



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *L. L. v Canada Employment Insurance Commission*, 2019 SST 568

Tribunal File Number: GE-18-3834

BETWEEN:

**L. L.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

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

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DECISION BY: Teresa Jaenen

HEARD ON: February 21, 2019 & April 2, 2019

DATE OF DECISION: May 13, 2019

## **DECISION**

[1] The appeal is allowed in part.

[2] I find that the claimant's self-employment was minor in extent because the claimant's involvement was such that a person would not normally rely on this self-employment venture as a principal source of livelihood. I find the appeal on the issue of week of unemployment is allowed because the claimant has proven that she was unemployed and is entitled to employment insurance benefits.

[3] On the issue of allocation of earnings the appeal is dismissed with modifications. I find that the modified earnings the claimant received from self-employment constituted earnings and should be allocated to the period in which the transactions were performed.

[4] I find on the issue of misrepresentation, resulting in the imposition of a warning letter, the appeal is allowed because the claimant did not knowingly misrepresent herself by providing the Commission with incorrect information.

## **OVERVIEW**

[5] The Appellant, L. L. (claimant) established a claim for employment insurance benefits on June 24, 2012. The claimant advised the Respondent, the Canada Employment Insurance Commission (Commission) that she was engaged in self-employment activity. The Commission allowed her claim and advised her to notify the Commission if her self-employment activity changed.

[6] The Commission commenced an investigation when it became aware that the claimant's self-employment activity had increased beyond which could be characterized as minor in extent yet this had not been disclosed. The claimant was given an opportunity to explain the discrepancy and provide the Commission with the requested information.

[7] The Commission determined that the claimant was involved in the operation of a business that was not minor in extent and imposed an indefinite disqualification from June 25, 2012, that resulted in an overpayment.

[8] The Commission, in addition notified the claimant that the money she received from self-employment as income from the business revenue constituted earnings to be allocated from June 24, 2012, to the week of February 24, 2013.

[9] The Commission determined that the claimant knowingly provided false information when she filed her and she failed to disclose her self-employment was not minor in extent. The Commission imposed a non-monetary sanction in the form of a letter of warning.

[10] The claimant appealed the Commission's decisions to the *Social Security Tribunal* (Tribunal).

### **PRELIMINARY ISSUES**

[11] I note that there is information included on the file that the Commission requested from the claimant for years outside of the issue under appeal. I have reviewed the relevant information as it pertains to the period under appeal.

### **ISSUES**

[12] Was the claimant self-employed? If so.

[13] Is the claimant's involvement in self-employment minor in extent?

[14] Was the earnings the claimant received from self-employment considered earnings? If so.

[15] How were they allocated?

[16] Should the claimant be imposed a warning letter because she provided false or misleading information to the Commission?

[17] Did the Commission act judicially when they imposed the warning letter?

## ANALYSIS

### Week of Unemployment

[18] An insured person who qualifies under Section 7 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 of each week of unemployment that falls within the period.<sup>1</sup> A week of employment for a claimant is a week in which the claimant does not work a full working week.<sup>2</sup>

[19] If a claimant is self-employed or engaged in the operation of a business on his or her own account (“self-employment”) during any week in a benefit period<sup>3</sup>, it will be deemed that the claimant to have worked a full working week during that week. As a result, that week will not be considered a week of unemployment for the purposes of section 9 of the Act.

[20] Subsection 30(2) of the Regulations provides an exception to the deeming rule in subsection 30(1) of the Regulations where the self-employment is minor in extent. The issue in this application is whether that exception applies to the claimant.

#### **Issue 1: Was the claimant self-employed? If so.**

[21] Yes, I find that the claimant was self-employed. The claimant does not dispute the fact that she is the owner of X, which she started in 2010 and operates as a home-based business.

#### **Issue 2: Is the claimant’s involvement in self-employment minor in extent?**

[22] I must determine whether the claimant’s involvement in X is minor in extent and whether the level of engagement can be determined as a principal means of livelihood. In this case, I will address the six factors of subsection 30(3) of the Regulations.

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<sup>1</sup> Section 9 of the *Employment Insurance Act* (EI Act)

<sup>2</sup> Section 11(1) of the EI Act

<sup>3</sup> Section 30(1) of the *Employment Insurance Regulations* (EI Regulations)

[23] I must weigh and consider all of these factors, but the two most important factors are the time spent and the claimant's intention and willingness to seek and accept other employment.<sup>4</sup>

[24] The Commission submits that when viewed objectively all six factors point to a finding that the claimant's engagement in the operation of his business was that of a person who would normally rely on that level of self-employment as their principal means of livelihood.

[25] The Commission contacted the claimant in regards to her 2012 expenses. K. T. discussed the claimant's telephone expenses and adjusted the personal calls. K. T. discussed the mileage driven for the year and the claimant explained that the 28,277 kilometres also included mileage driven for her job as a pharmaceutical representative. She stated that the pharmaceutical position required extensive travelling.

[26] The claimant spoke with K. T., and stated that she had spoken with someone at Service Canada regarding the incorporation of her business and had been told that she did not have to report income if she was incorporated, and she had been told this a couple of times. She stated she had now become incorporated (2013). The claimant stated she had done the honest thing by letting them know and it was not her fault. She will forever maintain she was specifically told, not to report her income once she became incorporated.

[27] The claimant spoke with K. T. and stated she has been complying with every request made and provided all the requested information. She stated she has explained she was given the wrong information and that she has been forthcoming about everything. She feels K. T. was unprofessional in saying she did not believe her.

[28] The claimant provided the Commission with the requested 2012 financial information.<sup>5</sup>

[29] The claimant testified that the interview that took place with K. T. and L. T. on November 23, 2016,<sup>6</sup> is not complete and provided a written copy of detailed information of

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<sup>4</sup> *Charbonneau v. Canada (Attorney General)*, 2004 FCA 61

<sup>5</sup> GD3-198 to GD3-713

<sup>6</sup> GD3-172 to GD3-174

what was not captured thoroughly in the transcript.<sup>7</sup> The claimant provided an audio of the interview that will confirm this.<sup>8</sup>

### **Time Spent**

[30] The Commission submits that the claimant is responsible for day-to-day operations of the business including writing cheques, paying bills, producing invoices, reconciling accounts, conducts all purchasing and all production. The claimant's tax return for 2012 shows 35,971, driven in the year and 28,777 of those were used for the business that equates to 80% of her travels.

[31] The claimant testified that the majority of time spent on her business is evenings and weekends. She stated that between June 24, 2012, and March 9, 2013, she sold approximately 58 key finders, and she is able to produce 22 per hours, so this would equate to about 2.3 hours per week. She stated that she receives most of her business through the internet and answering customers, generating invoices can be done at any time, and would only take about 10 minutes of her day.

[32] She stated that in 2012, she had worked for six months at her pharmaceutical job and then in June 2012, she began collecting EI. She stated that the majority of the mileage was related to her pharmaceutical job, as it required intensive travel. She stated except for the Alberta trade show, her other trade shows were local.

[33] I accept the claimant's testimony that the time spent on her business was minimal and that the nature of her home-based business would be conducted during the evenings and weekends. In addition, I accept the claimant's testimony that her time spent on her business was always outside of her pharmaceutical employment.

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<sup>7</sup> GD9-1 to GD9-11

<sup>8</sup> GD14A Audio File

### **Nature of employment**

[34] The Commission submits that the claimant is the sole owner/operator of X. The claimant's business is jewelry design and fashion sales. The claimant started her business in 2010 and she continues to run the business year-round.

[35] The claimant testified that her main hours worked were at trade shows that were on the weekends. She stated that she runs the business on a part-time basis as this is proven as she has done this while working full-time as a pharmaceutical representative.

[36] I accept the claimant's testimony that she is the owner/operator of X which she started in 2010, and in 2013 incorporated the business. The claimant's business operated throughout the year. However I am of the view that the business is home-based and more likely than not, would not operate the same as a retail location and the work could be performed outside of normal hours, being in the evening and weekends.

### **Continuity**

[37] The Commission submits that the claimant has been operating her business since 2010 as a sole owner/proprietor of X. Invoice dated Sept 5, 2012, from X shows keychain design patent fees; a patent grants one the right to exclude others from making, using, offering for sale or selling the patented invention.

[38] In addition, X was incorporated February 12, 2013. Corporation documents and 2013 T2 tax return were provided. The claimant opened a business bank account in April 2013. A breakdown of the claimant's business activities show that there were ongoing transactions in each week including sales transactions, payment of monthly fees, advertising and marketing. The claimant's inventory and business income continue to increase every year.

[39] The claimant testified that her business had been operational since 2010 and continues to do so. She agrees that she obtained a patent and she incorporated in 2013.

[40] I find that the evidence supports there is continuity. However, I find the Commission's submission that the claimant opened a bank account in April 2013, and the transactions going forward are for a period outside of the claimant's benefit period.

### **Capital/Resources Invested**

[41] The Commission submits that on the claimant's application completed May 29, 2012, the claimant states she had an inventory worth \$10,000 - \$15,000 and that \$15,000 - \$20,000 was reinvested into the business. The claimant's 2012 tax return shows that she carried over \$5619.00 of inventory in 2011 and her closing inventory for 2012 was \$15,399.10.

[42] The claimant testified that when she completed her application, she was only offered a range to include. She stated she chose the lowest range because her inventory would change throughout the year depending on her sales. She stated that in 2012 her sales were only \$28,208.62.

[43] The claimant had stated to the Commission in the interview that took place on November 23, 2016, that she had a laptop, cell phone, a cutting machine, tables and displays, that she estimated the value of approximately \$5000.00. She stated that she does not have any real estate and her car is personal and she does not have any loans.

[44] I am of the view that for the 2012/2013 benefit period the claimant's investment is not significant and that her assets are minimal. I find that a carry over of inventory of \$5,619.00 from the 2011 and an ending amount of \$15,399.10 is of minor extent.

### **Financial Success/Failure**

[45] The Commission submits that in 2012 the claimant inventory nearly tripled. The 2012 T1 shows the claimant's gross income from her business in 2012 as \$41,040.07, and her gross income from her employer X was \$41,777.57. The claimant started the year 2012 with an inventory worth \$5619.00 and ended the year with an inventory of \$15,399.10. The claimant declared her gross profit for the year at \$28,208.62. For the 2013 tax year, the business showed a total revenue of \$57,256.00 and a gross profit of \$44,756.00.



[46] The claimant reiterated at the hearing that it is her goal for the business to grow and be successful, but it is not at the point where it can be her sole livelihood, and it was not in 2012/2013. She stated that she still is required to work outside of her business in order to support herself and her family.

[47] I find from the tax information the Commission relied on are the gross profits, and the Commission had not considered the expenses. On the 2012 business statement show there are significant expenses directly related to the business that resulted in a net profit of \$9,675.81. Unfortunately, there is no documentary evidence of the 2013-tax return. However I find from the profit and loss statements provided on the file there are expenses that would need to be considered. I note the Commission referenced GD3-181 to this submission; however, the document refers only to the claimant's mileage for 2012.

[48] I find that during the investigation that took place on November 23, 2016, the Commission when asking their questions, did not ask specifically refer to the 2012/2013 benefit period as the evidence on the file<sup>9</sup> and the audio will support the conversation specifically speaks to the period of 2015 for revenue and expenses.

[49] I accept the claimant's testimony, along with profit and loss statements, that the business was not to point where it was her sole livelihood.

### **Availability**

[50] Records of employment on the file show the claimant was employed 5 out of 12 months in the year 2012 and 6 of 12 months in 2013. The claimant states she has been a pharmaceutical rep for 20 years and continues to look for work only as a pharmaceutical rep. The claimant states she was looking for full-time work, however, she has stated that work as a pharmaceutical rep is not full-time work but it is a contract based.

[51] The claimant stated to the Commission that she always continued to look for work as a pharmaceutical representative and her business has always takes a back seat when she has a contract. She explained that unfortunately the industry only offers term contracts and the jobs are

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<sup>9</sup> GD3-173

mostly heard of by word of mouth. She stated that she is constantly checking websites and confers with people in the industry.

[52] The claimant testified that during the interview on November 23, 2016, there was a conversation where she explained that if she were offered a job, while she was working on her business, in particular if she had invested \$5,000.00 in a trade show, she would cancel the trade show and lose her deposit. The claimant stated that she told K. T. that she is always available for any job that comes up regardless of how many times K. T. asks her the question.

[53] The claimant testified that she was clear telling K. T. that her business always takes the back burner when she works and she is always available when a term comes up.

[54] The claimant testified that GD3-173 does not capture all the information that was discussed at the interview. She stated that there was a discussion regarding availability and that she advised K. T. the jobs she has applied and her networking. She explained that she looks for work every day and she always has her cell phone with her so she can be reached.

[55] The claimant testified that she has never turned down a full-time job because of her business commitments. She maintains her business is a side job and not her main employment focus.

[56] The claimant testified that during the November 23, 2016, K. T. never asked her to provide a job search for the period of 2012/2013, but only one for a period from August 2016 to November 2016. The claimant has provided one for 2012/2013 with her appeal.<sup>10</sup>

[57] I find the claimant's testimony to be credible and that she has provided an audio of the interview, which clearly supports the Commission, failed to consider the depth of the efforts the claimant was making to find employment.

[58] I find the Commission failed to consider the claimant's efforts to find employment and this is shown by the lack of information documented (GD3-172 to GD3-173) but clearly is discussed in detail as indicated in the audio file.

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<sup>10</sup> GD9-4

[59] I find the audio tape clearly supports that during the 2 hours and 20 minutes, the claimant maintained she was always available for work, which K. T. will agree with at one point in the tape. I accept the claimant's testimony to be credible and consistent that she could not rely on her business as her main source of income and she was actively looking for employment.

[60] I am satisfied the claimant has proven her availability and that her business is minor in extent. I prefer the claimant's version of the November 23, 2016, interview as she can support it with an audio recording.<sup>11</sup>

### **Issue 3: Allocation of Earnings**

[61] Earnings<sup>12</sup> are defined as the entire income of a claimant arising out of any employment.<sup>13</sup>

[62] For income to be considered earnings, the income must be earned by labour or given in return for work, or there must be a sufficient connection between the claimant's employment and the sum received.<sup>14</sup>

### **Did the money the claimant receive from self-employment constitute earnings?**

[63] Yes, I find that the claimant had self-employment income that constituted earnings, because it was money earned in the form of sales from her business X. However, I find that the Commission incorrectly calculated the claimant's weekly earnings.

[64] The claimant is not disputing that she received the self-employed income but she is disputing the Commission's calculation of the net amount of earnings.

[65] The claimant provided the Commission with profit and loss statements, including sales receipts and expense receipts.<sup>15</sup> Upon receipt of the documents, the Commission prepared a spreadsheet based on the information provided. In their calculations, along with specific amounts assigned to advertising, shipping and utilities, they determined average weekly amounts to office

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<sup>11</sup> GD14A

<sup>12</sup> Section 35(2) Regulations

<sup>13</sup> *McLaughlin v. Canada (Attorney General)*, 2009 FCA 365

<sup>14</sup> *Canada (A.G.) v. Roch*, 2003 FCA 356

<sup>15</sup> GD3-254 to GD3-296

expenses at \$12.46; rent at \$7.27; and supplies at \$242.00. The Commission also prepared an earnings breakdown to show the overpayment for \$4,182.00.

[66] At the hearing, the claimant disputed the amounts the Commission averaged, in particular the amounts that had been applied to the office, rent and supplies expense. The claimant requested additional time to perform a recalculation based on the information she had provided to the Commission.

[67] The claimant provided in writing her calculations<sup>16</sup> showing discrepancies and she believed the correct amounts should be weekly expenses of \$641.48 for supplies; \$55.08 for rent; and \$24.04 for office.

[68] I respectfully requested the Commission to provide the calculation on how they derived the average weekly amount for the expenses in question and provided the claimant's calculations.

[69] The Commission advised me there were not able to explain with certainty as to how the allocation was determined, as the persons who worked on the file are no longer available to provide an explanation to the approach used. However, the Commission submits that if I find the claimant's profit and loss statements to be credible and should be used instead, then the Commission would defer to my judgment.<sup>17</sup>

[70] In reviewing the profit and loss statements provided, combined with the actual receipts the claimant provided, relating to the weekly periods the expenses were incurred, and based on the fact the Commission cannot provide an explanation what approach they used. I am satisfied that the information the claimant has provided is credible and that her self-employed earnings reported on the profit and loss statements provided in the file should be used in place of the Commission's averaged calculations as shown in file.<sup>18</sup>

[71] I give more weight to the profit and loss statements and that they should be used to calculate the weekly earnings because in my review of the Commission's calculations there are

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<sup>16</sup> GD10-8

<sup>17</sup> GD12-1

<sup>18</sup> GD3-209 to GD3-219

other discrepancies for amounts listed on the spreadsheet with no justification as to how or why they amounts were calculated. If find the amounts are differ from what the claimant reported on her profit and loss statements.

[72] The claimant has the onus of proving that the payments were not earnings and they should not be subject to allocation.<sup>19</sup>

[73] I find the claimant to be very credible and as the facts on the file will show she has met the onus because, she was very cooperative with the Commission throughout the investigation and provided copies of receipts to justify her expenses. I find that based on the claimant’s profit and loss statements <sup>20</sup> her self-employment earnings are:

|                   |          |                   |            |
|-------------------|----------|-------------------|------------|
| Week beginning:   |          | Week Beginning:   |            |
| June 24, 2012     | \$0.00   | November 4, 2012  | \$0.00     |
| July 1, 2012      | \$0.00   | November 11, 2012 | \$173.00   |
| July 8, 2012      | \$166.00 | November 18, 2012 |            |
| July 15, 2012     | \$0.00   |                   | \$1,825.00 |
| July 29, 2012     | \$0.00   | November 25, 2012 | \$0.00     |
| August 5, 2012    | \$0.00   | December 2, 2012  | \$50.00    |
| August 12, 2012   | \$0.00   | December 9, 2012  | \$252.00   |
| August 19, 2012   | \$0.00   | December 16, 2012 | \$486.00   |
| August 26, 2012   | \$0.00   | December 23, 2012 | \$0.00     |
| September 9, 2012 | \$0.00   | December 30, 2012 | \$0.00     |
|                   |          | January 6, 2013   | \$0.00     |

<sup>19</sup> *Bourgeois v. Canada (Attorney General)*, 2004 FCA 117

<sup>20</sup> GD3-254 to GD3-294

|                    |          |                   |          |
|--------------------|----------|-------------------|----------|
| September 16, 2012 | \$184.00 | January 13, 2013  | \$0.00   |
| September 23, 2012 | \$0.00   | January 20, 2013  | \$0.00   |
| September 30, 2012 | \$13.00  | January 27, 2013  | \$0.00   |
| October 7, 2012    | \$16.00  | February 3, 2013  | \$0.00   |
| October 14, 2012   | \$353.00 | February 10, 2013 | \$0.00   |
| October 21, 2012   |          | February 17, 2013 | \$130.00 |
| \$1,815.00         |          | February 24, 2013 |          |
| October 28, 2012   | \$288.00 | <u>\$3,494.00</u> |          |
|                    |          | <b>Total</b>      |          |
|                    |          | <b>\$9,245.00</b> |          |

**Issue 4: How are the earnings to be allocated?**

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

[75] The Commission maintains that this money constitutes because the payment was made to compensate the claimant for the work she performed to allow her business to operate. Therefore, in accordance with section 36(6) of the Regulations, it correctly allocated these earnings.

[76] I find that the corrected net income of \$9,245.00 generated by the claimant's business in the periods in question must be allocated pursuant to the provisions in section 36(6) of the Regulations because earnings arose from a transaction, the earnings were allocated to the weeks where it was indicated that the transaction occurred.

**Issue 5: Should the claimant be issued a warning for making a misrepresentation by knowingly providing false or misleading information to the Commission.**

[77] No, I find the claimant should not be issued a warning letter because I do not find she knowingly made false misrepresentation when she made her reports. In addition, I do not find the claimant provided the Commission with false information regarding her involvement in self-employment.

[78] The Commission determined a misrepresentation occurred. However, the misrepresentations occurred over 156 weeks ago and fall outside of the time limitation for penalty. Therefore, no monetary penalty will be imposed on this claim and a warning letter will be issued.

[79] The Commission submits it has met the onus of establishing the claimant made a misrepresentation when she provided information to indicate that her self-employment was minor in extent and did not notify the Commission that it was major in extent having become her principal means of livelihood. In addition, the claimant knew that she was fully involved in the operation of a business and did not advise the Commission as was instructed to do.

[80] The Commission determined that the claimant established a claim on June 24, 2012, and collected 32 weeks of EI. The claimant worked and earnings from self-employment were not correctly declared on her claimant reports. It was determined that the claimant provided false information concerning her self-employment, which caused the decision to initially be determined to be minor in extent. After the correct facts were gathered from the claimant, it is apparent that the self-employment is clearly not minor extent. An indefinite disentitlement was placed on the claim.

[81] Penalties may be imposed for false statements made "knowingly". "Knowingly" is determined on the balance of probabilities based on the circumstances of each case or the evidence of each case.<sup>21</sup>

[82] As I found the claimant's involvement in self-employment minor in extent, I do not find that the claimant provided false information as it related to her self-employment. I accept the claimant's testimony that she believed she has completed her application correctly because there

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<sup>21</sup> *Gates A-600-94*

is evidence on the file that she contacted Service Canada a month prior to her lay-off and specifically asked how her self-employment would affect her EI claim.

[83] I do not find there Commission had provided sufficient evidence to support that the claimant failed to advise them her self-employment was different from what she had indicated on her initial application.

[84] The claimant maintains that the department, which has led to this whole misunderstanding, grossly misinformed her and she wishes that she knew to protect herself better at that time.

[85] The evidence on the files support that the claimant contacted the Commission on April 25, 2012, prior to her lay-off from her employment and prior to her making her application for EI benefits. At that time, she wanted to know exactly how her self-employment earnings/expenses are to be declared and how it affects her EI.<sup>22</sup>

[86] The Commission responded to the claimant's request and provided an explanation on self-employment determination on minor in extent and her intent to look for work. She was advised to complete a questionnaire on self-employment she filed her application for benefits.

[87] The claimant applied for EI benefits at which time she completed a self-employment questionnaire.

[88] The Commission notified the claimant on June 28, 2012, that they had reviewed the information she provided on self-employment and allowed her claim. She was advised to report the number of hours she worked, regardless if she had any earnings. In addition was advised she must look for work and keep a record of employers she contacted and when.

[89] The claimant attended the interview on November 23, 2016, and was allowed to record the interview with investigators K. T. and L. T.

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<sup>22</sup> GD3-21 to GD3-22



[90] The claimant answered the Commission's questions that were directed at the 2015 tax year and she was requested to provide business expenses and bank statements for 2014, 2015 and 2016.

[91] I find the claimant to be honest and credible and there is sufficient evidence to support this because the claimant was more than cooperative with the integrity officer in providing documents and related business information and she provided plausible explanations that she had received direction from Service Canada agents on more than one occasion.

[92] The claimant stated to the Commission that she is a lawful citizen and business owner and the fact that she originally provided all of her hours and earnings from her business proves that she did not intend to mislead or lie about her business. The claimant said that she has nothing to hide and no reason to lie and she has been very cooperative with everything we have asked her for.

[93] On December 16, 2016, the Commission contacted the claimant and requested her to provide her personal tax returns from 2012 and 2013 and receipts to support business expenses for those years.

[94] On March 14, 2017, the Commission contacted the claimant confirming she had received the 2012 tax year documents and to submit 2013 and 2014 documents.

[95] The Commission notified the claimant of the adjustments made to her earnings and concluded that she knowingly made 15 false misrepresentations. The claimant was issued a notice of debt for \$14,060.00.

[96] The Commission may issue a warning instead of setting the amount of a penalty an act or omission under subsection 38(2) or 39(2).

[97] In this case, a monetary penalty could not be imposed as the weeks involved were in 2012 and 2013 and, therefore, beyond the 36-month period set when the decisions were rendered on May 30, 2018. The warning letter was determined to be the appropriate sanction given that the offences occurred over 36 months prior.

[98] The Commission submits that it found that the claimant's earnings from self-employment were not correctly reported.

[99] I find that the claimant may not have filed her reports correctly but I do not believe the claimant did it knowingly. I accept her testimony to be credible and she reported what she believed to be correct. The evidence on the file of her report cards show she was reporting the hours she worked and what she believed it to be the correct earnings as she had been requested to do.

[100] The claimant completed her reports beginning the week of July 15, 2012, to the week of February 24, 2013. The claimant reported that she had work that included self-employment and reported if there were hours worked and money earned in the period.<sup>23</sup>

**Issue 6: Did the Commission exercise its discretion properly with respect to the penalty amount?**

[101] The Commission submits that the jurisprudence supports its decision. The Federal Court of Appeal confirmed the principle that the Commission has sole discretion to impose a penalty or warning under sections 38 and 41.1 of the Act. The Court further reiterated that no Court, Umpire or Tribunal is entitled to interfere with a Commission's ruling with respect to the amount of that penalty, so long as the Commission can prove that it exercised its discretion "in a judicial manner". In other words, the Commission must demonstrate that it acted in good faith, taking into account all relevant factors and ignoring any irrelevant factors.

[102] I find the Commission failed to prove it exercised its discretion in a judicial manner. I am of the view that the Commission failed to give significant consideration to the claimant's explanations as it involved her self-employment activity. In particular, the fact on how much time she spent on the business and her desire to find full-time work.

[103] I also am of the view that the Commission failed to consider the correct benefit period when they spoke to the claimant at the interview on November 23, 2016, and they determined she had failed to report she worked and earned money.

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<sup>23</sup> GD3-34 to GD3-163

[104] I find from conversation on the audio,<sup>24</sup> K. T. during the interview, tells the claimant that she failed to report she worked and earned money. The claimant adamantly denies this. I agree with the claimant as reports on the file clearly support she indicated that she worked and earning money in the weeks she did.

[105] I find that the Commission failed to consider the claimant's willingness to accept employment and her efforts that she had made to find employment. The Commission did not ask the claimant to provide a job search for the 2012/2013, during the November 23, 2016, interview, but rather one for a period of August to November 2016, that was not the period under appeal. In addition, the evidence on the audio recording clearly demonstrates the claimant was actively looking for employment while she was self-employed, however, the Commission failed to consider it, as it is not recorded on the information on the file.<sup>25</sup>

[106] I note on the file, there are other benefit periods that were under question, and the claimant is asked questions that are not related to the 2012/2103 benefit period.<sup>26</sup> I am of the view that the interview that took place on November 23, 2016, would have been very confusing for the claimant as to what period she was being investigated for. In particular, her business situation that existed in 2012/2013 could be completely different than 2015 and 2016.

## **CONCLUSION**

[107] The appeal on the allocation of earnings is dismissed with modifications. I request the Commission to allocate the corrected amount of earnings to the weeks in which the transactions occurred.

[108] The appeal on the issues of week of unemployment and issue of a warning letter is allowed.

Teresa Jaenen  
Member, General Division - Employment Insurance Section

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<sup>24</sup> GD14A

<sup>25</sup> GD3-172 to GD3-173

<sup>26</sup> GD3-172 to GD3-173

|                       |   |
|-----------------------|---|
| HEARD ON:             | February 21, 2019 & April 2, 2019   |
| METHOD OF PROCEEDING: | In person   |
| APPEARANCES:          | L. L., Appellant<br>Sandra Guevara-Holguin, ,<br>Representative for the Appellant |