Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

[TRANSLATION]

Citation: *B. L. v. Canada Employment Insurance Commission*, 2017 SSTGDEI 52

Tribunal File Numbers: GE-15-4048
GE-15-4049
GE-15-4052

BETWEEN:

B. L.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Charline Bourque

HEARD ON: January 24, 2017

DATE OF DECISION: April 18, 2017

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Appellant, Mr. B. L., Claimant, participated in the in-person hearing held at the Service Canada Centre in X. Mr. Jean-Guy Ouellet accompanied him and acted as his representative. Mr. P. P. and Mr. S. S., joint shareholders of the business, were also present at the hearing.

INTRODUCTION

GE-15-4048—Benefit period effective December 20, 2009

[1] The Claimant submitted an application for Employment Insurance benefits effective December 20, 2009. On December 1, 2014, the Canada Employment Insurance Commission (Commission) notified the Claimant that he had neglected to provide information on four occasions. The Commission specified that the Claimant had worked as a self-employed person during the period from February 7 to April 3, 2010. Furthermore, the Commission specified that the Claimant had reported only a portion of his income arising from S. A. A. F. inc. (SAAF). The Commission adjusted the income for the weeks of January 3 and 31, 2010. Finally, the Commission found that the Claimant had knowingly made six false representations. The Commission imposed a non-monetary penalty (warning) (GD3-121 to GD3-123). The Commission also notified the Claimant of its reconsideration of his benefit claim, since it had reason to believe that false or misleading statements or inaccurate representations had been made and that, as a result, the reconsideration period could be extended to 72 months. The Commission added that, more specifically, the Claimant had not reported his income correctly and that he had not reported to have worked as a self-employed person (GD3-124).

[2] On November 6, 2015, following a reconsideration request, the Commission notified the Claimant that the decision with respect to the week of unemployment had not been amended. Furthermore, the decision with respect to the earnings was amended. The Commission indicated that, according to invoice 101507, the salary for the week of April 4, 2010, was $191 (instead of $150) and the one for the week of April 11, 2010, was $382.

Lastly, the Commission specified that the decision with respect to the penalty had not been amended.

GE-15-4049—Benefit period effective December 26, 2010

[3] The Claimant submitted a claim for Employment Insurance benefits effective December 26, 2010. On December 1, 2014, the Commission notified the Claimant that he had neglected to provide information on one occasion. The Commission specified that the Claimant had worked as a self-employed person during the period from December 18 to 24, 2011. The Commission found that the Claimant had knowingly made a false representation. The Commission imposed a penalty of $233.00 and issued a notice of violation (GD3-129 to GD3-131). The Commission also notified the Claimant that it had reconsidered his benefit claim, since it had reason to believe that false or misleading statements or inaccurate representations had been made and that, as a result, the reconsideration period could be extended to 72 months. The Commission claimed to have had reason to believe that the Claimant had not reported to have worked as a self-employed person from December 26, 2010, to May 7, 2011 (GD3-128).

[4] The Commission also notified the Claimant that, contrary to what had been indicated, he was running a business. The Commission found that the Claimant had knowingly made 10 false representations. The Commission specified that the Claimant had worked as a self-employed person from December 26, 2010, to May 7, 2011 (GD3-132/133).

[5] On November 6, 2015, following a reconsideration request, the Commission notified the Claimant that it had amended the decision with respect to the week of unemployment. The Commission specified that the Claimant was deemed not to be unemployed only from December 26, 2010, to January 15, 2011, and from March 13 to May 7, 2011. The disentitlement was rescinded for the periods from January 16 to March 12, 2011, and from December 18 to 24, 2011.

[6] Furthermore, the decision on the penalty was amended. The penalty of $233 was replaced with a warning.

GE-15-4052—Benefit period effective December 23, 2012

[7] The Claimant submitted a claim for Employment Insurance benefits effective December 23, 2012. On December 1, 2014, the Commission notified the Claimant that he had reported only a portion of his SAAF-derived income. The Commission adjusted the income for the weeks from March 31, April 7 and December 15, 2013. The Commission found that the Claimant had knowingly made two false representations. The Commission imposed a penalty of $207.00 and issued a notice of violation (GD3-71 to GD3-74).

[8] On November 6, 2015, further to the Claimant's request for a reconsideration, the Commission notified him that the decision with respect to his earnings had been upheld. Furthermore, the decision with respect to the penalty had been amended. The penalty was reduced to $124 instead of $207. The decision with respect to the notice of violation had been rescinded (GD3-116/117).

[9] A prehearing was held on October 4, 2015, by the Tribunal Member, Ms. Claude Durand. During this prehearing, it was disclosed that the dockets of each of the appellants would be enclosed. A specific decision would be handed down for each appellant. The hearing and the evidence would be collective, but specific evidence in the case of each appellant would also be presented.

[10] A collective hearing for dockets GE-15-4065 (S. A. A. F. inc.), GE-15-4048, GE-15-4049, GE-15-4051, GE-15-4052 (Mr. B. L.), GE-15-4053, GE-15-4054, GE-15-4055, GE-15-4057 (Mr. P. P.), GE-15-4059, GE-15-4061, GE-15-4062, GE-15-4063 (Mr. S. S.) was held on January 24, 2017.

[11] The appeal pertaining to GE-15-4051 was withdrawn.

[12] This appeal was heard in-person for the following reasons:

a) the fact that credibility may be a determinative factor

b) the information in the docket, including the need for additional information

c) the fact that more than one participant, including a witness, might be present

d) the fact that the Appellant or other parties are represented

e) the fact that this method of proceeding best meets the parties' needs for accommodation

ISSUES

[13] The Claimant is appealing the decision on the reconsideration of his benefit claim beyond the 36-month time frame, under subsection 52(5) of the *Employment Insurance Act* (Act) in dockets GE-15-4048 and GE-15-4049.

[14] The Claimant is appealing the decision to impose a disentitlement, pursuant to sections 9 and 11 of the Act and section 30 of the *Employment Insurance Regulations* (Regulations), that was rendered because he had not shown himself to be unemployed for the period of February 7 to April 3, 2010 (GE-15-4048), and during the period from December 26, 2010, to May 7, 2011 (GE-15-4049).

[15] The Claimant is appealing the decision concerning the allocation of earnings done pursuant to sections 35 and 36 of the Regulations with respect to the weeks of April 4 and 11, 2010, but including the calculation for the weeks of January 3 and 31, 2010 (GE-15-4048) and the weeks of March 31 and April 7, 2013 (GE-15-4052).

[16] The Claimant is appealing the decision to impose a penalty pursuant to section 41.1 of the Act that was rendered because he had made an act or omission by knowingly making a false or misleading representations (GE-15-4048 and GE-15-4049) and with respect to the imposition of a penalty of $124.00 under section 38 of the Act (GE-15-4042).

EVIDENCE

Unless otherwise indicated, the references to documents are taken from docket GE-15-4048.

[17] The evidence in the docket is as follows:

a) claim for Employment Insurance benefits filed on January 6, 2010 (GD3-3 to GD3-15).

b) claim for Employment Insurance benefits filed on January 6, 2011 (GE-15-4049/GE3-4 to GD3-16).

c) claim for Employment Insurance benefits filed on December 30, 2012 (GE-15-4052/GD3-4 to GD3-20).

d) Claimant's reports from January 3 to 9, 2010, and from January 24 to April 17, 2010. The Claimant reported having worked 15 hours for earnings of $150 (GD3-22 to GD3-81).

e) Claimant's reports from December 26, 2010, to January 15, 2011. The Claimant reported no work hours. The Claimant's reports from March 13 to May 7, 2011. The Claimant reported working 10 hours for earnings of $150 (GE-15-4049/GD3-23 to GD3-66).

f) the Claimant's reports from March 24 to April 20, 2013. The Claimant reported working 10 hours for earnings of $150. The Claimant's reports from December 15 to December 21, 2013. The Claimant did not report any working hours (GE-15-4052/GD3-28 to GD3-53).

g) On February 12, 2014, the Claimant specified that the business operates in the forestry management sector, as well as that of the maintenance and expertise in vegetation. The bulk of the work is done from April or May until December, and the work is occasional in winter. The work is on-call in winter subsequent to emergency situations, such as cases where trees are dangerously close to the power grid. The biggest client is Hydro-Québec; everything is done by invitation to tenders. The season begins and ends with contracts with Hydro-Québec; there is work to do between the poles, as well as emergency situations. There have already been contracts with the City of X and the Department of Transportation (GD3-82).

h) company invoices and work orders from Hydro-Québec for 2010 (GD3-83 to GD3-108).

i) company invoices and work orders from Hydro-Québec for 2011 (GE-15-4049/GD3-68 to GD3-114).

j) company invoices and work orders from Hydro-Québec for 2013 (GE-15-4052/GD3-55 to GD3-58).

k) interview report with Mr. B. L. that the Commission did, dated March 6, 2014 (GD3-110 to GD3-112).

l) decision by the Canada Revenue Agency (CRA) with respect to employment insurability. The CRA found that the Claimant was an employee and that his job was insurable (GD3-114/115).

m) interview report of Mr. B. L. that the Commission did, dated October 17, 2014 (GD3-118/119).

n) *Digest of Benefit Entitlement Principles*: Chapter 17 (GD13-4 to GD13-12) and Chapter 18 (GD13-100 to GD3-110).

o) Records of decision by the Commission with respect to the state of unemployment and insurability (GD14-3 to GD14-9).

p) Medical reports of the Claimant's spouse (GD14-10 to GD14-31).

q) Insurability Claims (GD14-32 to GD14-35).

[18] The evidence submitted at the hearing through the testimony of the Appellant, Mr. B. L., revealed that:

a) He is treasurer for the business.

b) The business offers services in the forestry sector, in particular for the maintenance of the power grid, according to invitations to tender obtained mainly through Hydro-Québec.

c) In the low season, from November to April/May, unless by specific contract, it consists of punctual work and the maintenance of machinery that professionals must do, since certification is required. The work is predominantly tied to emergency calls. They cannot work full-time, and the weather conditions influence their work opportunities. The work is off-the-ground only compared with summer, when the work is off-the-ground and on-the-ground.

d) The Commission and the CRA contacted him on a few occasions with respect to their business. He claims to have answered the questions asked of him and the demands made of him. The documents show that he was contacted on a few occasions with respect to self-employment. His unemployment was still granted to him.

e) The three shareholders made the decision to pay themselves a salary of $150 per week during the low season. This salary does not vary according to the work hours performed. In the high season, their salary is greater.

f) During the periods in question, he could not depend on this work as a principal means of livelihood.

g) The Claimant was experiencing a difficult personal situation. In September 2010, his wife was diagnosed with cancer. The medical appointments were usually in June and December, when he issued the Records of Employment.

h) To do the Records of Employment, he used a computerized pay system (sole accountant). He has training in forestry and took a course in business management, but he has no specific training pertaining to accounting. He prepares the Records in advance based on the dates of the projected work. There was lack of communication in certain situations when Mr. S. S. was asked to do additional work, which could amend the end date of the employment without notice.

i) He specified that if there was an additional week of work that was not covered by a Record of Employment, it was an error. Furthermore, he allocated from the new season for doing the Records of Employment for the next year. It involves an involuntary omission.

j) The Commission is disentitling him because the business paid for a Christmas party for employees (see invoice).

k) For the reported number of hours, it consists of an average during the low season that includes all the work done. He thought they were correct to do so in this way. He was never asked about this, despite the audits that were carried out. Furthermore, he banked

the overtime and paid it to himself after the work period, which made him late at the beginning of their benefit claim. Furthermore, for that reason, they have not all received the maximum amount that he could have received.

[19] The evidence submitted at the hearing by the testimony of the joint shareholder, Mr. S. S., reveals that:

a) He is Vice-President of the business. He is the liaison for Hydro-Québec.

b) Officials contacted him with respect to the business. The documents show that he was contacted on several occasions between 2007 and 2014.

c) When he issued invoices to Hydro-Québec, he believed that he had to indicate a team leader who is a shareholder of the business. In this way, even if a shareholder was not present in the field, he could provide their name. If the shareholder was present, their name was detailed on the invoice, since the hours worked appeared on it. He usually invoiced at the end of work or every three weeks.

d) He received $150 per week, as decided in the low season. There is no adjustment that is owed to him, and the business does not owe him an additional amount. During the periods in question, he could not depend on the business as his primary means of livelihood.

e) The Commission never told him that he could be considered a self-employed person. He still received Employment Insurance benefits and did not have a stopped payment for them. The Commission recognizes his right to unemployment.

f) He considers himself a salaried employee. They themselves work in their work teams.

[20] The evidence submitted at the hearing by the testimony of the joint shareholder, Mr. P. P., reveals that:

a) He is responsible for safety.

b) Officials also contacted him on several occasions with respect to the business. He was never notified that they were incorrect in their manner of operating.

c) The business does not owe him a sum of more than $150 per week.

d) He could not depend on the business as a primary means of livelihood.

e) For the period effective April 25, 2011, he confirmed that he was present on the work site. Before that period, the bulk of the work was done. It consisted of inspecting the first-aid kits, and the time was included in the reported working hours.

PARTIES' ARGUMENTS

[21] The Appellants have argued that:

a) The decisions on the benefit periods established beyond 36 months of the date of the decisions being reviewed (# 90972–#93402) are not based in fact or in law;

b) The decisions on the alleged earnings were unfounded in fact and in law (# 90996, #93406, #93408);

c) The decisions on upholding the warnings and/or the penalty are unfounded in fact and in law (# 90972, #93402, # 93406 et 93408);

d) The decisions (#93972, # 93406 et 93397) are unfounded in fact and in law, because it is *ultra petita* of the decisions subject to reconsideration regarding the application of the earnings and the components emanating therefrom;

e) The decisions on the state of unemployment that uphold all or part of the disentitlement (#90972, #934022) # are erroneous in fact and in law;

f) The decision-making process stated in section 52, as well as the one provided for in section 111 of the *Employment Insurance Act*, were not honoured, and the current decisions do not meet the requirements of the Act.

g) The representative submitted an oral argument plan for the Claimant's dockets (GD13-1 to GD13-3).

The arguments below were submitted at the collective hearing for each of the dockets:

Reconsideration

h) It is apparent that there was a reconsideration on the part of the Commission.

i) The Commission's policy for the reconsideration process (Chapter 17) specifies that the Commission intervenes for the future and not for the past. The current version of this policy was amended in June 2014.

> [Translation]
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> "The decision is corrected as of the current date, except for the following situations:
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> - cases where benefits were paid out in violation of an explicit provision of the Act;
> - cases where benefits were paid out in error, and the claimant should have known that they were not entitled to them;
> - cases where the benefits were paid out subsequent to a claimant's submission or false or misleading representation, and the decision is amended;
> - when a decision is disputed and, in precise circumstances, the claimant or the employer wishes that the decision be reconsidered." [representative's emphasis] (*Benefit Entitlement Digest*, 17.1.3) GE-15-4048/GD3-145/146).

j) As a result, the checks occurred, but the Commission did not act. Officials called appellants and verified their situation. He knew the situation of the claimants, who always reported their situation, and the Commission still indicated that he was entitled to unemployment. If there were questions, the Commission could have acted, and the

policy says that if the Commission could have checked it, it should revisit the matter retroactively only if it recognizes their entitlement to unemployment.

k) There is evidence where, in November 2014, the Commission specified that the Claimants are entitled to unemployment. As a result, it is the opposite of the Commission's own policies and, consequently, contrary to the reconsideration policy such as it is stated in the case law:

- CUB 5664 confirmed by the Federal Court of Appeal (*Boucher v. Commission (Attorney General)*, FCA A-580-79) (GE-15-4048/GD13-17/18): makes the distinction between that which is structural and that which is not. It is said that if the Commission had the necessary components, it cannot revisit the exercising of discretion, since a favourable decision was rendered vis-à-vis the Claimant.

- CUB37680A (GD13-19 to GD13-23): refers to the previous decision and incorporates the concepts. The issue is not the 36- or 72-month time frame but the scope of power under section 52. Under section 52, we can retroactively revisit a docket while it is in the evidence that the Commission has exercised its discretion and that entitlement to benefits has been granted. In the present case, in all the periods in question, there is evidence that an official conducted an audit and made the decision to grant entitlement to benefits.

- CUB19382 (GD13-24 to GD13-27): *a contrario*. It is not a question of discretion but a structural question that does not apply to the docket.

- SSTAD 1239 (GD13-28 to GD13-31): it consists of an application of the submitted reasoning. The Commission had the opportunity to take actions, but it did nothing. As a result, the Commission recommended that the appeal be allowed so that the corrections could be made as of the current date. The Commission itself recognizes that it is its policy (*C. S. v. Employment Insurance Commission of Canada*, 2015 SSTAD 1239).

- *Brien-Rajotte* (GD13-32 to GD13-38): *a contrario*. Talks only about the notice, but it does not talk about the birth of the reconsideration power. As a result, it

does not apply to the current docket. In this case, the decision-making process had not been completed for a week (*Brien-Rajotte v. Canada Employment Insurance Commission*, A-425-96).

l) The decisions are all from December 2014, and the Commission says the claimants committed fraud or that their reports were fraudulent.

m) The representative recalls the burden of proof and specifies that the Commission could not relate back within a time frame of more than three years. The return beyond three years is contrary to the Commission's power. The Commission assumes earnings beyond $150, but what if this $150 in earnings is false? With respect to the state of unemployment, the claimants report sums while they consider themselves salaried employees of the business. What if this representation is false?

n) The representative argues that if the Commission cites *Pilotte* (GD13-44/45), this decision cannot apply to the current docket (*Canada (Attorney General) v. Pilotte*, 1998 CanLII 8888 (FCA)).

o) Furthermore, the representative refers to *Carrière*, where the Court specifies that it must be determined whether the Claimant made a false representation. If she was not considered employees but were helping her spouse, we cannot go beyond 36 months (*Carrière v. Canada (Attorney General)*, 2001 FCA 323) (GD13-46/47).

Earnings

a) According to *King*, the earnings to be allocated within the meaning of the Regulations are the earnings received or payable. The Regulations are clear on this matter. Subsection 35(1) defines income that refers to sums received or payable (*Canada (Attorney General) v. King*, [1996] 2 FCR 940, 1996 CanLII 4045 (FCA)) (GD13-50 to GD13-56).

b) The claimants did not receive more than $150 and were not entitled to more than $150.

c) In our case, there is no evidence that the claimants could pick up more than $150. It consists of a presumption that the Commission made.

d) The representative refers to the following case law:

- *Yannelis*: payable is not a technical word. A sum is payable when an individual is bound to pay it. It is payable when it can be required from the employer and the employer is bound to pay it out. In the present case, this was not payable. There is a decision of the board that specifies that the salary will be $150 per week (*Canada (Attorney General) v. Yannelis*, 130 DLR (4^{th}) 632, [1995] FCJ No 1530 (FCA)) (GD13-51 to GD13-63).

- CUB51045B: on the presumption of earnings. The present case is not in suspicion but in clear evidence. The Commission recognizes that the claimants received $150, but it says that they should have received more. The Commission says that this is not how their business should have functioned. There is no allowable earning or enforceable penalty (GD13-64/65).

- SSTADEI 221: The Commission recognizes that the sum was not payable and that the appeal had to be allowed (*B. J. v. Employment Insurance Commission of Canada,* 2016 SSTADEI 221) (GD13-66 to GD13-70).

- The Commission cites CUB 79974, but that does not apply. It consists of a case where there was a filing of a grievance and the Claimant received a sum. This decision does not apply to the current docket (GD13-71/72).

- *McLaughlin*: specifies that there must not be a mixing of insurability and earnings. In actual fact, the Claimant received earnings and if he received them, the sums are applicable. As a result, the decision does not apply to the facts in the current docket (*McLaughlin v. Canada (Attorney General),* 2009 FCA 365) (GD13-73 to GD13-80).

- *Boone et al.*: The union received sums following a grievance. This decision has nothing to do with the present docket (*Boone et al. v. Canada (Attorney General),* 2002 FCA 257) (GD13-81 to GD13-83).

- *Martens*: the time that other employees spent. No one is obligated to work in their own business (*Martens v. Canada (Attorney General)*, 2008 FCA 240).

Week of Unemployment

e) The Commission has reason to believe that the number of hours usually worked corresponding to the regular week of full-time work within the meaning of section 31 of the Regulations would be 36 hours within the SAAF business. Showing that the number of retained hours corresponds to a full working week is in no way apparent from the docket. Failing such evidence, this notion cannot be applied.

f) The evidence attests that the number of hours worked over the course of the week was less than the number of hours usually worked within the business.

- *Goulet*: on the state of unemployment. The question you have to ask yourself, for the period in question, is: could this have corresponded to his primary means of livelihood in the framework of participation in the business? In the periods in question, the business carried out work only for emergencies, and the employees could not hope to make their primary earnings from it (*Canada (Attorney General) v. Goulet*, 2012 FCA 62) (GD13-84 to GD13-88).

- *Jouan*: whatever the importance of the other factors at play, the only thing that matters is whether the time dedicated to the business constitutes an entire week. It is understood that the time dedicated was 50 hours per week in *Jouan*, but the judge found that in the dead season, it can be different. It is the case of the type of business of claimants that can be seasonal (*Canada (Attorney-General) v. Jouan*, 1995 CanLII 11053 (FCA)) (GD13-89 to GD13-92).

- *Faucher*: refers to the roofers, and the Court will say that the type of work must be taken into consideration (*Faucher v. Canada (Employment and Immigration Commission*, 1997 CanLII 4856 (FCA)) (GD13-93 to GD13-95).

- *Proulx*: for the periods kept at issue, the work carried out is between 10 and 15 hours per week. The Claimant cannot make a living from it and is paid $150

per week. If it consisted of an employee of the business, section 31 would not apply to them by saying that that employee works a full working week (*Proulx v. Canada (Attorney General)*, 1998 CanLII 8882 (FCA)) (GD13-96/97).

Penalty

g) The burden of proof rests with the Commission and it is necessary that people have a subjective knowledge that representations made are contrary to the unemployment standards.

h) The representative submits that the Commission did not assume its burden of proof, especially since, on several occasions, there were exchanges with the three appellants to verify the accuracy of their answers. With respect to earnings, there is no alleged act. One cannot allege someone did something that does not exist. The salary that the official alleged had never been paid and had never been owed. When the Claimant reports $150, he does not report something false. The alleged act does not exist.

i) The penalty with respect to the employer: The representative recalls that the CRA confirmed that the Records of Employment did not contain false information over the period stated on the Record of Employment. The Commission makes allegations about the claimants that there is a lack of periods and that those are not found on the previous Record of Employment or the subsequent one. A penalty is imposed when the inaccurate information aims to provide a greater advantage to the Claimant, which is not the case in the current situation. The representative refers to the Commission's policy.

j) In the present case, the number of hours is not as high. Furthermore, with the overtime that was paid out at the end of the work, the Commission loses nothing, but it gains an advantage.

k) Furthermore, postponing overtime reduces the earnings, because in all the Records of Employment, calculating the benefit is not influenced by the data that is alleged to be missing, since the calculation was made based on the 14 best weeks. The purpose of the policy is to impose penalties for the Records of Employment that aimed to have the

employee pick up more benefits. In all cases, if there are errors, this has no effect but rather a contrary effect.

l) In the employer's docket, in the Commission's submissions on page GD4-4 (GE-15-4065), the Commission specifies that, considering the fact that the dockets were audited and that neither the shareholders nor the employees were informed of any issue, the Commission reduced the penalty to 30%.

m) All these recitals do not resemble 30%, but the Commission recognizes that the claimants are unaware of the scope of the errors and that for them this had no scope, while in actual fact, the claimants penalized themselves because in actual fact, they were missing hours on specific Records of Employment. There could have been overpaid weeks. The representative cites the following case law:

- *Caverly*: on the burden of proof: If in GD11, we see that it is not on the old one or previous one, the Commission must file the former one or the one before that (*Caverly v. Canada (Minister of Human Resources Development)*, 2002 FCA 92) (GD13-111 to GD13-113).

- *Tiessen Tuomi*: In terms of insurability, a priori, section 90 is clear and the jurisdiction falls to the CRA and in the dockets it says that the records are correct (*Canada (Attorney General) v. Tuomi*, 2000 CanLII 16151 (FCA)) (GD13-114/115).

- CUB73984: the penalties were imposed for the $150 against the alleged earnings. It is on this ground that the matter must be decided (GD13-116/117).

- *Mootoo*: on subjective knowledge (*Mootoo v. Canada (Minister of Human Resources Development)*, 2003 FCA 206). Mr. B. L. or Mr. S. S. did not have subjective knowledge that they were misleading the Commission when they produced the Records of Employment (GD13-118 to GD13-120).

- *Gates*: says that mere scepticism is insufficient for assuming the burden of proof (*Canada (Attorney) v. Gates*, [1995] 3 RCF 17, 1995 CanLII 3601 (FCA)) (GD13-123 to GD13-127).

- SSTAD357: specifies an error made unknowingly. When the Commission reads at GD4-4, has reason to believe that the Commission recognizes that the errors were not made knowingly (*Les Industries Rogers Migneault Inc. v. Canada Employment Insurance Commission*, 2015 SSTAD 357).

- *Ftergiotis*: the Claimant recognizes that he falsely reported his income. This does not resemble the current situation (*Ftergiotis v. Canada (Human Resources Development)*, 2007 FCA 55) (GD13-132 to GD13-138).

- CUB51045D: alleged earnings cannot give rise to a penalty (GD13-139/140).

- CUB71548: on the Records of Employment. Considers what the CRA reveals. The CRA recognizes that the Records of Employment are accurate for the stated periods (GD13-141 to GD13-146).

- CUB 66975A: refers to *Mootoo* and grants the benefit of the doubt to the Claimant (GD13-147 to GD13-149).

- CUB68452A: the Claimant's good faith was never disputed. The Commission recognizes, in the present appeal, the appellant's good faith (GD13-150 to GD13-152).

- *9041-6868 Québec Inc.*: When Mr. B. L. is accused of not having put the date on the Record of Employment, these are committees that he carried out, and he did not receive pay. This is not an employment contract; it is not insurable (*9041-6868 Québec Inc. v. Canada (Minister of National Revenue)*, 2005 FCA 334) (GD13-153 to GD13-161).

- CUB42757: Secondarily, the policy filed says that the maximum penalty is three times the rate, and the Commission arrives at a rate of 30%. Why does it begin to calculate the penalty at three times the rate? In the present case, it is clear that the

Commission is beginning with a maximum penalty, while the policy speaks of the taxable maximum. Why does it go from the maximum to afterwards considering the mitigating circumstances? The representative has reason to believe that the Commission did not meet its burden of proof. Mr. B. L. issues the Records of Employment in December, while for all the periods in question, he faces much greater worries than that of knowing whether he has the right date on the Record of Employment. It consists of a stated circumstance, which the Commission knew, but which was not recognized as a mitigating circumstance. At the very worst, a warning could be given (GD13-162 to GD13-164).

n) Other case law that the representative submitted and that was not cited previously:

- *Canada (Attorney General) v. Langelier*, 2002 FCA 157 (GD13-39 to GD13-43);
- CUB 47551 (GD13-48/49);
- CUB 32215 (GD13-98 to GD13-99);
- *Moretto v. Canada (Attorney General)*, 1998 CanLII 7566 (FCA) (GD13-121/122).

[22] The Respondent made the following submissions:

Reconsideration

a) When a claimant has not received the benefits to which they were entitled or they have received benefits to which they were not entitled, section 52 of the Act provides that, in the thirty-six (36) months that follow the time when the benefits were paid or are payable, the Commission can consider any request pertaining to those benefits. Moreover, if the Commission has reason to believe that the Claimant made a false or misleading statement or representation, regardless of whether that false statement or representation was made knowingly, the time for reconsideration is extended up to 72 months after the date on which the benefits have been paid or would have been paid.

b) For reconsideration purposes, the Commission does not have to prove that the Claimant knowingly made a false or misleading statement or representation with the intent of committing fraud. In other words, a mere error by the Claimant is considered a false or misleading representation, but it is not considered to have been made knowingly.

c) The Claimant reported work hours at the rate of 10 hours per week, while for certain weeks, according to the evidence in the docket, he worked many more hours than that. The Commission thereby argues that his representations were false. As a result, given the false or misleading representations, the Commission had just cause, on December 1, 2014, to reconsider the benefits paid out in the seventy-two (72) months (GE-15-4048 and GE-15-4049).

d) The Claimant reported only a portion of his work hours for the weeks included between March 31 and April 13, 2013, and did not report any work hours in the week beginning on December 15, 2013, while the documentary evidence shows that he had worked on Hydro-Québec work sites. The Commission thereby argues that his representations were false (GE-15-4052).

e) The Commission recalls that it is not important, when the time comes to determine the reconsideration period, whether the person knew that they were making a false or misleading statement or representation.

f) In the present case, the Commission had reason to believe that the false or misleading statements or representations had been made when the Claimant had neglected to report his complete earnings and the fact that he had been working for the business on the work sites, as an employee and/or team leader during a greater number of hours than what he was reporting. The Commission thereby had a reconsideration period of seventy-two (72) months. The Claimant must subsequently pay back the benefits that were paid to him but to which he was not entitled. The Commission is therefore asking the Tribunal to keep its recourse of a time frame of seventy-two (72) months provided for in subsection 52(5) of the *Employment Insurance Act*.

Relevant Case Law

g) In A-140-01, the Court found that the Umpire had erred in imposing on the Commission the burden of proving that the Claimant had knowingly made false representations to reconsider the benefit claim. The only requirement is to have reason to believe that a false or misleading representation was made. A reference is made to *Pilotte* (A-868-97) of the Federal Court of Appeal.

h) In A-0067-05, the Court affirmed that subsection 43(6) of the *Unemployment Insurance Act* (now subsection 52(5) of the *Employment Insurance Act*) requires only a single representation to be false or misleading in order to allow for a reconsideration within a time frame of six years, compared to three years according to subsection 43(1) of the *Unemployment Insurance Act* (now subsection 52(1) of the *Employment Insurance Act*) in all other cases. Whether false representations or misleading representations are the result of information or advice from the Commission is an unfounded argument, since subsection 43(6) of the *Unemployment Insurance Act* requires only that the representation be false or misleading to give rise to the Commission's reconsideration of the benefit claim.

Week of Unemployment

i) A Claimant who operates their own business is assumed to work a full working week unless they can show that they are involved in that business to such a minor extent that a person would not normally rely on that activity as a principal means of livelihood. In order to determine whether the Claimant was self-employed to a minor extent, the Commission must apply an objective test under subsection 30(2) of Regulations to the six factors listed in subsection 30(3) of the Regulations in the context of the Claimant's business over the course of 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.

j) In this case, the evidence in the docket indicates the following with respect to the six factors:

- The time spent: The shareholders work an average of ten (10) hours per week during the low season, and this has been the prevailing situation over several years. The Claimant mainly worked on accounting during this period. He mentions that he no longer has anything to do when the operations cease in December; however, it may happen that he is busy with the accounting, or moving the machinery, without asking for a salary in return. He also makes committees and little upkeeps, without reporting to the work sites.

  With respect to the period from February 7 to April 3, 2010, the invoices show that the Claimant was acting as team leader on various work sites and that he was working a greater number of hours during some weeks than what he was reporting. Furthermore, several expenses were carried out at the various suppliers, according to documents that appear on pages GD3-99 to 108, showing that the Claimant was spending a greater number of hours on his business than what he was reporting weekly.

  With respect to the periods from December 26, 2010, to January 15, 2011, and from March 13 to May 7, 2011, invoices show that the Claimant was acting as a team leader on a work site. Furthermore, several expenses were carried out at the various suppliers, according to documents that appear on pages GD3-71 to 114, showing that the Claimant was spending a greater number of hours on his business than what he was reporting weekly.

- The nature and amount of the capital and resources invested: the Claimant invested $1,500 at the time the business was created in 1996 (page GD3-112).

- The financial success or failure of the employment or business: Although this is a seasonal business that functions predominantly between May and December each year, it provides jobs for numerous employees. The Commission thereby has reason to believe that this business is successful.

- The continuity of the employment or business: the business has operated since 1996 and carries out work for large businesses, including Hydro-Québec (Page GD3-82).

- The nature of employment or business: The business operates in the forestry management sector (page GD3-82).

- The Claimant's intention and willingness to seek and immediately accept alternate employment: the Claimant claims to look for employment daily on the Internet; he is registered for job alerts and looks for work at the same time for his own business. He would be willing to accept a job in another business until the activities resume for SAAF (Page GD3-111)

k) When considered objectively, the six factors lead to the conclusion that the Claimant's involvement in his business was to the extent that a person would normally rely on it as a principal means of livelihood. Although the business is active at least eight months of the year (considered the high season), there are nonetheless other tasks to work on in the low season and, in 2010, the business obtained other contracts during the winter period, as shown in the invoices that appear on pages GD3-83 to 98 (GE-15-4048), to pages GD3-68 to 70 (GE-15-4049). The numerous invoices for gasoline and other furnishings, as well as for rentals of all types, support the fact that the Claimant was not unemployed between February 7 and April 3, 2010, between December 26, 2010, and January 15, 2011, and between March 13 and May 7, 2011. It is shown, by the invoices provided and the number of employees who were working in this period, that he was running his business to the extent that this activity constituted his primary means of livelihood. As a result, the Claimant has not refuted the presumption that he was working a full working week because he did not meet the exception under subsection 30(2) of the Regulations.

l) The Commission submits that the legislation supports its position. The Federal Court of Appeal has reiterated that, when a claimant is engaged in the operation of a business, that Claimant is responsible for refuting the presumption that they work a full working week. The Federal Court has reaffirmed that the most important and relevant factor in determining whether a claimant works a full working week is time spent, followed by

the Claimant's intention and willingness to seek and immediately accept alternate employment (*Martens v. Canada (Attorney General)*, 2008 FCA 240; *Charbonneau v. Canada (Attorney General)*, 2004 FCA 61; *Marlowe v. Canada (Attorney General)*, 2009 FCA 102).

m) The Federal Court of Appeal has confirmed the principle that subsection 30(2) of the Regulations nullifies the application of subsection 30(1) of the Regulations if a claimant can establish that the level of involvement in the operation of a business, considered objectively in light of the six factors stated in subsection 30(3) of the Regulations, is of such a minor extent that it would not normally constitute a principal means of livelihood for the applicant (*Martens v. Canada (Attorney General)*, 2008 FCA 240).

Earnings

n) According to subsection 35 of the Regulations, "income means any pecuniary or non-pecuniary income that is or will be received by a claimant from an employer or any person, including a trustee in bankruptcy." The Regulations also specify what types of income constitute earnings. Section 36 of the Regulations explains how earnings are to be allocated once they have been established: in other words, during which week they constitute earnings for the claimant.

o) Moneys received from an employer can be considered earnings. These amounts must be allocated, unless they are covered by the exceptions stated in subsection 35(7) of the Regulations or are not from employment.

p) The Claimant received money from S. A. A. F. inc. This money was paid to the Claimant as a salary. The Commission argues that this money constitutes earnings within the meaning of subsection 35(2) of the Regulations because it was remitted to the Claimant as payment for the hours worked at the business's client, Hydro-Québec. Therefore, pursuant to subsection 36(4) of the Regulations, it properly allocated these earnings to the period in which the services were provided.

q) According to the invoices in the docket, the Claimant worked in January and February 2010 on Hydro-Québec work sites. Invoices 101501, 101503 and 101505 (pages GD3-83 to GD3-93) show that the Claimant actually worked from January 3 to February 20, 2010, and that his salary varied according to the number of hours worked and depending on the salary calculated at $20 per hour, plus the 6% vacation pay, namely, $21.20, as defined by the Commission (GD3-110) and according to the information in the docket, while he reported only $150 for each of the weeks covered by this case (page GD3-22 to 81).

r) Furthermore, during the reconsideration of the docket, the Commission made additional amendments. In fact, invoice 101507 shows that the Claimant worked as an employee in addition to being team leader, for a salary of $191 applicable to the week of April 4 to 10, 2010, as well as for the week of April 11 to 17, 2010, for a salary of $382. The earnings were therefore allocated according to the information obtained and pursuant to the legislation.

s) The Claimant received money from SAAF. This money was paid to the Claimant as a salary. The Commission argues that this money constitutes earnings within the meaning of subsection 35(2) of the Regulations because it was remitted to the Claimant in payment for hours worked for, among others, the business's client, Hydro-Québec. As a result, pursuant to subsection 36(4) of the Regulations, it properly allocated these earnings to the period in which the services were provided. According to the invoices in the docket, the Claimant worked between March 31 and April 13, 2013, on Hydro-Québec work sites. Invoice 131801 (pages GD3-55) shows that the Claimant actually worked from April 2 to 8, 2013. Furthermore, he confirmed to the investigating agent to have worked the week of December 15, 2013 (GD3-60 to 62). The Claimant's earnings were therefore calculated based on the hourly rate of $21.20 and were allocated according to the information obtained and pursuant to the legislation (GE-15-4052).

t) The Commission submits that the case law supports its decision. Bordeleau J. upheld the principle whereby amounts received from an employer are considered earnings and must be allocated unless they are covered by the exceptions stated in subsection 35(7) of the Regulations or are not from employment (CUB 79974).

u) The Federal Court of Appeal has reaffirmed the principle that "[t]he entire income of a claimant arising out of any employment" must be taken into account in calculating the amount to be deducted from benefits (*McLaughlin v. Canada (Attorney General)*, 2009 FCA 365).

v) The Federal Court of Appeal has also confirmed the principle that amounts that constitute earnings under section 35 of the Regulations must be allocated pursuant to section 36 of the Regulations (*Boone et al. v. Canada (Attorney General)*, 2002 FCA 257).

w) In its additional arguments of April 4, 2017, the Commission added that, on page GD4-2 of the Commission's arguments to the Tribunal, it is specified that the Claimant's electronic reports—Questions and Answers—show that the Claimant had reported employment earnings of $150 for the week of January 3, 2010, and also for the week of January 31, 2010. The evidence for the week of January 3 appears on pages GD3-23 to GD3-24, and the evidence for the week of January 31 can be found on pages GD3-31 to GD3-33 of the reconsideration docket. On the other hand, during the investigation, several documents were collected, and the invoices and reports were used for the administrative review (GD4-3). Invoice 101501 accounts for reports 367657, 367658 and 367659 (GD3-83), and report 367657 shows that, for the period ending on Saturday, January 9, 2010 (which means it began on Sunday, January 3), Mr. B. L. worked 10 hours (GD3-84). Invoice 101503 accounts for reports 376217, 376218, 376219 and 376220 (GD3-85), and report 376218 shows that, for the period ending on Saturday, February 6, 2010 (therefore beginning on Sunday, January 31, 2010), Mr. B. L. worked 16 hours, namely, eight on Thursday, February 4 and eight on Friday, February 5, 2010 (GD3-87).

x) The earnings were therefore corrected from $150 to $212 (10 hours X $21.20) for the week of January 3 and from $150 to $339 (16 hours X $21.20) for the week of January 31, 2010. At the hourly rate of $20, 6% vacation pay is added, which gives a total of $21.20 per hour (GD4-10).

Warnings and Penalty

y) It was established that the burden of proof that rests with the Commission consists of establishing whether the Claimant had knowingly made a false or misleading representation, and the required standard of proof is a balance of probabilities.

z) Furthermore, the case law holds that the Commission is not bound to establish the "intent to deceive" to prove that a claimant knowingly made a false or misleading representation. For the purposes of the imposition a penalty on the Claimant, the fact finder may therefore decide, according to a balance of probabilities, that the Claimant subjectively knew that the representation was false.

aa) The Claimant worked on different occasions between January and April 2010, from the additional hours to the hours that he reported, namely, always 10 hours per week. He must have known that he had earned more than $150 when he was acting as an employee and/or team leader during the contracts for Hydro-Québec, in the field. For each of the weeks in this period, when he filled out his Claimant reports, he always reported his average, namely, 10 hours per week for $150 in earnings (GE-15-4048).

bb) According to the documentary evidence, the Claimant worked on ensuring the functioning of the business between December 26, 2010, and January 15, 2011, as well as from March 13 to May 7, 2011, 2011. Although he regularly reported that he had been working 10 hours per week, the Commission had reason to believe that the Claimant had worked more. He must have known that he was working more than the reported number of hours, especially when he was working as team leader during the contracts for Hydro-Québec, in the field. For each of the weeks in this period, whenever he completed his Claimant reports, he always reported his average, namely, 10 hours per week for $150 in earnings (GE-15-4049).

cc) The Claimant worked on a work site from April 2 to 8, 2013, as well as from December 13 to 20, 2013, and reported only a portion of or none of the work hours when he completed his reports (pages GD3-28 to 53). He otherwise claimed to have worked, but he had to repay the work hours that had been paid to him (GE-15-4052).

dd) Although the Claimant's representative argues that the Claimant always reported his situation in his claims, the Commission argues that it is not because he was reporting to be a shareholder when he was completing his claim that he should be considered as having reported all the information on his situation. The billed hours on the Hydro-Québec work sites show that the Claimant was working as a team leader, and the invoices show that he was active several days per week to carry out at least some purchases with the business credit card for operational requirements of said business and not for personal needs.

ee) The Commission finds that the Claimant completed his reports with the full knowledge of the facts and that he knew that he was conveying false information. As a result, the imposition of the warning was in order.

ff) The Commission claims that the case law supports its decision. The Court confirmed the principle that there is no false or misleading representation unless claimants subjectively know that the information they have given or the representations they have made—or representations that have been made about them—were false (*Mootoo v. Canada (Minister of Human Resources Development)*, 2003 FCA 206; *Canada (Attorney General) v. Gates*, [1995] 3 RCF 17, 1995 CanLII 3601 (FCA)).

gg) In a similar matter, the Court affirmed that the claimant was liable to a penalty under section 38 of the Act because there was ample evidence to support the Commission's opinion that the claimant knew that he had earnings over the course of the 17 weeks during which he was receiving benefits (*Ftergiotis v. Canada (Human Resources Development)*, 2007 FCA 55).

hh) If the Tribunal arrives at the conclusion that a penalty is justified, it must then determine whether the Commission exercised its discretion judiciously in setting the penalty amount.

ii) Since June 1, 2005, the Commission has had the following policy on calculating penalties: For an initial act or omission, the penalty amount may be set at up to 50% of the overpayment amount arising out of this act or omission. For a second act or omission, the penalty amount may be set at up to 100% of the overpayment amount. For the third act or omission, the penalty amount may be set at up to 150% of the overpayment amount. The Commission specified that these were maximum amounts that it had established by policy, and that it was only after the consideration of all the mitigating circumstances that the penalty amount was calculated.

jj) The Federal Court of Appeal confirmed that the Commission has just cause in adopting its own guidelines on imposing penalties in order to guarantee some consistency nationally and to avoid arbitrariness in these matters (*Canada (Attorney General) v. Gagnon*, 2004 FCA 351).

kk) The Commission argues that it exercised its discretion judiciously, given that it accounted for all the relevant circumstances of the case at the time of the imposition of the non-monetary penalty (GD3-120) (GE-15-4048; GE-15-4049).

ll) The Commission argues that it exercised its discretion judiciously, given that it considered all the relevant circumstances of the case at the time of setting the penalty amount. The penalty amount was assessed as follows in the initial decision (page GD3-45):

> [Translation]
>
> Net amount of the overpayment arising from act(s) or omission(s): $468.00
>
> Level of act or omission: 1st
>
> Number of act(s) or omission(s) : 1 act or omission, namely: 1 representation by the Claimant for which he neglected to specify that he had worked the week of December 16 to 22, 2012, when he had worked 36 hours.

The following mitigating circumstances were kept for the purposes calculating the penalty amount: no extenuating circumstance.

The penalty was assessed as follows: $468.00 X 50% = $234.00

mm) The Commission argues that it exercised its discretion judiciously, given that it considered all the relevant circumstances of the case at the time it set the penalty amount. The penalty amount was assessed as follows in the initial decision (page GD3-70):

[Translation]

Net amount of the overpayment arising from act(s) or omission(s): $413.00

Level of act or omission: 1st

Number of act(s) or omission(s): three acts or omissions, namely: three representations by the Claimant for which he neglected to specify all or some of his employment earnings.

The following mitigating circumstances were kept for the purposes calculating the penalty amount: no extenuating circumstance.

The penalty was assessed as follows: $413.00 X 50% = $207.00 (GE-15-4052).

nn) The Commission claims that the case law supports its decision. The Federal Court of Appeal had confirmed the principle that the Commission had the sole discretion to impose a penalty under subsection 38(1) of the Act. Furthermore, the Court had stated that no court, umpire or tribunal is authorized to interfere with a penalty decision by the Commission as long as the Commission could prove that it was exercising its discretion "judiciously." In other words, the Commission must show that it acted in good faith, considered all the relevant factors and disregarded irrelevant factors (*Canada (Attorney General) v. Uppal*, 2008 FCA 388; *Canada (Attorney General) v. Tong*, 2003 FCA 281).

ANALYSIS

The pertinent legislative provisions are reproduced in an appendix to this decision.

Reconsideration of the Claim

[23] The Claimant is disputing the reconsideration beyond 36 months conducted with respect to the benefit claim beginning on December 20, 2009 (GE-15-4048), and the benefit claim beginning on December 26, 2010 (GE-15-4049).

[24] Subsection 52(5) of the Act states that if, in the Commission's opinion, a false or misleading statement or representation has been made in connection with a benefit claim, the Commission has seventy-two months to reconsider the claim.

[25] The Commission specifies that the Claimant made false or misleading representations in reporting work hours at the rate of 10 hours per week, while in some weeks, according to the evidence in the docket, he was working many more hours than that. The Commission thereby argues that the Claimant's representations were false. As a result, given the false or misleading representations, the Commission had just cause, on December 1, 2014, to reconsider the benefits paid out in the seventy-two months.

[26] The representative specifies that, according to the Commission's policy on the reconsideration process (Chapter 17), the Commission intervenes for the future and not for prior periods. As a result, in the current docket, checks were made, but the Commission did not act. Officials telephoned appellants and verified their situation. He knew the situation of the claimants, who always reported their situation, and the Commission always indicated that he was entitled to unemployment. If there were questions, the Commission could have acted, and the policy says that if the Commission could have checked, it should not retroactively revisit the matter, as long as it recognized their right to unemployment.

[27] The representative argues that there is evidence that, in November 2014, the Commission specified that the claimants are entitled to unemployment. As a result, it is contrary to the Commission's own policies and, therefore, contrary to the reconsideration policy as stated in the case law.

[28] The Tribunal notes that the Commission contacted the Claimant with respect to the state of unemployment (self-employed person) on February 1, 2011 (GE-15-4048/GD14-3), and on January 31, 2014 (GD14-7/8). The Commission also contacted the Claimant on January 31, 2012, January 15, 2013, January 31, 2014, and January 26, 2015, with respect to insurability (GE-15-4048/GD14-4 to GD14-6 to GD14-9).

[29] In *Dussault*, the Federal Court of Appeal quotes *Langelier* as follows:

> 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 representation... 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).

[30] The Tribunal is of the opinion that the Commission did conduct audits on the Claimant's dockets. Nevertheless, these pertained to the Claimant's state of unemployment and insurability. Yet, in this case, the Commission affirms to have reason to believe that the Claimant made false or misleading representations based on the work hours that he had reported. The Commission specifies that the Claimant reported to have done 10 work hours per week, when the documents show that in some weeks he had more work hours.

[31] The Tribunal accounts for the Commission's reconsideration policy such as it is described in the *Benefit Entitlement Digest*, as well as the case law that the representative sent (GD13).

[32] The Tribunal accounts for the fact that the Claimant reported working between 10 and 15 hours on several of his reports.

[33] The Tribunal is of the opinion that, although the Claimant was subject to a reconsideration with respect to his insurability or state of unemployment, there is no indication that the Commission addressed, at the outset, the matter of reports or weekly work hours. Furthermore, even if that had been the case, the Act confers upon the Commission a possibility of reconsidering a benefit claim beyond 36 months if it has reason to believe that a false or misleading representation was made. As the Commission has emphasized below, there is no notion of intent taken that must be considered in this determination.

[34] If the Commission thereby obtained a copy of the business invoices, having reason to believe that the Claimant had worked more than 10 hours during some weeks, when in fact he was reporting only 10 work hours, the Tribunal is of the opinion that the Commission could have reason to believe that the Claimant had made false or misleading representations.

[35] The Tribunal is of the opinion that the Commission was reasonably satisfied that a false or misleading representation had been made, regardless of whether it had been made knowingly, in order to be able to apply subsection 52(5) of the Act. The Tribunal is satisfied that the Commission may reconsider the Claimant's applications for benefits within the 72-month time frame as provided for by the Act.

Week of Unemployment

[36] The Claimant is disputing the decisions made with regard to the week of unemployment: more specifically, in docket GE-15-4048, the decision on the week of unemployment during the period from February 7 to April 3, 2010, and in docket GE-15-4049, the decision on the week of unemployment for the periods of December 26, 2010, to January 15, 2011, and March 13 to May 7, 2011.

[37] Subsection 30(1) of the Regulations states the following:

> 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.

[38] Subsection 30(2) of the Regulations provides as follows:

> 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.

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

The Time Spent:

[40] The Commission argues that the Claimant works an average of ten hours per week during the low season and that this has been the prevailing situation over several years. The Claimant mainly does accounting during this period. He mentions that he no longer has anything to do when the operations cease in December; however, it may happen that he is busy with the accounting, or moving the machinery, without asking for a salary in return. He also does little committees and little upkeeps, without reporting to the work sites.

[41] The Commission adds that, with respect to the period from February 7 to April 3, 2010, the invoices show that Claimant was acting as team leader on various work sites and that he had worked a greater number of hours during specific weeks than what he was reporting.

Furthermore, several expenses were done with various suppliers, according to the documents that appear on pages GD3-99 to 108, showing that the Claimant was spending a greater number of hours on his business than what he was reporting weekly.

[42] Next, with respect to the periods included between December 26, 2010, and January 15, 2011, and between March 13 and May 7, 2011, the Commission argues that the invoices show that the Claimant was acting as team leader on a work site. Furthermore, several expenses were carried out with various suppliers, according to the documents that appear on pages GD3-71 to 114, showing that the Claimant was spending a greater number of hours on his business than what he was reporting weekly.

[43] The claimants explained that they were reporting between 10 and 15 work hours per week during the winter period. These hours corresponded to an average that they had established. They were paid at a rate of $150 for those weeks. Mr. S. S. also explained that he specified one of the three stakeholders as team leader, even though he was not present in the field. He specified that if the latter was doing work hours, they were detailed in the workforce section of the reports submitted to Hydro-Québec.

[44] The Tribunal notes that, according to the business invoices, the Claimant worked the following hours:

- 16 hours for the period ending on February 6, 2010 (GD3-87);
- 16 hours for the week ending on February 13, 2010 (GD3-88);
- 16 hours for the week ending on February 20, 2010 (GD3-86);
- 17 hours for the week ending on February 20, 2010 (GD3-93);
- 18 hours for the week ending on February 27, 2010 (GD3-92);
- 16 hours for the week ending on March 6, 2010 (GD3-91);
- 9 hours for the week ending on April 10, 2010 (GD3-98);
- 18 hours for the week ending on April 17, 2010 (GD3-97); and
- no hours for the week ending on April 9, 2011 (GE-15-4049; GD3-69).

[45] The Tribunal notes that the Claimant's reports from January 3 to January 9, 2010, and January 24 to April 17, 2010, specify that the Claimant reported to have worked 15 hours for $150 in earnings (GD3-22 to GD3-81). During the period from December 26, 2010, to January 15, 2011, and from March 13 to May 7, 2011, the Claimant reported to have worked 10 hours for $150 in earnings (GE-15-4049/GD3-23 to GD3-66).

[46] The claimants also specified that they made little committees for the business, such as going to carry machinery for repairs. They add that they could not carry out repairs themselves, since those must be certified.

[47] Furthermore, the Claimant specifies that the Commission alleges that he worked the week of December 26, 2010, since an invoice corresponding to the business's Christmas dinner is in the docket (GD3-74).

The Nature and Amount of the Capital and Resources Invested:

[48] The Commission specifies that the Claimant invested $1,500 towards the creation of the business in 1996 (page GD3-112).

The Financial Success or Failure of the Employment or Business:

[49] The Commission specifies that, although it is a seasonal business that functions predominantly between May and December every year, it provides jobs for numerous employees. The Commission thereby has reason to believe that this business is successful.

[50] The claimants specify that the business is seasonal. They indicate that they cannot depend on it during the winter season, since the work is, in and of itself, seasonal.

The Continuity of the Employment or Business:

[51] The Commission specifies that the business has been operating since 1996 and that it does work for large businesses, such as Hydro-Québec.

[52] The claimants specify that that their main client is Hydro-Québec. In order to get contracts, they must submit bids in response to invitations to tender. They indicate that, in the

low season, from November to April/May, unless by specific contracts, it consists of punctual work and the maintenance of the machinery that professionals must do, since a certification is necessary. The work is predominantly tied to emergency calls. They cannot work full-time, and the weather conditions influence their work opportunities. The work is only off-the-ground in comparison to the summer, when the work is off-the-ground and on-the-ground.

The Nature of the Employment or Business:

[53] The Commission specifies that the business works in the sector of forest management.

[54] The Claimant specifies that he is treasurer for the business. He considers himself a salaried employee of the business and works in the field. The business offers services in the forestry sector, in particular for the maintenance of the power grid, according to the invitations to tender obtained mainly from Hydro-Québec.

The Claimant's Intention and Willingness to Seek and Immediately Accept Alternate Employment:

[55] The Commission argues that the Claimant has said that he did daily job searches on the Internet. He is signed up for job alerts and looks for work at the same time for his own business. He would be willing to accept a position at another business until the operations resume for SAAF.

[56] The Commission submits that, when considered objectively, the six factors support the conclusion that the Claimant's involvement in his business is that of a person who would normally rely on this type of self-employment as a principal means of livelihood. Although the business is active at least eight months of the year (considered the high season), there are still other tasks to do in the low season and, in 2010, the business obtained other contracts during the winter period, as shown in the invoices that appear on pages GD3-83 to 98 (GE-15-4048), to pages GD3-68 to 70 (GE-15-4049). The numerous invoices for gasoline and supplies, as well as for rentals of all types, support the fact that the Claimant was not on unemployment between February 7 and April 3, 2010, between December 26, 2010, and January 15, 2011, and between March 13 and May 7, 2011. It is shown, with the invoices provided and the number of employees who were working at that time, that he was running his business as long as doing so

constituted his primary means of livelihood. Consequently, the Claimant did not refute the presumption that he was working a full working week because he did not meet the exception under subsection 30(2) of the Regulations.

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

> 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).

[58] 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 their level of engagement in the operation of their business, viewed objectively in light of the six factors stated in subsection 30(3) of the Regulations, is to such a minor extent that the applicant would not normally rely on that level of engagement as a principal means of livelihood (*Martens v. Canada (Attorney General)*, 2008 FCA 240).

[59] The Tribunal notes that, as mentioned in *Charbonneau*, the factors of time spent on the business, as well as the intention and willingness to seek alternate employment, are of utmost importance in order to determine whether the time that a claimant spent on the business is so minor in extent that this employment would not represent their primary means of livelihood.

[60] The Tribunal notes that, by its very nature, the business is seasonal. During the dead season, the Claimant does little work for the business, punctually.

[61] The shareholders have specified that they had determined an average of the hours worked during the winter season and that they reported this average of hours when they did their reports. The Tribunal accounts for the fact that this average differs from the actual hours worked for certain weeks, since the invoices at Hydro-Québec show it. Nevertheless, the Tribunal is of the opinion that none of these invoices shows that the Claimant was working

full-time. Furthermore, the Tribunal accounts for the invoices present in the docket that show that the Claimant was continuing to do specific work for the business. The Tribunal notes that the Claimant was reporting work hours and that these hours, even if they were represented by an average, included this time of service provided to the business.

[62] The Tribunal is of the opinion that, even in considering the time sheets and the invoices present in the docket, it can conclude only that the Claimant was working full working weeks during the period from February 7 to April 3, 2010, between December 26, 2010, January 15, 2011, and from March 13 to May 7, 2011.

[63] As a result, the Tribunal is of the opinion that, by relying on the evidence and the arguments the parties have submitted, and in considering the six factors stated in subsection 30(3) of the Regulations, the Claimant has to show that his level of involvement in his business is so minor in extent that it cannot constitute his primary means of livelihood. The Tribunal thereby finds that the presumption was reversed and that the Claimant proved that he had not been working full working weeks during his unemployment period. The Claimant is eligible for Employment Insurance benefits for the weeks in question.

Earnings

[64] The representative specified that the appeal of a part of the decision on the earnings, namely, the decision on the week of December 15, 2013, was withdrawn (GE-15-4052).

[65] In docket GE-15-4048, the initial decision indicates an allocation of earnings for the following weeks:

Week:	Income:	Instead of:
January 3, 2010	$212.00	$150.00
January 31, 2010	$339.00	$150.00 (GD3-121).

[66] During the reconsideration, the Commission indicated with respect to the decision on the earnings that:

> [Translation]
>
> The decision that was sent to you on December 1, 2014, concerning the current issue was replaced with this new decision: According to the invoice 101507, your salary for the week of April 4, 2010, was $191 (instead of $150) and that for the week of April 11, 2010, was $382. [Emphasis added]

[67] The Tribunal notes that the Commission makes no more mention of the weeks of January 3 and 31, 2010, in its reconsideration decision. Furthermore, as it "replaces" the previously rendered decision with a new one, the Tribunal is of the opinion that the weeks of January 3 to 31, 2010, should not be considered as being at issue, since the Commission is not notifying the Claimant that these weeks are still at issue. Nevertheless, the Tribunal notes that the Commission did not adjust the calculation of the overpayment as a result.

[68] Questioned on this subject, the Commission specifies that the earnings were corrected for these weeks (GD16-2).

[69] The Tribunal considered the weeks at issue in the present case. Nevertheless, the Tribunal is of the opinion that the Commission must indicate in its reconsideration decision the result of this reconsideration. If the Commission upholds the allocation of earnings for the weeks from January 3 to 31, 2010, as it indicates doing in its additional arguments, it must notify the Claimant, particularly if it is apparent that he is asking for the reconsideration.

[70] The Claimant is in disagreement with the allocation of the earnings that the Commission carried out for the weeks of January 3, January 31, April 4 and April 11, 2010 (GE-15-4048). Furthermore, the Claimant is in disagreement with the allocation of the earnings that the Commission did for the weeks of March 31 and April 7, 2013.

[71] The claimants argue that they did not receive more than $150 for each of the weeks and were not entitled to more than $150. There is no evidence that the claimants could pick up more than $150 for those weeks. It is a presumption that the Commission made.

[72] Subsection 35(2) of the Regulations indicates that the amount to be deducted from benefits payable under section 19, subsections 21(3), 22(5), 152.03(3) or 152.04(4) or section 152.18 of the Act, as well as for the application of sections 45 and 46 of the Act, is the entire income of a claimant arising out of any employment.

[73] In *McLaughlin*, the Federal Court of Appeal affirmed the principle by which "the entire income of a claimant arising out of any employment" must be taken into account in calculating the amount to be deducted from the benefits (*McLaughlin v. Canada (Attorney General)*, 2009 FCA 365).

[74] In *Boone*, the Federal Court of Appeal also confirmed the principle that sums constituting earnings pursuant to section 35 of the Regulations must be allocated pursuant to section 36 of the Regulations (*Boone et al. v. Canada (Attorney General)*, 2002 FCA 257).

[75] Subsection 36(4) of the Regulations states the following:

> 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.

[76] The Tribunal notes that for each of the weeks in question, the Claimant reported earnings of $150. He reported having worked 10 or 15 hours for these weeks.

[77] The Commission argues that, according to the invoices in the docket, the Claimant worked in January and February 2010 on Hydro-Québec work sites. Invoices 101501, 101503 and 101505 (pages GD3-83 to GD3-93) show that the Claimant actually worked between January 3 and February 20, 2010, and that his salary varied according to the number of hours worked and depending on the salary calculated at $20 per hour, plus the 6% vacation pay, namely, $21.20, as defined by the Commission (page GD3-110) and according to the information in the docket, while he reported only $150 for each of the weeks covered by the

current case (page GD3-22 to 81). Furthermore, during the docket reconsideration, the Commission carried out additional amendments. Invoice 101507 shows that the Claimant worked as an employee in addition to being team leader, for a salary of $191 applicable to the week of April 4 to 10, 2010, as well as for the week of April 11 to 17, 2010, for a salary of $382. The earnings were therefore allocated according to the information obtained and pursuant to the legislation (GE-15-4048).

[78] The Commission argues that, according to the invoices in the docket, the Claimant worked between March 31 and April 13, 2013, on Hydro-Québec work sites. Invoice 131801 (pages GD3-55) shows that the Claimant actually worked between April 2 and 8, 2013. The Claimant's earnings were therefore calculated according to the hourly rate of $21.20 and were allocated according to the information obtained and pursuant to the legislation (GE-15-4052).

[79] The Tribunal notes that the Claimant worked 10 hours during the week of January 3, 2010 (GE-15-4048/GD3-84); the Claimant also carried out work between February 1 and 20, 2010 (GE-15-4048/GD3-85/86), of which 16 hours were for the week of January 31, 2010 (GE-15-4048/GD3-87). For the week of April 4, 2010, the weekly report specifies that the Claimant was team leader, but no hours are associated with his work (GE-15-4048/GD3- 95). A second weekly report specifies that the Claimant worked 9 hours (GE-15-4048/GD3-98). For the week of April 11, 2010, the Claimant worked 18 hours (GE-15-4048/GD3-97). The Claimant worked 23 hours during the week of March 31, 2013 (GE-15-4052/GD3-56), and 6 hours during the week of April 6, 2013 (GE-15-4052/GD3-57).

[80] The Tribunal notes that the Commission determined that the Claimant's wage was $21.20. The Commission thereby determined that the earnings that the Claimant had reported should have been the multiplication of this rate by the number of hours worked.

[81] The Claimant confirmed that a decision had been made between the shareholders and set the salary of each at $150/week during the dead season. The shareholders specified that they had set their wage at $15.00/hour and had established an average between 10 and 15 work hours per week during the dead season. Their wage was $20.00 per hour during the summer season (GE-15-4048/GD3-110). The shareholders confirmed that they had received $150 for

those weeks as a salary and that no other amount was owed to them with respect to these periods.

[82] Mr. S. S., who is responsible for the invoicing Hydro-Québec, also confirmed that, initially, he felt it necessary to write down one of the shareholders as field team leader. He thereby wrote down the name of a shareholder, even though he was not present in the field. He explained that, when an employee did work, their name appeared in the detail of the invoicing with the hours worked.

[83] The Tribunal considers that it is incumbent upon the Claimant to prove that the sum paid or payable is not earnings within the meaning of the Act and its Regulations.

[84] The Tribunal is of the opinion that there is a difference between the amount that the business invoices to a client and the one paid to a salaried employee. If a business decision thereby provides for a different salary during the low period, it is a business decision into which the Commission cannot intervene. The Tribunal is in agreement with the fact that the claimants should have reported the actual number of hours worked. Nevertheless, by relying on the evidence that the parties have submitted, the Tribunal is of the opinion that the sums that the claimants reported are really the sums received as a salary.

[85] The Tribunal relies on the CRA decision, which indicates that a claimant is considered a salaried employee within their business (GD3-114/115). The CRA thereby confirms that the claimants received a salary that the business establishes for its salaried employees. The claimants wear two hats by being salaried employees and shareholders, but the Tribunal is of the opinion that the salary that was paid to them is actually $150 per week. The Tribunal is thereby of the opinion that it is this sum that they had to report and, as a result, it is this sum that the Commission must allocate.

[86] The Tribunal is of the opinion that the Commission does not have the authority to determine whether a business should have paid more to a salaried employee. Furthermore, the claimants confirmed that no sum was owing to them with respect to the periods at issue.

[87] The claimants explained that the hours reported constituted an average number of hours worked during the low season. Nevertheless, the salary that the business paid did not vary during this period.

[88] By relying on the evidence and the submissions that the parties have made, the Tribunal is thereby of the opinion that an amount of $150 should be allocated for each of the weeks at issue, namely, the weeks of January 3, January 31, April 4 and April 11, 2010 (GE-15-4048), and from March 31 to April 7, 2013 (GE-15-4052), under subsection 36(4) of the Act, since it consists of earnings payable to the Claimant under the terms of an employment contract in exchange for services provided for the period during which those services were provided.

[89] The appeal with respect to the allocation of the earnings for the week of December 15, 2013, has been withdrawn.

Warning and Penalty

[90] The Claimant disputes the warning imposed in dockets GE-15-4048 and GE-15-4049. Furthermore, the Claimant disputes the penalty of $124 that the Commission imposed in docket GE-15-4052.

[91] Subsection 38(1) of the Act specifies the following:

> **(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;

[92] Section 40 of the Act reads as follows:

> A penalty shall not be imposed under section 38 or 39 if
>
> **(a)** a prosecution for the act or omission has been initiated against the employee, employer or other person; or
>
> **(b)** 36 months have passed since the day on which the act or omission occurred.

[93] Section 41.1 of the Act reads as follows:

> **(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.

[94] The claimants specify that the Commission did not meet its burden of proof, especially since, on several occasions, there were exchanges with the three appellants to verify the accuracy of their answers. As for the earnings, the alleged act does not exist. One cannot allege that someone did something that does not exist. The salary that the official alleged had never been paid and had never been owed. When the Claimant reports $150, he is not reporting something false.

[95] The Commission argues that the Claimant worked on different occasions between January and April 2010, from the additional hours to the hours he reported, namely, always 10 hours per week. He must have known that he had earned more than $150 when he was acting as an employee and/or team leader during the contracts for Hydro-Québec, in the field. For each of the weeks in this period, when he completed his Claimant reports, he always reported his average, namely, 10 hours per week for $150 in earnings (GE-15-4048).

[96] The Commission added that the Claimant had performed work on ensuring the functioning of the business between December 26, 2010, and January 15, 2011, as well as between March 13 and May 7, 2011, according to the documentary evidence. Although he regularly reported to have been working 10 hours per week, the Commission has reason to

believe that the Claimant was working more. He must have known that he was working more than the reported number of hours, especially when he was acting as a team leader during the contracts for Hydro-Québec, in the field. For each of the weeks in this period, when he completed his Claimant reports, he always reported his average, namely, 10 hours per week for $150 in earnings (GE-15-4049).

[97] Lastly, the Commission specified that the Claimant had worked on a work site from April 2 to 8, 2013, as well as from December 13 to 20, 2013, and that he had reported only a portion of or no work hours when he had completed his reports (pages GD-328 to 53).

[98] The onus is on the Commission to show that the Claimant knowingly made false or misleading representations. The onus is then on the Claimant to explain why those representations were made (*Canada (Attorney General) v. Purcell*, [1996] 1 FCR 644, 1995 CanLII 3558 (FCA)).

[99] The case law also establishes that it is not enough for the Claimant to make a false or misleading representation, but that 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 representation (*Mootoo v. Canada (Minister of Human Resources Development)*, 2003 FCA 206).

[100] The Commission found that the Claimant had completed his reports knowing full well and that he had known that he had been conveying false information. As a result, the imposition of a monetary penalty is in order.

[101] The Tribunal notes that the Claimant's reports show that he reported 10 or 15 work hours, even during the weeks where the business invoices show that he worked more hours or those where no invoice shows that he performed work for the business.

[102] The Tribunal is of the opinion that the Commission demonstrated that the Claimant had made false or misleading representations. Nevertheless, his false or misleading representations must have been made knowingly.

[103] The burden of proof, which rests with the Commission, consists of establishing, on a balance of probabilities, that is not beyond a reasonable doubt that the Claimant had made a false statement or representation that he knew was false or misleading (*Canada (Attorney General) v. Gates*, [1995] 3 FCR 17, 1995 CanLII 3601 (FCA)).

[104] The claimants reported that they had established an average number of work hours between 10 and 15 hours for the weeks worked during the low season. He also reported earnings of $150 for these weeks, relying on a collective decision that the shareholders had made.

[105] The claimants explained that they thought that the method complied with the Employment Insurance rules. They specify that the Commission audited them almost annually and that they answered all the questions asked of them. Each year, they received their Employment Insurance and therefore thought that they were following the rules.

[106] In *Gates,* the Court specified that "[i]n 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*, [1995] 3 FCR 17, 1995 CanLII 3601 (FCA)).

[107] The Tribunal considers that it finds that the claimants correctly reported their earnings of $150 for the weeks in which the warnings and the penalty are at issue. As mentioned previously, the Tribunal is of the opinion that the sum to be allocated really is $150, since it consists of amounts payable to the Claimant by the business. Furthermore, the Tribunal can find only that the Claimant was working full working weeks during the weeks in question.

[108] The Tribunal is of the opinion that the claimants gave credible testimony that was consistent with the representations that they had made previously. The Commission had audited and questioned them on several occasions, and they received their pensions. Nevertheless, the Tribunal takes into consideration the fact that the claimants did not correctly report the hours worked for certain weeks at issue. Nevertheless, the Tribunal is of the opinion that these false representations were not made knowingly.

[109] Thereby, by relying on the evidence and the arguments that the parties have submitted, the Tribunal is of the opinion that, on a balance of probabilities, the Claimant did not knowingly make false or misleading representations. As a result, the Tribunal is of the opinion that no warning or penalty can be assessed.

CONCLUSION

[110] The Tribunal is of the opinion that the Commission was reasonably satisfied that a false or misleading representation had been made, regardless of whether it had been made knowingly, in order to be able to apply subsection 52(5) of the Act. The Tribunal is satisfied that the Commission can reconsider the Claimant's applications for benefits within the 72-month time frame as provided for by the Act.

[111] The Tribunal is of the opinion that, taking account of the six factors stated in subsection 30(3) of the Regulations, the Claimant has to demonstrate that his level of involvement in his business is so minor in extent that it cannot be relied on as his principal means of livelihood during the periods in question. The Tribunal thereby finds that the presumption was reversed and that the Claimant proved that he was not working full working weeks during the weeks in question. The Claimant is eligible for Employment Insurance benefits during the period from February 7 to April 3, 2010 (GE-15-4048), from December 26, 2010, to January 15, 2011, and from March 13 to May 7, 2011 (GE-15-4049).

[112] The Tribunal is of the opinion that an amount of $150 should be allocated for each of the weeks in question, namely, the week of January 3, January 31, April 4 and April 11, 2010 (GE-15-4048), and from March 31 to April 7, 2013, pursuant to subsection 36(4) of the Act, since it consists of earnings payable to the Claimant under the terms of the employment

contract in exchange for services provided during the period in which those services were provided.

[113] The appeal of a part of the decision on the earnings, namely, the decision pertaining to the week of December 15, 2013, has been withdrawn (GE-15-4052). As a result, the appeal on this issue is dismissed.

[114] The Tribunal is of the opinion that, on a balance of probabilities, the Claimant did not knowingly make false or misleading representations. As a result, the Tribunal is of the opinion that no warning or penalty can be assessed.

[115] The appeal is allowed in part.

Charline Bourque
Member, General Division—Employment Insurance Section

APPENDIX

THE LAW

Employment Insurance Act

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

11 (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.

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

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

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

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

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

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

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

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

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

41 The Commission may rescind the imposition of a penalty under section 38 or 39, or reduce the penalty, on the presentation of new facts or on being satisfied that the penalty was imposed without knowledge of, or on the basis of a mistake as to, some material fact.

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

52 (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.

Employment Insurance Regulations

30 (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.

35 (1) The definitions in this subsection apply in this section.

employment means

(a) any employment, whether insurable, not insurable or excluded employment, under any express or implied contract of service or other contract of employment,

(i) whether or not services are or will be provided by a claimant to any other person, and

(ii) whether or not income received by the claimant is from a person other than the person to whom services are or will be provided;

(b) any self-employment, whether on the claimant's own account or in partnership or co-adventure; and

(c) the tenure of an office as defined in subsection 2(1) of the *Canada Pension Plan*. (*emploi*)

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

pension means a retirement pension

(a) arising out of employment or out of service in any armed forces or in a police force;

(b) under the *Canada Pension Plan*; or

(c) under a provincial pension plan. (*pension*)

self-employed person has the same meaning as in subsection 30(5). (*travailleur indépendant*)

(2) Subject to the other provisions of this section, the earnings to be taken into account for the purpose of determining whether an interruption of earnings under section 14 has occurred and the amount to be deducted from benefits payable under section 19, subsection 21(3), 22(5), 152.03(3) or 152.04(4) or section 152.18 of the Act, and to be taken into account for the

purposes of sections 45 and 46 of the Act, are the entire income of a claimant arising out of any employment, including

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

(b) workers' compensation payments received or to be received by a claimant, other than a lump sum or pension paid in full and final settlement of a claim made for workers' compensation payments;

(c) payments a claimant has received or, on application, is entitled to receive under

(i) a group wage-loss indemnity plan,

(ii) a paid sick, maternity or adoption leave plan,

(iii) a leave plan providing payment in respect of the care of a child or children referred to in subsection 23(1) or 152.05(1) of the Act,

(iv) a leave plan providing payment in respect of the care or support of a family member referred to in subsection 23.1(2) or 152.06(1) of the Act, or

(v) a leave plan providing payment in respect of the care or support of a critically ill child;

(d) notwithstanding paragraph (7)(b) but subject to subsections (3) and (3.1), the payments a claimant has received or, on application, is entitled to receive from a motor vehicle accident insurance plan provided under a provincial law in respect of the actual or presumed loss of income from employment due to injury, if the benefits paid or payable under the Act are not taken into account in determining the amount that the claimant receives or is entitled to receive from the plan;

(e) the moneys paid or payable to a claimant on a periodic basis or in a lump sum on account of or in lieu of a pension; and

(f) where the benefits paid or payable under the Act are not taken into account in determining the amount that a claimant receives or is entitled to receive pursuant to a provincial law in respect of an actual or presumed loss of income from employment, the indemnity payments the claimant has received or, on application, is entitled to receive pursuant to that provincial law by reason of the fact that the claimant has ceased to work for the reason that continuation of work entailed physical dangers for

(i) the claimant,

(ii) the claimant's unborn child, or

(iii) the child the claimant is breast-feeding.

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

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

(5) Earnings that are payable to a claimant under a contract of employment without the performance of services or payable by an employer to a claimant in consideration of the claimant returning to or beginning work shall be allocated to the period for which they are payable.

(6) The earnings of a claimant who is self-employed, or the earnings of a claimant that are from participation in profits or commissions, that arise from the performance of services shall be allocated to the weeks in which those services are performed.

(6.1) The earnings of a claimant who is self-employed, or the earnings of a claimant that are from participation in profits or commissions, that arise from a transaction shall be allocated

(a) if the aggregate amount of earnings that arise from a transaction occurring in a week is greater than the maximum yearly insurable earnings referred to in section 4 of the Act divided by 52, to the weeks in which the work that gave rise to the transaction was performed, in a manner that is proportional to the amount of work that was performed during each of those weeks or, if no such work was performed, to the week in which the transaction occurred; or

(b) if the aggregate amount of earnings that arise from a transaction occurring in a week is less than or equal to the maximum yearly insurable earnings referred to in section 4 of the Act divided by 52, to the week in which the transaction occurred or, if the claimant demonstrates that the work that gave rise to the transaction occurred in more than one week, to the weeks in which the earnings were earned, in a manner that is proportional to the amount of work that was performed during each of those weeks.

(6.2) The earnings of a claimant who is self-employed, or the earnings of a claimant that are from participation in profits or commissions, that do not arise from the performance of services or from a transaction shall be allocated equally to each week falling within the period in which the earnings were earned.

(7) The earnings of a claimant who is self-employed in farming shall be allocated

(a) if they arose from a transaction, in accordance with subsection (6.1); and

(b) if they were received in the form of a subsidy, to the week in which the subsidy was paid.

(8) Where vacation pay is paid or payable to a claimant for a reason other than a lay-off or separation from an employment, it shall be allocated as follows:

(a) where the vacation pay is paid or payable for a specific vacation period or periods, it shall be allocated

(i) to a number of weeks that begins with the first week and ends not later than the last week of the vacation period or periods, and

(ii) in such a manner that the total earnings of the claimant from that employment are, in each consecutive week, equal to the claimant’s normal weekly earnings from that employment; and

(b) in any other case, the vacation pay shall, when paid, be allocated

(i) to a number of weeks that begins with the first week for which it is payable, and

(ii) in such a manner that, for each week except the last, the amount allocated under this subsection is equal to the claimant's normal weekly earnings from that employment.

(9) Subject to subsections (10) to (11), all earnings paid or payable to a claimant by reason of a lay-off or separation from an employment shall, regardless of the period in respect of which the earnings are purported to be paid or payable, be allocated to a number of weeks that begins with the week of the lay-off or separation in such a manner that the total earnings of the claimant from that employment are, in each consecutive week except the last, equal to the claimant's normal weekly earnings from that employment.

(10) Subject to subsection (11), where earnings are paid or payable to a claimant by reason of a lay-off or separation from an employment subsequent to an allocation under subsection (9) in respect of that lay-off or separation, the subsequent earnings shall be added to the earnings that were allocated and, regardless of the period in respect of which the subsequent earnings are purported to be paid or payable, a revised allocation shall be made in accordance with subsection (9) on the basis of that total.

(10.1) The allocation of the earnings paid or payable to a claimant by reason of a lay-off or separation from an employment made in accordance with subsection (9) does not apply if

(a) the claimant's benefit period begins in the period beginning on January 25, 2009 and ending on May 29, 2010;

(b) the claimant contributed at least 30% of the maximum annual employee's premium in at least seven of the 10 years before the beginning of the claimant's benefit period;

(c) the Commission paid the claimant less than 36 weeks of regular benefits in the 260 weeks before the beginning of the claimant's benefit period; and

(d) during the period in which the earnings paid or payable by reason of the claimant's lay-off or separation from an employment are allocated in accordance with subsection (9) or, if the earnings are allocated to five weeks or less, during that period of allocation or within six weeks following the notification of the allocation, the claimant is referred by the Commission, or an authority that the Commission designates, under paragraph 25(1)(a) of the Act, to a course or program of instruction or training

(i) that is full-time,

(ii) that has a duration of at least 10 weeks or that costs at least $5,000 or 80% of the earnings paid or payable by reason of the claimant's lay-off or separation from employment,

(iii) for which the claimant assumes the entire cost, and

(iv) that begins during one of the 52 weeks following the beginning of the claimant's benefit period.

(10.2) If any of the conditions under which the Commission may terminate the claimant's referral under paragraph 27(1.1)(b) of the Act exists, the earnings paid or payable to the claimant by reason of a lay-off or separation from an employment shall be re-allocated under subsection (9).

(11) Where earnings are paid or payable in respect of an employment pursuant to a labour arbitration award or the judgment of a tribunal, or as a settlement of an issue that might otherwise have been determined by a labour arbitration award or the judgment of a tribunal, and the earnings are awarded in respect of specific weeks as a result of a finding or admission that disciplinary action was warranted, the earnings shall be allocated to a number of consecutive weeks, beginning with the first week in respect of which the earnings are awarded, in such a manner that the total earnings of the claimant from that employment are, in each week except the last week, equal to the claimant's normal weekly earnings from that employment.

(12) The following payments shall be allocated to the weeks in respect of which the payments are paid or payable:

(a) payments in respect of sick leave, maternity leave or adoption leave or leave for the care of a child or children referred to in subsection 23(1) or 152.05(1) of the Act;

(b) payments under a group sickness or disability wage-loss indemnity plan;

(c) payments referred to in paragraphs 35(2)(d) and (f);

(d) workers' compensation payments, other than a lump sum or pension paid in full and final settlement of a claim made for workers' compensation payments;

(e) payments in respect of the care or support of a family member referred to in subsection 23.1(2) or 152.06(1) of the Act; and

(f) payments in respect of the care or support of a critically ill child.

(13) A payment paid or payable to a claimant in respect of a holiday or non-working day that is observed as such by law, custom or agreement, or a holiday or non-working day immediately preceding or following a holiday or non-working day that occurs at the establishment of the employer or former employer from whom the claimant receives that payment, shall be allocated to the week in which that day occurs.

(14) The moneys referred to in paragraph 35(2)(e) that are paid or payable to a claimant on a periodic basis shall be allocated to the period for which they are paid or payable.

(15) The moneys referred to in paragraph 35(2)(e) that are paid or payable to a claimant in a lump sum shall be allocated beginning with the first week that those moneys are paid or payable to the claimant in such a manner that those moneys are equal in each week to the weekly amount, calculated in accordance with subsection (17), to which the claimant would have been entitled if the lump sum payment had been paid as an annuity.

(16) The moneys allocated in accordance with subsection (14) or (15) shall not be taken into account in the allocation of other earnings under this section.

(17) The weekly amount shall be calculated in accordance with the following formula, according to the claimant's age on the day on which the lump sum payment is paid or payable:

$$\mathbf{A / B}$$

where

A is the lump sum payment; and

B is the estimated actuarial present value $1 payable at the beginning of every week starting from the day on which the lump sum payment is paid or payable and payable for the claimant's lifetime, as calculated each year in accordance with the following formula and effective on January 1 of the year following its calculation:

$$\mathbf{B = [\Sigma_{t = 0} \text{ to infinity of } ({}_tP_x / (1+ i)^t) - 0.5] \times 52}$$

where

${}_tP_x$ is the probability that the claimant will survive for "t" years from the claimant's age "x" using the latest Canadian mortality rates used in the valuation of the Canada Pension Plan prorated in equal parts between males and females,

i is the annualized long-term Government of Canada benchmark bond yields averaged over the 12-month period beginning on the September 1 and ending on the August 30 before the January 1 on which the estimated actuarial present values are effective, expressed as a percentage and rounded to the nearest one tenth of a percentage, and

t is the number of years that the claimant survives according to the claimant's age for which the probability of survival is estimated by ${}_tP_x$.

Note: The estimated actuarial present values are published annually on the Service Canada website.

(18) Earnings that are payable to a claimant under a government program intended to encourage re-employment and that are payable to the claimant as a supplement to earnings arising from a contract of employment shall be allocated to the period for which they are payable.

(19) Where a claimant has earnings to which none of subsections (1) to (18) apply, those earnings shall be allocated

(a) if they arise from the performance of services, to the period in which the services are performed; and

(b) if they arise from a transaction, to the week in which the transaction occurs.

(20) For the purposes of this section, a fraction of a dollar that is equal to or greater than one half shall be taken as a dollar and a fraction that is less than one half shall be disregarded.