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

Citation: *J. F. v. Canada Employment Insurance Commission,* 2017 SSTGDEI 61

Tribunal File Number: GE-16-3342

BETWEEN:

J. F.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Paul Dusome

HEARD ON: March 9, 2017

DATE OF DECISION: April 28, 2017

REASONS AND DECISION

PERSONS IN ATTENDANCE: the Appellant.

INTRODUCTION

[1] The Appellant received 50 weeks of combined maternity and parental benefits. By letter dated June 3, 2016, the Respondent imposed a penalty and issued a notice of violation related to undeclared income in the last 14 weeks of benefits paid. The Appellant requested a reconsideration on June 20, 2016. The Respondent's reconsideration decision, dated August 11, 2016, maintained the initial decision. The Appellant filed her appeal with the Tribunal on September 1, 2016, but it was incomplete. The appeal was completed on November 10, 2016. The Tribunal granted an extension of time to file the appeal in its decision dated January 11, 2016.

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

a) The fact that credibility may be a prevailing issue.

b) The information in the file, including the need for additional information.

c) The form of hearing provides for any special accommodations required by the parties.

d) The form of hearing respects the requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

ISSUES

[3] There are three issues. First, should a penalty be imposed pursuant to subsection 38(1) of the *Employment Insurance Act* (EI Act)? Second, did the Respondent act in a judicial manner in assessing the penalty amount it imposed on the Appellant? Third, did the Respondent act in a judicial manner in issuing the notice of violation?

EVIDENCE

[4] The Appellant received 15 weeks of maternity benefits, followed immediately by 35 weeks of parental benefits, ending on February 8, 2014. She was exempted from filing bi-weekly reports. The Appellant obtained the exemption by completing an "Exemption Declaration – Maternal/Parental" on her application for EI benefits, under which she agreed to the following statement:

> Normally you are asked to complete a report every two weeks to receive your EI payment. Each completed report becomes a claim for benefits for the weeks of unemployment. You could be exempted from completing reports.
>
> Before being exempted, you must agree to the following statement.
>
> I understand that I am making a claim for benefits covering every week of my period of eligibility. I accept that I will not be required to complete claimant's reports for this period. I also agree to inform Service Canada Centre immediately if, while I'm collecting Employment Insurance benefits:
>
> 1. I work,
> 2. I receive money, or
> 3. any situation arises that affects my Employment Insurance benefits.
>
> Following receipt of my last payment of benefits, I agree to notify Service Canada to confirm that I have declared any situation or earnings that have the effect of reducing or eliminating my benefits. I am aware that I may be penalized or be liable to prosecution for failing to report any of the above.

[5] The Appellant returned to work on November 3, 2013, and had earnings in the 14 following weeks, to the end of her benefit period. There is no evidence that either party contacted the other at the end of the Appellant's parental leave or that the Appellant provided false information to the Respondent about her last 14 weeks of parental leave. The Appellant's evidence of her efforts to notify the Respondent of her return to work will be set out below. The Appellant applied for maternity benefits again on March 3, 2015. The Record of Employment showed the Appellant had been working and earning money from November 3, 2013 to February 8, 2014. The Respondent sent to the Appellant a "Request for clarification of employment information" letter dated April 5, 2016, respecting the earnings in that 14 week period. The Appellant responded, confirming that the earnings information was correct. The Appellant stated that she was aware that she needed to notify the government of her

employment status, and that the Respondent, in a phone call she made to the Respondent, told her to deliver a letter in writing to state the date she was returning to work. The Appellant related her unsuccessful efforts to deliver the letter.

[6] After speaking to the Appellant about her efforts to notify the Respondent of her return to work, the Respondent determined that the Appellant had knowingly failed to declare her earnings for the 14 weeks of November 3, 2013 to February 8, 2014. This resulted in a total of eight misrepresentations, based on two week reporting periods, and allocation of earnings to those 14 weeks, resulting in an overpayment of benefits later fixed at $7014.00. The Respondent assessed the matter as what it considered the first level of misrepresentation, reduced the penalty based on the Appellant having responded to its request for clarification, and fixed the penalty at $1754.00. The Respondent also issued a notice of violation, classified as a very serious violation based on the amount of the overpayment. The Respondent communicated this information to the Appellant by its letter of June 3, 2016.

[7] The Respondent set out the rationale for the penalty in its Record of Decision dated June 3, 2016, as follows:

> Rationale:
> It is the claimant's responsibility to accurately declare work and earnings. Taking into consideration that the claimant responded to the request for information and that she acknowledged her rights and responsibilities on the initial application, it is being concluded that based on the balance of probabilities, the claimant knowingly failed to declare their earnings for the 14 weeks in question. There are no prior misrepresentations and therefore this is deemed to be a first level misrepresentation. This claim is within the 36 month time frame to impose a monetary penalty, however taking into consideration the mitigating circumstances as provided below, the monetary sanction is being reduced.
>
> Calculation:
> Number of Misrepresentations: 8 Net Overpayment Amount: $7014
> Level of Misrepresentation: 1st Level - penalty up to 50% of the net overpayment.
> Penalty Cap per BPC = $5,000
>
> A. Penalty Cap on BPC $5000.00 minus any previous penalty amount(s) on this BPC $0.00 = Maximum Penalty Amount $5000.00 for this BPC.
>
> B. Specific Mitigating Circumstances recognized for Penalty Reduction:
> The claimant responded to the request for additional information and stated that she contacted the call centre to declare her return to work but was directed to write a letter. After doing so, she says she was told she needed to go in person. When she went to the

> office it was closed and she was never able to go back due to her return to work. She states that the office was closed because it was a remote location. The claimant only declared her change of address to X on June 5, 2014, four months after her claim for parental benefits ended. At the time she was on benefits, she was living in X and there were no remote offices there. The call centre is able to accept changes over the phone when a claimant has returned to work. They would have stopped her claim and amended the appropriate reports. She would not have been asked to mail a letter and then go in person to provide this information. Based on this information, those issues cannot be considered as mitigating circumstances. However, given that the claimant did respond to the letter, a reduction is applicable.
>
> Penalty reduced based on above circumstances by 25%: Net O/P $7014 X (Penalty % 50- 25 reduction=25%) = $1754 Penalty
>
> C. Legal Validation Amount - Section 38(2) of the Act:
> 3 X claimant's Weekly Rate of Benefit ($501) X Number of Misrepresentations (8) = $12024
>
> The penalty therefore is the lesser of A, B, or C, and therefore is $1754.

[8] The Respondent set out the rationale for the violation in its Record of Decision dated June 3, 2016, as follows:

> Decision details:
> Relevant Facts:
> This is a first level misrepresentation for which a penalty in the amount of $1754 is being imposed due to 8 misrepresentations on 8 reports for which the claimant received benefits.
>
> Net Overpayment amount is $7014.
>
> Credibility:
> N/A
>
> Decision:
> Violation Imposed: Very Serious
>
> Rationale:
> The claimant failed to declare earnings on two weeks [sic] for which he [sic] received benefits. The net overpayment amount is $7014 and therefore the violation is considered to be Very Serious.

[9] The Appellant's request for reconsideration stated that on deciding to return to work, she called the Respondent about her planned return to work, and she was instructed that in order to cancel her benefits, she would need to visit the Service Canada office in her area, in person, to

deliver a letter about her return to work. Not being able to deliver the letter in person, the Appellant mailed it to her local Service Canada office, but on following up after her return to work, she found out the letter had not been received. She explained that due to her living in a rural area, her long commute to and from work, her working hours and not being permitted to leave work during work hours to attend to personal matters, she could not deliver the letter in person. She expressed frustration with not being able to cancel benefits online or over the phone, and not being able to get to a Service Canada office due to its hours of operation coinciding with her hours of work. She spoke with several people at the Service Canada office who said there was nothing else they could recommend. The Appellant did not dispute that she owed the benefits paid from November 3, 2013 to February 8, 2014, but did contest the assessment of the penalty and the notice of violation. The Respondent spoke to the Appellant by phone on August 11, 2016 to review the request for reconsideration and the Appellant's reasons with her. The Respondent noted the following information about its procedures in the notes of the conversation with the Appellant:

> The claimant claims to have spoken to several Service Canada representatives who did not know how to help her stop her benefits. She was told to write a letter and deliver this in person.
>
> The Service Canada Call Center representatives are trained and equipped to take this information and stop the claim; it is inconceivable that she would be told several times by several different representatives they could not do this and that she had to write a letter and hand deliver this. The mandate of Service Canada is to prevent having people have to report in person.
>
> There is no evidence to support the claimant's statement that she contacted the Commission. The only call recorded relative to this issue is the call back requested by the claimant on July 20, 2016 about her overpayment and to advise she had submitted a request for reconsideration.
>
> The reporting of a return to work is not a complex situation. In fact it is something that our call centres deal with very frequently on a daily basis.

[10] The Respondent reviewed the amount of the penalty, and determined that the reduction was proper. It also reviewed the notice of violation, and determined there were no mitigating factors to warrant removing the violation. The reconsideration letter of August 11, 2016 maintained the initial decisions respecting both the penalty and the violation.

[11] The Appellant provided the following testimony at the hearing. On October 22, 2013, before returning to work on November 3, 2013, she called Service Canada to notify it of her planned return to work and to cancel her benefits. She was told she could not cancel by phone, but rather needed to write a letter and deliver it to a Service Canada office in order to cancel benefits. On October 27, 2013, the Appellant called Service Canada again to explain that she could not get to a Service Canada office to deliver the letter; she asked if could she cancel by email, or phone call to another number, or a form to fill out; she was told her only option was to write a letter and drop it off. The Appellant testified that she could not get to a Service Canada office, as she and her husband had just moved to a rural area a few weeks before, she did not have a working vehicle, her husband needed his vehicle for his work, as he moves from site to site frequently during the day, her husband left for work about 5:30am and returned about 7:00pm, and there was no one else she could get a ride with to get to a Service Canada office.

[12] The Appellant testified that she attempted to deliver the letter at least four times, to three different Service Canada locations, but did not succeed, as her time was limited on lunch from work, and the lines were too long, so she had to leave. One time she did go with her husband to use his truck to get to a Service Canada office, but again, the lines were too long and she had to leave to drive her husband to his next job site.

[13] The Appellant called the Respondent at least four times, two before her return to work, as noted above, and two or perhaps more after she returned to work. In these later calls, she was told she could not cancel over the phone. The last agent of the Respondent she spoke to told her to either deliver the letter, or wait for the Respondent to contact her on what to do. So she waited.

[14] The Appellant stated she did not mail the letter to the Respondent, as she was told to deliver it in person, and as she was not comfortable mailing it as she did not know who to address it to, so was worried it would get lost. The Appellant did not seek time off from work to deliver the letter. She had no one else to deliver the letter for her. She did not contact her local Member of Parliament for assistance. She tried an online search to find more information on what to do, but had no luck.

SUBMISSIONS

[15] The Appellant submitted that she did contact the Respondent to tell it of her intended return to work, but was told she had to deliver a letter in order to cancel her benefits, and she was unable to do this despite her best efforts. She was not trying to deceive the government, but was very frustrated by the difficulty of trying to cancel her benefits, and found it unfair that the Respondent imposed the penalty and violation.

[16] The Respondent submitted that the Appellant's explanation does not make sense, and is contradicted by the Respondent's practices. The Appellant did knowingly make false statements by not declaring her earnings, so a penalty was justified. The Respondent makes a specific reference to paragraph 38(1)(e), knowingly negotiating a special warrant. The Respondent acted in a judicial manner in assessing the penalty and in issuing the notice of violation in accordance with section 7.1 of the EI Act.

ANALYSIS

[17] The relevant legislative provisions are reproduced in the Annex to this decision.

[18] Section 38 of the EI Act authorizes the Commission to impose a penalty for each act or omission enumerated in subsection 38(1) (*Canada (Attorney General) v. Lingam*, 2005 FCA 164). The Commission has the discretion to impose a penalty in any amount not exceeding the maximum amounts set out in the provision (*Canada (A.G.) v. Uppal*, 2008 FCA 388). The authority to impose a violation is also discretionary (*Gill v. Canada (A.G)*, 2010 FCA 182). Discretionary decisions can only be varied if the Respondent did not exercise its power in a judicial manner, or acted in a perverse or capricious manner without regard to the material before it (*Uppal*, supra). A discretionary power is not exercised judicially if it can be shown that the decision maker: acted in bad faith; acted for an improper purpose or motive; took into account an irrelevant factor; ignored a relevant factor; or acted in a discriminatory manner (*Canada (A.G.) v. Purcell*, A-694-94).

In cases involving a claimant knowingly providing false or misleading information, , the Respondent must prove on a balance of probabilities that there was subjective knowledge by

the claimant who made the false or misleading statement (*Mootoo v. Minister of Human Resources Development*, 2003 FCA 206).

Findings

[19] It is clear on the evidence that the Appellant knew she had to report her return to work, in order to stop the payment of EI benefits. It is also clear that the Appellant continued to receive those benefits while she was working in the last 14 weeks of her benefit period, from November 3, 2013 to February 8, 2014. The Appellant does not dispute these facts. When the Respondent sent, in April 2016, its request for clarification of employment information, the Appellant responded to confirm that the earnings were correct, and that she was aware of the need to report her return to work. She then expressed her frustration in her unsuccessful efforts to report returning to work. There is no evidence that the Appellant made statements to the Respondent denying that she had returned to work, or denying or understating her earnings.

[20] The Appellant has provided her reasons for not reporting her return to work due to the Respondent requiring a written letter delivered by her to a Service Canada location, and her inability to deliver the letter despite her various efforts. The Tribunal does not find her explanation credible, for a number of reasons. The Respondent provided evidence of its procedures in dealing with information to stop benefits, namely that Service Canada Call Centre representatives are trained and equipped to take the information and to stop the claim; that it is inconceivable that the Appellant would be told by several different representatives that they could not take the information and stop the claim, but rather that the Appellant must write a letter and hand deliver it; further there was no record of the Appellant having contacted the Respondent prior to July 20, 2016, when she left a call back request about the overpayment and reconsideration request. That evidence directly contradicts the Appellant's claim of being told to hand deliver a letter, and does not support her having contacted the Respondent by phone prior to July 20, 2016. The Respondent's evidence on that matter is more consistent with the Respondent's responsibilities to maintain control of payments, including ending payments, and with the Respondent's increasing use of telecommunications, including phone and internet, to provide for reporting by claimants.

[21] There is an inconsistency in the Appellant's evidence respecting the letter for the Respondent. She testified that she did not mail the letter to the Respondent, having been instructed to hand deliver it. But her request for reconsideration states she was instructed to deliver the letter, but she couldn't so she mailed it, then called later to follow up and was told the letter had not been received. The Appellant was clear in her testimony that she did not mail the letter, as she was not sure who to send it to, fearing it would get lost and not get into her file. The Tribunal accepts that the Appellant did not mail the letter to the Respondent. Simply put, that is a very poor reason for not mailing a letter when she is trying to stop benefits being paid, and is not able to deliver the letter to the Respondent.

[22] There is the Appellant's lack of trying other avenues to get the information to the Respondent, if indeed she had been told to hand deliver a letter. The Appellant knew she had to report starting work in order to stop payment of the benefits. When she could not deliver the letter herself, she did not seek time off work to deliver it, or seek the help of others to deliver the letter for her, or seek the assistance of her MP, or mail the letter. She, on the advice of the Respondent in a phone call, stopped trying, and waited for the Respondent to contact her. That statement is itself not believable. If the Appellant truly did not want to receive the benefits, she would have tried alternatives to personally hand delivering a letter. She would not have just waited for the Respondent to contact her.

[23] Finally, there is the fact that the Appellant continued to receive EI benefits during the 14 week period, and kept them. In her request for reconsideration, the Appellant wrote "…now I have all this money shoved into my bank account that I did NOT want, but that I also had no way of preventing that from happening." Her action of accepting and keeping the benefits, and her limited efforts to stop their payment, is inconsistent with her claim that she did not want the money and had no way of preventing it from happening.

[24] The Tribunal does not accept the Appellant's claims about her efforts to report her return to work. Had she contacted the Respondent by phone or by mail, her benefits would have been stopped under the Respondent's practices. The Tribunal concludes that the Appellant did not report her return to work, or her earnings, to the Respondent during the 14 weeks from

November 3, 2013 to February 8, 2014. She did report them when contacted by the Respondent in April, 2016.

Imposition of a penalty

[25] On the basis of the factual situation in this case, and the provisions of section 38 of the EI Act relied on by the Respondent, is the Respondent authorized to impose a penalty on the Appellant?

[26] Before dealing the analysis of the penalty decision in this case, some comments on the Respondent's decision letters and Representations in penalty cases. The decision letters, as in this case, refer to knowingly making false statements or representations. The Respondent's Representations usually refer to section 38 or to subsection 38(1), without reference to particular paragraphs, again with generic references to knowingly making false statements or representations. The onus is on the Respondent to prove its case. Part of that case is the specific paragraph of subsection 38(1) that the Respondent relies upon. Neither appellants nor the Tribunal should be left to guess as what paragraph, what legal ground, the Respondent relies upon to make its case.

[27] This case is a bit different, in that the Respondent does in its Representations cite paragraph 38(1)(e) in its "summary of relevant facts". But when it comes to setting out the Respondent's position, there is no reference to paragraph 38(1)(e), but rather the usual generic references to section 38 (without subsection or paragraph), and to "misrepresentation knowingly made", and "false statement knowingly made". The following analysis will show the difficulty for the Respondent in relying on such generic Representations.

Interpretation of subsection 38(1)

[28] Section 38 of the EI Act is a not a penal provision, in the sense of criminal law, and it is an error to use criminal law principles in interpreting the EI penalty regime: *Canada (A.G.) v. Deen*, 2003 FCA 435; *Canada (A.G.) v. Gray*, 2003 FCA 464. As stated in *Deen*,

> The penalties under the employment insurance scheme established by the Act are to be viewed not as sanctions involving a criminal record but as deterrents in support of the voluntary and truthful declarations required from claimants.

[29] However, both of the above cases dealt with the issue of applying criminal law sentencing principles to the assessment of the amount of a penalty imposed under section 38 of the EI Act. Other decisions have stated that the purpose of the penalty provisions is punishment (*Canada (A.G.) v. Dussault*, 2003 FCA 372). The Court, in *Miller v. Canada (A.G.)*, 2002 FCA 464, referred to the seriousness of a penalty:

> **[20]** I would also note that, before neither the Board nor the Umpire, had the Commission been able to produce in evidence the reporting cards completed by Mr. Miller that contained the statements on which it relied to justify the penalty that it had imposed. Given the seriousness of the imposition of a penalty for lying, the Commission ought not normally to resort to the notes of an interview between a Commission official and the claimant as proof of a false statement made by the claimant in a document that the claimant had given to the Commission.

[30] The Supreme Court of Canada, in *Abrahams v. Canada (A.G)*, [1983] SCR 2, had stated that the EI legislation was to be given a liberal interpretation, and that difficulties in the language were to be resolved in favour of claimants. That principle has been applied by the Federal Court of Appeal to section 7.1 of the EI Act, which is part of the regime of sanctions in the Act:

> **[37]…**In the case of social benefits legislation such as this, any doubt arising from the difficulties of the language should be resolved in favour of the claimant: ***Abrahams v. Attorney General of Canada***, [1983] 1 S.C.R. 2 at page 10 and see also ***Finlay v. Canada (Minister of Finance)***, *supra* at page 1113 to 1115. To the extent that subsection 7.1(4) is ambiguous on the issue of whether the Commission has the discretion not to issue a notice of violation, that ambiguity should be resolved in favour of the claimant.
>
> **[38]** In this regard, as noted above, the respondent Crown has asserted that the purpose of section 7.1 is to deter abuse of the employment insurance scheme by imposing an additional sanction on claimants who attempt to defraud the system. I agree that that is the purpose of section 7.1. But that is the purpose that underlies the rest of the sanctioning regime in the Act too. As we have seen, the sanctioning regime in the Act is suffused with multiple administrative discretions. The purpose that the Crown posits for section 7.1 does not necessarily lead to the conclusion that when one of the circumstances in section 7.1(4) is present, a notice of violation is, unlike all of the other sanctions in this sanctioning regime, automatic.
>
> *Gill v. Canada (A.G.)*, 2010 FCA 182

[31] The first step in applying the non-criminal law principle from the *Abrahams* case to the paragraphs of subsection 38(1) is to look at the language employed. The beginning text of subsection 38(1) refers to “a penalty for each of the following acts or omissions”. Paragraphs

(a) to (h) set out those acts or omissions. Most of the paragraphs appear to require a positive act, rather than an omission, using the language of commission rather than omission: (a) “made a representation”; (b) “provided information or made a representation”; (d) “made a claim or declaration”; (e) “negotiated or attempted to negotiate” a special warrant; (f) “knowingly failed to return a special warrant or the amount of the warrant or any excess amount of the warrant, as required by section 44”; (g) “imported or exported a page issued by the Commission, or had it imported or exported”; and (h) “participated in, assented to or acquiesced in an act or omission in paragraphs (a) to (g)”. Paragraph (c), “knowingly failed to declare to the Commission all or some of the claimant’s earnings for a period determined under the regulations…” is an omission, but is no longer operative, as there are no regulations in force pertaining to the paragraph. Paragraph (f) can also be interpreted as an omission. Paragraph (h) does not create an independent act or omission; it only applies to acts or omissions that fall under the previous paragraphs.

[32] Since this provision must be given a liberal interpretation, and any difficulties in the language be resolved in favour of claimants, the verbs in paragraphs (a), (b) and (d), “made” and “provided”, require a positive action by the claimant to provide information to the Respondent that is false or misleading. A failure to provide information is not caught by this language. Even paragraph (d), involving non-disclosure of facts, requires that the claimant make a claim or declaration that involves non-disclosure, in addition to not disclosing facts. Paragraph (e) requires the positive action of negotiating or attempting to negotiate a special warrant. Paragraph (f) requires knowingly failing to return a warrant or money; this is more than an innocent omission. Paragraphs (g) and (h) require positive acts by the claimant. In addition, since the provision must be liberally interpreted, the Respondent must clearly bring the act or omission of the claimant within the language of one or more of the paragraphs of subsection 38(1).

Application of subsection 38(1) to this case

[33] The first difficulty for the Respondent is the generic nature of penalty decisions, mostly citing “false or misleading representations”, even when, as in this case, there were no representations made. The appellants, and the Tribunal, are entitled to know the legal basis of

the imposition of the penalty, in addition to the factual allegations in support. That means that the Respondent needs to set out in its decisions which paragraph(s) of subsection 38(1) it relies on as the legal basis for imposing the penalty. It is not for the Tribunal to establish the Respondent's position on the legal basis. Failure to apprise the appellants of the legal basis in advance may be a violation of the rules of natural justice, in that the appellants are not made aware of what that legal basis is. Once the Respondent has stated its legal basis, the Tribunal must rule on that issue, rather than on other possible bases for liability. Notwithstanding those comments, the Tribunal will rule on the generic misrepresentation claim in this case for the following reasons. The recurring references to "false representation" throughout the Respondent's documents, including its Representations, can be interpreted as the Respondent implicitly resting its case in part on paragraphs 38(1) (a), (b) or (d), in which case the Tribunal should deal with those grounds, rather than take a technical approach that in the absence of express reference to a subsection 38(1) paragraph, the Tribunal will not rule on alleged misrepresentations. Failure of the Tribunal to deal with the misrepresentation issue, without inviting submissions from the Respondent, could violate the rules of natural justice for the Respondent. Ruling on the alleged misrepresentations does not violate the rules of natural justice for the Respondent, as it was provided with the opportunity to state its position, has done so, and if that position is deficient, the Respondent will have to deal with the outcome.

[34] The second difficulty for the Respondent in this situation (involving a failure to report a return to work and earnings when the Appellant is exempt from filing reports) is that the Appellant did none of the following acts: provide false or misleading information; make a false or misleading representation; or make a claim or declaration she knew was false or misleading because of non-disclosure of facts. She omitted to provide information to the Respondent. Paragraphs (a), (b) and (d) require a positive act on the part of the claimant. There was no positive act (that is, representation, provision of information or claim or declaration with non-disclosure of facts) by the Appellant here, until April 2016. When the Appellant did provide information about her return to work and her earnings, that information was true, and therefore the April 2016 statement cannot fall under any of paragraphs 38(1)(a), (b) or (c), which require falsity, deception or non-disclosure.

[35] In order to discharge its onus respecting a false or misleading representation, the Respondent must provide evidence of the questions asked and the claimant's responses. Once it appears that the claimant has wrongly answered a simple question, the onus shifts to the claimant to provide an explanation for the incorrect answer (*Caverly v. Minister of Human Resources Development*, 2002 FCA 92). There is no evidence of questions and answers respecting the Appellant's return to work early and her earnings, until 2016, when the Appellant truthfully answered the questions about her return to work and her earnings. Those truthful answers cannot be false or misleading representations. The generic reference in the Respondent's decision letter of June 3, 2016 and subsequent documents to "false representations" cannot support the Respondent's position under paragraphs 38(1) (a), (b) or (d).

[36] Consistent with this reasoning is the decision in *CUB 64895*, in a factual situation the same as this case, the parent being exempted from filing reports, then not declaring earnings at the time:

> The only paragraph in subsection 38(1) that speaks to a penalty for failure to declare earnings is paragraph 38(1)(c) which became inoperative on August 12, 2001.
>
> The legal issue is not whether Ms. Gilbert was in breach of the undertakings she gave on the Exemption Form, but rather whether those breaches constituted an act or omission falling within the scope of subsection 38(1) of the Act. That subsection authorizes the Commission to impose penalties with respect to "acts or omissions". Paragraph (c) being inoperative, the only "omission" mentioned in the remaining paragraphs is that in paragraph (f) which has no application to this case. Paragraphs (a), (b), (d), (e), (g) and (h) all speak to "acts" or sins of commission, not "omissions". Ms. Gilbert's failures to inform the Human Resource Centre in compliance with the agreement contained in the Exemption Form were "omissions", not "acts".

[37] While the Tribunal is not bound by the Umpire decisions, this decision is persuasive. The Umpire correctly points out that the failure of the appellant to fulfil the undertakings in the exemption form (quoted above in paragraph 4) is an omission that is not captured by the language of any of the paragraphs of subsection 38(1).

[38] In its Representations in this case, the Respondent "submits that in the case at hand, it has met the onus of establishing that the claimant made a misrepresentation she knew that she was employed with L'Oreal Canada from November 3, 2013 to the end of her claim on February 8, 2014 and still receiving benefits." The Respondent did not put its mind to whether

the Appellant had in fact made any representation at all, let alone a false one. It did not analyze the paragraphs of subsection 38(1) to be able to state the specific legal basis for its position. It simply relied on a generic claim that the Appellant had made a false or misleading representation.

[39] The third difficulty for the Respondent is the absence of reference to the specific legal basis for assessing the penalty until it filed its representations with the Tribunal. There, after quoting the "Exemption Declaration – Maternal/Parental" quoted above, the Respondent cites paragraph 38(1)(e) as the legal basis of its decision. That is the only reference to a paragraph in subsection 38(1) in support of its imposition of a penalty. Paragraph 38(1)(e) provides that the Commission may impose a penalty where a claimant, being the payee of a special warrant, knowingly negotiated or attempted to negotiate it for benefits to which the claimant was not entitled. That is another legal basis on which the Tribunal must decide this appeal. The Federal Court of Appeal decision in *Canada (A.G.) v. Tamber*, 2009 FCA 351, stated:

> **[4]** In particular, we are of the view that the direct deposit of the benefits in the claimant's account cannot under any logic allow for the conclusion that the claimant comes within the four corners of paragraph 38(1)(e).

A special warrant is the instrument used to pay benefits. The evidence shows that the EI benefits were paid by direct deposit to the Appellant's bank account. The Tribunal is bound by this authority to find against the Respondent on this ground, as, in having money directly deposited, the Appellant did not "negotiate" or "attempt to negotiate" the special warrant.

[40] The fourth difficulty for the Respondent is that it has not, expressly or implicitly, rested its case on paragraph 38(1)(f), knowing failure to return a special warrant or an excess amount. The onus is on the Respondent to prove its case, both legally and factually. It has not put its case forward on the basis of paragraph 38(1)(f). The Tribunal therefore cannot find for the Respondent on this basis.

[41] For the above reasons, the Respondent has not discharged its onus of proving that the Appellant has engaged in an act or omission for which a penalty may be imposed on her under the paragraphs of subsection 38(1) relied on by the Respondent, either expressly (paragraph (e)) or implicitly (paragraphs (a), (b) or (d)).

Penalty amount

[42] An amount for a penalty can only be fixed if the Respondent has proven a valid case for imposing a penalty. It has not done so. The amount of the penalty assessed has no legal basis, and cannot stand. The Respondent has acted in a non-judicial manner in assessing the amount of a penalty when there is no legal basis for imposing the penalty.

Notice of violation

[43] Section 7.1(4) of the EI Act authorizes the accumulation of a violation if the Appellant has had a penalty imposed under section 38 (or other sections) of the EI Act, or has been found guilty of an offence under the EI Act or the *Criminal Code*. The Respondent has rested its case for a violation on the imposition of a penalty under section 38, not on any of the other grounds set out in section 7.1(4). For the reasons given above, a penalty has not been validly imposed on the Appellant in this case. The penalty was the only basis the Respondent relied on in imposing the violation. There is therefore no legal basis for the accumulation of a violation in this case. The Respondent has acted non-judicially in accumulating the violation.

CONCLUSION

[44] The Respondent has not proven on a balance of probabilities that the Appellant fell within paragraph 38(1)(e) of the EI Act, the sole provision on which it expressly relied in this appeal. Nor has it proven on a balance of probabilities that the Appellant fell within paragraphs 38(1)(a), (b) or (d) of the EI Act. The imposition of the penalty cannot stand. With the imposition of the penalty being invalid, there is no basis upon which to require the Appellant to pay a penalty, and the amount of the penalty cannot stand either. There being no penalty, there is no basis under paragraph 7.1(4)(a) of the EI Act to accumulate a violation, so the notice of violation cannot stand.

[45] The appeal is allowed on all three issues.

Paul Dusome

Member, General Division - Employment Insurance Section

ANNEX

THE LAW

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).

(2) The Commission may set the amount of the penalty for each act or omission at not more than

(a) three times the claimant's rate of weekly benefits;

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

(i) three times the amount of the deduction from the claimant's benefits under subsection 19(3), and

(ii) three times the benefits that would have been paid to the claimant for the period mentioned in that paragraph if the deduction had not been made under subsection 19(3) or the claimant had not been disentitled or disqualified from receiving benefits; or

(c) three times the maximum rate of weekly benefits in effect when the act or omission occurred, if no benefit period was established.

(3) For greater certainty, weeks of regular benefits that are repaid as a result of an act or omission mentioned in subsection (1) are deemed to be weeks of regular benefits paid for the purposes of the application of subsection 145(2).

7.1 (1) The number of hours that an insured person requires under section 7 to qualify for benefits is increased to the number set out in the following table in relation to the applicable regional rate of unemployment if the insured person accumulates one or more violations in the 260 weeks before making their initial claim for benefit.

TABLE / *TABLEAU*

Regional Rate of Unemployment / *Taux régional de chômage*	*Violation*			
	minor / *mineure*	serious / *grave*	very serious / *très grave*	subsequent / *subséquente*
6% and under/ *6 % et moins*	875	1050	1225	1400
more than 6% but not more than 7%/ *plus de 6 % mais au plus 7 %*	831	998	1164	1330
more than 7% but not more than 8%/ *plus de 7 % mais au plus 8 %*	788	945	1103	1260
more than 8% but not more than 9%/ *plus de 8 % mais au plus 9 %*	744	893	1041	1190
more than 9% but not more than 10%/ *plus de 9 % mais au plus 10 %*	700	840	980	1120
more than 10% but not more than 11%/ *plus de 10 % mais au plus 11 %*	656	788	919	1050
more than 11% but not more than 12%/ *plus de 11 % mais au plus 12 %*	613	735	858	980
more than 12% but not more than 13%/ *plus de 12 % mais au plus 13 %*	569	683	796	910
more than 13%/ *plus de 13 %*	525	630	735	840

(2) [Repealed, 2016, c. 7, s. 210]

(2.1) A violation accumulated by an individual under section 152.07 is deemed to be a violation accumulated by the individual under this section on the day on which the notice of violation was given to the individual.

(3) A violation may not be taken into account under subsection (1) in more than two initial claims for benefits under this Act by an individual if the individual who accumulated the violation qualified for benefits in each of those two initial claims, taking into account subsection (1), subparagraph 152.07(1)(d)(ii) or regulations made under Part VIII, as the case may be.

(4) An insured person accumulates a violation if in any of the following circumstances the Commission issues a notice of violation to the person:

(a) one or more penalties are imposed on the person under section 38, 39, 41.1 or 65.1, as a result of acts or omissions mentioned in section 38, 39 or 65.1;

(b) the person is found guilty of one or more offences under section 135 or 136 as a result of acts or omissions mentioned in those sections; or

(c) the person is found guilty of one or more offences under the *Criminal Code* as a result of acts or omissions relating to the application of this Act.

(5) Except for violations for which a warning was imposed, each violation is classified as a minor, serious, very serious or subsequent violation as follows:

(a) if the value of the violation is

(i) less than $1,000, it is a minor violation,

(ii) $1,000 or more, but less than $5,000, it is a serious violation, or

(iii) $5,000 or more, it is a very serious violation; and

(b) if the notice of violation is issued within 260 weeks after the person accumulates another violation, it is a subsequent violation, even if the acts or omissions on which it is based occurred before the person accumulated the other violation.

(6) The value of a violation is the total of

(a) the amount of the overpayment of benefits resulting from the acts or omissions on which the violation is based, and

(b) if the claimant is disqualified or disentitled from receiving benefits, or the act or omission on which the violation is based relates to qualification requirements under section 7, the amount determined, subject to subsection (7), by multiplying the claimant's weekly rate of benefit by the average number of weeks of regular benefits, as determined under the regulations.

(7) The maximum amount to be determined under paragraph (6)(b) is the amount of benefits that could have been paid to the claimant if the claimant had not been disentitled or disqualified or had met the qualification requirements under section 7.