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

Citation: *ML v Canada Employment Insurance Commission*, 2020 SST 1223

Tribunal File Number: GE-20-433

BETWEEN:

M. L.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Charlotte McQuade

HEARD ON: March 16, 2020 and July 2, 2020

DATE OF DECISION: July 9, 2020

Canada

DECISION

[1] The appeal is dismissed. The Canada Employment Insurance Commission (the "Commission") has proven[1] that M. L. (the "Claimant") knowingly provided false or misleading information so the Commission was entitled to impose a penalty. The Commission did not properly exercise its discretion when imposing a non-monetary penalty of a warning. However, when I substitute my decision for that of the Commission's, I find a warning is still the appropriate penalty.

[2] The Claimant has not shown she worked enough hours to qualify for employment insurance (EI) special benefits (sickness, maternity and parental benefits) so she has to repay the benefits she was paid.

OVERVIEW

[3] The Claimant applied for EI sickness benefits on December 30, 2013. She noted in the application that she had been laid off her from her job as a farm labourer with a numbered company due to shortage of work. The Clamant provided a Record of Employment (ROE) from a prior employer, a restaurant, saying that she had worked from June 9, 2013 to August 31, 2013 and earned 480 hours of insurable employment. [2]She also included a ROE from the numbered company saying she worked from September 16, 2013 to December 20, 2013 and accumulated 584 hours of insurable employment. [3] The Commission established a benefit period on December 22, 2013 and the Claimant was paid 55 weeks of a combination of special benefits (sickness, maternity and parental benefits). An investigation conducted by Commission's Integrity department revealed that the ROEs issued by the numbered company, which was operating as an employment agency, were suspect. The Commission reconsidered the Claimant's claim, saying it was within the 72- month period to do so, as they suspected the Claimant had made false or misleading representations.

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[1] The Commission has to prove this on a balance of probabilities, which means it is more likely than not.
[2] GD3-18.
[3] GD3-20 to GD3-21.

[4] On August 19, 2019[4], the Commission determined that the Claimant did not qualify for EI special benefits because she had submitted a fraudulent ROE [5]in support of her claim. After excluding the insurable hours from that ROE, the Commission said the Claimant only had 480 hours of insurable employment in her qualifying period, instead of the required 600 hours, so she was not entitled to the special benefits she had been paid. This decision resulted in an overpayment. The Commission also imposed a non-monetary penalty of a warning for reason the Claimant had knowingly made four false representations and knowingly negotiated thirty benefit warrants she was not entitled to.[6] These decisions were maintained by the Commission upon reconsideration. The Claimant appealed the Commission's reconsideration decision to the Social Security Tribunal (Tribunal). The Claimant says she did work with the employer in question and so there should be no warning. She also says she has enough insurable hours to qualify for special benefits when considering both the insurable hours she earned form the restaurant and the numbered company.

[5] I have decided, for the reasons set out below, that the Claimant has not proven she had enough hours of insurable employment to establish a claim for special benefits. I also have decided that she knowingly made four false representations so a penalty is appropriate. The Commission did not properly exercise its discretion when it decided to imposing a warning so I have substituted my own decision as to a penalty. I find a warning still to be the appropriate penalty.

PRELIMINARY MATTERS

[6] The Claimant was provided with an interpreter on both hearing dates. At the start of the hearing on March 16, 2020, the Claimant confirmed she had the Tribunal file. However, it became apparent as the hearing progressed that the Claimant had not received the entire Tribunal file. I adjourned the hearing then so the entire file could be provided to the Claimant and her representative. The Claimant's representative confirmed at the reconvened hearing that the entire file had been received.

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[4] GD3-77
[5] The ROE (E26764572) dated December 24, 2013 from1683175 Ontario Ltd., which was operating as an employment agency (GD3-20).
[6] GD3-74.

ISSUES

[7] Issue 1: Can the Commission extend the reconsideration past the usual 36-month reconsideration period to 72 months?

[8] Issue 2: Does the ROE from the numbered company contain false information about the Claimant's employment?

[9] Issue 3: If so, has the Claimant worked enough hours to establish a claim for special benefits?

[10] Issue 4: Did the Claimant knowingly provide false or misleading information? If so, did the Commission properly exercise its discretion in imposing a non-monetary penalty of a warning?

ANALYSIS

Can the Commission extend the reconsideration past the usual 36-month reconsideration period to 72 months?

[11] Yes. The Commission had a reasonable basis to conclude that the Claimant made false or misleading statements in connection with her claim for benefits so it was able to extend the reconsideration period to 72 months.

[12] Where a claimant has either received benefits to which he or she is not entitled, or has not received benefits to which he or she is entitled, [7]the Commission the authority to reconsider that individual's claim for benefits within 36 months after the benefits have been paid or would have been payable.

[13] If a person has received benefits for which the person was not qualified for or to which the person was not entitled, the amount calculated is repayable. [8]

[14] If, in the opinion of the Commission, a false or misleading statement or representation has been made in connection with a claim, the Commission may extend the reconsideration

[7] Section 52 of the *Employment Insurance Act*.
[8] Subsection 52(3) of the *Employment Insurance Act.*

period to 72 months. [9] The Commission does not have to prove that the false or misleading statement was made knowingly; however, there should be a reasonable basis for the Commission to conclude that a false or misleading statement or representation was made. [10]

[15] The Commission's ability to extend the reconsideration period from 36 months to 72 months is part of an "exceptional system" and so the Commission bears a heavy burden of demonstrating that there is a reasonable basis for it to exercise its power. The Commission also has a duty to explain to a claimant "precisely why … the statement seems false". [11]

[16] I find the Commission had a reasonable basis to conclude that there was a false or misleading statement or representation made by the Claimant in connection with her claim.

[17] The Claimant applied for EI sickness benefits on December 30, 2013. In support of her application, the Clamant provided two ROEs. One ROE was from a restaurant saying that the Claimant had worked from June 9, 2013 to August 31, 2013 and accumulated 480 hours of insurable employment. [12] The Claimant also provided a ROE (E26764572) from 168375 Ontario Ltd., which was operating as an employment agency, saying she worked from September 16, 2013 to December 20, 2013 and accumulated 584 hours of insurable employment. It said the reason for issuance was shortage of work. [13] The Claimant said in her application that she had worked as a farm labourer earning $10.50 per hour. The Commission established a benefit period on December 22, 2013 and the Claimant was paid 55 weeks of a combination of special benefits (sickness, maternity and parental benefits).

[18] An investigation conducted by Commission's Integrity department revealed that the ROEs issued by the employment agency were suspect.

[19] The Commission was unable to validate the Claimant's employment with the employer during its investigation. While the employer had provided copies of seven cheques issued to the Claimant, a payroll transaction record for those cheques[14], and issued a T4 to the Claimant, no

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[9] Subsection 53(5) of the *Employment Insurance Act.*
[10] *Canada (Attorney General) v. Langelier*, 2002 FCA 157.
[11] *Canada (Attorney General) v. Langelier*, 2002 FCA 157.
[12] GD3-18.
[13] GD3-20.
[14] GD3-40 to GD3-43.

supporting records for those documents such as time sheets/attendance records was found with the Claimant's name in any of the employer's records. The name of the co-worker the Claimant had provided to the Commission also could not be found in the employer records covering the period the Claimant was said to have worked. [15] The Commission determined that upon investigating numerous claims with this employer, that the placements to which the claimants were sent to by the employer, all kept time cards/sheets and/or business records to show or support their employees' work. However, the Claimant's name could not be found in any of the placements' records. [16]The Claimant's situation was therefore contrary to other workers/claimants who could be identified by their signatures in the business records and also by the pattern of work when working at their regular greenhouse work location.

[20] The employer told the Commission that his business records were accurate. He admitted that there may be different variations of the person's name but said he relied on what the worker writes on the time and attendance records. He stated that if a person worked he would record it every night on paper, on the record, and then for the week would "make the paper" to ensure he keeps track of who worked and what should be paid to the workers.[17]

[21] The Claimant told the Commission in a questionnaire regarding her employment that she only used her real name and no other name or nicknames. The Claimant also said that she had just come to Canada and did not know where the farm was that she worked, only that it was in the X area. The Claimant was asked to provide names of co-workers to help validate her employment but only provided the first name of a one co-worker, "T". [18]

[22] I find the Commission had a reasonable basis to conclude that there was a false or misleading statement or representation made by the Claimant in connection with her claim when she provided an ROE from the numbered company and said in her application that she had worked with that employer. In that regard, the employer had no supporting documentation such as attendance records or time sheets validating her employment, as existed with other employees to support the paycheques, payroll record and T4. Further, the farms whom the employer supplied workers to were unable to validate her employment. The Claimant herself provided no

[15] GD3-70.
[16] GD3-69.
[17] GD3-36.
[18] GD3-56.

verifiable information to the Commission to substantiate her claim she actually worked for the employment agency.

[23] I find the decision letters of August 19, 2019[19] were issued within the 72-month reconsideration period from the establishment of the benefit period on December 22, 2013.

Does the ROE from the numbered company contain false information about the Claimant's employment?

[24] Yes. I find as a fact the ROE (E26764572) the Claimant filed in support of her application from 168375 Ontario Ltd., contains false information that she was employed from September 16, 2013 to December 20, 2013 and contains false information that she accumulated 584 hours of insurable employment.

[25] The Commission argues, based on its investigation, that the Claimant's alleged employment with 1683875 Ontario Ltd. did not exist and that the ROE from this employer was false. The Respondent argues that when this ROE is excluded, the Claimant does not have enough insurable hours to prove that she qualified to receive special benefits.

[26] The Commission says that information discovered in 2012 and 2013 was that 16383875 Ontario, which was operating as an employment agency was paying cash to claimants who were not reporting their work or earnings while collecting benefits. An investigation conducted by the Commission's Integrity department revealed that the ROEs issued by this employer, including the Claimant's ROE, were suspect.

[27] The Commission obtained the employer's business records and met with various greenhouse owners/farms to whom the employer supplied workers. The Commission's investigation revealed that many workers used alternate names, English nicknames, family related names and other created names to both identify themselves during their ROE period of employment and during the periods on claim when they attempted to hide their work and identities. The investigation also revealed that workers/claimants could be identified by their

[19] GD3-74 and GD3-76.

signatures found in the business records and also by the pattern of work when working at their regular greenhouse work location.

[28] The Commission says that it is not disputing the company actually existed; rather its position is the Claimant never performed any duties or worked for the numbered company. The Commission asserts that the Claimant and the employer colluded for the purpose of procuring EI benefits to which the Claimant was not entitled.

[29] The Commission says that no supporting business records could be found to support actual work performed by the Claimant as indicated on the ROE, which was contrary to what was found throughout the major investigation where workers/claimant's work has regularly been validated and/or seen in the business records to support the other ROEs issued by the employer. The Commission says that at times, the employer identified in the records certain workers as employees with the phrase "Payroll".[20] This phrase was never seen or attached to anything close to the Claimant's first or last name in the records.

[30] The employer told the Commission that he operates an employment agency supplying greenhouse workers to a variety of greenhouses in the X area. He said that he mostly paid these workers cash for the work they performed and he considered most of the workers he supplied as subcontractors and not as employees. He said some workers had asked to be paid with cash or by cheque but he had never told any of the workers to not report their earnings. The employer denied colluding with the workers to have them not report their earnings or monies they received. He confirmed his business records were accurate and no different names of workers were recorded or used to hide their identities. He agreed there may be different variations of the person’s name but said he relies on what the worker writes on the time and attendance records. He stated that if a person worked he would record it every night on paper, on the record, and then for the week would "make the paper" to ensure he keeps track of who worked and what should be paid to the workers.[21]

[31] The Claimant’s position is that she was employed at 168375 Ontario Ltd, as noted on the ROE. In support of her position, the Claimant provided a letter from the employer dated

[20] GD3-49.
[21] GD3-35 to GD3-36.

November 17, 2019 that states, “Please accept this letter as confirmation that (Claimant’s name) has been employed with (employer’s name). Since 2013. (Claimant’s name) labour and full time basis of $l0.50 per hours. If you have any question or require further information, please do not hesitate to contact me at (phone number noted).” The document is signed by the “manager” of the employment agency. [22]

[32] The Claimant also provided a T4 showing employment earnings of $6514.00 for 2013.[23] She says she paid taxes on her income. She also provided seven pay stubs with her name on them, relating to the period from September 16, 2013 to December 21, 2013. The pay stubs cover two-week pay periods, noting the rate of pay as $10.50 per hour. The hours worked ranged over the two week periods range from 76 to 85. [24]

[33] The Claimant testified at her first hearing that she was introduced to her employment by a friend by the name of “T”. She did not know she was working for an employment agency. She did not know who the person was who completed her ROE. At the reconvened hearing, the Claimant said she was new to Canada at the time. She said she came to Canada in March or April 2013 and did not speak or read English. She said she was referred to the job but she could not remember the name of the person who referred her to this employer.

[34] The Claimant testified that she could not remember if she signed any documents with the employer when she started. She said did not meet with anyone from the employer when she was hired. She just was referred to a place and worked. She explained she was picked up and dropped off at a grape farm in X. She says she did not know the name of the farm, as she cannot read English and she never found out the name. She did not know where exactly the farm was in X as she was new to Canada and not familiar with this. She said that she would be picked up and taken to work by different people each day and then taken home.

[35] The Claimant described her job. She said she only worked at one farm, although she worked at different places on the farm. She explained there are many grape trees per line. Her job was cutting leaves and tying the branches. A vehicle would pick her up and she would be

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[22] GD2-7.
[23] GD2-12.
[24] GD3-62 to GD3-68

assigned a row to work in, which sometimes they could not finish. She would start at 7 a.m. and work 8 to 9 hours. She does not now how many people worked on the farm. She did not work with same people every day. She could remember only the first names of some of her co-workers: T, H and P. She does not know who her supervisor was. She said she never asked those questions. The person who would pick her up to take her to work would tell her what to do and leave.

[36] The Claimant said she did not sign any time card or other documentation at the farm showing the hours she worked. She said the person who picked her up and dropped her off knew how many hours she worked. She said this person would record it and submit it to someone higher. She said she was paid by cheque every two weeks and the person who drove her to the farm gave her the cheque directly. She had no contact with the owner of the employment agency. She said did not know she was working for an employment agency. She had heard about it but did not really know. She got her ROE from the person who picked her up. She told this person she was going on sickness leave. The Claimant said she did not fill out any paperwork with this person. She gave her full name and SIN number to the person who picked her up but her coworkers knew her as "T". The Claimant said she did not go back to work for this employer after her maternity leave. I asked the Claimant why she told the Commission she only used her proper name. She said that she must have forgot to share that. The Claimant says she had no explanation for why the employer did not have her name in its farm records and why none of the farms had her name in their records.

[37] I asked the Claimant how she had gotten the letter from the employer dated November 17, 2019. The Claimant's representative said he obtained the letter by emailing the employer.

[38] I find that it is more likely than not that the Claimant was not employed at 168375 Ontario Ltd. from September 16, 2013 to December 20, 2013 and did not earn 584 hours of insurable employment from working there, as noted in the ROE.

[39] Although the pay cheques, pay stubs and T4, as well as the employer's payroll notes, prove that the Claimant was paid by the employer, the employer had no supporting documentation for those records or payments, such as time sheets/attendance records with the Claimant's name, despite the fact the employer was able to provide supporting documentation to

the Commission for other employees showing the hours worked at what location, with signatures of the employees. [25] This causes me to question the whether the Claimant actually worked with this employer.

[40] I acknowledge the possibility that the employer's records are not completely accurate. However, given the Claimant maintains she was employed for over three months with this employer, I would expect that there would be a notation somewhere of her name in the employer's underlying records that would substantiate the pay cheques and pay documentation that was provided. Even if the Claimant did not sign anything and her hours were recorded by the person picking her up, the documentation as to her hours worked and where should have been in the employer's records. The Claimant says she provided her SIN number and provided her proper name to the person who picked her up and the Claimant's proper name is on the pay documentation so the employer clearly had her proper name. However, the Commission was not able to find *any* supporting or underlying documentation concerning the Claimant from the employer or from the locations to which the employer supplied workers.

[41] Further, the Claimant only provided minimal information to the Commission and it was not information that allowed verification that she actually worked with the employment agency. The Claimant provided the Commission with the first name of one co-worker and said she worked in X area. She was unable to provide the Commission with any verifiable information of her employment such as the name or specific location where she worked or the full names of any co-workers.

[42] I find the Claimant's testimony that she worked at the employment agency to lack credibility. The Claimant said she worked at a farm but said she was not aware she was working for an employment agency. While the Claimant did provide some explanation of her job duties at a grape farm, her description was vague and lacked sufficient detail to satisfy me she was actually employed with the numbered company. At the initial hearing, the Claimant gave the first name of the friend who referred her to this job. At the reconvened hearing, she said she could not remember the person's name. Other than the brief explanation of job duties, the Claimant provided no other detail as to her employment. She testified that she did not know the

[25] GD3-44 to GD3-49.

name of the farm where she worked. She did not know the full name of any co-workers. She did not know the name of the person(s) who picked her up and dropped her off each day. She did not know the name of any supervisor. She could not remember if she had signed any employment documentation when she started. She says she signed nothing at the farm indicating her hours of work. She had only provided her SIN number to the person who picked her up and dropped her off, that person was aware of how many hours she worked, and that person gave that information to someone higher up.

[43] The Claimant's explanation for her inability to provide further detail about her employment is that she was new to Canada and did not know English. Although I appreciate the Claimant was new to Canada, one would expect after a period of three months, she would at least know the name of the farm she was placed to work at, or the name of the person who was picking her up and providing her with her paycheques or be able to provide a full name of at least one person associated with her employment. I find it quite implausible that a person who had worked daily for over three months would not be able to provide any details about the circumstances of her employment, even if she did not know English.

[44] The Claimant provided a letter from the employer dated November 17, 2019, which she says substantiates her employment. I do not find the information in this letter to be credible. First, the employer himself was being investigated himself by Commission for various matters. The information in the letter, therefore, has to be considered in light of the fact the employer may have an interest in the Claimant's ROE being found valid. Secondly, the information lacks sufficient detail to be convincing. The Claimant testified she did not work with the employer after her maternity leave yet this letter says she has been employed since 2013, suggesting she is still employed. I note further, that the letter provides no specific dates as to when the Claimant was hired, the dates she worked, no information as to what location she was placed to work at and no supporting documentation corroborating the information in the letter. As well, the information in the letter is inconsistent with the employer's own information to the Commission that his records were accurate. If that were the case, the Claimant's name would have been found in the employer's supporting documentation for the payments made to her. I find this letter does not substantiate the Claimant's employment.

[45] I acknowledge the Claimant was paid by the numbered company but this is not enough to prove she worked and earned the insurable hours noted on the ROE from the numbered company. I am not satisfied there has been any credible evidence provided by the Claimant that she actually worked for the employment agency. The Clamant has not proven that it is more likely than not that she was employed with 168375 Ontario Ltd. from September 16, 2013 to December 20, 2013. As such, I find the information in the ROE about the Claimant's employment and insurable hours is not valid and cannot be used to support her claim for EI benefits.

Does the Claimant have sufficient insurable hours in her qualifying period to establish a claim for special benefits?

[46] No. The Claimant has not proven she has the minimum 600 hours required to establish a claim for special benefits in her benefit period.

[47] Not everyone who stops working can be paid EI benefits. Claimants have to prove [26] that they qualify for benefits. [27] In order to qualify, claimants need to have worked enough hours during a certain timeframe. [28] (This timeframe is called the qualifying period; I will explain what that is in more detail further down in the decision.)

[48] In general, the number of hours that claimants need to have worked in order to qualify depends on the regional rate of unemployment that applies to that claimant. [29] But, for claimants who want special benefits (which includes sickness, maternity and parental benefits), the law provides another way to qualify to get them.

[49] People who want special benefits can qualify if they have 600 or more hours. [30] This only applies to those who do not qualify under the general rule. Neither party has asserted the Claimant qualifies under the general rule[31] so I accept that she does not qualify under that rule.

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[26] The Claimant has to prove this on a balance of probabilities which means it is more likely than not.
[27] Section 48 of the *Employment Insurance Act*
[28] Section 7 of the *Employment Insurance Act*; section 93 of the *Employment Insurance Regulations.*
[29] Paragraph 7(2)(b) of the *Employment Insurance Act*; section 17 of the *Employment Insurance Regulations*.
[30] Subsection 93(1) of the *Employment Insurance Regulations*; the hours need to be hours of insurable employment.
[31] Set out in section 7 of the *Employment Insurance Act.*

[50] As noted above, the hours that are counted are the ones that the Claimant earned during her qualifying period. In general, the qualifying period is the 52 weeks before a claimant's benefit period would start. [32] (The benefit period is a different timeframe; it is the time when EI benefits may be paid to claimants.)

[51] The Commission decided that the Claimant's qualifying period was the usual 52 weeks, and went from December 23, 2012 and December 21, 2013. [33]The Claimant did not dispute the Commission's decision about her qualifying period and there is no evidence that causes me to doubt it. So, I accept as fact that the Claimant's benefit period is from December 23, 2012 to December 21, 2013.

[52] The Commission does not dispute the information in the ROE provided by the restaurant. [34] The Commission accepts the Claimant earned 480 hours of insurable employment from this employer during her qualifying period. I accept that the Claimant earned 480 hours of insurable employment in her qualifying period from this employer.

[53] However, the Commission says that, after excluding the 584 hours noted on the ROE from the numbered company [35], the Claimant does not have the required 600 hours in her qualifying period to qualify for special benefits.

[54] The Claimant confirmed in her testimony that, aside from the restaurant and numbered company for which she had filed ROEs, she had no other work in the year before she applied for EI benefits.

[55] For the reasons set out above, the Claimant has failed to satisfy the onus on her to prove that any of the hours of insurable employment listed on her ROE from the numbered company [36]were earned by her through employment with this employer. The ROE issued from the numbered company, therefore, cannot be relied on by the Claimant to establish her claim for benefits.

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[32] Section 8 of the *Employment Insurance Act*.
[33] GD3-76.
[34] GD3-18.
[35] GD3-20.
[36] GD3-20.

[56] As the Claimant only has 480 hours of insurable employment, instead of the required 600 hours, in her qualifying period, I find she does not have enough hours to establish a claim for special benefits.

[57] The Claimant has failed to prove she qualified to receive benefits.[37] As such, benefits were never payable and a benefit period should not have been established. The Claimant is responsible to repay money the money she was not entitled to receive. [38]

Did the Claimant knowingly provide false or misleading information?

[58] Yes. I find that she did.

[59] To impose a penalty, the Commission has to prove that the Claimant knowingly provided false or misleading information. [39]

[60] A penalty can also be imposed if, being the payee of a special warrant, the Claimant knowingly negotiated or attempted to negotiate it for benefits to which the Claimant was not entitled. [40] Negotiating a warrant requires the cashing of a cheque. [41]

[61] It is not enough that the information is false or misleading. To be subject to a penalty, the Commission has to show that it is more likely than not that the Claimant knowingly provided it, knowing that it was false or misleading.[42]

[62] If it is clear from the evidence the questions were simple and the Claimant answered incorrectly, then I can infer that the Claimant knew the information was false or misleading. Then, the Claimant must explain why she gave incorrect answers and show that she did not do it knowingly. [43] The Commission may impose a penalty for each false or misleading statement knowingly made by the Claimant.

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[37] This obligation arises under subsection 48(1) of the *Employment Insurance Act*.
[38] Subsection 43(b) of the *Employment Insurance Act.*
[39] Section 38 of the *Employment Insurance Act.*
[40] Paragraph 38(1)(e) of the *Employment Insurance Act*.
[41] *Canada (Attorney General) v. Tamber*, 2009 FCA 351.
[42] *Bajwa v Canada*, 2003 FCA 341; the Commission has to prove this on a balance of probabilities, which means it is more likely than not.
[43] *Nangle v Canada (Attorney General)*, 2003 FCA 210

[63] I do not need to consider whether the Claimant intended to defraud or deceive the Commission when deciding whether she is subject to a penalty. [44]

[64] The Commission says the Claimant knowingly made a total of four false representations when she submitted an application for benefits, provided an ROE she knew was false, and provided written statements to the Commission on May 31st, 2019[45] and June 21, 2019 [46]saying she worked and earned the insurable hours noted on the ROE from 163875 Ontario Ltd. The Commission says the Claimant also knowingly endorsed thirty benefit warrants, knowing her claim was established with false information. The Commission says the Claimant accepted her rights and responsibilities when she submitted her application and was advised false or misleading statements could cause penalties or prosecution.

[65] The application completed by the Claimant on December 30, 2013 asked the name of her last employer and the period worked. The Claimant noted on her application that she had been employed as a farm labourer at 1683175 Ontario Ltd. from September 16, 2013 to December 20, 2013 at a rate of pay of $10.50 per hour and that she was not working due to a shortage of work. [47] She also noted the restaurant where she had worked prior to that. The Claimant filed ROEs from both the restaurant [48] and 1683175 Ontario Ltd. [49] in support of that application. The Clamant was asked whether she worked with 1683174 Ontario Ltd. for the period noted on the ROE on the questionnaire she filed with the Commission on May 31, 2019. She answered yes. She was asked on the questionnaire, which she completed on June 21, 2019, to provide any documentation supporting her employment with 163875 Ontario Ltd., and she provided her paystubs and T4.

[66] The application form completed by the Claimant states, “If you knowingly withhold information or make a false or misleading statement, you have committed an act or omission that

[44] *Canada (Attorney General) v Miller*, 2002 FCA 24.
[45] GD3-55.
[46] GD3-59.
[47] GD3-7 to GD3-9.
[48] GD3-18 and
[49] GD3-20.

could result in an overpayment of benefits as well as severe penalties or prosecution."[50] The Clamant accepted having read and understood her rights and responsibilities. [51]

[67] As I have found above, the Claimant was not employed with 1683175 Ontario Ltd. from September 16, 2013 to December 20, 2013 and the ROE from that employer was invalid.

[68] I find that the Commission has satisfied its initial onus to prove that there were four false representations knowingly made by the Claimant. She said on her application that she was employed with the employment agency, when she was not and she filed a false ROE from that employer. She made two false representations when she confirmed her employment with the numbered company on the questionnaires returned to the Commission on May 31, 2019 and June 21, 2019. The question as to her who her last employer was and the duration of employment were simple. The Claimant clearly would have known whether she had been employed or not with the numbered company, when she completed her application and filed the ROE from that employer and when she completed the questionnaires confirming that employment.

[69] However, I find the Commission has not satisfied its initial onus to prove that the Claimant knowingly negotiated thirty warrants for benefits to which she was not entitled. To satisfy this onus, the Commission would have to show the Claimant negotiated benefit payments made by cheque. However, the Commission provided no evidence showing the Clamant was paid cheque.

[70] The Claimant has provided no explanation as to why she applied for benefits with false information or submitted an ROE with false information, or why she confirmed her employment with the numbered company in the two questionnaires she completed, other than to deny the information is false. I find the Claimant has not provided a reasonable explanation to show that the representations were not knowingly made. The Claimant has not been able to provide any credible evidence to support the assertion that she was employed by 1683175 Ontario Ltd. The Claimant knew that the ROE was false and the information she provided to the Commission on her application and in the questionnaires that she was employed with 1683175 Ontario Ltd. was also false because she knew she had not worked for this company.

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[50] GD3-13.
[51] GD3-14.

[71] I find that the Claimant knowingly made four false representations and therefore the imposition of a penalty was open to the Commission.

Did the Commission properly exercise its discretion in imposing a non-monetary sanction of a warning?

[72] No. I find it did not. However, when I substitute my decision for that of the Commission, I find a warning is still the appropriate penalty.

[73] A monetary penalty cannot be imposed if 36 months have passed since the day on which the act or omission occurred. [52]

[74] A warning may be issued within 72 months after the day on which the act or omission occurred. [53]

[75] The Commission has the discretion to impose a warning instead of a monetary penalty. [54] I have to look at how the Commission exercised its discretion. I can only remove the warning and substitute my own decision as to a penalty if I first decide that the Commission did not exercise its discretion properly when decided to impose a warning. [55]

[76] When deciding to impose a warning, the Commission considered there were four false statements knowingly made and thirty warrants knowingly negotiated by the Claimant for benefits she was not entitled. The Commission also considered that all warrants and/or statements were issued/made outside of the 36-month time limitation for a monetary penalty, with the exception of the false statements made in the Claimant's written replies on May 31, 2019 and on June 21, 2019. The Commission noted that as nearly all of the misrepresentations and/or falsified documents are outside of the 36-month limitation for a monetary penalty, and

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[52] Subsection 40(b) of the *Employment Insurance Act*.
[53] 41.1(2) of the *Employment Insurance Act*.
[54] Section 41.1 of the *Employment Insurance Act*.
[55] *Canada (Attorney General) v Kaur*, 2007 FCA 287. The Commission's decision can only be interfered with if it exercised its discretionary power in a non-judicial manner or acted in a perverse or capricious manner without regard to the material before it: *Canada (Attorney General) v Tong*, 2003 FCA 281. Discretion is exercised in a non-judicial manner if the decision-maker acted in bad faith, or for an improper purpose or motive, took into account an irrelevant factor or ignored a relevant factor or acted in a discriminatory manner: *Attorney General of Canada v Purcell*, A-694-94.

given the Claimant's mitigating circumstances of being new to Canada, having a language barrier and that her claim was for special benefits, a "warning" only was issued.[56]

[77] I find that the Commission did not properly exercise its discretion when imposing a warning because the Commission included in its consideration the fact the Claimant knowingly negotiated thirty warrants for benefits that she was not entitled to. As above, the Commission has not proven this and so it should not have been a consideration in determining what type of penalty to impose.

[78] As the Commission did not properly exercise its discretion, I will substitute my decision concerning the penalty. I find, having regard to four false representations being knowingly made within the 72 month time period and considering the mitigating circumstances that the Claimant was new to Canada and had a language barrier as well as the fact her claim was for special benefits, I find a warning is still the appropriate penalty.

CONCLUSION

[79] The appeal dismissed.

Charlotte McQuade
Member, General Division - Employment Insurance Section

HEARD ON:	March 16, 2020 and July 2, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	M. L., Appellant Dung Van Truong, Representative for the Appellant

[56] GD3-70 to GD3-71.