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

Citation: *L. C. v. Canada Employment Insurance Commission*, 2017 SSTGDEI 90

Tribunal File Number: GE-16-3147

BETWEEN:

L. C.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division—Employment Insurance Section

DECISION BY: Charline Bourque

HEARD ON: June 1, 2017

DATE OF DECISION: June 19, 2017

Canada

REASONS AND DECISION

APPEARANCES

L. C., the claimant, took part in the hearing by teleconference. He was accompanied by Yves Langlois, who acted as his representative.

INTRODUCTION

[1] The appellant filed a claim for employment insurance (EI) starting on April 3, 2011. On November 12, 2013, the Canada Employment Insurance Commission (the Commission) notified the claimant that, according to its records, the claimant had failed to provide information six times. The Commission states that the claimant was on self-funded leave during the weeks of August 14, September 25, November 6 and December 18, 2011, and January 29 and March 11, 2012. The Commission states that the claimant was not entitled to benefits during those periods because his periods of leave are part of his work schedule. Moreover, the Commission states that the claimant did not declare his earnings from RCI as wages. The Commission adjusted the earnings for certain weeks between April 17, 2011, and March 4, 2012. The Commission believes that the claimant made the misrepresentations knowingly and imposed a penalty of $5,000 for the 16 misrepresentations. In addition, the Commission issued a notice of a very serious violation.

[2] On March 5, 2014, in response to the claimant's request for reconsideration, the Commission informed the claimant that the decision regarding earnings was upheld. The Commission states that it checked with the employer RCI, and the employer confirmed the wages paid for each of the weeks at issue. The employer also confirmed that the claimant was not eligible for payments during weeks of leave following a period of 28 consecutive days of work. The claimant had not stopped working due to a shortage of work but was on leave as set out in his agreement with the employer, namely 28 days of work followed by 14 days of leave. The Commission also informed the claimant that the decision regarding the penalty and the decision regarding the violation were upheld.

[3] On January 5, 2016, the General Division of the Social Security Tribunal of Canada (the Tribunal) determined that the claimant's appeal had not been filed within the prescribed time

limit. On August 17, 2016, the Tribunal's Appeal Division allowed an extension of time to appeal to the General Division and referred the matter back to the General Division for a hearing on each of the issues.

[4] This appeal was heard by teleconference for the following reasons:

(a) The complexity of the issue or issues;

(b) The information in the file, including the need for additional information; and

(c) This method of proceeding respects the requirement under the Social Security Tribunal Regulations to proceed as informally and quickly as the circumstances and the considerations of fairness and natural justice permit.

ISSUES

[5] The claimant appeals the decision to impose a penalty under section 38 of the *Employment Insurance Act* (the Act) for making a representation that he knew to be false or misleading.

[6] The claimant appeals the decision regarding the notice of violation issued to him under section 7.1 of the Act.

EVIDENCE

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

(a) The employer states that employees working at remote work sites, currently X in X, work a 28/10 or 14/14 schedule. They work 7 days a week, 80 hours a week. The work schedule depends on the section of the site in which they are working. It does not depend on their trade or department. The work schedule is determined in accordance with the Commission de la construction du Québec (CCQ) collective agreement. Labour standards apply to employees who do not belong to the CCQ union. However, it makes no difference to the schedule. It is more for things such as the hourly work week, the regular hourly rate and the double-time rate. Employees

are told their schedule during the hiring call. The call is made by the employees directly to X at the site. They are notified verbally. The X site does not close during the summer or winter period. Employees may continue to work on a voluntary basis if they wish. Those wishing to take advantage of the leave provided for in the order may do so. The employer knows that EI does not provide benefit payments for periodic leave. In fact, the employer states that it has known since around 2010. However, some employees say that they are entitled to benefits. Ms. D. mentions it to employees when they request a record of employment during a period of leave. However, the employer does not systematically inform employees. The employer does not provide a record of employment for periods of periodic leave. When an employee requests a record of employment, the request is denied. It issues records of employment for work shortages, voluntary departures or other justifiable reasons. Employees are not required to stay on site during periods of leave. Employees may not negotiate extensions to their leave. When employees depart the site for periodic leave, they know in advance when they must return. They are given round-trip plane tickets and are told the date of return. For CCQ employees, travel is at the employer's expense. For employees governed by the labour standards, Ms. D. is unable to confirm (GD3-29/30).

(b) Request for Information—Payroll, completed by the employer on December 6, 2012 (GD3-31 to GD3-34).

(c) Claimant's EI reports from August 7, 2011, to March 17, 2012 (GD3-39 to GD3-119).

(d) The claimant confirms that he was normally on this type of schedule, but he was not a permanent employee. He was never certain that he would be called back to work. He is currently on leave for three weeks because RCI has no work for him. He has to call them back to see whether he will be returning to work next week. Normally he is on a 28/14 schedule; initially it was 28/10, but later it became 28/10. He has never been all year; he is never sure that he will be called back. He was informed that, on this type of schedule, he is not entitled to benefits during the weeks he is on

leave, since they are not weeks of unemployment. He said he did not know that he was not entitled to benefits during those periods; he thought he was entitled to benefits because he was not working. It was explained to him that the periods of leave were due to his work schedule: his hours are compressed into a 28-day period and then he is on leave, the days of leave having accumulated, for example, over a period of four weeks. He was asked about undeclared earnings. He said that he had not submitted any reports between August 7, 2011, and March 10, 2012. He filed claims for the weeks he was on leave, but he believes that he was reporting his earnings (GD3-128).

(e) The claimant's spouse states that she checked the pay stubs, and a few are missing. She states that RCI had told L. C. he was entitled to benefits for the weeks in which she submitted the reports. Everyone on the site said that they were entitled to benefits for weeks of leave. It was a foreman who apparently told the employees that they were entitled to benefits. The foreman is said to be E. M., who is the superintendent. She states that the undeclared earnings were an error on her part. Sometimes L. C. could be called in to work on Thursday, and the pay week ended on Saturday, so there were a few days of pay in the week. She has no explanation for the undeclared earnings other than not being aware of the law. She admits that she submitted the reports in L. C.'s file; she cannot explain what she did to submit her spouse's reports. Since the company had told him that he was entitled to benefits, she submitted the reports. When she was asked why there had been no declared earnings in blocks of five work weeks for L. C., she could not provide an explanation. She admits that they are wrong for the periods of leave, but she cannot explain the earnings. She asks that the penalties be as small as possible. She admits that she and her spouse were wrong about the weeks during which they received benefits for weeks of leave, and she feels that they have learned their lesson. Her spouse is 63 years old and does not have many years left to work, after which he will receive his pension (GD3-130).

[8] The evidence presented at the hearing through the appellant's testimony reveals the following:

(a) The claimant lived in X and worked in X, at X. His schedule was 28 days of work followed by 14 days of leave.

(b) He was paid weekly during the 28 days of work and was not paid during the 14 days of leave.

(c) He claimed EI during the 14 days of leave. When he found out that he was not eligible for EI, he notified the Commission and reimbursed a significant portion of the amounts claimed.

(d) He has been working since the age of 18. He had claimed EI before but never had a problem until this claim.

(e) He feels that the penalty is undeserved and that the fine is a large one. He thought that he was entitled to EI but, when he found out that he was not eligible for it, he notified the Commission.

(f) The full amount requested is large and repaying it will be a burden. He is nearly 68 years old and recently stopped working. He would like not to have to repay the remaining amounts.

(g) He asks that the penalty and the violation be rescinded. He acknowledges his error and states that he did not mean to do wrong. He has always paid and has never had a problem.

(h) He had not noticed that weeks of undeclared wages were being requested from him. He states that his spouse submitted the reports for him, and he does not understand where this error may have come from. He was unaware of this request until the hearing.

(i) He did not act in bad faith. He worked for RCI in 2011. He does not understand why it is not indicated.

ARGUMENTS

[9] The appellant presented the following arguments:

(a) The claimant indicates that, initially, he was told that he was entitled to EI benefits during the 14 days of leave but, after obtaining information from the EI offices, he was told that he was not eligible.

(b) He has only two months until he turns 65 and retires. He will not be able to pay the amount.

(c) The claimant indicates that he has been making contributions for a number of years but has not received the value of the fine. He maintains that he has six weeks of overpayment.

(d) He feels that the penalty is undeserved and that the fine is a large one. He thought that he was entitled to EI but, when he found out that he was not eligible for it, he notified the Commission. He acted in good faith.

[10] The respondent presented the following arguments:

Week of unemployment

(a) Subsection 11(4) of the Act provides that an insured person who works a greater number of hours, days or shifts than are normally worked in a week by persons employed in full-time employment and who, under an employment agreement, is entitled to a period of leave is deemed to have worked a full working week during each week that falls wholly or partly in a period of leave. The first condition concerns the work itself and the second, an entitlement under an employment agreement. When both conditions are met, the claimant is deemed to be employed during the full week in which such leave occurs.

(b) In this case, the claimant worked 28 consecutive days followed by a 14-day period of leave. The period of leave is part of his employment contract; he is not out of work during the period of leave. The claimant had periods of leave for the full weeks of August 14, September 25, November 6 and December 18, 2011, and January 29 and March 11, 2012. In effect, from April 18, 2011, to September 20, 2012 (page GD3-27), the claimant was not unemployed. He was not entitled to benefits because he was deemed to have worked a full week each week.

(c) The Commission submits that the case law supports its decision. The Federal Court of Appeal has affirmed the principle that claimants who have a schedule that alternates periods of work with periods of leave are deemed to be employed during the periods of leave included in such recognized schedules (*Canada (AG) v. Merrigan*, 2004 FCA 253; *Canada (AG) v. Duguay*, A-75-95).

Allocation of earnings

(d) Section 35 of the Regulations defines income as "any pecuniary or non-pecuniary income that is or will be received by a claimant from an employer or any other person, including a trustee in bankruptcy." 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.

(e) Moneys received from an employer can be considered earnings. Such amounts must be allocated unless they are covered by the exceptions set out in subsection 35(7) of the Regulations or are not from employment.

(f) In this case, the claimant received money from RCI. The money was paid to the claimant as wages. The Commission maintains 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.

(g) Therefore, pursuant to subsection 36(4) of the Regulations, the Commission correctly allocated the earnings to the period in which the services were rendered.

(h) 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 therefore be allocated unless they are covered by the exceptions set out in subsection 35(7) of the Regulations or are not from employment (CUB 79974).

(i) The Federal Court of Appeal has reaffirmed the principle that "the entire income of a claimant arising out of any employment" is to be taken into account in calculating the amount to be deducted from benefits (*McLaughlin v. Canada (AG),* 2009 FCA 365).

(j) 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 (AG),* 2002 FCA 257).

Penalty

(k) Under section 38 of the Act, the Commission may impose a penalty for any misrepresentation made knowingly by the appellant. "Knowingly" means that the Commission can reasonably conclude that the claimant knew the information he was providing was wrong when he provided it or that he failed to report certain information. There is no element of intent in this consideration.

(l) The Commission has the initial onus to prove that misrepresentation took place. Once the Commission can reasonably conclude that benefits were paid as a result of an act or omission, the onus shifts to the claimant or the employer to show that the events may be interpreted as having occurred unintentionally. An act or omission must be proved on a balance of probabilities standard. It is not enough to simply believe a claimant who proclaims his innocence. To conclude that a misrepresentation was made knowingly, the evidence must show that

(1) objectively, an act or omission occurred; (2) it misled the Commission; (3) it led to the payment of actual or potential benefits to which the claimant was not entitled; and (4) at the time of the representation, the claimant knew that he was not properly reporting the facts.

(m) In this case, the Commission maintains that it has shown that the claimant made 17 misrepresentations, namely one misrepresentation by requesting that the Commission process his reports for April 3 to 23, 2011, stating that he had not worked during that period (pages GD3-15 to GD3-17) even though he had returned to work on April 18, 2011 (page GD3-27), and 16 misrepresentations by submitting reports stating that he had not worked and had no earnings for August 7, 2011, to March 10, 2012, even though he knew he had worked for RCI during that period. It was the claimant's spouse who submitted the reports, but she was acting on his behalf.

(n) On every report, before the questions, there is a warning that reads: "Answer all questions truthfully. Providing false information on your behalf or on someone else's behalf is considered fraud and is punishable by law."

(o) Sixteen times she answered "no" to the question: Did you work or earn wages during the period from . . . to . . . (depending on the reporting period) (pages GD3-42, GD3-47, GD3-52, GD3-57, GD3-62, GD3-67, GD3-72, GD3-77, GD3-82, GD3-87, GD3-92, GD3-97, GD3-102, GD3-107, GD3-112 and GD3-118). She could not have been unaware that her husband was working.

(p) The representative alleges that the claimant was told that he was entitled to benefits during periods of leave and that he would have six weeks of overpayment (page GD2A-2). The Commission did not impose a penalty for those weeks of leave.

(q) The penalty was imposed for the 27 weekly pay cheques that were not declared (pages GD3-132 and GD3-133).

(r) The Commission submits that the case law supports its decision. The Federal Court of Appeal affirmed the principle that a false or misleading representation is made only where claimants have subjective knowledge of the falsity of the information given or representations made by or about them (*Mootoo v. Canada (AG)*, 2003 FCA 206; *Canada (AG) v. Gates*, A-600-94).

(s) In a similar case, the Federal Court of Appeal 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 he had earnings during the 17 weeks he was receiving benefits (*Ftergiotis v. Canada (AG)*, 2007 FCA 55).

(t) If the Tribunal finds that a penalty is justified, it must then determine whether the Commission exercised its discretion judicially in setting the amount of the penalty.

(u) As of June 1, 2005, the Commission has adopted the following policy regarding the calculation of penalties. For a first act or omission, the penalty may be up to 50% of the overpayment generated by the act or omission. For a second act or omission, the penalty may be up to 100% of the overpayment. For a third or subsequent act or omission, the penalty may be up to 150% of the overpayment. These are maximums that the Commission has set by policy, and the penalty is calculated only after all the mitigating circumstances have been considered.

(v) The Federal Court of Appeal confirmed that the Commission is justified in adopting its own guidelines on imposing penalties in order to guarantee some consistency nationally and avoid arbitrariness in such matters (*Canada (AG) v. Gagnon*, 2004 FCA 351).

(w) The Commission argues that it exercised its discretion judicially by thoroughly considering the relevant circumstances at the time it determined the amount of the penalty. The penalty was determined as follows:

- Net overpayment generated by the act or omission: $12,341.00

- Instance of act or omission: First

- Number of acts or omissions: 17, namely 16 EI reports from the claimant in which the claimant did not declare any employment earnings and one request for payment for the week of April 17, 2011.

- Mitigating circumstances considered in calculating the penalty: None

(x) As this is the first instance of misrepresentation, the penalty imposed would have been 50% of the overpayment, or $6,171.00.

(y) However, the Commission's policy is to limit the penalty to a maximum of $5,000.00 for the first instance of misrepresentation. The maximum penalty was imposed, namely $5,000.00 (page GD3-151).

(z) The Commission submits that the case law supports its decision. The Federal Court of Appeal affirmed the principle that the Commission has sole discretion in imposing a penalty provided under subsection 38(1) of the Act. Furthermore, the Court stated that no court, umpire or tribunal is authorized to intervene in respect of a penalty decision by the Commission as long as the Commission can prove that it exercised its discretion "judicially." In other words, the Commission must show that it acted in good faith, considered all the relevant factors and disregarded irrelevant factors (*Canada (AG) v. Uppal*, 2008 FCA 388; *Canada (AG) v. Tong*, 2003 FCA 281).

Violation

(aa) As of July 8, 2010, notices of violation are no longer sent automatically when the Commission imposes a penalty, issues a letter of warning or takes legal action. When a decision is made to impose a penalty resulting from a misrepresentation, the Commission must determine whether a notice of violation is required or not under subsection 7.1(4) of the Act. Mitigating circumstances must be considered in deciding whether to issue a notice of violation. Another factor to consider is the

overall impact of issuing a notice of violation to the claimant, including the claimant's ability to make a future claim for benefits.

(bb) In this case, the discovery of a misrepresentation generated an overpayment of $12,341.00 (page GD3-136). As a result, a notice of a very serious violation was issued to the claimant. Subsection 7.1(5) classifies violations based on the severity of the act or omission. The violation is classified strictly on the basis of the overpayment generated by the act or omission in question. The amount of the penalty is not a factor in classifying the violation.

(cc) The Commission argued that it exercised its discretion judicially in this case in making the decision to issue a notice of violation. Having considered the overall impact of issuing a notice of violation to the claimant, as well as mitigating circumstances, previous violations and the impact of a notice of violation on the claimant's ability to qualify on future claims, it determined that a notice of violation was appropriate (page GD3-152).

(dd) The Tribunal may not intervene in a decision by the Commission unless it determines that the Commission failed to exercise its discretionary authority judicially when it issued the claimant the notice of violation.

(ee) The Commission submits that the case law supports its decision. The Federal Court of Appeal affirmed the principle that the purpose of section 7.1 of the Act is to prevent abuses of the EI system by imposing an additional penalty on claimants who try to defraud the system. The Court also stated that the Commission has sole discretion to issue a notice of violation pursuant to section 7.1(4) of the Act. The Tribunal and the Umpire have jurisdiction to determine whether the Commission exercised its discretion judicially in deciding to issue a notice of violation (*Gill v. Canada (AG)*, 2010 FCA 182).

ANALYSIS

The relevant statutory provisions are appended to this decision.

Week of unemployment

[11] The claimant stated that he was not questioning the weeks of paid leave. He points out that he himself notified the Commission when he learned that he was not entitled to receive benefits during his periods of leave. The claimant states that he is repaying these amounts.

[12] Section 9 of the Act reads as follows:

> 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.

[13] Subsections 11(1) and (2) of the Act read as follows:

> (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.

[14] Subsection 11(4) of the Act states that 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.

[15] Subsection 31(1) of the Regulations reads as follows:

> (1) A full working week of a claimant, other than a claimant referred to in section 29 or 30, is the number of hours, days or shifts normally worked in a calendar week by persons

> in the claimant's grade, class or shift at the factory, workshop or other premises at which the claimant is or was employed.

[16] The employer confirmed that the claimant was working a schedule of 28 working days for 14 days of leave (GD3-30). The claimant confirmed this.

[17] On the basis of the evidence and arguments presented by the parties, the Tribunal is satisfied that the claimant's regular work week consists of a greater number of hours than are normally worked in a week by a person employed in full-time employment. The Tribunal is therefore satisfied that the weeks in question in this appeal reflect weeks of leave provided under the claimant's employment agreement. Therefore, the weeks of leave provided for in his employment agreement are considered weeks of employment pursuant to subsection 11(4) of the Act. The claimant is therefore not eligible for EI benefits during those weeks for the entire period from April 18, 2011, to September 20, 2011. The claimant did not experience any work stoppages during that period.

[18] The overpayment arising from the periods of paid leave is $3,103 ($468.00 × 6 weeks of benefits and $295.00 for the week of December 11, 2011) (GD3-138).

[19] The appeal is dismissed on this issue.

Earnings

[20] It is apparent from the claimant's testimony at the hearing that he did not understand that the Commission had allocated the earnings for undeclared weeks of work. The claimant believed that the amount he was repaying, apart from the six weeks of leave, was the amount of the penalty. He thought that the amount was very large. Moreover, the claimant did not understand that the penalty imposed by the Commission was imposed only on undeclared weeks of earnings and that no penalty was imposed on weeks of paid leave.

[21] The claimant appeared at the hearing to challenge the large overpayment, which he believed was related solely to the periods of leave between his periods of employment of which he himself had notified the Commission, when he learned that he should not have received EI.

He can neither understand nor explain why no earnings were declared for the periods to which the Commission allocated the earnings for wages received from his employer.

[22] Subsection 35(1) of the Regulations defines “employment” and “income” as follows:

> *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*)

[23] Subsection 35(2) of the Regulations states that 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.

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

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

[26] Subsection 36(4) of the Regulations reads as follows:

> 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.

[27] The Tribunal notes that the claimant confirmed that his wife was submitting his reports on his behalf. He had informed the Commission about the situation (GD3-128).

[28] The claimant's reports from August 7, 2011, to March 17, 2012, show that the claimant or his wife, who was submitting the reports on his behalf, indicated that he answered "no" to the question "Did you work or earn wages during the period from . . . to . . ." (GD3-39 to GD3-119).

[29] Ms. S., the claimant's wife, explained to the Commission that the unreported earnings were an error on her part. Sometimes L. C. could be called in to work on Thursday, and the pay week ended on Saturday, so there were a few days of pay in the week. She has no explanation for the undeclared earnings other than not being aware of the law. She admits that she submitted the reports in L. C.'s file; she cannot explain what she did to submit her spouse's reports. Since the company had told him that he was entitled to benefits, she submitted the reports. When she was asked why there had been no declared earnings in blocks of five work weeks for L. C., she could not provide an explanation. She admits that they are wrong for the periods of leave, but she cannot explain the earnings. It was explained to the claimant that, according to the letter, there were a number of weeks of undeclared earnings, that the third column on the right was what had been reported as earnings to EI. She says that she has difficulty remembering from one month to the next. (GD3-130).

[30] The employer confirmed the earnings received by the claimant for the week of April 17, 2011, and for the period from August 7, 2011, to March 17, 2012 (GD3-31 to GD3-34).

[31] At the hearing, the claimant could not confirm whether the earnings received matched those reported by his employer. The claimant did not know that the Commission was requesting an amount related to an allocation of earnings for amounts that he had not declared.

[32] The Tribunal notes that the record of employment reflects the amounts reported by the employer.

[33] The claimant stated that he had worked for the employer during that period even though he did not know the exact dates.

[34] Based on the evidence and arguments presented by the parties, the Tribunal is of the opinion that the amounts at issue represent earnings derived from wages pursuant to subsection 35(2) of the Regulations. Therefore, the amounts must be allocated in accordance with subsection 36(4) of the Regulations.

[35] The Tribunal is of the opinion that the Commission allocated the earnings correctly (GD3-138). The overpayment related to the allocation of earnings is $12,341.00, or 26 full weeks of benefits and part of the week of December 11, 2011 ($468 × 26 weeks + $173.00 = $12,341.00).

[36] The appeal is dismissed on this issue.

Penalty

[37] Paragraph 38(1)(a) of the Act reads as follows:

> (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;

[38] The claimant states that he has been working since he was 18 years old. He had claimed EI before but never had a problem until this claim. He feels that the penalty is undeserved and

that the fine is a large one. He thought that he was entitled to EI but, when he found out that he was not eligible for it, he notified the Commission. The full amount requested is large and repaying it will be a burden. He is nearly 68 years old and recently stopped working. He would like not to have to repay the remaining amounts. He asks that the penalty and the violation be rescinded. He acknowledges his error and states that he did not mean to do wrong. He has always paid and has never had a problem.

[39] The Tribunal takes into account the fact that the claimant did not understand that weeks of undeclared wages were being requested from him. The claimant states that his spouse submitted the reports for him, and he does not understand where this error may have come from. He was unaware of this request until the hearing.

[40] The Commission maintains that it has shown that the claimant made 17 misrepresentations, namely one misrepresentation by requesting that the Commission process his reports for April 3 to 23, 2011, stating that he had not worked during that period (pages GD3-15 to GD3-17) even though he had returned to work on April 18, 2011 (page GD3-27), and 16 misrepresentations by submitting reports stating that he had not worked and had no earnings for August 7, 2011, to March 10, 2012, even though he knew he had worked for RCI during that period. It was the claimant's spouse who submitted the reports, but she was acting on his behalf. On every report, before the questions, there is a warning that reads: "Answer all questions truthfully. Providing false information on your behalf or on someone else's behalf is considered fraud and is punishable by law." Sixteen times she answered "no" to the question: Did you work or earn wages during the period from . . . to . . . (depending on the reporting period) (pages GD3-42, GD3-47, GD3-52, GD3-57, GD3-62, GD3-67, GD3-72, GD3-77, GD3-82, GD3-87, GD3-92, GD3-97, GD3-102, GD3-107, GD3-112 and GD3-118). She could not have been unaware that her husband was working. The representative alleges that the claimant was told that he was entitled to benefits during periods of leave and that he would have six weeks of overpayment (page GD2A-2). The Commission did not impose a penalty for those weeks of leave.

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

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

[43] The claimant's reports show that the claimant or his wife answered "no" to the question "Did you work or earn wages during the period from . . . to . . ."

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

[45] The onus is on the Commission to prove, based on a balance of probabilities, which is not beyond all reasonable doubt, that the claimant made a misrepresentation or a statement that he knew to be false or misleading (*Canada (Attorney General) v. Gates*, FCA #A-600-94).

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

[47] At the hearing, the claimant understood that the amount requested by the Commission, apart from the six weeks of paid leave, was not simply the amount of the penalty imposed, as he had assumed.

[48] The claimant stated that he did not know why his wages had not been declared for those weeks. He confirmed that his wife was submitting the reports on his behalf.

[49] Ms. S. had told the Commission investigator that the undeclared earnings were an error on her part. She could not explain what she had done to submit the reports.

[50] On the basis of the evidence and submissions of the parties, the Tribunal is of the opinion that, on a balance of probabilities, the claimant or his wife, acting on behalf of the claimant, knowingly made false or misleading statements by failing to declare the earnings received from his employer.

[51] In *Uppal*, the Court found that, "It is trite law that an Umpire cannot interfere with the quantum of a penalty unless it can be shown that the Commission exercised its discretionary power in a non-judicial manner or acted in a perverse or capricious manner without regard to the material before it" (*Canada (Attorney General) v. Uppal*, FCA #A-341-08).

[52] The Commission said that a penalty of $5,000.00 was imposed on the claimant (GD3-91). The Commission said it based its decision on the policy whereby the penalty for a first misrepresentation is no more than 50% of the overpayment generated by the misrepresentation and no more than $5,000 (GD3-151).

[53] The Commission argues that it exercised its discretion judicially by thoroughly considering the relevant circumstances at the time it determined the amount of the penalty. The penalty was determined as follows:

- Net overpayment generated by the act or omission: $12,341.00
- Instance of act or omission: First
- Number of acts or omissions: 17, namely 16 EI reports from the claimant in which the claimant did not declare any employment earnings and one request for payment for the week of April 17, 2011.
- Mitigating circumstances considered in calculating the penalty: None

[54] As this is the first instance of misrepresentation, the penalty imposed would have been 50% of the overpayment, or $6,171.00. The Commission further states that its policy is to limit

the penalty to a maximum of $5,000.00 for the first instance of misrepresentation. The maximum penalty was imposed, namely $5,000.00 (page GD4-9).

[55] Having determined that the misrepresentations were made knowingly, the Tribunal has jurisdiction to assess whether the Commission exercised its discretion correctly in calculating the penalty.

[56] The Tribunal relies on the Federal Court of Appeal, which found that the Board may consider circumstances that did not exist at the time the misrepresentations were knowingly made but arose only after a penalty had been imposed (*Canada (Attorney General) v. Gray*, 2003 FCA 464).

[57] The Tribunal notes that the Commission did not consider any mitigating circumstances in its decision.

[58] However, the Tribunal is of the opinion that the Commission did not consider a number of circumstances raised by the claimant. Based on the facts on file and the additional information presented at the hearing, the appellant did not understand that the Commission had performed an allocation for undeclared earnings. Moreover, his wife was submitting most of his reports. The claimant stated that he was unaware that incorrect information had been submitted. The claimant is 65 years old and will be retiring shortly. He says that he is unable to repay the amount. He says that he has already repaid a significant portion of the overpayment.

[59] Given the additional information, the Tribunal finds that the Commission did not exercise its discretion correctly in calculating the penalty in its decision. The Tribunal makes this finding based on *Kaur* (*Canada (Attorney General) v. Kaur*, 2007 FCA 287):

> In order to establish if the Commission's decision was exercised in a judicially correct manner, this Court established in *Canada v. Dunham*, 1996 CanLII 3967 (CAF), [1997] 1 F.C. 462 (F.C.A.) that the Board can rely not only on the evidence that was before the Commission, but also on the evidence put before the Board. The appeal from the Commission to a Board of Referees is held *de novo.* Additional evidence can be introduced and the Board must make its own decision based on it.

[60] Based on the facts on file and the additional information presented at the hearing, the Tribunal finds that the Commission did not exercise its discretion judicially. The Commission did not consider all the evidence in assessing the relevant factors and mitigating circumstances in this case, in particular the fact that the claimant is 65 years old and will soon be retired and unable to repay the amount. Moreover, the Tribunal notes that it was the claimant who initially contacted the Commission because he wanted to ensure that he would not receive EI benefits to which he was not entitled. Lastly, the claimant is not a frequent EI claimant, and his understanding of EI is limited (*Uppal,* 2008 FCA 388).

[61] Given the circumstances described, the Tribunal finds that the Commission did not exercise its discretion judicially. Accordingly, for the reasons above, the Tribunal finds that a penalty of 10% of the overpayment is appropriate.

[62] The appeal is allowed in part on this issue.

Violation

[63] The claimant contests the violation imposed on him.

[64] The Commission states that the discovery of a misrepresentation generated an overpayment of $12,341.00 (page GD3-136). As a result, a notice of a very serious violation was issued to the claimant. Subsection 7.1(5) classifies violations based on the severity of the act or omission. The violation is classified strictly on the basis of the overpayment generated by the act or omission in question. The amount of the penalty is not a factor in classifying the violation.

[65] The Commission argued that, in this case, it exercised its discretion judicially in deciding to issue a notice of violation. Having considered the overall impact of issuing a notice of violation to the claimant, as well as mitigating circumstances, previous violations and the impact of a notice of violation on the claimant’s ability to qualify on future claims, it determined that a notice of violation was appropriate (page GD3-152).

[66] The Tribunal may not intervene in a decision by the Commission unless it determines that the Commission failed to exercise its discretionary authority judicially when it issued the claimant the notice of violation.

[67] Paragraph 7.1(4)(a) of the Act reads as follows:

> (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;

[68] The Tribunal finds that the Commission did not exercise its discretion judicially because it did not consider any mitigating circumstances even though a number of factors had been raised by the claimant.

[69] Consequently, the Tribunal is of the view that, given the mitigating circumstances above, the Commission has not exercised its discretion judicially and, therefore, no notice of violation should be issued.

[70] The appeal is allowed on this issue.

COMING INTO FORCE

[71] The appeal is allowed in part.

Charline Bourque
Member, General Division—Employment Insurance Section

ANNEX

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).

(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

7.1 (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.

7.1 (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.

7.1 (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.

7.1 (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.

Employment Insurance Regulations

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***)

. . .

35 (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,

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

. . .

(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.

35 (3) Where, subsequent to the week in which an injury referred to in paragraph (2)(d) occurs, a claimant has accumulated the number of hours of insurable employment required by section 7 or 7.1 of the Act, the payments referred to in that paragraph shall not be taken into account as earnings.

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

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

(b) payments under a sickness or disability wage-loss indemnity plan that is not a group plan;

(c) relief grants in cash or in kind;

(d) retroactive increases in wages or salary;

(e) the moneys referred to in paragraph (2)(e) if

(i) in the case of a self-employed person, the moneys became payable before the beginning of the period referred to in section 152.08 of the Act, and

(ii) in the case of other claimants, the number of hours of insurable employment required by section 7 or 7.1 of the Act for the establishment of their benefit period was accumulated after the date on which those moneys became payable and during the period in respect of which they received those moneys; and

(f) employment income excluded as income pursuant to subsection 6(16) of the *Income Tax Act.*

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.

36 (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.