



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *R. L. v. Canada Employment Insurance Commission*, 2016 SSTGDEI 57

Tribunal File Number: GE-15-3847

BETWEEN:

**R. L.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

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

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DECISION BY: Katherine Wallocha

HEARD ON: April 26, 2016

DATE OF DECISION: April 28, 2016

## **REASONS AND DECISION**

### **PERSONS IN ATTENDANCE**

R. L., the claimant, attended the hearing via teleconference.

### **INTRODUCTION**

[1] The claimant became unemployed on February 26, 2014. He filed for Employment Insurance (EI) benefits on March 29, 2014. An initial claim for EI benefits was established on March 2, 2014. The Canada Employment Insurance Commission (Commission) informed the claimant by letter dated June 3, 2015 that action was being taken on his claim. The claimant did not declare earning for the weeks beginning June 22 and June 29, 2014 and these monies were allocated. The claimant was further imposed a penalty and a violation. The claimant sought reconsideration of the Commission's decision, which the Commission maintained in their letter dated October 22, 2015. The claimant appealed to the Social Security Tribunal (SST).

[2] The hearing was held by Teleconference for the following reasons:

- a) The complexity of the issue under appeal.
- b) The fact that the claimant will be the only party in attendance.
- c) The information in the file, including the need for additional information.

### **ISSUES**

[3] The issues under appeal are:

1. whether the claimant has earnings to be allocated to a period of a claim pursuant to sections 35 and 36 of the *Employment Insurance Regulations* (Regulations).
2. whether the claimant should be assessed a penalty pursuant to section 38 of the *Employment Insurance Act* (EI Act) for making a misrepresentation by knowingly providing false or misleading information to the Commission.

3. whether the claimant should be assessed a serious violation under section 7.1 of the EI Act.

## **THE LAW**

### **Earnings**

[4] Subsection 35(1) of the Regulations defines “income” as “any pecuniary or non-pecuniary income that is or will be received by a claimant from an employer or any other person, including a trustee in bankruptcy.”

[5] Subsection 35(2) of the Regulations provides, in part, that earnings to be taken into account for the purposes of determining whether an interruption of earnings under section 14 has occurred and the amount to be deducted from benefits payable under section 19, subsection 21(3), 22(5), 152.03(3) or 152.04(4) or section 152.18 of the EI Act, and to be taken into account for the purposes of sections 45 and 46 of the EI Act, are the entire income of a claimant arising out of any employment.

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

- a) disability pension or a lump sum or pension paid in full and final settlement of a claim made for workers' compensation payments;
- b) payments under a sickness or disability wage-loss indemnity plan that is not a group plan;
- c) relief grants in cash or in kind;
- d) retroactive increases in wages or salary;
- e) the moneys referred to in paragraph (2)(e) if
  - i) in the case of a self-employed person, the moneys became payable before the beginning of the period referred to in section 152.08 of the Act, and

- ii) in the case of other claimants, the number of hours of insurable employment required by section 7 or 7.1 of the Act for the establishment of their benefit period was accumulated after the date on which those moneys became payable and during the period in respect of which they received those moneys; and
- f) employment income excluded as income pursuant to subsection 6(16) of the *Income Tax Act*.

[7] Subsection 36(1) of the Regulations provides that earnings as determined under section 35 shall be allocated in the manner describe in this section.

[8] Subsection 36(4) of the Regulations states that earnings that are payable to a claimant under a contract of employment for the performance of services shall be allocated to the period in which the services were performed.

### **Misrepresentation**

[9] Section 38(1) of the EI Act states that the Commission may impose on a claimant, or any other person acting for a claimant, a penalty for each of the following acts or omissions if the Commission becomes aware of facts that in its opinion establish that the claimant or other person has

- a) in relation to a claim for benefits, made a representation that the claimant or other person knew was false or misleading;
- b) being required under this Act or the regulations to provide information, provided information or made a representation that the claimant or other person knew was false or misleading;
- c) knowingly failed to declare to the Commission all or some of the claimant's earnings for a period determined under the regulations for which the claimant 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).

### **Violation**

[10] Subsection 7.1(4) of the EI Act provides, in part, that a claimant will accumulate a violation if a penalty was imposed on him/her under section 38 of the EI Act.

### **EVIDENCE**

#### **Information from the Docket**

[11] The Commission submitted a letter dated February 4, 2013 informing the claimant that actions were being taken on his EI claim. He was informed that the Commission wrote to him on September 20, 2011 concerning his earnings received as wages which their records show he did not declare. The claimant's earnings were allocated to the weeks beginning March 1, March 8, March 15, March 22 and March 29, 2009. The Commission concluded that the claimant made three false representations however a monetary penalty was not imposed (Pages GD3-12 and GD3-13).

[12] The claimant applied for regular EI benefits stating that his last day of work was February 26, 2014 and he would not be returning to work for this employer (Pages GD3-3 to GD3-11).

[13] The Commission provided the Full Text Screens for the Telephone Reporting Service which indicates that the claimant filed his reports on July 5, 2014 for the reporting period

starting on June 22 to July 5, 2014. These reports ask the claimant “Did you work or earn wages during the period from June 22 to July 5?” The claimant responded “no”. The claimant was asked to confirm his answer “You said you did not work or earn wages. Is this right?” The claimant responded “yes”. The claimant was further asked “Is there any other money that you have not told us about that you received or will receive for this 2 week period?” The claimant responded “no” (Pages GD3-12 to GD3-21).

[14] An employer submitted a Record of Employment (ROE) dated January 20, 2015 indicating that the claimant began working as a winch truck driver on June 26, 2014 and he stopped working on January 7, 2015 due to a shortage of work accumulating 1080 hours of insurable employment (Page GD3-22).

[15] The Commission sent a Request for Payroll Information dated March 26, 2015 where the employer to provided payroll data showing that the claimant earned \$1,060.00 in the week beginning June 22, 2014 and \$1,250.00 in the week beginning June 29, 2014 (Page GD3-24).

[16] The Commission sent a Request for Clarification of Employment Information dated April 22, 2015 asking the claimant to confirm the information provided by the employer and to explain the discrepancies from what he was reported to have earned and what he declared (Pages GD3- 26 and GD3-27).

[17] The Commission sent a letter dated June 3, 2015 informing the claimant that actions were being taken on his EI claim. Since he did not respond to their inquiry of April 22, 2015, the Commission was acting based on the information they had on hand. He was informed that according to their records, he did not declare any earnings and adjustments to his earnings and this means that he will have to pay back any benefits he should not have received. It was determined that the claimant made one false representation in one report to claim benefits and imposed a penalty of \$514.00. The evidence in his file indicates that this is his second incident of improper reporting or of omitting information. The claimant was notified of the previous incident in the letter dated February 4, 2013. The Commission concluded that the claimant accumulated a violation when he knowingly made a misrepresentation on his EI claim classified as a serious violation (Pages GD3-28 to GD3-31).

[18] The claimant was sent a Notice of Debt dated June 6, 2015 in the amount of \$1,542.00; overpayment of \$1,028.00 and penalty of \$514.00 (Page GD3-32).

[19] The claimant contacted the Commission on June 10, 2015 and explained that he did not respond to the Request for Clarification of Employment Information because he lives in a rural area and is only able to collect his mail once a month or so (Page GD3-33).

[20] The claimant submitted a letter with his Request for Reconsideration and he stated that he lives in a rural area and only travels to town for his mail once a month because of his tight budget. On June 9 or 10, 2015 he picked up his mail and received the Request for Clarification, the notice of debt and the letter of actions being taken against his EI claim (Page GD3-36).

[21] The claimant was contacted by the Commission and he stated that the legislation should be changed and stated that he needed the money to get to work. He disagreed with the penalty because he paid in to the fund and that is what the funds are intended for. He further stated that his previous allocation should not matter since he paid back the previous debt (Page GD3-38).

[22] The claimant explained that he had just started the new job and he needed the money to kick start his new job for gas and food for travelling back and forth and because of it, he is being penalized. He wondered what kind of system is that and asked if that is not what EI is for, to help people who are unemployed (Page GD3-39).

[23] The Commission sent a letter dated October 22, 2015 informing the claimant that the decision regarding his earnings was maintained. For the weeks commencing June 22 and June 29, 2014 he earned \$1,060 and \$1,250 respectively. This income is considered earnings subject to allocation to the weeks earned. Regarding the penalty, the claimant was informed that the decision was changed due to the mitigating factors and the penalty was reduced by 10% from \$514.00 to \$463.00. Regarding the violation, the decision was maintained and the claimant will continue to have a violation classified as serious (Page GD3-42).

[24] The claimant submitted a letter of appeal dated October 22, 2015 stating that his overpayment and penalty was assessed against him by the malicious government wasting his tax payer's dollars to cause undue stress and intolerable hardship to a true Canadian Citizen. He stated that he took a two week overpayment in order to be able to survive and rejoin the

workforce. He explained that he took a job 135 KMs away from his area and needed the money in order to be able to travel to work because it was too far to walk. The claimant continued to rant about a dictatorship society stating that EI is paid for by the people for the people and not for the government to “fuck” people over. He stated that the government wants to keep blue collar “pieces of shit” citizens out of work by hiring immigrants to help company’s reduce their overhead leaving Canadian people out of work and struggling to survive in this “piss poor country.” He suggested that the Canadian government should send Canadian citizens a bullet so the unemployed can make a choice to continue to be screwed or to take their life. He asked that he be sent a bullet. He stated that he has always paid any monies owed at the end of tax season instead of being attacked with outrageous penalties and enduring malicious undue stress and hardship and wasting tax payer’s dollars trying to recover such a small amount which costs thousands of taxpayer dollars (Pages GD3-44 to GD3-45).

### **Testimony at the Hearing**

[25] The claimant testified at the hearing that everything he has written down is the truth and the fate of his life rests with the Tribunal. He stated that he is done being a Canadian citizen, he is done being attacked by the government and he is done being treated like a slave in Canada. He has written nine letters to politicians about having the legislation changed so that people in his situation can be put back into the workforce without prosecution or penalty however he did not hear back from anyone. He stated that his life is on the line here; if he is going to get screwed by the government for being an honest tax paying citizen and using the essential systems to put him back in to the workforce to be able to pay income tax, “if you’re going to screw me on that then I’m going to Ottawa and I’m going to put a bullet in my head right on the goddamn doorsteps of Parliament and I’m going to make a statement that the whole bloody Canada is going to see.”

[26] The claimant stated that he did take an overpayment and he will pay that back but he feels he is being attacked and is so frustrated with this; he has lost family and it has caused so much undue hardship. He stated that it is ridiculous that someone on EI can have his EI garnished to repay the overpayment. He stated that the government is throwing him out on the



doorstep for trying to return back to the workforce. He stated that he is not putting up with anymore.

[27] The claimant stated that he went back to work, he took a job 150 KMs from his home and had to travel back and forth and he needed the extra EI cheque to help with that but to be attacked because of it, he does not understand what kind of government we have other than a bunch of thieves and BS politicians. He added that there is no compassion, no nothing.

[28] The claimant stated that in October 2015, he made an attempt on his life because of this. He has struggled to get back in to the workforce and managed to get a full-time job but there is no work so he was laid off again; he managed to accumulate 731 hours in the last six months and applied for EI but is unable to receive benefits because of his violation. He stated that he worked a total of 14 hours in the last month. He believes that the government has taken the jobs away without compensation or forewarning. He added that basically, we are putting a bullet in his head; he is ready to lose it. People who have never walked a day in his shoes, who sit behind a desk are making decisions regarding his life and his financials. He has given up everything in order to be employed but there is no work.

[29] The claimant confirmed that he received the letter from 2013 and explained that he paid back the debt created in the previous claim and does not understand how it impacts this claim. He further confirmed that he knew that if he did not declare his earnings that action would be taken on his claim. He explained that he had to sell his house because there were no jobs in Calgary and he moved up north and was living in his car and this is why he did not report his earnings in 2013. He stated that the government does not understand and does not consider the reasons. Furthermore, he had no problem repaying the overpayment.

[30] The claimant confirmed the information provided by the employer regarding the earnings received for the weeks beginning June 22 and June 29, 2014. He stated that he does not deny that he needed that money just to go to work.

[31] The claimant explained that he was receiving EI benefits and CRA took his last few benefit cheques to pay for the overpayment. He stated that he made an attempt on his life and ended up in the hospital. He further explained that he had a doctor's note; he was supposed to

receive 15 weeks of sickness EI benefits but only receive nine weeks. The claimant stated that he managed to get a job but took over \$25 per hour loss in wages and was getting barely 40 hours every two weeks. He stated that now he is laid off again because there is no work in the oil patch and he is looking at between two and five hours per week.

[32] The claimant stated that he has stated from the beginning that he will pay the overpayment back at tax time like an honest person would do; he is not a criminal and he is not a thief like “he has been pegged.” He now owes money on his taxes because of this; because of the malicious attack by the government on the poor and the unemployed. There are two options, stop the government from coming after him for \$1,400.00 or watch him take his life.

## **SUBMISSIONS**

[33] The claimant submitted that:

- a) He is a hard working honest tax paying Canadian Citizen who has had a difficult time in 2014 and 2015. He has been unemployed due to the oil patch drop and this lay off was directly caused by our government. Work was very slow, low pay hours, low paycheques and it costs to be employed. In 2015, he was unemployed for 10 months, he worked and was then on EI again. While on EI, they maliciously wanted him to pay back this overpayment with a penalty so they took his EI payment without notice and this attack caused him to make an attempt on his life; putting him in a very financial hardship way (Page GD2-2).
- b) The overpayment was taken by him so he could return to the workforce without having to walk over 300 KMs to go to work with no money. The penalty is an outrage for doing what it takes to return to the workforce without have to steal, beg or borrow (Page GD3-34).
- c) This decision has caused him grave hardship and financial difficulties because he was unable to respond as requested in time. He was only given a short time to respond and he called the EI office the day that he was informed by mail. He was very distraught over the decision because it has set him back to financial hardship with no means of paying his bills, rent, groceries, fuel and being able to look for work (Page GD3-36).

- d) The overpayment was a must in order to travel from his place of residence to his place of employment on a daily basis to work and to allow him to return to the workforce. He took a final cheque in order to be able to receive a pay cheque three weeks after his start date. He believes the EI system does not take that in to account for this overpayment. He believes that the legislation should be changed to allow people to be able to return to the workforce. It is only one cheque. This program is for the people who need it; it would be different if he took more than one cheque. For EI to take action against anyone during their claim is an outrage against the people. All that does is put people in financial hardship while they try to obtain work or return to the work force. Please change the legislation so people who pay in to this program can be able to return to the workforce (Pages GD3-36 and GD3-37).
- e) He had paid in to EI for all these years and is entitled to it (Page GD3-38).
- f) There should be no issue with him being able to receive a two week benefit in order to return to the workforce especially in this case where funds were required in order for him to travel the distance to and from work as well as being able to sustain life without hardship until he received a paycheque. He would not have an issue making a repayment on his EI claim without a malicious attack on his EI claim with a penalty (Page GD3-51).
- g) He believes that this attack by our government is the worst form of bullying when especially the pain and hurt this causes a human being. The government puts its citizens out of work and expects them to survive this long then to attack him by taking the only income he has and to make him pay a penalty because he made a judgement call to take an absolutely necessary two week cheque in order to live and rejoin the workforce. This has caused him extreme hardship emotionally and financially. He has no problem paying back the overpayment but he does not agree or respect the way he is being attacked. He refuses to be treated like a “piece of shit” by our government. He feels like ending his life so that the government might see what this does to people who struggle just to pay taxes. He refuses to pay any penalties and interest because of the bully tactics of our government and the hardship this has caused him (Page GD2-15).

[34] The Commission submitted that:

### **Earnings**

- a) Sums received from an employer are presumed to be earnings and must therefore be allocated unless the amount falls within an exception in subsection 35(7) of the Regulations or the sums do not arise from employment (Page GD4-5).
- b) The claimant received money from an employer and this money was paid to the claimant as wages. The Commission maintains that this money constitutes earnings pursuant to subsection 35(2) of the Regulations because the payment was made to compensate the claimant for having worked. Therefore, in accordance with subsection 36(4) of the Regulations it correctly allocated these earnings to the weeks in which the work was performed (Page GD4-5).

### **Misrepresentation**

- c) In the case at hand, it has met the onus of establishing that the claimant knowingly made a misrepresentation because he knew that he was employed in the weeks of June 22 and June 29, 2014 when he reported that he did not work and did not earn any income during that period on claim. The fact that the claimant opines that the legislation should be different does not change the fact that he knowingly failed to report his work and earnings. It should also be clarified that the claimant was not assessed with a penalty due to failing to reply to a letter that was sent to him in the mail; rather the penalty was imposed for stating he did not work or having earnings on his reporting declaration (Page GD4-6).
- d) The penalty amount was calculated at a rate of 40% of the overpayment amount for a second offence instead of 100% due to a Commission error on the original penalty calculation and due to the claimant's explanation for not reporting his earnings as required. The Commission submitted that it rendered its decision in this case in a judicial manner, as all the pertinent circumstances were considered when assessing the penalty amount (Page GD4-7).

## **Violation**

- e) The discovery of a misrepresentation resulted in an overpayment of \$1,028.00. The claimant's prior offence did not include a violation therefore the violation imposed in this case was regarded as a serious violation rather than a subsequent violation. Consequently, the claimant accumulated a violation qualified as serious (Page GD4-8).
- f) It is submitted that the Commission exercised its discretion in a judicial manner when issuing the Notice of Violation. After considering the overall impact to the claimant of issuing a notice of violation, including mitigating circumstances, prior offences and the impact on the ability of the claimant to qualify on future claims, it is determined that a violation is applicable in this case (Page GD4-8).

## **ANALYSIS**

### **Earnings**

[35] In order to be considered earnings, the income must be arising out of any employment or there is a "sufficient connection" between the claimant's employment and the sums received (*Canada (Attorney General) v. Roch*, 2003 FCA 356). The claimant must disclose all monies paid or payable and must prove that the income is not earnings and should not be allocated.

[36] It is incumbent upon the claimant to establish that all or part of the sums received as a result of their dismissal amounted to something other than earnings (*Bourgeois v. Canada (Attorney General)*, 2004 FCA 117).

[37] In this case, the claimant does not dispute that he worked and received earnings for the weeks beginning June 22 and June 29, 2014 and he readily admitted that he did not declare these earnings. Therefore, the Tribunal finds that the sums received as wages are considered earnings pursuant to section 35(2) of the Regulations because the monies were income arising out of employment.

[38] The Tribunal further finds that these earnings reported by the employer and confirmed by the claimant need to be allocated in accordance with section 36(4) of the Regulations

because the claimant received earnings in the form of wages from his employer and they must be applied to the period when the services were rendered.

[39] The claimant argued that he had paid in to EI for many years and is entitled to it. While the Tribunal respects the claimant's argument, the claimant received benefits during a period where he was gainfully employed and according to the current legislation, his earnings must be allocated to the period where he earned his wages. Section 44 of the EI Act states that "a person who has received or obtained a benefit payment to which the person is disentitled, or a benefit payment in excess of the amount to which the person is entitled, shall without delay return the amount, the excess amount or the special warrant for payment of the amount, as the case may be". The Tribunal is unable to intervene as the claimant received EI benefits that he was not entitled to and the EI Act clearly states that any overpayments must be repaid.

[40] The claimant further argued that the overpayment was taken by him so he could return to the workforce and he believes the EI system does not take that in to account; he believes the legislation should be changed. The Tribunal has not been granted the power to change the current law. The claimant is making this argument in the wrong forum as only Parliament can change the legislation.

[41] For these reasons, the Tribunal concludes that the claimant had received earnings by an employer and these earnings were properly allocated pursuant to sections 35 and 36 of the EI Regulations.

### **Misrepresentation**

[42] In order for the Commission to impose a penalty, the false or misleading statement must be made knowingly. Knowingly is determined on the balance of probabilities based on the circumstances of each case or the evidence of each case.

[43] The Federal Court of Appeal (FCA) decision *Canada (Attorney General) v. Mootoo*, 2003 FCA 206 in which the court confirmed the principle that for a finding of misrepresentation, on the balance of probabilities, the claimant must have subjective knowledge that the report was false in order to penalize him or her.

[44] Once the Commission has shown from the evidence that the claimant has wrongly answered very simple questions on the claimant's reports, the burden then shifts to the claimant to explain why the incorrect answers were given (*Canada (Attorney General) v. Gates*, A-600-94).

[45] The claimant admitted that he knowingly answered the questions on the claimant report incorrectly explaining that he needed the extra two weeks of EI benefits in order to assist him in going back to work. He stated that his new job was 135 KMs away from his place of residence and he needed gas and food until he received a paycheque from the employer. While the Tribunal recognizes the claimant's motives behind answering the questions incorrectly, the fact remains that he did not declare that he was working or that he had earnings. All claimants are reminded before filing the claimant report that they are required to answer the questions truthfully. He did not do so. Furthermore, the claimant could have contacted the Commission after he had received his paycheque to voluntarily inform that he had received an overpayment however, he did not and instead waited to for the overpayment to be discovered. The Tribunal finds that the claimant did knowingly make a false statement or representation to the Commission when he failed to report that he had worked and he did not declare his earnings. The claimant wrongly answered very simple questions. He was working. He had to know that he was working and it was his responsibility to inform the Commission that he had worked and to declare the wages he earned.

[46] The Commission has the sole discretion to impose a penalty and no Court, Umpire, Board of Referees or Tribunal can interfere with the Commission's ruling with respect to a penalty so long as the Commission can prove that it exercised its discretion in a judicial manner (*Canada (Attorney General) v. Dunham*, A-708-95).

[47] The claimant argued that his previous allocation should not be considered in this matter because he repaid that debt. However, this was the claimant's second offence for improperly declaring that he had worked or that he had earnings. While the penalty for a second offence is normal 100% of the overpayment, the Commission erred and originally imposed a penalty at 50% and decided not to correct their error. Due to the claimant's reasons for not declaring his earnings and his mitigating circumstances, the Commission decided to reduce the penalty a

further 10%. The Tribunal finds that the Commission exercised its discretion in a judicial manner because they did not consider irrelevant facts or fail to take into account relevant facts.

[48] The claimant argued that this is an attack by the government and he considers it bullying; he refuses to pay any penalties or interest because of the hardship this has caused him. The Tribunal acknowledges the claimant's position on this matter however, he admitted that he did not inform the Commission that he was working or that he had earned income; he was not truthful when he completed his claimant reports and therefore, a penalty is warranted. The Tribunal is mindful that the claimant had done this before and while he only received a warning the last time, he had to know that this was not the proper way to complete his reports and that a penalty was highly likely; it is the claimant's responsibility to report his earnings.

[49] It is important to note that the claimant is not being penalized because he did not respond to the letter sent by the Commission in a timely manner. While the Commission imposes deadlines, they do so in order to be able to tend to EI matters in a timely manner and the claimant's inability to respond to the letter did not cause the penalty.

[50] The claimant further argued that this overpayment with the penalty will cause financial hardship. Notwithstanding the claimant's unfortunate circumstances, the Tribunal has no jurisdiction to write off or forgive an overpayment or a penalty as this is a discretionary power residing solely with the Commission.

[51] For these reasons, the Tribunal concludes that the claimant did make statements or representations that he knew to be false or misleading. The Commission is appropriate in imposing a penalty pursuant to section 38 of the EI Act.

### **Violation**

[52] In order for the Commission to issue a Notice of Violation, the claimant must have committed one of the offences in section 7.1(4) of the EI Act and was imposed a penalty or issued a warning.

[53] The FCA decision in *Gill v. Canada (Attorney General)*, 2010 FCA 182 recognized that the Commission has the discretionary power to issue a Notice of Violation but established that it



is not mandatory or automatic under subsection 7.1(4) of the EI Act. The Commission must exercise this discretion in a judicial manner.

[54] In this case, the claimant was working while in receipt of EI benefits. He did not declare these earnings and it was determined that he made a false or misleading statement. Given the finding that the claimant should be imposed a penalty under section 38 of the EI Act; the Commission may then impose a Notice of Violation.

[55] The Commission considered the overall impact to the claimant including mitigating circumstances, prior offences and his ability to qualify on future claims. The Tribunal finds that the Commission did, in fact, exercise its discretion in a judicial manner because they took into consideration only relevant information.

[56] The claimant argued that he is now unable to qualify for EI benefits because he requires more hours due to the violation imposed. While the Tribunal understands the difficult situation the claimant now finds himself, unfortunately the claimant is responsible for having not declared that he worked or had earnings. The Tribunal recognizes why the claimant felt it necessary to have one more EI benefit payment to assist him in returning to the workforce however, the claimant did not voluntarily inform the Commission that he had taken an overpayment; had he done so, the penalty would not have been imposed and the violation would not exist.

[57] Therefore, the Tribunal concludes that the claimant should be imposed a Notice of Violation categorized as serious pursuant to section 7.1 of the EI Act.

## **CONCLUSION**

[58] The appeal is dismissed.

*K. Wallocha*

Member, General Division - Employment Insurance Section