

[TRANSLATION]

Citation: *J. T. v. Canada Employment Insurance Commission*, 2015 SSTGDEI 213

Date: December 9, 2015

File number: GE-15-2026

GENERAL DIVISION – Employment Insurance Section

Between:

J. T.

Appellant

and

Canada Employment Insurance Commission

Respondent

Decision by: Charline Bourque, Member, General Division – Employment Insurance Section

Hearing by videoconference on October 15, 2015

REASONS AND DECISION

PERSONS IN ATTENDANCE

J. T., the claimant, was present at the hearing by videoconference. He was accompanied by Anie Beauchemin, who acted as his representative.

INTRODUCTION

[1] The Appellant made a claim for employment insurance benefits effective June 12, 2011. On March 10, 2015, the Canada Employment Insurance Commission (the “Commission”) informed the claimant that the *Employment Insurance Act* [translation] “allows the Commission to reconsider a claim for benefits within 36 months after the benefits have been paid or would have been payable. If the Commission is of the opinion that a false or misleading statement or representation has been made, the period for reconsideration may be extended to 72 months. The Commission is of the opinion that a false or misleading statement(s) or misrepresentation(s) was/were made, in particular, with respect to your employment as a self-employed person with your company, Lubrifiant JMT.”

[2] On March 10, 2015, the Commission informed the claimant that [translation] “According to our records and contrary to what you have told us, you are self-employed. We are acting on the basis of the information available to us and the explanations you have provided. We have concluded that you knowingly made these false statements.” The Commission added that [translation] “because of the circumstances related to these false statements, we will not require that you pay a penalty.” An overpayment of \$14,976.00 was established.

[3] On May 20, 2015, following a request for reconsideration, the Commission informed the claimant that it had not changed the decision related to the week of unemployment. The Commission explained that [translation] “First, you stated that you had to hire a secretary to help you because you were constantly travelling in order to promote your oils and lubricants to clients and you were always away from your place of business in order to cover the Abitibi and

Northeastern Ontario territory to sell your products. Second, you alleged that you devoted only a few hours per week and that you were actively seeking suitable employment.”

[4] The Commission also stated that the decision on the false statements had not changed. The Commission explained that when [translation] “making your claim and the questions asked by the system to complete the claimant’s reports are clear. You failed to mention that you were operating a business when you made your claim. The question was asked: “Are you self-employed? You answered “NO”. On each of the 17 claimant’s reports that you completed, the question was: Are you self-employed and have you received money from employment and you answered “NO”.”

[5] The Commission informed the claimant that the decision related to the penalty had not changed. The decision sent to you on March 10, 2015 is therefore upheld. The Commission added that the [translation] “letter of warning in your file is in place of a monetary penalty because you completed the claim and claimant’s reports more than 36 months before the Commission carried out its investigation. For this reason, no monetary penalty was added to the overpayment, only monthly interest has been added to your debt” (GD3-141/142).

[6] The claimant appealed these decisions to the Social Security Tribunal of Canada (the “Tribunal”) on June 22, 2015.

[7] This appeal was heard by the videoconference hearing method for the following reasons:

- a) The fact that credibility may be a determinative issue.
- b) The information in the file, including the need for additional information.
- c) The fact that the Appellant or other parties are represented.
- d) The availability of videoconferencing where the Appellant resides.

- e) This method of proceeding respects the requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit (Exhibits GD-1 to GD-4)..

ISSUES

[8] The issues are as follows:

- a) Does the Commission have 72 months to reconsider the claim for benefits that began on June 12, 2011?
- b) Is the claimant considered not unemployed because he was operating a business for the purposes of section 30 of the *Employment Insurance Regulations* (the “Regulations”)?
- c) Did the claimant knowingly perpetrate one of the acts or omissions listed in section 38 of the *Employment Insurance Act* (the “Act”)?
- d) Did the Commission exercise its discretionary power judiciously by issuing a warning under section 41.1 of the Act?

THE LAW

Reconsideration

[9] Section 52 of the Act states:

(1) Notwithstanding section 120, 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 (*a*) has received money by way of benefits for which the person was not qualified or to which the person was not entitled, or (*b*) has not received money for which the person was qualified and to which the person was entitled, the

Commission shall calculate the amount of the money and notify the claimant of its decision and the decision is subject to appeal under section 114.

(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.

Week of unemployment

[10] Section 11 of the Act [version of 2011-01-01 to 2011-12-14] states:

(1) A week of unemployment for a claimant is a week in which the claimant does not work a full working week.

(2) A week during which a claimant's contract of service continues and in respect of which the claimant receives or will receive their usual remuneration for a full working week is not a week of unemployment, even though the claimant may be excused from performing their normal duties or does not have any duties to perform at that time.

(3) A week or part of a week during a period of leave from employment is not a week of unemployment if the employee (a) takes the period of leave under an agreement with their employer; (b) continues to be an employee of the employer during the period; and (c) receives remuneration that was set aside during a period of work, regardless of when it is paid.

(4) An insured person is deemed to have worked a full working week during each week that falls wholly or partly in a period of leave if (a) in each week the insured person regularly works a greater number of hours, days or shifts than are normally worked in a week by persons employed in full-time employment; and (b) the person is entitled to the period of leave under an employment agreement to compensate for the extra time worked.

[11] Section 30 of the *Employment Insurance Regulations* (the “Regulations”) [version of 2011-06-16 to 2011-06-25] states:

(1) Subject to subsections (2) and (4), where during any week a claimant is self-employed or engaged in the operation of a business on the claimant's own account or in a partnership or co-adventure, or is employed in any other employment in which the claimant controls their working hours, the claimant is considered to have worked a full working week during that week.

(2) Where a claimant is employed or engaged in the operation of a business as described in subsection (1) to such a minor extent that a person would not normally rely on that employment or engagement as a principal means of livelihood, the claimant is, in respect of that employment or engagement, not regarded as working a full working week.

(3) The circumstances to be considered in determining whether the claimant's employment or engagement in the operation of a business is of the minor extent described in subsection (2) are

(a) the time spent;

(b) the nature and amount of the capital and resources invested;

(c) the financial success or failure of the employment or business;

(d) the continuity of the employment or business;

(e) the nature of the employment or business; and

(f) the claimant's intention and willingness to seek and immediately accept alternate employment.

(4) Where a claimant is employed in farming and subsection (2) does not apply to that employment, the claimant shall not be considered to have worked a full working week at any time during the period that begins with the week in which October 1st falls and ends with the week in which the following March 31 falls, if the claimant proves that during that period

(a) the claimant did not work; or

(b) the claimant was employed to such a minor extent that it would not have prevented the claimant from accepting full-time employment.

(5) For the purposes of this section, “self-employed person” means an individual who

(a) is or was engaged in a business; or

(b) is employed but does not have insurable employment by reason of paragraph 5(2)(b) of the Act.

False statements

[12] Section 38 of the Act [version of 2011-01-01 to 2011-12-14] stipulates:

(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.

...

Warning

[13] Section 41.1 of the Act [version of 2011-01-01 to 2011-12-14] states:

- (1) The Commission may issue a warning instead of setting the amount of a penalty for an act or omission under subsection 38(2) or 39(2).
- (2) Notwithstanding paragraph 40(b), a warning may be issued within 72 months after the day on which the act or omission occurred.

EVIDENCE

[14] The evidence in the file is as follows:

- a) Resolutions of the board of directors of the company, Radiateur JMT Ltée, dated February 28, 2011 indicating that the claimant was appointed as president.
- b) Resolution of the board of directors of Radiateur JMT Ltée, with an effective date of January 1, 2011, reporting the claimant's resignation as a board member and president of the company (GD3-116).
- c) Notice of resignation from Radiateur JMT Ltée (GD3-117).
- d) The record of employment from Radiateur JMT Ltée indicates a termination of employment on June 10, 2011 for a shortage of work/end of season or contract (GD3-15).
- e) Income statements for Lubrifiant JMT Inc. as at August 31, 2011 and August 31, 2012 (GD6-5 to GD6-13).
- f) The claimant's reports for the period from June 12, 2011 to February 4, 2012 (GD3-21 to GD3-90).
- g) The Commission's investigation report dated July 10, 2013 indicates that the Employer, Mr. I. L., took possession of the company, Radiateur JMT, on January 1, 2011. He hired the claimant for six months after the acquisition (GD3-93).

- h) On September 4, 2013, in response to the questionnaire sent to him by the Commission, the claimant responded to the question “Are you self-employed other than in fishing or farming” by stating that he was not self-employed and that the answer was therefore “No” (GD3-99).
- i) Notice to appear by Integrity Services dated May 12, 2014 to R. T., the claimant’s wife (GD5-3/4).
- j) Notice to appear by Integrity Services dated May 12, 2014 to the claimant related to the information on records of employment A89157931 and A89157933 (GD5-5).
- k) Letter of confirmation from Mr. I. L. of Radiateur JMT Ltée dated June 4, 2014 indicating that the claimant had continued to work for Radiateur JMT Ltée after the sale of shares for a period of six months (GD3-106).
- l) Commission’s investigation report dated June 10, 2015 with the claimant as the Employer of Lubrifiant JMT. The claimant indicated that he had sold oil products in the past but that since 2010 the company has been a management company. He hired his wife as secretary because he needed someone to handle the administration and answer the telephone. [translation] “The latter says that he is always away, meeting forestry companies to make sales, promote oil and grease. He needs someone whom he can trust. He covers the entire region as well as Northeastern Ontario.” According to the record of employment of May 31, 2010 to January 28, 2011, 1,224 hours were worked on bookkeeping. The claimant indicated that he worked full-time in his business so that if there was a call, someone was there to answer it. [translation] “When she is working, does she [Ms. R. T.] have to take time to look after the house, do the laundry? I pay my employee, is paid 40 hours per week, I trust her and she does the work, if she does other things, that is not my business.” For the period from February 2011 to June 2011 (5 months), he indicated that the bills were piling up. He looked after the telephone. The investigator provided a chart of the business’ transactions from September 2010 to September 2012. It showed rental income of \$7,300.00 and \$1,774.95 in antifreeze sales. The claimant stated that forestry operations were slowing down but he hoped that it would improve. For the same

period, \$40,000.00 in wages; the investigator suggested that a cell phone would have been less expensive. The claimant stated that he was old school and did not have a cell phone. [translation] “There needs to be someone to talk to the client Mr. J. T. said. He added that he is a business man.” For the record of employment covering the period from July 4, 2011 to September 22, 2012, the claimant stated that he worked in time in his business. He said that he was the one who decided if she worked the whole week or not. Depending on need. The investigator asked what the business’ expenses were. He said that it was electricity, heating of the office in the principal residence. The business’ expenses were related to the office expenses. He said that if he had not hired his wife, he would have rented space and hired an employee. He is still in business and is thinking of hiring a secretary and renting space this year (GD3-120/121).

- m) Record of employment of Ms. R. T. from the Employer, Lubrifiant JMT Inc. indicating a period of work from July 4, 2011 to September 22, 2012 (GD3-122).
- n) Commission’s investigation report dated June 10, 2015 with the claimant as claimant. The claimant indicated that he sold his business (family), Radiateur JMT, to move on to other things after several years in business. The claimant stated that he was over 60 years old but was not ready to stop working. He did not sell in order to retire. The claimant said that he sold his company shares on December 31, 2010. On January 2, 2011, he started working as an employee of Radiateur JMT with the new owner I. L. Before December 31, he worked full-time in his business, Radiateur JMT. The claimant stated that he was hired for a transition period. His employer was able to terminate his employment at any time. The claimant stated that he finished working in June 2011. During the period that he received benefits from June 2011 to January 2012, the claimant said that he looked for employment. He said that it is not true that companies will hire employees who are 60 years old and older. [Translation] “The investigator asked the claimant, because you were working full-time at Radiateur JMT as the owner in 201[2]0 and as an employee from January to June 2011, who was looking after Lubrifiant JMT? The claimant said that it was somewhat the same clients as Radiateur JMT. In the evenings, one to two hours each

night.” The claimant stated that he did not spend much time on his business (Lubrifiant JMT), a maximum of two hours per day and had no income. [translation] “The investigation says: As the employer of Lubrifiant JMT, you said that you were always away and that you worked in time, which is why you needed a full-time employee. That period overlaps the time that you worked at Radiateur JMT and the time that you received benefits. The claimant stated that he was entitled to hire and pay an employee” (GD3-123/124).

- o) On May 8, 2015, the Commission contacted the claimant’s representative with respect to the claimant’s request for reconsideration. The representative stated that it was impossible for the claimant to operate his business at full capacity because, at the time, forestry operations were disrupted by government cutbacks. The claimant was looking for employment as a heavy equipment mechanic. He had gone to see his clients to find work and not to sell them products because operations were significantly reduced and they were not interested in buying products from Lubrifiant JMT. He did not find employment despite his efforts because he was 60 years old and employers did not want to invest in training (GD3- 136).
- p) List of job searches carried out (GD3-137 and GD6-3).

[15] The evidence presented at the hearing through the Appellant’s testimony revealed:

- a) The claimant was the majority shareholder of Radiateurs JMT. He is a welder-mechanic. He repaired radiators. The administration was handled by his wife, Ms. R. T. He was a shareholder for 25 years. On December 31, 2010, he sold the company to another shareholder. He continued to work for the company in order to provide a transfer of knowledge for a period of six months until June 2011.

- b) The claimant stated that he had a 7th grade education and that he does not understand computers very well and does not use them. This is why he does not handle the administration.
- c) The claimant was also a shareholder in the company Lubrifiant JMT. He indicated that that company was not linked to Radiateur JMT except that it leased space at Radiateurs JMT. Lubrifiant JMT only sold containers of oil and antifreeze. Prior to the sale, the company had one regular employee. That person found employment elsewhere and his wife took over.
- d) When Radiateurs JMT was sold, the offices were moved into his home because no decision had been made in that regard. He was not working there because he was working at Radiateurs full-time. It was his wife who looked after everything connected to Lubrifiants JMT. Until 2013, Lubrifiants had facilities that were leased. He kept a small amount of inventory and acted as an intermediary. His wife handled the administration. The sales counter remained at Radiateurs for a certain period of time as a courtesy, but there was no longer a sales counter onsite. The sales counter was at his residence and was looked after by his wife. The inventory was gradually liquidated because the main clients were connected to forestry operations and a few mining operations, which had cut back their operations.
- e) After he was dismissed, he made a claim for employment insurance benefits and then tried to find employment. He completed his claim with the help of an officer as he was unable to complete it on the computer. He indicated that he was not working for Lubrifiant despite the fact that he held shares. The officer asked him two or three times if he was paid by the company and he answered no. He was unable to work for Lubrifiants because the work consisted of managing the inventory and billing, which he was unable to do.
- f) The claimant was called to appear by the Commission to provide explanations about his wife's employment. He indicated that his wife was also called to appear separately. He indicated that the investigator read him charts but that he did not understand the numbers and did not have the related documents and did not

understand everything. He stated that he was there to answer questions about what the company did but was unable to answer questions related to paperwork.

- g) The report indicates at page GD3-120 that the claimant [translation] “works full-time in his business.” In addition, the representative pointed out that the interview date is given as May 6, 2015 which is likely an inversion (GD3-123). Then, in terms of the claimant’s interview as a claimant, the claimant stated that he was not informed, that there was no break in the interview to inform him that he was being interviewed as a claimant. He indicated that the interview was for his wife’s situation. He stated that the investigator asked the question and answered the question himself with respect to dates and amounts that he was not familiar with. At the end, the claimant indicated that he would appeal because he asked the investigator if he could reread the report to make any necessary corrections and then sign it to attest to its accuracy. The investigator refused. The claimant told the investigator that he had not understood the questions and that the investigator himself had answered the questions. He expected to contest the dates that the investigator was indicating because he did not have any documents and was not certain of the dates. He stated that he did not claim any gas for Lubrifiant because he was not working there. He indicated that he could not work evenings; he had never worked evenings for any company. He worked in the garage from 7:30 a.m. to 5:30 p.m. He was not working evenings. He had never promoted Lubrifiant JMT oils because they were products for forestry operations. He would have been unable to go into the forest because he was not allowed to. Nor was he able to take them onsite. He was not asked about his job searches.
- h) A Commission officer called him afterwards to clarify certain questions. However, he did not want to answer without preparation based on the experience he had had with the investigator. He asked for the questions to be sent to him in writing so that he could understand them and sign his statement. The Commission refused to do that.
- i) As for his job searches, he said that he went to the companies he was familiar with. He was referred to human resources. He knew them personally. He was asked about his level of education but he had none. However, he had somewhat of a reputation in

the trade. He was told that they would call him back. He indicated that many machines, even welding machines, operate with computers and that he does not have the appropriate training.

- j) He never received any money from Lubrifiant JMT. He did not make any false statements. To him, a self-employed person must work, which is not the case in his situation. He is looking to dissolve the company. Since December 31, 2014, someone else has been handling the paperwork that needs to be prepared monthly even if there are few transactions. On the financial statement, the “wages” expense corresponds to the salary for his wife, who is the only person working there.
- k) The representative indicated that the Commission’s report indicates that she herself said that the claimant had changed versions when she had actually indicated to the Commission that that was not what the claimant had told the investigator.

PARTIES’ ARGUMENTS

[16] The Appellant presented the following arguments:

- a) The decision is based on the investigator’s version, which is incorrect. He argued that he was looking for employment while he was receiving benefits. He did not work in his company and did not make any false statements.
- b) He indicated that at the time of his report, he was the owner of a business but did not work there. He does not consider that he was operating that business.
- c) The claimant argued that the investigation was late and even outside the prescribed period.
- d) The claimant completed his employment insurance claim with the help of a Commission officer who told him not to indicate that he was a shareholder of the company after he confirmed two or three times that he was not receiving any money from the company. As a result, the claimant replied the same way in his reports.

- e) As for the Commission's investigation, the claimant was never called to appear for himself; the meeting was for Ms. R. T. He did not agree to be interviewed about benefits; there was no clear break contrary to what the investigator indicated. The investigator asked questions about documents that the claimant did not have.
- f) Report GD-123 indicates that the report states that the claimant was working "in time". The commission assumed that this meant working full-time when that is not what is in the report.
- g) The 2011 and 2012 financial statements show wages paid of between \$15,000 and \$17,000. In addition, the company's gross profit for 2011 was \$1,808 and \$1,796 for 2010. It was impossible for the claimant to work 35 to 40 hours/week full-time, travelling around the entire territory and pay his gas expenses from his own pocket. There are numerous inconsistencies in the Commission's reports. It is unreasonable to think that a person could rely on this company as his principal means of livelihood. Moreover, on the advice of the accountant, the company was changed into a management company.
- h) In terms of the law, the Commission quoted subsection 30(2) incorrectly (GD4-9). Moreover, the Commission did not send all of the documents that the representative had sent to it.
- i) As for the list of job searches provided, the Commission asked for the list of job searches. At no time did it ask for further details regarding those searches.

[17] The Respondent presented the following arguments:

Reconsideration period

- a) In this case, the Commission concluded that the claimant had reported not being self-employed (page GD3-7) and had made this same declaration on all of his claimant's reports (pages GD3-21 to GD3-90) when it was shown that he was

operating a business (page GD3-120). He confirmed that he continued to look after it and had had to hire an employee.

- b) The Commission therefore argued that false or misleading statements were made and the Commission was justified in reconsidering the file within the 72-month period.

Week of unemployment

- c) A claimant who operates his own business is assumed to work a full working week unless he can show that he is involved in that business to such a minor extent that a person would not normally rely on that engagement as a principal means of livelihood. In this regard, the claimant must inform the Commission of his engagement and it is up to the Commission to make the final decision.
- d) To determine whether the claimant's self-employment is exercised to a minor extent or not, the Commission must apply the objective test under subsection 30(2) of the Regulations to the six factors set out in subsection 30(3) of the Regulations in the context of the claimant's business during his benefit period. The two most important factors are the time spent and the claimant's intention and willingness to seek and immediately accept alternate employment.
- e) In this case, the evidence in the file showed that during the period from July 4, 2011 to September 22, 2012, the claimant hired his wife because he was working full-time for his business (GD3-120 and GD3-122). He later stated that he had only devoted one to two hours per evening to it (GD3-123). However, considering the employee's period of employment (page GD3-122), the claimant had clearly indicated having to hire her because he was working full-time in his business. When the investigation officer pointed out to him that he had mentioned that he was working full-time during that period and that period overlapped his benefit period, the claimant had indicated that he would appeal.

- f) The claimant indicated that he had carried out job searches and provided summary evidence (pages GD3-123 and GD3-137). When viewed objectively, the facts in the file show that, while the claimant was no longer involved with Radiateur JMT, he was working full-time in his business, Lubrifiant JMT, during his period of unemployment. He even had to hire his wife (page GD3-122) because he indicated that he was working full-time (page GD3-120).
- g) The claimant also indicated that, had he not hired his wife, he would have had to lease space and hired an employee, all during the period from July 4, 2011 to September 22, 2012 (page GD3-120).
- h) Consequently, the claimant did not refute the assumption that he was working a full working week because he did not meet the exception under subsection 30(2) of the Regulations.

False statements and warning

- i) The Commission has the initial onus to prove that there was misrepresentation. Once the Commission can reasonably conclude that benefits were paid as a result of an act or omission, the onus shifts to the claimant or the Employer to show that the events can be interpreted as having occurred unintentionally.
- j) An act or omission must be proved on a balance of probabilities standard. It is not enough to simply believe a claimant who proclaims his innocence. To be able to conclude that a misrepresentation is made knowingly, the evidence must make it possible to show that: (1) objectively, there was an act or omission; (2) it misled the Commission; (3) it led to the payment of actual or potential benefits for which the claimant did not qualify, and (4) at the time of the representation, the claimant knew that he was not properly reporting the facts.

- k) In this case, the Commission argued that it had shown that the claimant had made false statements when he did not report that he was self-employed. The Commission argued that the claimant knew that he should report it because he was asked the question. That decision led to the overpayment of employment insurance benefits. The Commission claims that the case law supports its decision.
- l) If the Tribunal finds that a penalty is justified, it must then determine whether the Commission exercised its discretion judiciously when setting the amount of the penalty.
- m) Section 40 of the Act states that a penalty shall not be imposed under section 38 or 39 if a prosecution for the act or omission has been initiated against the employee, employer or other person, or 36 months have passed since the day on which the act or omission occurred. However, the Commission may issue a warning instead of setting the amount of a penalty for an act or omission under section 38 or 39.
- n) Consequently, under subsection 41.1(1) of the Act, the Commission issued a warning to the claimant to the effect that if further omissions or misrepresentations were discovered, more severe penalties would be imposed.

ANALYSIS

Reconsideration

[18] Subsection 52(5) of the Act states that, 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.

[19] The claimant stated that he did not make a false statement. He indicated that he was the owner of a business but did not work there and does not consider that he operated that business. He believes that the investigation was late, even outside the allowed period.

[20] For its part, the Commission concluded that the claimant indicated that he was not self-employed and made that same statement on all his claimant's records despite the fact that it

was shown that he operated a business. He confirmed that he continued to be involved in the business and had had to hire an employee.

[21] In *Dussault*, the Federal Court of Appeal cites *Langelier* and comments:

“With respect, I consider that the Umpire misdirected himself when he imposed on the Commission a burden pursuant to s. 43(6) of proving [translation] "that the claimant knowingly made false statements". That is actually the burden imposed by s. 33(1), dealing with penalties. All Parliament requires in s. 43(6) is that "in the opinion of the Commission, a false or misleading statement . . . has been made".... Of course, in order to arrive at this conclusion the Commission must be reasonably satisfied that "a false or misleading statement or representation has been made in connection with a claim".

In other words, the mere existence or presence of a false or misleading statement suffices, to the degree that the Commission is reasonably satisfied of this fact, to trigger the application of subsection 43(6) without the need to find intention in the person making the statement. Its existence is inferred objectively from the facts. (*Canada (Attorney General) v. Dussault*, 2003 FCA 372).

[22] The claimant stated that he completed his claim for employment insurance benefits with the help of an officer at the Service Canada Centre to whom he mentioned that he was a shareholder in a company. The officer clearly asked the claimant if he was receiving compensation from the company to which the claimant indicated that he was not receiving money from the company.

[23] The Tribunal is of the opinion that the Commission could consider that a false or misleading statement had been made because, despite everything, the claimant had not reported being a shareholder of a company. Thus, the Tribunal is of the opinion that the Commission was reasonably satisfied that a false or misleading statement had been made, regardless of whether or not it was made knowingly, in order to be able to apply subsection 52(5) of the Act.

[24] Accordingly, the Tribunal is satisfied that the Commission was able to reconsider the claimant's claim for benefits within the 72-month period set out in the Act, specifically, the claimant's claim for employment insurance benefits beginning June 12, 2011.

Credibility

[25] As pointed out by the representative, the Tribunal notes that the Commission changed the words used in its quote of subsection 30(2) of the Regulations. In effect, the Commission writes in French “. . . dans une mesure si limitée que cet emploi ou cette activité ne représenterait pas normalement son principal moyen de subsistance” (GD4-9). The wording of the Act in French reads “. . . dans une mesure si limitée que cet emploi ou cette activité ne constituerait pas normalement le principal moyen de subsistance d'une personne. . .” (underlining added) (GD4-9).

[26] The Tribunal must point out to the Commission that it should not alter in any way the wording of the Act, especially when it appends the sections of the Act as reference for the Tribunal or the claimant.

[27] The claimant founded the company, Radiateur JMT, and worked there for over 25 years before selling it. He also founded the company, Lubrifiant JMT, in about 2008.

[28] Before analysing the factors related to unemployment status, the Tribunal wishes to clarify that, in light of the many contradictions between the claimant's testimony before the Tribunal and the facts reported by the Commission's investigator in his investigation reports, the Tribunal attributes greater weight to the claimant's testimony. The claimant provided credible testimony. He explained certain differences appearing in the investigator's report.

[29] Moreover, the Commission drew its conclusions from the investigation report even though some words are missing from the report and those words are crucial to understanding it. As the representative pointed out, the Tribunal notes that the investigation report does not indicate that the claimant worked full-time for Lubrifiant JMT. The report states rather [translation] “you said that you were always away and that you worked in time” (underlining added) (GD3-120 and GD3-123). However, the Commission assumed that this meant full-time work although nothing indicates that that was the situation. In that same report, the claimant

confirmed working full-time for Radiateur JMT. As for his work with Lubrifiant JMT, the report indicates that the [translation] “claimant says that he did not spend much time on his business (Lubrifiant JMT), a maximum of two hours per day and had no income” (GD3-123).

[30] The claimant also explained to the Tribunal how the investigation was carried out. He indicated that he met with the investigator to explain the Radiateur company to the investigator. The Tribunal notes that he was called in by the Commission to discuss Mrs. R. T. and that there was no mention that he should have been called to appear in relation to his own employment insurance claim. The claimant indicated that there was never any transition between the two interviews as mentioned in the investigation report. He claims that the investigator presented him with a series of numbers of which he had no understanding. The investigator answered the questions himself. The claimant told the Tribunal that he did not have much education and that he could not answer the investigator’s questions about the numbers given to him. He referred the investigator to his wife who was familiar with them. The Tribunal notes that the report indicates that [translation] “the investigator provided a chart of the business’ transactions from September 2010 to September 2012. It showed rental income of \$7,300.1 and \$1,774.95 in antifreeze sales” (GD3-120). The claimant confirmed that he was still unable to verify these numbers because it was his wife who looked after them.

[31] The Tribunal also notes that the investigator made several judgments about the claimant’s situation or that of his wife. He asked the claimant, among other things [translation] “while she is working, does she [Ms. R. T.] have to take time to look after the house, do the laundry?” The investigator also commented that [translation] “for the same period, \$40,000.00 in salary, a cell phone would have been less expensive” (GD3-120).

[32] The Tribunal notes that the Commission argued about the fact that Ms. R. T. was an employee of Radiateur JMT. However, the Tribunal is of the view that any shareholder, whether involved or not in the management and operations of the company, may employ the person of his choice. If questions remain about Ms. R. T.’s role in relation to an employment insurance situation, then that situation should be examined in Ms. R. T.’s file and not in that of the claimant. Ms. R. T.’s situation as an employee of Lubrifiant JMT is not at issue in this appeal.

[33] The claimant also explained why he indicated to the investigator that he was going to appeal. He indicated that, because he did not understand the numbers and the situation, he asked the investigator for a copy of the report so that he could reread it, make any changes and sign it to attest to its validity. This request was denied.

[34] The claimant also indicated that when the Commission called him back about this matter, he did not want to answer the questions in order to avoid finding himself in the same situation as with the investigator where he did not understand everything. He asked the Commission to give him the questions in writing so that he could understand and answer them. He would then have signed the document and attested to the validity of his answers. The Commission refused to do this.

Week of unemployment

[35] Subsection 30(3) of the Regulations sets out the circumstances to be considered in determining if a claimant is employed or engaged in the operation of a business. The Tribunal must therefore take the following factors into consideration to determine if the claimant is considered a self-employed person or the operator of a business:

The time spent

[36] The claimant stated that he was not involved in the business. He indicated that it was his wife, Ms. R. T., who was involved because the work involved managing the inventory and billing. He stated that he does not have the skills to perform this type of work.

[37] The claimant stated that he has owned Lubrifiant JMT since 2008 and that it was his wife who looked after it until she retired. He had an employee who worked at the counter located in Radiateur JMT. When that employee left, Ms. R. T. took over. The claimant looked after Radiateur JMT. He worked there full-time and continued to work there for a period of about six months after the company was sold. He worked days from 7:30 a.m. to 5:30 p.m. for Radiateur JMT and does not see how he could have worked full-time for Lubrifiant JMT.

[38] Furthermore, he indicated that the sale of oils and antifreeze was mainly targeted at the forestry industry and, to a lesser degree, the mining industry. It would have been impossible for him to visit the worksites to sell or promote his products because it was not allowed. Thus, it was not possible for him to work full-time for Lubrifiant nor could he have worked evenings because the businesses were closed. He also stated that he had never worked on the road.

[39] The Commission stated that [translation] “according to the statement made to the investigator for his wife’s file, the claimant claims that he had to hire his wife, R. T., as secretary because he was always away doing promotion to sell his lubricants and oils” (GD3-139/140).

[40] Based on the evidence and the arguments presented by the parties, the Tribunal is of the opinion that the time spent at Lubrifiant JMT by the claimant does not correspond to that of a person who would normally rely on that business as a principal means of livelihood. The claimant had worked full-time for Radiateur JMT since it was founded. He is a welder-mechanic by trade and worked in a garage. While some of the clients may be the same for both companies, the Tribunal is not satisfied that that shows that the time spent at Lubrifiant JMT by the claimant corresponds to that of a person who would normally rely on that business as a principal means of livelihood.

The nature and amount of the capital and resources invested

[41] The claimant indicated that he was a shareholder in Lubrifiant JMT. He had a sales counter for his products leased at Radiateur JMT. When Radiateur JMT was sold, the sales counter moved to his residence. The business owned a warehouse, which was partially leased. The balance sheet as at August 31, 2012 shows capital assets of \$185,162 (GD6-12).

[42] The Commission did not take this element into consideration in its decision report (GD3-139).

[43] Based on the evidence and the arguments presented, the Tribunal is of the view that the capital invested by the claimant in the business is sufficient to determine that it corresponds to that of a person who would normally rely on this level of self-employment as a principal means of livelihood.

The financial success or failure of the employment or business

[44] The claimant indicated that the company is still active but he is looking to dissolve it. The claimant provided the company's income statements for 2011 and 2012. The income statement ending August 31, 2011 shows a gross profit of \$1,808. This profit was \$2,169 in 2010 (GD6-5) and \$5,509 in 2012 (GD6-10).

[45] The claimant also indicated that, on the advice of his accountant, the company was changed to a management company.

[46] The Commission indicated that [translation] "while the claimant stated that this company was changed to a management company, on the Internet, the Lubrifiants JMT listing still has his business telephone number and a place of business, the listing is still in the Yellow Pages and thus advertising is still in effect" (GD3-139/140).

[47] The Tribunal is of the opinion that even though the claimant continues to do some advertising for the company, the financial statements do not show high annual profits. In addition, given the situation, the company was changed to a management company. Based on the evidence and the arguments presented, the Tribunal is of the view that the company's financial situation does not allow the Tribunal to determine that it corresponds to the financial situation of a person who would normally rely on this level of self-employment as a principal means of livelihood.

The continuity of the employment or business

[48] The claimant stated that he is a welder-mechanic. He was the owner of Radiateur JMT and continued to work there following its sale until June 2011. He indicated that he did not work for Lubrifiant JMT. He was the company's shareholder but he did not work there. He indicated that, following the departure of an employee, his wife took over. The work for Radiator JMT is mainly related to billing and managing inventory. He claimed that he does not have the skills to perform this type of work.

[49] The Commission indicated that [translation] "Lubrifiant JMT is directly linked to Radiateur JMT because the two businesses deal mostly with the same clients. In addition, the claimant hired his wife as secretary to work in Lubrifiant JMT during the period that he was claiming employment insurance. In effect, the claimant initiated his employment insurance claim on June 12, 2011 and hired his secretary on July 4, 2011. The claimant received all of the benefits to which he was entitled until January 29, 2012, namely, 32 weeks and his wife's employment ended on September 22, 2012. His wife did not work at Lubrifiant JMT while the claimant was working as an employee for Radiateur JMT from January 2011 to June 2011" (GD3- 139/140).

[50] Based on the evidence and the arguments presented, the Tribunal is of the opinion that the financial statements do not show that the business was flourishing in the years at issue. The claimant claimed that he did not receive any money from the company. He hired Ms. R. T. as secretary to work in the business while he was receiving employment insurance benefits. It was established that the sales counter was moved into his residence a few months after the sale of Radiateur JMT. Moreover, if the claimant was unable to do the work because he lacked the knowledge, he could have, as manager, hired an employee to do the work. The claimant also indicated that, following his wife's retirement, he hired another person to handle the paperwork and provide the documents that are required for a company monthly. Lastly, the claimant was working full-time for Radiateur JMT before Lubrifiant JMT was established and continued to work there after it was established.

[51] Thus, although the claimant has some interest as a shareholder in the success of the business, the Tribunal believes that that interest is not sufficient to determine that this business corresponds to a business of a person who would normally rely on it as a principal means of livelihood.

The nature of the employment or business

[52] The claimant said that he does not have the training to look after Lubrifiant JMT. He looked after Radiateur JMT. He was a welder- radiator mechanic and did not handle the paperwork because he does not use a computer. He was unable to handle Lubrifiant JMT because the work involved mainly managing inventory and billing. The claimant had an employee to handle Lubrifiant JMT. When that employee left, Ms. R. T. took his place. The claimant indicated that even after December 2014 when his wife retired, he hired an employee to handle the paperwork that must be done monthly because the company is still active.

[53] The Commission indicated that the nature of the employment is and remains in the same field in which the claimant has worked for several years.

[54] The Tribunal is of the opinion that, while Lubrifiant JMT may have activities related to Radiateur JMT and common clients, the claimant had an employee to look after the business before his wife took over. Moreover, he indicated that he was unable to perform the necessary work, which involves managing inventory and billing and which requires the use of a computer.

[55] Based on the evidence and the arguments presented, the Tribunal is of the opinion that it cannot determine that the claimant would normally rely on this business as a principal means of livelihood.

The claimant's intention and willingness to seek and immediately accept alternate employment

[56] The claimant indicated that he made employment efforts and provided the list of companies contacted. He stated that he does not know how to use a computer and visited the employers in person. He was generally asked for his diplomas, which he does not have, but he is known in the area. He indicated that his age and the fact that he does not work with computers can make it difficult for him to find employment. He searched for jobs that he had the ability and the experience to do.

[57] The representative explained that she provided the list of job searches completed as requested by the Commission. However, she indicated that while the Commission criticized the claimant for the lack of detail on that list, he was never asked to provide a more detailed list.

[58] The claimant stated that he was never absent from his home more than one night. He has never worked on the road and always worked days at the garage on a fixed work schedule. His wife looked after Lubrifiant JMT and he was never paid by that company since he never worked there.

[59] The Commission indicated that before [translation] “the decision was made in the claimant’s case based on the facts [where] the claimant stated that he was often absent from his home to cover all of the territory he served and his absence required the hiring of a secretary, which left him little time to look for work as an employee. After learning of the Commission’s decision and receiving the statement of account, the claimant said that he would not have been able to work more than an hour or two in the evenings, which would make him available for suitable work. During the administrative review, the claimant provided his representative with a list of job searches carried out with six employers, the majority in the forestry field or [*sic*] the claimant stated that the forestry industry was very quiet at that time. The claimant claimed that employers do not want a 60-year-old employee” (GD3-139/140).

[60] Accordingly, the Tribunal is of the opinion that the claimant carried out job searches in keeping with his skills. Based on the evidence and the arguments presented, the Tribunal is of the opinion that it cannot determine that the claimant would normally rely on this business as a principal means of livelihood and that, therefore, his participation was to a minor extent.

[61] The Commission concluded that the evidence in the file showed that, during the period from July 4, 2011 to September 22, 2012, the claimant hired his wife because he was working full-time for his business. He indicated later on that he spent only one or two hours in the evening. However, considering the employee's period of employment, the claimant had clearly indicated having to hire the person because he was working full-time in his business. When the investigation officer pointed out to him that he had mentioned that he was working full-time during that period and that that period overlapped his benefit period, the claimant had said that he would appeal. The claimant indicated that he had carried out job searches and provided summary evidence. When considered objectively, the facts in the file show that while the claimant was no longer involved with Radiateur JMT, he was working full-time in his company, Lubrifiant JMT, during his period of unemployment. He even hired his wife because he stated that he was working full-time. The claimant also stated that if he had not hired his wife, he would have leased space and hired an employee, still during the period from July 4, 2011 to September 22, 2012. Consequently, the claimant did not refute the presumption that he worked a full working week because he did not meet the exception set out in subsection 30(2) of the Regulations.

[62] In *Charbonneau*, the Federal Court of Appeal stated:

“In conclusion, if it is true to say that all the factors listed in subsection 30(3) of the Employment Insurance Regulations must be taken into consideration, the fact is that the "time" factor (paragraph (a)) and the "intention and willingness" factor (paragraph (f)) are of utmost importance. A claimant who does not have the time to work or who is not actively seeking work should not benefit from the Employment Insurance system”
(*Charbonneau v. Canada (Attorney General)*, 2004 FCA 61).

[63] The Federal Court of Appeal confirmed the principle by which subsection 30(2) of the Regulations will nullify the application of subsection 30(1) of the Regulations if the claimant can show that his level of engagement in the operation of his business, viewed objectively in light of the six factors listed in subsection 30(3) of the Regulations, is to such a minor extent that the claimant would not normally rely on that level of engagement as a principal means of livelihood (*Martens v. Canada (Attorney General)*, 2008 FCA 240)

[64] Based on the evidence and the arguments presented, the Tribunal is of the opinion that, taking into consideration the six factors set out in subsection 30(3) of the Regulations and for the reasons stated earlier, the claimant's level of engagement in the business, Radiateur JMT, aside from the financial level, is so minor that it cannot constitute the claimant's principal means of livelihood. Thus, the Tribunal finds that the presumption was overcome and that the claimant proved that he was not working full working weeks.

False statements

[65] The Tribunal notes that the Commission did not impose any penalty on the claimant because more than 36 months had passed between the investigation and the claim for benefits and the statements made by the claimant.

[66] Paragraph 38(1)(a) of the 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;

[67] The claimant claims that he did not make a false or misleading statement. He indicated that he completed his claim for employment insurance benefits with a Service Canada officer. He went to the Service Canada office and because of his problems using computers, an officer filled out his claim with him. He argued that the officer did ask him the question related to self-employment and that he indicated that he was a shareholder of a company but did not receive any compensation. The claimant stated that the officer told him he did not have to report it and he did not do so.

[68] The Commission argued that it had shown that the claimant made false statements when he did not report being self-employed. The Commission argued that the claimant knew that he should declare it because he was asked the question. That decision led to the overpayment of employment insurance benefits. The Commission submitted that the case law supports its decision. The claimant argued that, having been told by the officer that he should not report the fact that he was a shareholder of a company, he continued to not report it when he submitted his reports.

[69] The onus is on the Commission to show that the claimant knowingly made false or misleading statements. The onus is then on the claimant to explain why those statements were made. (*Canada (Attorney General) v. Purcell*, FCA A-694-94).

[70] The reports show that the claimant answered “No” to the question “Are you self-employed?”

[71] The case law also establishes that it is not enough for the claimant to make a false or misleading statement but he must also have done so knowingly. It is therefore necessary, on a balance of probabilities, for the claimant to have knowledge of the fact that he was making a false or misleading statement (*Mootoo v. Canada (Department of Human Resources Development)*, 2003 FCA 206).

[72] In *Gates*, the Court stated: “In deciding whether there was subjective knowledge by a claimant, however, the Commission or Board may take into account common sense and objective factors. In other words, if a claimant claims to be ignorant of something that the whole world knows, the fact finder could rightly disbelieve that claimant and find that there was in fact, subjective knowledge, despite the denial. Not to know the obvious; therefore, might properly lead to an inference that the claimant is lying. This does not make the test objective: it does, however, take into account objective matters in coming to a decision on subjective knowledge. If, in the end, the trier of fact is of the view that the claimant really did not know that the representation was false, there is no violation of subsection 33(1).” (*Canada (Attorney General) v. Gates*, FCA A- 600-94).

[73] The Tribunal is of the opinion that the Commission demonstrated that the claimant made false or misleading statements. However, his false or misleading statements must have been made knowingly.

[74] The claimant explained that, when his employment ended with Radiateur JMT and on the advice of his employer, he went to the Service Canada Centre where an officer completed his employment insurance claim with him. He indicated that the officer asked him questions that he answered and filled out the form for him. The claimant indicated that he remembered the question about being self-employed, a question that he was asked more than once by the officer. The claimant confirmed to the officer that he was a shareholder for Radiateur JMT but did not work there or receive wages. The claimant stated that the officer then told him that he did not have to report it. The claimant indicated that he completed his reports the same way having been advised by the officer that he did not have to report his self-employment since he was not working for the company.

[75] Moreover, the Tribunal is aware that the question “Are you self-employed” can be unclear for someone in the claimant’s situation who is a shareholder but does not work for the company. The claimant was unable to report hours or wages because he was not working for the company. Thus, the Tribunal is of the opinion that the claimant had no subjective knowledge that his statements were false or misleading.

[76] For this reason, the Tribunal finds that, on a balance of probabilities, the claimant had no knowledge of the fact that he was making a false or misleading statement. The Tribunal is of the opinion that the claimant did not knowingly make a false or misleading statement.

[77] Accordingly, the Tribunal is of the opinion that the Commission may not impose a penalty or warning on the claimant.

CONCLUSION

[78] The Tribunal is satisfied that the Commission was entitled to reconsider the claimant’s claim for benefits within the 72-month period prescribed by the Act and consequently, the claimant’s claim for employment insurance benefits beginning June 12, 2011.

[79] Based on the evidence and the arguments presented, the Tribunal finds that, taking into consideration the six factors set out in subsection 30(3) of the Regulations, the claimant's level of engagement in the company, Radiateur JMT, was to such a minor extent as to not constitute the claimant's principal means of livelihood. Thus, the Tribunal is of the view that the presumption was overcome and that the claimant showed that he was not working full working weeks.

[80] In the Tribunal's opinion, the Commission may not impose any penalty or warning on the claimant because it was not shown, on a balance of probabilities, that the claimant knowingly make false or misleading statements.

[81] The appeal is allowed.

Charline Bourque
Member, General Division — Employment Insurance Section