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

Citation: *EC v Canada Employment Insurance Commission*, 2020 SST 1133

Tribunal File Number: GE-19-2783

BETWEEN:

E. C.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Candace R. Salmon

HEARD ON: February 5, 2020

DATE OF DECISION: May 15, 2020

Canada

Decision

[1] The appeal is allowed in part. I find the Claimant was self-employed and working full working weeks during the relevant time. This means that she is disentitled from being paid regular employment insurance benefits.

[2] I further find the Canada Employment Insurance Commission failed to exercise its discretion judicially in imposing the penalty. I find I have the authority to make the decision the Canada Employment Insurance Commission should have made, so I have reduced the penalty to a warning letter. Because of this decision, the Notice of Violation is automatically reduced to a non-classified violation.

Overview

[3] The Claimant worked as a self-employed fitness trainer and instructor, and was contracted for services by a fitness facility. The Claimant provided personal training, group exercise, and other services to the fitness facility.

[4] While the Claimant was working at the fitness facility, she was claiming employment insurance (EI) benefits. On her biweekly EI report cards, she did not report that she was self-employed or that she had any earnings. When the Claimant made a subsequent claim for EI benefits, the Canada Employment Insurance Commission (Commission) determined she had been overpaid during her previous benefit period because she was working full working weeks for the period in question and as a result could not be paid EI benefits. The Commission also decided that the Claimant knowingly provided false or misleading statements when she failed to report her earnings.

[5] The Commission issued a decision finding the Claimant did not have weeks of unemployment, and assessed a penalty and issued a Notice of Violation. The Commission upheld these decisions after reconsideration. The Claimant appeals the Commission's decisions to the Social Security Tribunal (Tribunal).

Preliminary Matters

[6] A complete Notice of Appeal was filed with the Tribunal on February 23, 2016. The issues relate to a Commission decision dated July 19, 2013. The Tribunal's Appeal Division returned the appeal file to the General Division for a hearing on its merits, after overturning a previous General Division decision, which found the appeal was made too late.

[7] This appeal file was initially assigned to my colleague. Before he could compete the file, he left the Tribunal and I was assigned to re-hear the appeal. The hearing proceeded on February 5, 2020, and was attended by the Claimant and her husband, who is also her representative and was affirmed to give testimony.

Issues

[8] **Issue #1 –** Was the Claimant's level of engagement in the business so low that she was not working full working weeks?

[9] **Issue #2 –** Did the Claimant work full working weeks from July 13, 2011, until April 3, 2012?

[10] **Issue #3** – Did the Commission exercise its discretion judicially when it assessed a penalty against the Claimant?

[11] **Issue #4** – Did the Commission exercise its discretion judicially when it issued a Notice of Violation against the Claimant?

Analysis

[12] The law says that a person can be paid EI benefits for each week of unemployment.[1] A week of unemployment means any week in which a person does not work a full working week.[2]

[1] *Employment Insurance Act*, section 12.
[2] *Employment Insurance Act*, section 9.

[13] If a person is self-employed or engaged in the operation of a business, the person is assumed to be working full working weeks.[3] This means the person cannot be paid EI benefits.[4]

[14] The Claimant disputes the Commission's finding that she was self-employed and that her services were not insurable.

[15] I note that the Canada Revenue Agency (CRA) has jurisdiction over employment insurability, and I have no authority to overturn or alter its finding that the Claimant was self-employed in non-insurable employment from July 13, 2011, until April 3, 2012.[5] The Claimant had the option of appealing this decision, and did not do so. While the CRA's decision on insurability is strong evidence that the Claimant was self-employed, and is determinative on her insurability, I have considered the Claimant's evidence relating to self-employment under the *Employment Insurance Act*.

[16] The Claimant submitted that she was hired to teach fitness classes, do personal training, and conduct workshops for the payor[6] on a full-time basis. She stated that all tools and equipment for the job were provided by the payor, and said she bore no financial responsibility for the business. She said the payor directed which fitness classes she would teach, set the schedule, and required written notes reflecting personal training sessions to be submitted or payment for the hours would not be made. She stated that she earned $22 per hour as a personal trainer, $16.50 per hour when she taught fitness classes, and $10 per hour when she worked the front desk. She added that the payor scrutinized the content of all training sessions and classes, and determined all of her activities while working. She also stated that she was "not allowed to work for other employers," that she was told directly that she "could only work for [payor name],"[7] and that she could not market her services because all advertising was done by the payor.

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[3] *Employment Insurance Regulations*, subsection 30(1).
[4] *Marlowe v. The Attorney General of Canada*, 2009 FCA 102.
[5] The Federal Court of Appeal has affirmed multiple times that the CRA has exclusive jurisdiction to determine the number of hours a insured person has had in insurable employment. The jurisdiction comes from the *Employment Insurance Act*, subsection 90(1). Some of the Federal Court decisions reiterating this finding are *Attorney General of Canada v. Haberman*, A-717-98 at paragraph 19, *Attorney General of Canada v. Thiara*, 2001 FCA 386 at paragraph 1, and *Canada (Attorney General) v. Didiodato*, 2002 FCA 345 at paragraph 2.
[6] The Claimant states this is the employer. The Commission states the Claimant was self-employed. I will refer to the purported employer as the payor.
[7] RGD3-153.

[17] The payor told the Commission that he hired the Claimant's company as an independent contractor to offer fitness classes at his facility. He added that the hours worked in this capacity are not insurable, so he did not issue a ROE. He also provided copies of documents which appear to be invoices from the Claimant's company, requesting payment for services rendered to the payor's company. At the hearing, the Claimant submitted she did not know where the invoice documents came from and submitted I should not rely on them.

[18] The Claimant registered a business name for "fitness training, group, and personal training" on June 3, 2011. Her representative submitted that the Claimant registered her business name, but did not work under the name. He submitted the registration was done only because the Claimant considered using it as a trade name and wanted to hold the business name.

[19] The payor submitted various typed invoices for payment with handwritten notes and calculations to the Commission. It stated the documents are "all the invoices we have on file submitted from [the Claimant]." At the hearing, the representative submitted that these documents were not provided by the Claimant and that I should rely on only the Trainer Biweekly Payroll printout because it was the complete synopsis for schedule and payroll provided by the payor to the Claimant. The representative submitted the Claimant does not know if the invoices are accurate. He added that he asked for copies of cancelled cheques to show the Claimant received and cashed the cheques, but the payor did not provide the information and the Commission did not obtain the cancelled cheques.

[20] I find the invoices provided by the payor to the Commission are more likely than not documents provided by the Claimant to the payor for payment of services rendered. The Claimant submitted that the payor required her to complete notes confirming her hours of training to be paid for them. There is no other evidence of notes confirming this information to the payor, other than these documents, which the payor submits are the Claimant's invoices. I note that the invoice dated June 25, 2011, appears to be the first invoice and is written on letterhead from the Claimant's business name, not her personal name. The cheque paying for the invoice is also written to the Claimant's fitness training company, not to her as an individual.

[21] All of the invoices from June 25, 2011, until February 5, 2012, are requested by and made payable to the Claimant's business name. Some of the invoices specifically state, "please make

cheque payable to [Claimant name] doing business as [Claimant business name].” The February 20, 2012, and March 19, 2012, invoices are written from the Claimant herself, not her business name. There is also a handwritten T4A document, relating to the 2011 tax year, issued by the payor to the Claimant’s business name.

[22] The Claimant submitted to the Tribunal on September 27, 2019, that the Commission submitted no proof of income. In an affidavit of the representative, he submits the Claimant did not work for the payor between May 29, 2011, and July 24, 2011, which appears to be based on the Trainer Biweekly Payroll report because he referenced it as an attachment in the affidavit. However, the Claimant testified that she taught fitness classes in the early mornings and again in the evenings from June until November or December 2011, so the affidavit is incorrect in stating she did not work with the payor from May 29, 2011, until July 24, 2011. I find this also casts doubt on the reliability of the Trainer Weekly and Biweekly Payroll forms, because they do not reflect payroll in this period but the Claimant testified that she worked and the invoices provided by the payor to the Commission show she was paid for 26.5 hours on the June 25, 2011, invoice.[8]

[23] The *Employment Insurance Act* defines employment as the act of employing or the state of being employed.[9] Insurable employment is defined as, amongst other things, employment in Canada by one or more payors under any express or implied contract of service.[10] A self-employed person is defined as, amongst other things, an individual who is or was engaged in a business.[11]

[24] I find, on a balance of probabilities, that the Claimant was self-employed and engaged in a business from June 2011 until April 2012.

[25] While the payor directed which classes the Claimant would teach and when they occurred, I find this is a standard practice since the payor ran a business which required consistently scheduled fitness classes. I further find the difference in wages paid for working different tasks supports an independent contractor relationship, as an employer-employee relationship generally includes a set wage that does not fluctuate based on task. Additionally, I find that the Claimant

[8] This invoice appears to have been paid to the Claimant’s business name on June 27, 2011. A copy of the cheque and stub are included at RGD3-192.
[9] *Employment Insurance Act*, subsection 2(1).
[10] *Employment Insurance Act*, subsection 5(1).
[11] *Employment Insurance Act*, subsection 152.91(1).

submitted invoices for her work, which supports an independent contractor relationship. The Claimant testified that the payor required her to provide notes confirming the time she spent in personal training sessions, which I find is a description of an invoice; though, I note the invoices in the file reflect all of the work the Claimant did in a period of time, not only the personal training work.

[26] I also considered that the Claimant told the CRA that she was not allowed to work for other employers, and stated she was told directly that she "could only work for [payor's name]."[12] At the hearing, she stated that the payor preferred that she not work for other payors but it was not a term of the job. I find this information is inconsistent and weakens the Claimant's credibility because she has made directly conflicting statements that she must have known cannot both be true. I find the Claimant was not limited to working for only one payor, or employer, because she admitted at the hearing that her payor did not require this.

[27] I also considered that the payor stated to the Commission that the Claimant was hired as an independent contractor to offer fitness classes at his facility and was not an insurable employee. The CRA determined the Claimant was self-employed and not employed in insurable employment at the relevant time. The payor issued a T4A to the Claimant's business name, though there are two versions; one T4A lists the Claimant's business name as an incorporated company and the address as the worksite owned by the payor, while the second directs the T4A to the Claimant's correct business name at her home address.[13] I find that while there may be an error on one version of the T4A, as the Claimant's business is not incorporated, the payor's intention was clearly to issue the T4A in the name of her business.

[28] I recognize the Claimant submitted that she did not own any of the tools or equipment at the job, which were provided by the payor. She added that she had no financial responsibility for the business, and was not allowed to hire helpers or subcontract her work to another trainer. I find, however, that the evidence supporting self-employment outweighs the evidence supporting an employment relationship.

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[12] RGD3-153.
[13] The two T4A documents are included at AD1B-13.

[29] I also considered the invoices. The Claimant refutes that the invoices submitted to the Commission by the payor are documents that she created. I have already found that they are more likely than not documents that she prepared and used to document her hours and be paid for her work. Most of these documents from June 2011 through February 2012 list the payee as the Claimant's business name, not her personal name. At the hearing, the representative submitted that the Claimant was going to do personal training on her own after she left the payor's business. He stated that the payor was not paying her, so she investigated the idea of having her own business and filed an application to hold the name.

[30] I find the representative's explanation is not supported by the facts. The Claimant registered a business name on June 3, 2011. She testified, and the evidence supports, that she also started working for the payor in June 2011. While I do not dispute the representative's submission that the Claimant experienced issues being paid, it is not possible that the Claimant registered a business name in reaction to not being paid by a payor she only started working for in the same month. The Claimant's business name's first invoice for payment appears to be dated June 25, 2011, but does not state the date when services were rendered. The Trainer Biweekly Report shows the Claimant worked 45 minutes in the week of May 29, 2011, but does not appear to have been paid for that time. While I cannot discern the exact start date, it appears the Claimant started working for the payor around the beginning of June 2011. Since she filed a business name registration on June 3, 2011, I find it is more likely than not that the lack of being paid by the payor was not relevant to the registration.

[31] I also note that the Claimant made reference in the file to correspondence and documentation that shows the payor treated her as an employee. The payor was a husband and wife team. During the demise of the payor's marriage, a provincial newspaper wrote an article quoting the wife as saying the payor, being her ex-husband, "paid business expenses and employees out of what he took out of the accounts."[14] I find this statement is not determinative. I find the Claimant operated her own business and her earnings were principally paid to her business by the payor. The fact that a former owner of the payor company used the term "employees" in a

[14] AD1B-15.

newspaper article does not mean that the Claimant is an employee under the *Employment Insurance Act.*

[32] I find the Claimant was more likely than not performing services as her own business on her own account. It appears, based on the invoices supplied by the payor to the Commission and by the registration of the Claimant's business name around the same time she started working for the payor, that her subjective intention was initially to be an independent contractor. While this is not defined in a formal contract, at least not one that any party has submitted as evidence, I find the Claimant's behaviour was that of an independent contractor because I place significant weight on the business name registration, the invoices, the CRA's ruling, and the Claimant and representative's inconsistent statements. Taken together, I find the evidence supports the conclusion that the Claimant was self-employed from June 2011 through April 2012.

Issue 1: Was the Claimant's level of engagement in the business so low that she was not working full working weeks?

[33] The Commission submitted a Request for Insurability Ruling to the CRA on September 19, 2012. The CRA responded on October 17, 2012, and determined that from July 13, 2011, until April 3, 2012, the Claimant was a self-employed worker and her services were not insurable. The ruling states the Claimant had 90-days from the date of the letter to submit an appeal. There is no evidence in the file that the Claimant appealed this ruling within the allowed timeframe, or after.

[34] At the hearing, the representative confirmed the Claimant did not appeal the CRA's ruling. He submitted the ruling was not appealed because the CRA said the decision would not have any impact on the taxes the Claimant would be required to pay. He stated he thought the decision only meant the Claimant would have to recover the HST on top of the money owed to the Claimant by her payor when she filed a small claim in provincial court. He submitted the reason the Claimant "asked for the ruling" was from an HST standpoint.

[35] I find the representative's submission is inconsistent with the evidence. The evidence shows that the request for an insurability ruling was made by the Commission. On September 19, 2012, a Commission investigator told the Claimant that an insurability ruling had been requested.[15]

[15] RGD3-168.

The CRA issued its ruling on October 17, 2012. I find the Claimant did not request the insurability ruling.

[36] As I have found the Claimant was self-employed and engaged in a business at the relevant time, the law presumes that she was working full working weeks.[16]

[37] I must now consider whether the Claimant meets the requirements to engage an exception to the presumption that she was working full working weeks.

Analysis - Unemployment

[38] Once a claim for EI benefits is established, EI benefits are paid to a claimant for each week of unemployment.[17] A week of unemployment is defined as a week in which a claimant does not work a full working week.[18]

[39] The *Employment Insurance Regulations* say that if a claimant is engaged in self-employment, during any week, the claimant is deemed to have worked a full working week during that week.[19] The exception to this regulation is when the amount of involvement in the business is so minor that a claimant would not rely on her employment in the business as her means of livelihood.[20] I must decide if the Claimant meets this exception by looking at the Claimant's degree of involvement in her business. I do this by considering several factors laid out in the *Employment Insurance Regulations*. The factors to be considered are:

- the time spent;
- the nature and amount of money and resources invested;
- the financial success or failure of the business;
- the continuity of the employment or business;
- the nature of the employment or business; and

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[16] *Employment Insurance Regulations,* subsection 30(1).
[17] *Employment Insurance Act*, section 9.
[18] *Employment Insurance Act*, section 11(1). A week is defined as the 7 day period beginning on a Sunday (*Employment Insurance Act*, section 2).
[19] *Employment Insurance Regulations,* section 30(1).
[20] *Employment Insurance Regulations,* section 30(2).

- the claimant's intention or willingness to seek and immediately accept alternate employment.[21]

[40] I must consider each of the factors, but the most important factors to consider are time spent and the intention or willingness to accept other employment.[22]

[41] The Claimant has the burden of demonstrating that she meets the requirements for receiving EI benefits and that no circumstances exist that will disentitle or disqualify her from receiving EI benefits.[23]

Issue 2: Did the Claimant work full working weeks from July 13, 2011, until April 3, 2012?

[42] For the reasons below, I find the Claimant's involvement in her business was not minor in extent from July 13, 2011, until April 3, 2012. Accordingly, the Claimant was working full working weeks during that time and is disentitled from receiving EI benefits.

[43] The Claimant applied for regular EI benefits on July 15, 2011, and on July 18, 2012.

[44] Following the claim made on July 15, 2011, a benefit period was established effective July 10, 2011. After serving a two-week waiting period, as was required by the law at the time, the Claimant received 23 weeks of regular EI benefits from July 24, 2011, until December 31, 2011.

[45] Claimants are required to complete biweekly EI reports when claiming EI benefits. From July 10, 2011, until December 31, 2011, the Claimant reported on each biweekly report card that she was not self-employed. She also reported that she did not work or receive any earnings during the period of the report, which included work for which she could be paid later, unpaid work, or self-employment.[24]

[46] The Claimant submitted copies of financial report printouts titled Trainer Biweekly Payroll. One document states:

Period	Hours worked (rounded)	Earnings

[21] *Employment Insurance Regulations*, section 30(3).
[22] *Charbonneau v. Canada (Attorney General)*, 2004 FCA 61.
[23] *Employment Insurance Act*, section 49(1); *Canada (Attorney General) v. Picard*, 2014 FCA 46; *Canada (Attorney General) v. Peterson*, A-370-95.
[24] The biweekly report cards are produced in their entirety at pages RGD3-16 through RGD3-79.

December 11, 2011, until December 24, 2011	1430 minutes = 24 hours	$654.18
December 25, 2011, until January 7, 2012	1625 minutes = 27 hours	$659.91
January 8, 2012, until January 21, 2012	1925 minutes = 32 hours	$821.92
January 22, 2012, until February 4, 2012	2460 minutes = 41 hours	$1,053.00
February 5, 2012, until February 18, 2012	2455 minutes = 41 hours	$1,025.92
February 19, 2012, until March 3, 2012	1760 minutes = 29 hours	$683.35
March 4, 2012, until March 17, 2012	2065 minutes = 34 hours	$842.92
March 18, 2012, until March 31, 2012	2235 minutes = 37 hours	$928.17
April 1, 2012, until April 14, 2012	2440 minutes = 41 hours	$1,205.17
April 15, 2012, until April 28, 2012	1885 minutes = 31 hours	$862.92
April 29, 2012, until May 12, 2012	2195 minutes = 37 hours	$1,038.17
May 13, 2012, May 26, 2012	2220 minutes = 37 hours	$950.17
May 27, 2012, until June 9, 2012	2270 minutes = 38 hours	$974.67
June 10, 2012, until June 23, 2012	2730 minutes = 46 hours	$1,098.54
June 24, 2012, until July 7, 2012	2270 minutes = 38 hours	$942.86

[47] On September 4, 2012, the Commission spoke with the Claimant about her claim for EI benefits made on July 18, 2012. The Commission noted that there is a dispute about whether the Claimant's employment was insurable. It also noted that the Claimant appears to have been working through the entire period of time she claimed EI benefits on the claim beginning on July 10, 2011, though she reported no earnings on her biweekly claim reports.

[48] As noted above, the CRA issued a ruling finding the Claimant was self-employed from July 13, 2011, until April 3, 2012. The Commission submits that because the Claimant was determined to be self-employed by the CRA and had no insurable employment in that period, she cannot qualify for EI benefits. I find I must consider all of the evidence to determine if the Claimant meets the exception for self-employed persons under the *Employment Insurance Act*.

[49] The Commission issued a decision on April 29, 2013, finding the Claimant was not entitled to EI benefits from July 10, 2011, because she was self-employed and could not be considered unemployed. Including a penalty of $3,404, the Commission issued a Notice of Debt on May 4, 2013, for a total balance of $10,271. The Commission included the overpayment breakdown in its file. It shows the Claimant was overpaid $296 in each week from July 24, 2011, until December 25, 2011.

[50] The Claimant requested reconsideration of the Commission's decision on June 6, 2013. She submitted that she did not receive any correspondence from the Commission requesting information.

[51] The Commission contacted the Claimant on July 11, 2013. The agent spoke to the Claimant's husband, who stated that a representation form was sent to the Commission, to allow them to discuss the claim with him. The agent stated that the form had not yet been received. The agent also stated that she needed to speak directly to the Claimant.

[52] The Commission agent's file notes from July 19, 2019, show that she did not receive a return phone call or message from the Claimant and noted that there were no missed calls for which she did not recognize the number. She documented that this meant the Claimant did not return her call. The agent's notes state that there was no new information on file to change the decision. She

placed importance on the fact that the Claimant did not report any of her earnings while working in 2011, and did not appeal the CRA's decision ruling she was self-employed.

[53] The Commission issued a reconsideration decision on July 19, 2013, upholding its previous finding that the Claimant had failed to prove she was not working full working weeks from July 10, 2011, onwards.

[54] The Claimant submitted an application requesting leave to appeal to the Tribunal's Appeal Division on December 10, 2013. While the document was pre-emptive, because the Claimant had not yet appealed to the General Division of the Tribunal, I note that the Claimant submitted that her 2011 income was improperly reported. She submits that her payor did not pay her the wages it was supposed to pay and she had to pursue an action in small claims court. She submits that she was entitled to receive EI benefits in 2011 because she was not earning income at the time and was available for work.

[55] I have already determined that the invoices provided by the payor are reliable payroll documents, and have already determined that these documents were originally submitted by the Claimant as invoices for her services. The invoices reflect the Claimant as having worked from June 25, 2011, through March 19, 2012. There is also a Trainer Biweekly Payroll document showing the Claimant worked from May 29, 2011, until the week of July 10, 2011. While there is time recorded, there are no earnings listed for the dates. I have already found this document holds less weight because the earnings information does not appear to match the time worked. However, I note that the Claimant submits it is reliable. It shows that from July 24, 2011, through July 8, 2012, the Claimant had earnings in every biweekly pay period.[25]

[56] I will now consider whether the Claimant has engaged the exception to the self-employment rules by deciding whether her involvement in her business was so minor in extent that a claimant would not rely on her employment in the business as her means of livelihood.

[25] AD1B-23.

Time spent

[57] The Claimant spoke to a Commission agent on August 2, 2012. She stated that she usually worked 25 hours per week and earned $500 working as a personal trainer. She explained that she earned $22 per hour as a personal trainer, $16.50 per hour when she taught fitness classes, and $10 per hour when she worked the front desk.

[58] The Claimant testified that she taught between eight and ten 45-minute fitness classes per week, and spent approximately 25 hours per week in the job. The invoices support the Claimant working on average 30 hours per biweekly period from June 2011, through December 2011.

[59] I find that the Claimant's time spent in pursuit of her self-employment between June 2011 and April 2012 was significant because she worked on average at least 15 hours per week, and often more. This supports a significant connection to the self-employment.

[60] I note that self-employment is not to be determined on a week-to-week basis based on the number of hours a claimant works in a given week; rather, the total number of hours worked is the relevant consideration.[26]

Nature and amount of the capital and resources invested

[61] The representative submitted that the only capital invested to set up the Claimant's business was the business name registration. He believed it was approximately $70. The representative submitted that the registration was only done because the Claimant considered using it as a trade name and wanted to hold the business name.

[62] The Claimant stated she had no equipment for the business, nor any office space or business expenses aside from registration.

[63] I find the capital invested in the business is low, and supports a minor connection to the self-employment.

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[26] *Canada (Attorney General) v. Childs,* (1998) 231 N.R. 373 (Fed. C.A.).

Financial success or failure of the employment or business

[64] The Claimant's self-employment was principally done through the payor's company. The invoices and payroll information show that the Claimant continuously earned money from this employment from June 2011, through April 2012.

[65] Because the Claimant was able to consistently earn money, I find the business has been a financial success. This supports a major connection to the self-employment.

Continuity of the employment or business

[66] While the Claimant has not continued to operate her business, I find that at the relevant time she was working consistently in the business. This is not a situation where the Claimant did a few training sessions and had no intention of continuing, but a lengthy period of time where the Claimant sought to create and maintain a fitness company as her main business. This means there was continuity of the employment. This supports a major connection to the self-employment.

Nature of the employment or business

[67] This factor, "considers whether there is any connection between the employment that has been lost and the business in which the claimant is engaged. If the employment that has been lost is similar to the activity undertaken in the business, it may indicate that the employment is a stepping stone into the business."[27]

[68] The Claimant's employment, before starting her self-employment in June 2011, was working at a gym as a trainer and fitness instructor. This is the same type of work she did in her self-employment.

[69] I find the Claimant's self-employment is substantially similar to her previous employment. This supports a major connection to the self-employment.

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[27] *Martens v. Attorney General of Canada*, 2008 FCA 240, paragraph 47.

Claimant's intention and willingness to seek and immediately accept alternate employment

[70] The Claimant testified that when she was not teaching fitness classes, she was looking for other work. She stated that she applied for numerous jobs, and ultimately decided to upgrade her skills by returning to school in the hope of getting different or better employment.

[71] While the Claimant submitted that she applied for numerous jobs, she did not present any evidence of the specific jobs to which she applied. Further, she ultimately went back to school instead of pursuing employment. I find the Claimant's intention was to build her self-employment fitness business during the time she worked for the payor, because the evidence shows she registered a business name and consistently met with fitness clients at the payor's work site, in addition to teaching fitness classes. This means I find that her intention from June 2011 until April 2012, was to operate her self-employment business and she was not willing to seek and immediately accept alternate employment.

[72] The *Employment Insurance Act* is designed to provide temporary relief to those who are unemployed and actively seeking other work. It cannot be used to subsidize entrepreneurs who are starting their own business.[28] Considering all of the six factors in the Employment Insurance Regulations,[29] I find the Claimant has failed to prove that her level of engagement was low enough or of such a minor extent that she would not normally rely on it as a principle means of livelihood.

[73] The Claimant testified that she spent approximately 25 hours per week in the employment, which I found was a financial success and had continuity. While the Claimant's investment in the business was low, the nature of her self-employment is substantially similar to the nature of her previous full-time employment. This may indicate that the previous employment was a stepping stone into the self-employment business, which I find is more than likely the case because the previous employment and self-employment are so similar.

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[28] *Canada (Attorney General) v. Jouan*, (1995) 179 N.R. 127 (F.C.A.).

[29] These six factors include the time spent, the nature and amount of the capital and resources invested, the financial success or failure of the employment or business, the continuity of the employment or business, the nature of the employment or business and the claimant's intention and willingness to seek and immediately accept alternate employment. These are listed at subsection 30(2) of the *Employment Insurance Regulations.*

[74] Finally, I am not convinced that the Claimant was willing to seek and immediately accept alternate employment because I find the evidence more strongly supports that she wanted to build her self-employment business. It follows that the exception in subsection 30(2) of the *Employment Insurance Regulations* cannot apply to the Claimant's self-employment. The Claimant was working full working weeks. This means that benefits cannot be paid to the Claimant, because she did not have weeks of unemployment.

Analysis – Penalty

[75] The Commission may impose a penalty on a claimant if a claimant makes a representation that she knew was false or misleading.[30]

[76] It is not enough that the statement or omission be false or misleading, the claimant must knowingly make the false or misleading statement or representation. Knowingly means the claimant knew the information provided was untrue when she made the statement, and does not include any element of intention to deceive.[31]

[77] The Commission has the burden to show the statement or representation is false or misleading, and that the Claimant made the misrepresentation with the knowledge that it was false or misleading.[32] If proven, the burden shifts to the Claimant to prove the statements were not made knowingly.

[78] The decision to impose a monetary penalty and the calculation of the penalty amount are discretionary decisions of the Commission.[33] This means that it is open to the Commission to set it at the amount it thinks is correct. I have to look at how the Commission exercised its discretion. I can only change the penalty amount if I first decide that the Commission did not exercise its discretion properly when it set the amount.[34]

[79] If the Commission acted in bad faith or for an improper motive, took into account irrelevant factors or failed to consider relevant factors, or if it acted in a discriminatory manner, then it did not

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[30] *Employment Insurance Act*, section 38(1)(a).
[31] *Attorney General of Canada v. Gates*, A-600-94.
[32] *Mootoo v. Canada (Minister of Human Resources Development*), 2003 FCA 206.
[33] *Canada (Attorney General) v. Gauley*, 2002 FCA 219.
[34] *Attorney General of Canada v. Kaur*, 2007 FCA 287, paragraphs 20 to 22.

exercise its discretion judicially.[35] If I find the Commission did not exercise its discretion judicially, I may make the decision the Commission should have made.

[80] In these cases, I am respectful of the Commission's discretion to assess a penalty, and recognize that the law has clarified that I have the ability to modify a penalty under the circumstances above, but I cannot eliminate a penalty if I find the Commission had a legal basis to impose it.[36]

Issue 3: Did the Commission exercise its discretion judicially when it assessed a penalty against the Claimant?

Did the Claimant knowingly make false or misleading statements to the Commission?

[81] I find the Claimant knowingly made false or misleading statements to the Commission.

[82] The Claimant spoke to the Commission on September 10, 2012. The Commission asked why she did not report any earnings while collecting EI in 2011, if she was working from July until December 2011. The Claimant stated that, "there should be" reported earnings and that she would "look into that."

[83] On December 4, 2012, the Commission sent a letter to the Claimant, confirming the CRA ruled that from July 13, 2011, until April 3, 2012, she was self-employed. It noted that she was paid EI benefits from July 13, 2011, until December 31, 2011, and asked her to explain why she did not report her self-employment or her earnings on any of the biweekly EI report cards during the period she collected EI benefits.

[84] The Commission's file notes from April 29, 2013, state the Claimant did not reply to the letter, so it determined she knowingly made 13 false and misleading representations.

[85] The Commission issued a decision on April 29, 2013, finding the Claimant knowingly provided false or misleading information on 13 occasions while claiming EI benefits in 2011. It imposed a penalty of $3,404 for the 13 misrepresentations.

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[35] *Canada (Attorney General) v. Purcell*, A-694-94.
[36] *Canada (Attorney General) v. Gauley*, 2002 FCA 219.

[86] The Commission upheld its finding in a reconsideration decision dated July 19, 2013.

[87] At the hearing, the representative submitted that the Claimant thought she was an employee, so was not being dishonest when she reported that she was not self-employed. He also stated that she had not been paid for her work, and said the Claimant had to sue the payor in small claims court to receiving her earnings. He submitted that the Commission was, "asking her to declare earnings she doesn't have and they're not earnings until you have them." The representative submitted that the Claimant was working at the relevant time, but was under the understanding that if she had not been paid she did not have to report the hours worked.

[88] The representative added that "most people" who complete biweekly EI reports do not read the questions in their entirety and just click through the responses. He stated the Claimant was not intentionally misleading the Commission, but failed to fully understand the questions. He stated that at the time, the Claimant was not being paid and it created severe financial distress.

[89] I do not agree with the representative's submissions on these points. While he submits the Claimant was not paid, so did not misrepresent herself on biweekly EI claim reports because she did not yet have income, I find the biweekly report cards are clear. They state, "did you work or receive any earnings during the period of this report? This includes work for which you will be paid later, unpaid work or self-employment." When the Claimant responded, "no," I find she knew that she was providing false information because she knew she had been working and would be paid. Earnings do not become earnings only when they are paid to a Claimant, as the representative submitted, but are earned when the work is done and must be reported to the Commission when a claimant is claiming EI benefits.

[90] On the July 15, 2011, application for EI benefits, the form states the Claimant has the responsibility to report all employment, whether working for herself or someone else, and accurately report all employment earnings before deductions in the week(s) in which they were earned.[37] The Claimant failed to do this. Her representative submits that most people simply click through the biweekly report cards and do not read everything; in this case, I am only concerned with what the Claimant did. I find the Claimant failed to report her employment earnings while claiming EI benefits.

[37] A copy of this section of the application form is included at RGD3-7.

The fact that she was not actually paid the earnings at the time she worked the hours is not relevant to the fact that she did not report them on the biweekly EI report card.

[91] I have considered the case law in this area. The *Employment Insurance Act* states[38] the Commission may impose a penalty if the Claimant made a representation that she "knew" was false or misleading, relative to a claim for EI benefits. The Federal Court of Appeal (FCA) has explained that interpreting the word "knew" requires a subjective test, to determine whether the required knowledge existed.[39] In this case, I find the Claimant knew that she was reporting incorrect information to the Commission.

Did the Commission judicially exercise its discretion when it calculated the penalty?

[92] I find the Commission failed to judicially exercise its discretion when it calculated the penalty amount; as a result, I find the penalty must be reassessed considering all of the Claimant's evidence.

[93] The file shows that the Commission considered that the offence was the Claimant's first. It also noted that it gave the Claimant the opportunity to provide an explanation and mitigating circumstances regarding why she had not reported her earnings, that she had self-employment, and had returned to university, but the Claimant did not respond. Based on this, the Commission assessed a penalty at 50% of the overpayment.[40]

[94] The Claimant sent a letter with her reconsideration request. The letter confirms that she taught fitness classes during late 2011, and that she was not paid in full for the classes taught so she had to pursue a small claim. She stated that income was not reported to the Commission because there was an outstanding judgment in the provincial small claims court.

[95] The Commission tried to contact the Claimant, but was only able to speak with her representative. At that time, the Commission did not have an authorization to discuss the case with him, so no further evidence was provided. The Commission's notes show that it considered the Claimant's letter, sent with the reconsideration request, but determined there was no new information that could alter its decision. Its notes state that the fact the Claimant confirmed that she worked and

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[38] *Employment Insurance Act*, paragraph 38(1)(a).
[39] *Attorney General of Canada v. Bellil*, 2017 FCA 104.
[40] RGD3-202 – The Commission considered other penalty amounts and selected the lowest one.

did not report her earnings while working does not assist her case. The Commission found there was nothing in the file to change its decision.

[96] After the Commission issued its reconsideration decision, the Claimant submitted documents stating her husband suffered from numerous medical issues and was placed on disability. She added that she suffers from depression and Attention Deficit Disorder. She added that collection of the overpayment and penalty presented severe financial hardship to her family.

[97] There is no evidence that the Commission considered the Claimant's evidence about her family's medical and financial situation when it assessed the penalty. Even though this information was submitted to the Commission after the reconsideration decision was made, I find I am able to consider it. The FCA determined that additional evidence that was not before the Commission can be presented to the Tribunal, and if the evidence is relevant and was not considered, then the Commission's discretion was not properly exercised.[41]

[98] The Commission did not exercise its discretion properly because it failed to consider mitigating factors. I find this means that I can make the decision that the Commission should have made.

[99] The Commission calculated the penalty as 50% of the net overpayment, because it was the Claimant's first offence. This means the Commission used the overpayment of $6,808 multiplied by the 50% reduction to determine the penalty at $3,404. However, it did not consider the mitigating circumstances that the Claimant identified. These include the extreme financial hardship caused by the penalty, the difficulties relating to her husband's health and inability to work, and the fact the Claimant is the main income earner.

[100] In cases where the Commission has imposed a penalty, I consider that the Commission intended that something more than zero was contemplated and that the law is designed to permit some degree of monetary punishment on the Claimant. Courts have found that the power to vary the quantum of a penalty in light of mitigating circumstances is not the same as reducing the amount to zero, which amounts to no penalty at all and is, in reality, a usurpation of power that resides exclusively in the Commission. Where the test of liability has been met and Commission's power to

[41] *Canada v. Dunham,* [1997] 1 F.C. 462 (FCA).

impose a monetary penalty is not questioned, the circumstances in which a claimant makes knowingly false representations can, at most, only reduce the amount of the penalty, except in the most extreme circumstances.[42]

[101] I find this is a case where eliminating the financial penalty is appropriate. The Claimant has another file, which I heard and decided separately.[43] While its issues are similar to this case, the timeframe is more than five years after the events of this case. In that case, the Claimant was assessed a penalty of $2,907 which was a 100% penalty. After realizing the incidents in the case currently under appeal happened more than five years before, the Commission modified that penalty to 50% because it was not considered a second incident, and then reduced it further to become only a warning letter. It did this because it had not considered the Claimant's mitigating circumstances, including her spouse's illness and disability, and the fact that the Claimant is the main income earner in the household.

[102] Similarly, in this case the Claimant was assessed a first incident penalty of 50% of the overpayment, being $3,404. I find that considering the several mitigating circumstances and financial hardship presented by the penalty, it should be reduced to a warning letter and that this is consistent with the Commission's treatment of the Claimant's other, similar, file. While I recognize the Claimant misrepresented her earnings and a penalty should have a deterrent effect, I find the mitigating circumstances are significant enough to eliminate the financial penalty and replace it with a non-financial warning letter. However, the warning letter is still a form of penalty so eliminating the financial penalty does not eliminate the violation.

Analysis – Violation

[103] The Commission may issue a violation in cases where a penalty has been imposed.[44] A violation increases the number of hours of insurable employment that the Claimant requires to qualify for benefits. In this case, I find a penalty of a warning letter has been imposed.

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[42] *Canada (Attorney General) v. Schembri*¸2003 FCA 463*; and Canada (Attorney General) v. Gauley,* 2002 FCA 219.
[43] The other decision is *E. C. v. Canada Employment Insurance Commission*, GE-19-1962.
[44] *Employment Insurance Act,* section 7.1.

Issue #4 – Did the Commission exercise its discretion judicially when it issued a Notice of Violation against the Claimant?

[104] The Claimant was issued a Notice of Violation because the Commission determined she made misrepresentations by knowingly providing false or misleading information when she failed to declare her self-employment and earnings while receiving EI benefits in 2011.[45]

[105] As the Claimant knowingly made misrepresentations to the Commission, the Commission has the authority to determine whether a Notice of Violation will be issued. As with the penalty amount, the decision to impose a violation is discretionary. So, I must review how the Commission exercised its discretion when it decided to impose a violation by taking the same approach as I did when I reviewed how it decided the penalty amount. I am generally only able to change the Commission's finding on this matter if I determine it failed to act judicially when it imposed the Notice of Violation.

[106] The discovery of the Claimant's misrepresentation resulted in an overpayment totaling over $5,000.[46] Consequently, the Commission determined that the Claimant incurred a very serious violation.[47] The impact of the Notice of Violation was that the Claimant would need more hours of insurable employment to establish a claim for EI benefits for the following five years, or for her next two qualified claims, whichever occurred first.

[107] For the same reasons as stated above, I find the Commission did not act judicially when it imposed the Notice of Violation. The Claimant had mitigating circumstances that the Commission failed to take into consideration. However, as I have changed the penalty to a warning letter, the violation is now an unclassified violation. This means that it does not, by itself, increase the hours of insurable employment required to establish a subsequent claim for EI benefits.[48]

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[45] *Employment Insurance Act*, section 7.1(4) .

[46] *Employment Insurance Act*, Section 7.1(4) explains when an insured person accumulates a violation. Section 7.1(5) of the *Employment Insurance Act* explains how the violation is classified, either as minor, serious, or very serious.

[47] *Employment Insurance Act*, section 7.1(5).

[48] *Employment Insurance Act*, subsection 7.1(5) says that except for violations for which a warning was imposed, each violation is classified as minor, serious, very serious, or subsequent. *Canada (Attorney General) v. Savard*, 2006 FCA 327 confirmed at paragraph 26 that a warning letter may result in a Notice of Violation, but it results only in an unclassified violation that, on its own, does not increase the hours of insurable employment required to establish a

[108] Therefore, I find the violation is reduced to a non-classified violation.

Other Issues

[109] In the file, the Claimant expressed frustration that she was not allowed to provide evidence to the Commission before it made the reconsideration decision. I find that is not the case. The Claimant was contacted by the Commission on July 11, 2013, and a message was left with her husband to return the call. Her husband stated he could discuss the issues because an authorization to represent his wife had been submitted. The Commission agent noted that she did not have the document on file, but regardless of that she needed to speak to the Claimant directly.

[110] The Commission agent's file notes from July 19, 2013, show that she did not receive a return phone call or message from the Claimant and noted that there were no missed calls for which she did not recognize the number. She documented that this meant the Claimant did not return her call. The agent's notes state that there was no new information on file to change the decision. She placed importance on the fact that the Claimant did not report any of her earnings while working in 2011, and did not appeal the CRA's decision ruling she was self-employed.

[111] After the Claimant filed the pre-emptive application for leave to appeal to the Appeal Division on December 10, 2013, the next communication in the file is a letter from the Claimant to the Commission on January 21, 2016. In the letter, the Claimant refers to several conversations with the CRA and requests the Commission suspend garnishment of her wages and reconsider the file. An agent contacted the Claimant on February 10, 2016, and spoke to her husband. He stated the Claimant was working.

[112] In the same conversation, the Commission agent asked for the Claimant's phone number at work, which her husband refused to provide. He stated that he had permission to discuss his wife's case, but the Commission noted it had nothing on file supporting that. The Claimant's husband then said that he filed the documents with the CRA, not the Commission. The Commission stated that it could not use the CRA authorization and required the Claimant complete

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claim for EI benefits. However, the Court noted that it is still a violation and any subsequent classified violation within five years of the warning letter would be a subsequent violation.

a Commission form.[49] The Commission agent again asked the Claimant's husband to ask the Claimant to make contact, and he responded that she would call tomorrow. By February 12, 2016, the Claimant had not contacted the Commission agent.

[113] I find the Claimant had multiple opportunities to communicate her position to the Commission. During the initial investigation, she spoke to an investigator on September 10, 2012, who asked why she did not declare any earnings on the 2011 biweekly EI report cards. The Claimant stated there should have been declarations, and said she would look into the issue. In her next correspondence, a letter dated September 12, 2013, she did not address this question. While I accept the Claimant may not have received the Commission's December 4, 2012, letter asking her to explain why she did not report her 2011 income on her biweekly EI report cards,[50] she was aware of the issue because she spoke to a Commission investigator.

[114] After she made a request for reconsideration, the Commission left a message with her husband on July 11, 2013, asking her to return the call. The Claimant did not return Commission's calls. Similarly, in February 2016, a Commission agent spoke to the Claimant's husband. The agent attempted to speak to the Claimant, but her husband would not provide her contact information at work. He stated his wife would call the following day, which she did not do.

[115] While the Commission agents spoke to the Claimant's husband, I find on a balance of probabilities that it is more likely than not that the message was communicated to the Claimant. I make this finding because of the Claimant's husband's active participation in the file and his statement to the Commission that he wrote the reconsideration request, as well as his participation at the hearing as representative. I find it would be highly unlikely that he would not have told the Claimant that the Commission was trying to contact her to get further information.

[116] Given this lengthy history of communication attempts, I find the Claimant's submission that she had no opportunity to make arguments is without merit.

[117] At the hearing, the representative submitted that the Commission should not be able to go back so many years and expect the Claimant to pay back benefits. He submitted that there are

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[49] An authorization to disclose was filed with the Tribunal on February 23, 2016, naming the Claimant's husband as her representative.
[50] RGD3-199.

provincial limitation laws that limit the length of time the Crown has to file charges against an accused person, and he submits this is a similar situation.

[118] The limitation period in this case is set by the *Employment Insurance Act*, and is not the same as provincial limitation laws. Under the *Employment Insurance Act*, a Claimant is liable to repay an amount paid by the Commission to the Claimant as benefits to which the Claimant was not entitled.[51] The *Employment Insurance Act* also states that all amounts payable under section 43 are debts to the Crown, and are recoverable in the Federal Court or any other court of competent jurisdiction or in any other manner provided by the *Employment Insurance Act.*[52] The *Employment Insurance Act* also states that no amount due under this section may be recovered more than 72 months after the day on which the liability arose.[53]

[119] The date on which the liability arose, however, is not the date when the benefits were paid. The FCA has confirmed that the date on which the Commission notifies the Claimant of the amount to be repaid determines the starting point of the prescription period for recovery of the debt.[54]

[120] The Commission can reconsider a claim for up to 72 months where a false or misleading statement or representation has been made in connection with the claim.[55] Where the Commission decides that a person has received EI benefits to which they were not entitled, it must calculate the overpayment and notify the Claimant. In this case, a Notice of Debt was issued in May 4, 2013.

[121] This amount, however, is repayable under the debts to the Crown section noted above.[56] These two sections operate together. In this case, section 52 of the *Employment Insurance Act* allows 72 months to reconsider a claim where a false or misleading statement has been made, and section 47 allows the Commission 72 months to recover the overpayment. This means that, together, the Commission has 144 months, or 12 years, to recover the overpayment in this case.[57]

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[51] *Employment Insurance Act*, paragraph 43(b).
[52] *Employment Insurance Act*, subsection 47(1).
[53] *Employment Insurance Act*, subsection 47(3).
[54] *Brière v. Canada (Employment and Immigration Commission)*, [1989] 3 FC 88, at para 66.
[55] *Employment Insurance Act*, subsection 52(5).
[56] It is repayable under section 43. This is confirmed in subsection 52(3)(a).
[57] Time exhausted by appeals or reviews is additional to the 12 years noted here.

[122] The delay in recovery is, as discussed above, allowed by legislation and the Commission is within its rights to pursue the recovery of overpaid benefits.

Conclusion

[123] The appeal is allowed in part. I find the Claimant was self-employed and working full working weeks during the relevant time. This means that she is disentitled from being paid regular employment insurance benefits.

[124] I further find the Commission failed to exercise its discretion judicially in imposing the penalty. I find I have the authority to make the decision the Commission should have made, so I have reduced the penalty to a warning letter. Because of this decision, the Notice of Violation is automatically reduced to a non-classified violation

Candace R. Salmon
Member, General Division - Employment Insurance Section

HEARD ON:	December 20, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	E. C., Appellant S. C., Representative for the Appellant