything. She advised the Respondent that she would have to talk to her lawyer.

[29] The Respondent notified the Appellant on October 21, 2014 that they have completed an in-depth review of her request and have determined in all 3 instances that the decisions, as communicated to you on May 22, 2014, is therefore maintained. (GD3-405 through 408)

[30] The Appellant filed an appeal with the Tribunal on November 10, 2014. She argues that she is unsophisticated and has tried to resolve this matter without representation. She attended two interviews alone without representation and felt overwhelmed and intimidated by the interviewer. She has no knowledge of the activities of the main proprietor of ABC Financial Solutions Inc. and she is innocent of any allegations of fraud and requests a hearing (GD2-4). The Appellant submitted her T4s form 2008- 2012 (GD2-9 to GD2-11).

[31] The Appellant advised the Tribunal that she drove herself to and from work each day. Her job duties were data entry for tax forms. She stated that her employer was a good employer and he was at the premises most of the time she worked there. She would start work at 8:30 AM and each day her employer would layout the work he required her to do each day. When she was not busy with data entry she would attend to filing. She stated she brought her lunch with her to work and prepared it in the kitchen located within the basement converted to office space. The Appellant advised the Tribunal that she has earned a master's degree in Information Technology from her home country and she was trying to learn the accounting and tax business from her employer. She stated she worked for the employer because they both were able to communicate in her native language. She questioned why the Respondent investigators did not come to see her at her place of employment at the time she was asked to attend interviews as they could have seen her working and seen her place of employment. The Appellant reiterated her evidence provided to the Respondent's investigators concerning her bank statements, cash withdrawals, work environment and job duties which the Tribunal found consistent.

SUBMISSIONS

[32] The Appellant submitted that;

- a) She worked for her employer as stated in her records of employment and has paid all of her taxes and deductions.
- b) She has provided all of the documents requested by the Respondent and the investigators.
- c) She has no knowledge of the activities of her employer and she is innocent of any fraudulent activities.

[33] The Respondent submitted that;

- a) Section 6 of the Act defines an "initial claim for benefit" as a claim made for the purpose of establishing an Appellant's benefit period. At this stage, the person must complete an application form and provide a record of employment in order to prove that he or she qualifies to receive employment insurance benefits under the Act.
- b) To be entitled to receive employment insurance benefits, all the requirements in the Act must be fulfilled before benefits are payable. These would include having the requisite number of hours of insurable employment and an interruption of earnings from employment to be qualified under subsection 7(2) of the Act.
- c) In the case at hand, the Respondent submits that the preponderance of evidence demonstrates that the Appellant's employment with ABC Financial Solutions Inc. never existed. The employer, R. S., was investigated and multiple employers admitted Mr. R. S. issued Record of employment in their company name to individuals who never worked. In the case of his own company, ABC Financial Solutions Inc. Mr. R. S. issued 9 Record of employment with the reason for separation as maternity (GD3-133 to GD3-141) to which the Appellant has 3. Mr. R. S. indicated he only had one person working with him yet a significant number of Records of employment overlap.
- d) The Appellant indicated in the first interview she only worked with Mr. R. S. (GD3- 201 to GD3-202) and in the second interview she indicated she worked with a man in 2008.

There was a valid employee who worked in 2008 that worked evening and weekends who verified no one else worked there at the same time (GD3-197)

- e) The Record of employment show an overlap the first employment of two weeks and the period from August 2, 2011 to March 31, 2012 there is another record of employment from November 1, 2011 to February 12, 2012 (GD3-133 to GD3-141). The Appellant submitted pay stubs for the periods she worked. The Appellant stated she worked Monday to Thursday yet the pay stubs for the first period, March 16, 2008 to October 11, 2008, the first day work is a Sunday and the last day is a Saturday (GD3- 351 to GD3-365). The other two periods of employment have a last day worked as a Saturday (GD3- 366 to GD3-381). When adding up the pay stubs for each specific record of employment the earnings are exactly what is shown on the record of employment. This is incorrect as the earnings for the record of employment E08718386 (GD3-21) from March 16, 2008 to October 11, 2008 is a bi-weekly and should only have 14 pay periods yet all 15 pay stubs were included. record of employment E09330561 (GD3-62) from October 26, 2009 to May 15, 2010 is a monthly therefore only 7 pay periods yet all 8 are included. This is the same for record of employment E17604545 (GD3- 109), all 8 pay stubs were included but only the last 7 should have been.
- f) The Appellant deposited cheques from ABC Financial Solutions into her account and would make multiple cash withdrawals for roughly the same amount (GD3- 203 to GD3- 325). This occurred on multiple occasions. The Appellant indicated she did this as she gave her husband cash to pay the bills. The Respondent indicates that submission of pay cheques is consistent practice with the presentation of a false record of employment. These individuals would be given a cheque that they would cash and in turn repay Mr. R. S. in cash. This practice was done to try and deceive the Government. Finally, it is not credible the Appellant worked full time filing papers and doing office work but could not remember the client's names or how much they were charged for ABC Financial Solutions Inc. services. She was making \$15.50 from August to December 2011 but in January 2012 the rate went down to \$15.00 for January to March 2012. The Appellant stated she was doing more work and the employer's statement was she was busy and cleaning the bathrooms.

- g) The Respondent submits that the benefit period effective November 23, 2008 is cancelled because the information on the Appellant's record of employment used to establish the claim was false/ incorrect. Consequently, the Appellant failed to prove that she accumulated the required hours of insured employment pursuant to section 7 of the Act during her qualifying period. The Respondent submits that the benefit period effective May 16, 2010 is cancelled because the information on the Appellant's record of employment used to establish the claim was false/ incorrect.
- h) The Respondent submits that the jurisprudence supports its decision. The Federal Court of Appeal re-affirmed the principle that the Appellant bears the onus of proving his or her eligibility to benefits under the Act. The Court refused to reverse the Respondent's decision to cancel the benefit period where the applicant was found to have had no insurable employment during his qualifying period based of false records of employment and the insurability ruling of Revenue Canada.
- i) With the exclusion of the false records of employment from ABC Financial Solutions Inc. (E08718386), (E09330561), and (E17604545) the Respondent concluded the Appellant had not proven that she qualified to receive employment insurance benefits pursuant to section 7 of the Act.
- j) The benefit periods established effective November 23, 2008, May 16, 2010 and April 1, 2012 were cancelled resulting in an overpayment of \$34,747.00.
- k) The attention of the Tribunal is drawn to the fact that, where a Appellant has either received benefits to which he or she is not entitled, or has not received benefits to which he or she is entitled, Section 52 of the Act gives the Respondent the authority to reconsider that individual's claim for benefits within 36 months after the benefits have been paid or would have been payable. In addition, if the Respondent is of the opinion that the Appellant, in relation to the receipt of those benefits to which he or she was not entitled, provided false or misleading information, whether or not the Appellant provided such false or misleading information knowingly, the Respondent may reconsider that individual's claim for benefits up to 72 months after the benefits

have been paid or would have been payable.

- l) The Appellant was issued a Notice of Violation pursuant to s. 7.1(4) of the Act because the Respondent determined that the Appellant made a misrepresentation by knowingly providing false or misleading information to obtain employment insurance benefits. The discovery of this false information over the 3 claim period resulted in an overpayment of \$29,106.00 (GD3-401 to GD3-402).
- m) The Respondent further notified the Appellant that she was subject to a penalty under section 38 of the Act because she made 73 misrepresentations with respect to her claims for benefits. As the application, records of employment and all the benefit warrants are beyond the thirty-six month limitation period, the penalty was set at \$7,676.00 for 9 false misrepresentations, the two interviews and pay stubs supplied. A notice of Debt was issued to the Appellant on May 24, 2014 (GD3-383-384).
- n) Since July 8, 2010 the Respondent is no longer issuing a Notice of Violation automatically when a penalty is imposed; a warning letter is sent; or the insured individual is the subject of a prosecution. Once a decision has been made to impose a sanction because of misrepresentation, the Respondent must then determine whether or not to issue a Notice of Violation pursuant to subsection 7.1(4) of the Act. In making the decision to issue a Notice of Violation, mitigating factors must be considered. An additional factor to consider is the overall impact the violation will have on the Appellant, including their ability to establish a claim in the future.
- o) In this case, the discovery of a misrepresentation resulted in an overpayment of \$5,649.00 (GD3-399 to GD3-400). Consequently, the Appellant accumulated a violation qualified as very serious. Subsection 7.1(5) categorizes the violation according to the severity of the misrepresentation. The classification of the violation will be determined only in accordance with the amount of the overpayment resulting from the misrepresentation. The amount of the penalty is not a factor in the determination of the said classification. In the case at hand, it is submitted that the Respondent exercised its discretion in a judicial manner when issuing the Notice of

Violation. After considering the overall impact to the Appellant of issuing a notice of violation, including mitigating circumstances, prior offences and the impact on the ability of the Appellant to qualify on future claims, it is determined that a violation is applicable in this case (GD3-388).

- p) In order to intervene with the Respondent's decision, the Tribunal must determine that the Respondent did not exercise its discretion in a judicial manner when it decided to issue the Notice of Violation.
- q) The Respondent submits that the jurisprudence supports its decision. The Federal Court of Appeal confirmed the principle that the purpose of section 7.1 of the Act is "to deter abuse of the employment insurance scheme by imposing an additional sanction on Appellants who attempt to defraud the system". The Court further re-affirmed that the power to issue a Notice of Violation as provided under subsection 7.1(4) of the Act is a discretionary power that belongs to the Respondent. The Tribunal and the Umpire have jurisdiction to determine whether the Respondent has exercised its discretion in a judicial manner when issuing the Notice of Violation.

ANALYSIS

[34] **ISSUE 1:** The first issue before the Tribunal is the cancellation of benefit periods pursuant to sections 7, 10(6)(a) 48 and 49 of the EI Act) and subsection 14(1) of the Regulations.

[35] Subsection 7(1) of the Act states: Unemployment benefits are payable as provided in this Part to an insured person who qualifies to receive them.

[36] To be entitled to receive employment insurance benefits, all the requirements in the Act must be fulfilled before benefits are payable. These would include having the requisite number of hours of insurable employment and an interruption of earnings from employment to be qualified under subsection 7(2) of the Act.

[37] In the case at hand, the Respondent has determined that a preponderance of evidence demonstrates that the Appellant's employment with ABC Financial Solutions Inc. never existed.

[38] A lengthy investigation conducted by Service Canada Integrity officers suggested that some of the records of employment issued by the Appellant's employer were suspect and this included the records of employment used by the Appellant (GD3-122 to GD3-123). The Respondent's investigation determined that the Appellant's employer had issued approximately 44 records of employment linked to 15 employers. ABC Financial Solutions Inc. is owned by Mr. R. S. All the records of employment that were issued to individuals from ABC Financial Inc. were woman who filed for maternity/ parental benefits. The Tribunal finds that the Appellant was also employed by ABC Financial Inc. and also was issued records of employment for maternity/parental benefits.

[39] The Tribunal has reviewed all of the evidence relied upon by the Respondent and cannot find any direct evidence that the Appellant's records of employment were fraudulent. The Tribunal finds that the evidence relied upon by the Respondent is circumstantial and not supported by any facts or direct evidence. On the contrary the Tribunal finds that the direct evidence by the Appellant's employer and the Appellant was ignored.

[40] The Tribunal recognizes some similarities in the fraudulent records of employment allegedly issued by the Appellant's employer to third parties the Tribunal finds no evidence presented by the Respondent that the records of employment issued to the Appellant were in fact fraudulent. The Tribunal finds that the Appellant's employer stated to the Respondent's investigators that he signed the Appellant records of employment and that she was still employed by him during the investigation. (GD3-177) The Tribunal is concerned that during fact finding by the Respondent's investigators no attempts were made by the investigators to visit the place of employment to determine the validity of the Appellant's statements. The employer explained the Appellant's wages and work environment to the Respondent's investigators which was consistent with the Appellant's explanation to the Tribunal and these facts were not challenged by the Respondent. The employer specifically stated that the Appellant worked the longest for him; she worked three times and has three children.

[41] The Tribunal finds that the Appellant has provided evidence that her employment with ABC Financial existed. The Tribunal finds the Appellant's evidence specifically itemizing her duties and work environment were consistent throughout the hearing and consistent with the

explanations provided by her employer to the Respondent's investigators. The Appellant provided copies of her personal banking records to both the Respondent and the Tribunal and there is no credible evidence to demonstrate that the Appellant was not paid wages by her employer during the 3 periods in question. The Appellant advised the Tribunal that sums of money shown as withdrawn or deposited in cash were credible and were part of the normal distribution and use of families within her cultural environment. The Tribunal finds that the Appellant's banking records revealed consistent deposits from her employer representing wages from employment and the Tribunal finds no evidence that cash withdrawals were related to the Appellant's employer. The Tribunal accepts the Appellant's evidence concerning the deposits and withdrawals as a normal part of her personal financial procedures and that the enquiries by the investigators concerning personal cheques to "R. S. MSP/DIV were for purposes completely unrelated to her employment with ABC Financial Inc.

[42] The Tribunal finds that on the balance of probabilities the Appellant did work for ABC Financial Inc. and was brought into an investigation concerning her employer about his business practices and records that were totally unrelated to her employment.

[43] The Tribunal allows the Appellant's appeal for the cancellation of the benefit periods pursuant to sections 7, 10(6)(a), 48 and 49 of the Act and subsection 14(1) of the Regulations.

[44] **ISSUES 2 AND 3:** The second and third issues before the Tribunal are the imposition of penalties pursuant to section 38 of the Act for making a misrepresentation by knowingly providing false or misleading information to the Respondent and a Notice of Violation issued pursuant to section 7.1 of the Act.

[45] Section 38 of the Act gives to the Respondent the power to impose a penalty when it is of the opinion that an Appellant has made a representation that the Appellant knew was false or misleading.

[46] The Appellant filed for maternity benefits on three (3) occasions. She negotiated benefit maternity and parental benefits on each occasion.

[47] The Respondent contends that the Appellant tendered documents for the purpose of proving entitlement to benefits that she was not entitled to because she used fraudulent records of employment each time.

[48] In this case the Tribunal finds that the Appellant negotiated benefits using records of employment from ABC Financial Inc. The Tribunal finds that the records of employment used by the Appellant were not fraudulent and she was therefore entitled to benefits as provided in the Act.

[49] Section 38 of the EI Act allows the Respondent to impose a monetary penalty on an Appellant who makes a false or misleading statement or representation or who provides false information to the Respondent. In order for a penalty to be imposed, it must be clear that the Appellant intended to knowingly make a false statement or to provide false or misleading information to the Respondent. Once it appears from the evidence that the Appellant has made a false or misleading statement, the onus shifts to the Appellant to provide an explanation that rebuts the inference that the statements were knowingly made. The Tribunal finds on the balance of probabilities and a lack of evidence presented by the Respondent's investigators that the Appellant's records of employment were not fraudulent and therefore she did not knowingly make false statements or to provide false or misleading information to the Respondent.

[50] The Tribunal finds that the Appellant used legitimate records of employment to qualify for benefits and negotiate warrants for benefits to which she was entitled. The Appellant has provided any evidence of her legitimate employment with ABC Financial Inc., to confirm that she was legitimately employed and the Tribunal finds that the facts relied upon by the Respondent were circumstantial and contradicted by both the employer and the Appellant.

[51] The Tribunal finds that the Respondent made errors in the exercise of its discretion to impose a penalty. The Tribunal finds, on the facts of this matter, that the Respondent has not met the onus on it to establish that the Appellant "knowingly" made the false or misleading statements.

[52] The Tribunal allows the Appellant's appeal on the imposition of a penalty pursuant to section 38 of the Act for making a misrepresentation by knowingly providing false or misleading

information to the Respondent. The Tribunal finds that the Notice of Violation issued pursuant to section 7.1 of the Act was not issued properly by the Respondent exercising its discretion in a judicial manner as the Tribunal finds the Appellant has provided evidence that she did submit legitimate records of employment.

CONCLUSION

[53] The appeal on the cancellation of the benefit period is allowed.

[54] The appeal on the imposition of a penalty is allowed.

[55] The appeal on the Notice of Violation is allowed.

Joseph Wamback

Member, General Division - Employment Insurance Section