



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *JA v Canada Employment Insurance Commission*, 2021 SST 387

Tribunal File Number: GE-21-97

BETWEEN:

**J. A.**

Appellant (Claimant)

and

**Canada Employment Insurance Commission**

Respondent (Commission)

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

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DECISION BY: Linda Bell

HEARD ON: March 10, 2021

DATE OF DECISION: March 20, 2021

## **DECISION**

[1] I am dismissing the appeal in its entirety. The Claimant's self-employment and engagement in the operation of a business were not minor in extent. He has failed to rebut the presumption that he was working full workweeks. This means he is liable to repay the Employment Insurance (EI) benefits he was not entitled to receive.

[2] The Commission acted properly when imposing the monetary penalty and warning letter. This means I cannot interfere with the penalty or warning. I do not have authority to reduce or write off the overpayment of EI benefits or the penalty amount.

## **OVERVIEW**

[3] The Claimant was working in the oilfield industry until March 22, 2016. He made an initial claim for regular EI benefits and established a benefit period effective March 27, 2016. The Claimant collected 47 weeks of regular EI benefits, ending March 25, 2017.

[4] The Commission conducted a post audit review. They determined that the Claimant failed to report that he was self-employed and working in his self-employment on his biweekly claim reports. They say the Claimant was self-employed because he owns 50% of two corporations. The Commission determined that he is not entitled to the 47 weeks of EI benefits he collected up to March 25, 2017, because his self-employment was not minor in extent. They also determined that he was working a full workweek, more than 20 hours per week.

[5] The Commission imposed a retroactive stop payment (disentitlement) from March 27, 2016, onward. This results in a \$25,132.00 overpayment of benefits. The Commission also issued the Claimant a \$269.00 penalty and a warning letter because they determined he knowingly provided false information by failing to report he was self-employed and working in his self-employment, on his biweekly claim reports.

[6] Upon reconsideration, the Commission maintained their decision to impose the disentitlement, monetary penalty, and warning letter. The Claimant appeals to the Social Security Tribunal. He requests that the overpayment and penalty be "cleared" due to his circumstances. He states in his appeal that when the "oil crash" happened in 2016, he volunteered to take a lay

off from his job. He says he decided to start his own business and he worked in his business with “absolutely no pay.” He says he did not know this wasn’t allowed while collecting EI benefits.

### **PRELIMINARY MATTERS**

[7] On February 9, 2021, I informed both parties and the Claimant’s representative that the Tribunal must receive all written submissions and evidence no later than March 3, 2021. Two days after this deadline, the representative requested an adjournment, stating he requires more time to prepare for this case due to reasons relating to the pandemic. Specifically, he states that his law library is closed and he is having difficulty with gathering evidence due to the pandemic. I denied the request for adjournment<sup>1</sup>, recognizing that I already granted the representative a 4-week delay to allow him more time to prepare. I also informed the parties that I must conduct proceedings as informally and quickly as possible, in consideration of fairness and natural justice for both parties.<sup>2</sup> The hearing proceeded on March 10, 2021, as scheduled. The Claimant, his representative, and his witness attended the hearing.

[8] On March 9, 2021, the representative submitted a late document, labelled GD10. At the outset of the hearing, the representative said his late document consists of his written submissions. I explained that I would not be considering the GD10 document because he submitted it late, six days after the March 3, 2021, deadline. I did, however, provide the representative and the Claimant a full opportunity to make oral submissions and to read their GD10 submissions during the hearing.

[9] Prior to concluding the hearing, I asked the representative and Claimant if they were still having difficulty in obtaining relevant evidence. They both answered, “No.” I also asked them if there was any documentary evidence they might wish to submit for consideration after the hearing. Both the Claimant and representative said they had no further evidence to submit. After consideration of the foregoing, I am satisfied that the principles of natural justice and procedural fairness were upheld. I will now turn my mind to determine the issues under appeal.

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<sup>1</sup> See the GD-09 document.

<sup>2</sup> Section 3 of the *Social Security Tribunal Regulations*.

## ISSUES

[10] Did the Commission conduct their post audit review within the required time limit?

[11] Was the Claimant self-employed or engaged in the operation of a business during the benefit period?

[12] When considering all of the necessary factors, is the Claimant's self-employment or engagement in the operation of a business minor in extent?

[13] Does the Claimant meet the exception to be entitled to EI benefits while self employed?

[14] Has the Claimant rebutted the presumption that he was self-employed and working full workweeks, while claiming EI benefits?

[15] Did the Commission prove the Claimant knowingly provided false or misleading information on the 27 biweekly claim reports?

[16] If so, did the Commission properly decide the penalty?

[17] Do I have the authority to write off or reduce the overpayment and penalty amount?

## ANALYSIS

[18] The Claimant has the burden of demonstrating that he meets the requirements for receiving regular EI benefits.<sup>3</sup> The Claimant must prove that no circumstances exist that will disentitle or disqualify him from receiving benefits.<sup>4</sup>

### **Did the Commission conduct their post audit review within the required time limit?**

[19] Yes. The law says that the Commission may reconsider claims for benefits within 36 months after the benefits have been paid or would have been payable.<sup>5</sup> This period is extended to 72 months in cases where, if in the opinion of the Commission, a false or misleading statement

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<sup>3</sup> The Claimant has to prove this on a balance of probabilities, which means it is more likely than not.

<sup>4</sup> *Canada (Attorney General) v Picard*, 2014 FCA 46; *Canada (Attorney General) v Peterson*, A-370-95.

<sup>5</sup> See section 52(1) of the *Employment Insurance Act (Act)*.

or representation has been made in connection to a claim.<sup>6</sup> The Federal Court of Appeal has said that the Commission must be “reasonably satisfied” of its opinion that a false or misleading statement has been made.<sup>7</sup>

[20] I find as fact that the period under review is from March 27, 2016, to March 25, 2017. This is because these are the dates, during which the Claimant collected EI benefits. The Commission commenced their post audit review when they sent the Claimant the September 21, 2017, letter about his March 27, 2016, EI claim.<sup>8</sup> This is because they say they received information from the Canada Revenue Agency (CRA) indicating that on July 15, 2015, the Claimant had applied for a Business Registration Number for his numbered limited company (corporation). Their review covers the Claimant’s 27 biweekly claim reports completed on-line from March 27, 2016, to April 1, 2017. The Commission provides a list of the benefits paid to the Claimant for the 47 weeks, ending on March 25, 2017.<sup>9</sup> So, the period under review is from March 27, 2016, to March 25, 2017.

[21] On each of the 27 biweekly claim reports provided in evidence, the Claimant answered “No” to the question, “Are you self-employed?” He also answered “No” to the question, “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,” on each report. The Commission submits that the Claimant had knowingly made 27 false and/or misleading statements when he failed to declare on his biweekly claim reports that he was self-employed and was working in his self-employment.

[22] I find that the evidence, as set out above, supports a finding that the Commission was reasonably satisfied of its opinion that a false or misleading statement had been made. This is because the Claimant knew he owned 50% of his business and was working in his self-employment but on every biweekly report he answered “No” to the questions, “Are you self-employed,” and “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?” This means

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<sup>6</sup> See section 52(5) of the *Act*.

<sup>7</sup> *Canada (Attorney General) v Langelier*, 2002 FCA 157; *Canada (Attorney General) v Dussault*, 2003 FCA 372.

<sup>8</sup> See GD3-189.

<sup>9</sup> See GD3-187 to GD3-188.

the period during which the Commission may conduct a review of his claims extends to 72 months.<sup>10</sup>

[23] As stated above, the period under review is from March 27, 2016, to March 25, 2017. Based on the Commission's initial letter, they commenced their review on September 21, 2017, which is less than 36 months from when the benefits were paid or payable. The Commission informed the Claimant of the outcome of their review, the imposition of the retroactive disentitlement and a penalty on March 19, 2020, within the extended 72-month period. So, I find as fact that the Commission conducted their review within the prescribed time limit.

**Was the Claimant self-employed or engaged in the operation of a business during while collecting EI benefits?**

[24] Yes, I find as fact that the Claimant was self-employed and engaged in the operation of his businesses during the period from March 27, 2016, to March 25, 2017.

[25] The law states the fact that the Claimant is not being paid, cannot be conclusive evidence that he was not working in his self-employment.<sup>11</sup>

[26] The Commission submits that the Claimant was involved in the operation of a business during the entire period he was on his EI claim, ending March 25, 2017. They determined that the Claimant failed to prove he was "not unemployed" because his involvement in his self-employment was not minor in extent.

[27] The Claimant disputes the Commission's determinations. He says he was not self-employed while collecting EI benefits because he was a silent shareholder of his wife's business. He says he feels misunderstood and attacked by the Commission. He states the Commission took his statements out of context because they did not consider that his wife "pioneered and led" the efforts in setting up the business. He argues that the Commission made their decision based on their agent's "assumptions" that he went into their retail store daily. He states they cannot prove

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<sup>10</sup> See section 52(5) of the *Act*.

<sup>11</sup> *Attorney General of Canada v Enns*, FCA, A-559-89.

that he was at his store every day. He argues that the agent had already made up their mind and took his answers out of context because he “wasn’t properly instructed.”<sup>12</sup>

[28] I favour the Claimant’s written statements in his appeal to the Tribunal, his reconsideration request, his answers to the Commission’s questions in their September 21, 2017, questionnaire, and his answers during their March 4, 2020, interview. I favour these statements over the Claimant’s testimony during the hearing because they were consistent, forthright, unrehearsed, and probable given the circumstances. Further, I find the Claimant’s oral testimony that he only spent 6 to 8 hours per week working at his business, is not credible. This is because his testimony contradicts his previous statements; it is unsupported by documentary evidence; and it is not probable given the totality of the evidence before me.

[29] I cannot speak to how the Claimant may have felt during his telephone conversations with the Commission. However, this does not change the fact that his statements in his appeal to the Tribunal are consistent with his statements in his reconsideration request and his answers to the Commission’s questions. Further, I find that the Commission’s questions, as listed in their September 21, 2017, letter and their record of their March 4, 2020, telephone conversation with the Claimant, are straightforward and unambiguous.<sup>13</sup> The questions directly relate to the Claimant’s involvement in his self-employment and his job search efforts during the period he was on his EI claim. Even though the timing of the Commission’s telephone calls and questions may have been random or unexpected by the Claimant, it does not change the fact that his initial answers to the Commission and statements to the Tribunal were consistent, unrehearsed, and are probable given the circumstances relating to his involvement in his self-employment.

[30] I recognize that it was not until the hearing that the Claimant began to argue that he was a silent shareholder and was not self-employed. He says he was only an investor, a silent partner, of his wife’s business. This is in contradiction to his appeal in which he states, “I decided to start my own business,” “I incorporated my first business,” and “I worked in this business with absolutely no pay.” It also contradicts his previous statements to the Commission where he says

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<sup>12</sup> At 1:57.58 of the hearing recording.

<sup>13</sup> See pages GD3-189 to GD3-200 and GD3-222 to GD3-223.

that he owns 50% of the business, he negotiated their first lease, and he just worked for himself for no pay.

[31] The Claimant's wife testified as his witness. She states it was her idea to start a franchise business to operate a supplement (vitamin) retail store but she could not qualify for the loan on her own. She says she had been living in a common-law relationship with the Claimant for about 8 years at that time. They have since married. She asked the Claimant to invest and he agreed. He invested \$40,000.00 into "her business idea" and they became equal shareholders.

[32] The witness testified that they started their first corporation in July 2015, while the Claimant was still working in the oil industry. They opened their first store in AB in approximately October 2015, after several months of preparation and setting up. They started their second corporation for the SK location in approximately June or July 2016. They opened the SK store in November 2016. They sold their AB store in October 2018. She says they started their third corporation a few months before opening their third store in December 2018, in BC. She confirmed that the Claimant owns 50% of the shares in all three corporations and they are currently working on starting up a fourth corporation for another location.

[33] The Claimant says that he signed all the required documents to become a 50% shareholder in each corporation. He asserts that it is his wife's company and when she couldn't secure the loan to start their first corporation, she asked him for the money. He says he gave her the money because she is his "wife, everything is commonly, we are very mutually joined."<sup>14</sup> The Claimant confirms that since he was laid off from his job, he never returned to work for another employer. Rather, after his EI benefits ended he became an employee of his own corporations.

[34] I find as fact that the Claimant was self-employed and engaged in the operation of a business during the entire period under review, from March 27, 2016, to March 25, 2017. This is because he owns 505% of the shares in his first corporation that was set up in July 2015. They opened their first store in October 2015, five months before he applied for EI benefits. While he

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<sup>14</sup> At 1:11 40 of the audio recording.



was collecting EI benefits, they set up their second corporation sometime around July 2016, and opened their second store in November 2016.

**Was the Claimant's self-employment minor in extent?**

[35] No. I find that the evidence, as set out below, supports a finding that the Claimant's self-employment was not minor in extent during the period from March 27, 2016, to March 25, 2017.

[36] The intention of Employment Insurance is to support those who are unemployed, during a week of unemployment.<sup>15</sup> A claimant who is self-employed or engaged in the operation of a business has a job and is usually not entitled to receive EI benefits.<sup>16</sup>

[37] The law says that EI benefits are not a subsidy for people who are starting a business.<sup>17</sup> There is, however, an exception. A self-employed claimant can still receive EI benefits if they are self-employed or engaged in the operation of a business that is so minor in extent that most people would not rely on that kind of business as a main source of income.<sup>18</sup>

[38] There are six factors I must consider when deciding whether the self-employment activity is minor in extent:

- a) The time spent;
- b) The nature and amount of capital and resources invested;
- c) The financial success or failure of the employment or business;
- d) The continuity of employment or business;
- e) The nature of the employment or business; and
- f) The claimant's intention and willingness to seek and immediately accept alternate employment.<sup>19</sup>

[39] I agree with the representative that the law says the two most important factors are the time spent and the Claimant's intention and willingness to seek and immediately accept alternate employment.<sup>20</sup> However, I must still consider all six factors.

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<sup>15</sup> Section 9 of the *Act*.

<sup>16</sup> Subsection 30(1) of the *Employment Insurance Regulations (Regulations)*.

<sup>17</sup> *Canada (Attorney General) v Jouan*, A-366-94.

<sup>18</sup> A claimant is not considered to be working full working weeks if they can prove that the self-employment activity is so minor in extent that a person would not normally rely on that level of activity as a principal means of livelihood (section 30(2) of the *Regulations*).

<sup>19</sup> Section 30(3) of the *Regulations*.

<sup>20</sup> *Charbonneau v Canada (Attorney General)*, 2004 FCA 61.

a) Time Spent Working in the Self-Employment

[40] The Commission submits that it is more likely than not that the Claimant was working at his own business during his period of unemployment. They determined he was spending more than 20 hours per week assisting with the operation of the business.

[41] The Claimant disputes the Commission's determinations. He provides a detailed explanation how his first job was in the oil industry. He says he had only ever worked in the oil industry. He worked his way up to the senior position as a Field Specialist II, through on-the-job training. He states there is a small group of companies that own every division of companies offering employment in their small "oil-industry town."<sup>21</sup> He states that he had no other options but to contact these same few companies, as listed on his job search, because they were the only oil industry companies in their town.

[42] The Claimant states that after he interviewed for employment with four companies in the oil industry, they put him on their call list but they never called him to work. He repeatedly said how well connected he was in the oil industry so he knew the job prospects were "hopeless," when oil prices continued to decrease. He says there were jobs available in the oil industry at the time, but he did not qualify for them because they required an engineering degree, which he did not have.

[43] The Claimant explained that once those four employers placed him on their call lists he had to wait to see if work ever came available. He said he waited for them to call him but no work was available. Although he may have kept in contact with each company to refresh his interest of returning to work, I find it is more likely than not that he managed those contacts with very little effort or time. This left the majority of his time available to focus his energy on his self-employment and engaging in the operations of his corporations.

[44] When I asked why the Claimant didn't seek any other type of employment, the Claimant says he has no experience to work in any other industry. He states that the Commission should not penalize him for wanting to advance his own business, as there were no other jobs available to him.

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<sup>21</sup> Starting from 1:41.01 of the audio recording.

[45] The Claimant states that he looked for work on-line, job advertisements, and through friends and family. He says he did consider working in construction or the trades, as he knew people who worked in these industries but he never applied for any jobs in any industry except the oil industry.

[46] I am not convinced that the Claimant spent the majority of his time searching for work in the oil industry, during the period under review from March 27, 2016, to March 25, 2017. Rather, as set out above, he consistently states that he was very well connected and well known in the industry. He was well aware of the downturn in the industry, and as he said, the job prospects were, “hopeless.” He admits that he wasn’t qualified for the few jobs that were available so he was not successful in getting employment, even when leveraging his connections.

[47] As set out above, the Claimant initially states that he went into his store on a regular basis, but it was more on a volunteer basis. When the Commission asked him how often he worked at the store, he said he didn't have set hours, he just went in “most days” and helped out, because he wasn’t working. During the hearing, the Claimant contradicts his previous statements by saying he was only at the store to see his wife for approximately 5 to 8 hours per week. He says he would clean shelves from time to time but then insists that he never spent more than 8 hours per week “at the store.” He argues that no one can prove how much time he spent working in the store. As I set out earlier, I do not find these statements credible because they clearly contradict the Claimant’s previous statements in his appeal, reconsideration request, and his answers to the Commission’s questions.

[48] Further, the test I must determine is how much time the Claimant was engaged in self-employment and the operation of his business, not how many hours he spent at his retail store. Engagement in self-employment includes various business activities such as any of the following. Self-studies; business courses; computer courses; telephone calls; negotiations for loans, leases, and new franchise agreements; travel relating to setting up new locations; banking; running errands; ordering stock; doing unpaid work at the store; negotiating the sale of a business; all business-related discussions or meetings with professionals including suppliers; lawyers; bankers; CEOs; accountants.

[49] I find that the evidence supports a finding that the Claimant asked to be laid off from his job with WCPWC so that he could spend more time in his self-employment and engaged in the

operation of his business. The Claimant readily admits that he negotiated the lease for their first location and invested \$40,000.00 while he continued to work in the oil industry. This is further evidence that he was engaged in the operation of the business prior to the onset of his March 27, 2016, EI claim. He then became 50% owner of a second corporation, signed for a \$200,000 personal loan from the franchise CEO, entered into a 10-year lease, and opened their second store in June or July 2016, while he was collecting EI benefits. He readily admits that he was in SK when this second store opened up. On a balance of probabilities, I find that the forgoing evidence supports a finding that the Claimant was fully engaged in setting up this second corporation and store.

[50] When asked when the Claimant became a paid employee of his corporations, he said it was not until 2018. However, the Record of Employment (ROE) states his first day worked is April 10, 2017, only 16 days after his EI claim ended. I also asked why, if he was just a salesperson at his own stores, his wage was higher than his wife's, who was the manager, and any other sales clerks they employed. He argued that it is not unusual for sales positions to earn more than management. He reiterated that it was not illegal to pay himself more.

[51] I then reviewed the Commission's questions as listed in the GD3-222 document. Specifically, why he hired others to work in his store while he was collecting EI benefits. The Claimant deflected this question and said that he didn't understand the severity of the Commission's questions. Then he said he didn't have any influence over who was hired to work in their stores, which I find incredible.

[52] I am not convinced by the Claimant's response that he didn't have any influence over who was hired to work in their stores. Nor is his statement credible when he says that he wasn't qualified to work in the store during the period he was on his EI claim. I asked him to explain how he could be so successful and earn such a high wage of \$32.10 per hour, immediately upon his hire date. I note that the Claimant initially states he took courses in June 2017, "after my claim was over."<sup>22</sup> He clarified that he spent the next, "considerable amount of months and time researching the field very heavily." He says he took on-line courses and preparing himself for

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<sup>22</sup> At 1:49.03 of the audio recording.

that position because it was the only way that he could earn his own income and not have to claim EI again in the future.

[53] When I asked the type of courses he took, the Claimant replied that it wasn't anything "registered." He says he took, "a lot of on-line courses," such as "excel or courses you buy on-line," and he read a lot of books. He says they were primarily business courses and scientific studies related to vitamins and supplements. When I asked when he started taking these courses, he said, "after my claim was over." When I asked if he wanted to submit evidence in support of these statements, the Claimant said there is nothing to submit because they weren't "registered."

[54] I asked the Claimant why he didn't spend his time off work studying to be qualified for the few oil industry jobs that were available instead of studying and taking courses to learn the vitamin and supplement industry. He responded that he would have to go to university to get an engineering degree for the few jobs that were available.

[55] I am not convinced that the Claimant conducted his business education as of June 2017. This is because he says that when he became a paid employee, he had studied and developed the knowledge and skills to be the most successful salesperson, warranting a wage of \$32.10 per hour from the onset of his employment. I recognize that his corporation issued him a ROE stating that his first day worked is April 10, 2017. This is two months before he says he started his business studies and several months after his two corporations and two retail stores were operating.

[56] I find that as of March 27, 2016, the Claimant was self-employed and engaged full-time in the operation of his businesses. This is because in his appeal he states that he, "volunteered to take a lay-off," and he worked in his business with absolutely no pay. He states during the hearing that he did self-study and on-line courses in order to advance his business knowledge. He continues his efforts to promote his businesses as he is actively working on setting up a fourth business and store location. Although he states he was actively looking for work in the oil industry, he readily admits that the work he was seeking was no longer available as the prices of oil continued to drop.

[57] Further, I find that it is more likely than not that the Claimant was fully engaged in the activities required to set up his second corporation and store, while he was collecting EI benefits.

The witness testified that it took several months to form their second corporation effective June or July 2016. The Claimant owns 50% of the shares for this second corporation, which operates their retail store in SK. This retail store opened in November 2016. The Claimant testified that he was in SK visiting family during the time this store opened. He asserts that he did not work at the SK store and was not involved in the set up because the franchise crew did the setting up. As stated above, the test is now how much time he spent at the retail store. Rather, the test is how much time he spent in self-employment or engaged in the operation of the business.

[58] After careful consideration of the totality of the evidence before me, I find it is more likely than not that the Claimant was self-employed and engaged in the operation of his business full-time, working more than 30 hours per week, during the entire period under review. The facts support that he waited almost 5 months after their first store opened before volunteering for a lay-off from his paid employment. This provided time for him to monitor the success of their first corporation and store before applying for EI benefits. He then engaged in setting up their second corporation and opening their second store, shortly after he started collecting EI benefits. So, based on the foregoing, I find as fact that, during the period under review from March 27, 2016, to March 25, 2017, the time the Claimant spent in his self-employment and engaged in the operation of his businesses was full-time, working more than 30 hours per week.

b) Nature and Amount of the Capital and Resources Invested

[59] The Claimant confirmed the Commission's submissions that he initially invested \$40,000.00 into their first corporation and he was a signatory on the loan. He was still working in the oil industry when he negotiated their first 10-year lease. Then he signed to secure a \$200,000 personal loan from the franchise CEO, to set up their second corporation and open their SK store in June or July 2016. He set up this corporation and opened their SK store during the period he was claiming EI benefits. The Claimant entered into a 10-year lease for their second store. He was involved in setting up their third corporation, owning 50% of the shares, borrowing \$200,000 from a bank, and entering into a 10-year lease to open their BC location in December 2018. The witness states they are currently working on setting up a fourth corporation to open up another store.

[60] The Commission submits that the Claimant retained the services of both a business lawyer and an accountant. This evidence is not in dispute.

[61] I have carefully considered the Claimant's \$40,000.00 personal investment, the \$400,000 corporate loans, and the fact that his businesses have continuously operated since the first store opened in approximately October 2015. This evidence supports a finding that the Claimant has a significant amount of capital and resources invested in his self-employment and business operations.

c) Financial Success or Failure of the Employment or Business

[62] The Commission states the Claimant's business is financially viable and successful. This is because it began operating in October 2015, and it is currently his principal means of livelihood.

[63] As set out above, the Claimant's business is a financial success, which he continues to expand. He owns 50% of each of their three corporations. They opened their first store in AB around October 2015. They opened their second store in SK around July 2016. They opened their third location in BC in December 2018. They sold their AB location in October 2018, so they currently operate the stores in SK and BC.

[64] The witness states that she and the Claimant are working on setting up a fourth corporation to operate at a new location. The Claimant states that currently, these businesses are his principal source of income. He argues that the Commission should not punish him for operating a successful business that provides employment for others. I find as fact that the undisputed evidence supports the Claimant's businesses are a financial success at this time.

d) Continuity of Employment or Business

[65] The Commission submits that his business commenced operations on October 3, 2015. Based on the Claimant's appeal his business is still operating.

[66] As set out above, the Claimant's first corporation was established July 15, 2015, their second corporation was established around July 2016, and the third was established with their



store opening in December 2018. Therefore, the evidence supports that the Claimant's self-employment has been in operation since July 2015, and is ongoing.

e) Nature of the Employment or Business

[67] The Commission submits that the Claimant told them he owns and operates two S.K. franchises. The Claimant states that he owns 50% of each corporation that own and operate the three franchised retail stores, selling supplements (vitamins) in the industry of sports nutrition.

f) Willingness to Seek and Immediately Accept Alternate Employment

[68] The law states that a claimant will not be considered unemployed if, all the while he is receiving EI benefits, he merely says he is available to work and does not undertake serious, real steps to find suitable employment.<sup>23</sup>

[69] The Commission acknowledges that the Claimant now says that he did not work in his business during his claim because he was seeking employment with a higher level of pay. The Commission submits that the Claimant's job search does not show that he was actively seeking alternate employment during the 12 months he was collecting EI benefits. This is because his job search indicates he only applied for seven positions during this period.

[70] As set out above, the Claimant testified that he was very "connected" in the oil industry. He states there are only a few employers who controlled the industry in their small town. He testified that he attended four interviews with employers listed on his job search. These employers placed him on their hiring lists. He then waited for them to call him to work. He repeatedly said that he was very connected and knowledgeable of what was happening in the oil industry. When the industry continued to go "further and further down," his job prospects were "hopeless." He reiterated that despite being so well connected there were simply no jobs in the oil industry that he qualified for.

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<sup>23</sup> *Charbonneau v Canada (Attorney General)*, A-699-02

[71] As set out above, the Claimant says he looked for work on-line, in job advertisements, through word of mouth with family and friends. He considered looking for a job in construction and trades but did not apply for any other jobs outside of the oil industry.

[72] When asked why he didn't start looking for jobs in other industries, the Claimant argued there was no other industry in his town. However, based on the undisputed evidence that his own corporations were hiring employees, there was an opportunity for him to work in retail sales at his supplement stores.

[73] I commend the Claimant for having the knowledge and foresight to know that the oil industry would no longer be viable employment. He took action by investing in his future, educating himself, and becoming a successful self-employed person engaged in the operation of his business. However, as set out above, the intention of EI is to support those who are unemployed, during a week of unemployment, not people who are self-employed who are not undertaking serious, real steps to find suitable employment outside their self-employment.<sup>24</sup>

[74] Overall, I find that the Claimant has failed to show he had a willingness to seek and immediately accept alternate employment. This is because restricting a job search to a specific job, that the Claimant knows is no longer available, is not a willingness to seek or immediately accept alternate employment. He has not proven that he made serious efforts to find an alternate type of employment. The evidence supports that he focused his time and energy on expanding his knowledge and growing his self-employment.

**Does the Claimant meet the exception to be entitled to EI benefits while engaged in self-employment?**

[75] No. I find that the Claimant has failed to meet the exception.<sup>25</sup> I accept the Commission's submission that when viewing all six factors objectively, the evidence supports a finding that the Claimant's self-employment and engagement in the operation of his businesses, was that of a person who was building his business so that he could rely on that level of self-employment as his principal means of livelihood.

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<sup>24</sup> Section 9 of the *Act*.

<sup>25</sup> See subsection 30(2) of the *Regulations*.

[76] I do not accept it is a mere coincidence that the Claimant volunteered for a lay-off, five months after their first store opened. Rather, on a balance of probabilities, I find he was well aware of the downturn in the oil industry and knew how well his first corporation was performing, so he decided to collect EI benefits while he was self-employed and engaged in the operation of his business. He then started his second corporation and opened up the second store in SK while in receipt of EI benefits. The evidence supports that Claimant put his efforts into building his businesses, which has sustained him since April 10, 2017, only 16 days after his claim for EI benefits ended. Therefore, I find as fact that the Claimant's involvement in his self-employment was not minor in extent.

**Has the Claimant rebutted the presumption that he worked full workweeks during his entire benefit period?**

[77] No. After consideration of the totality of the evidence, as set out above, I find that the Claimant has failed to rebut the presumption that he was working full workweeks.

[78] The Commission submits that it is more likely than not that the Claimant was working more than 20 hours per week at his own business during the period of his unemployment. They note that the Claimant's corporation issued him a ROE on February 14, 2018, stating that his first day worked was April 10, 2017. They state that this ROE shows the Claimant was working (on average) 40 hours per week. The Commission notes that according to this ROE the Claimant was working as a sales clerk, earning slightly more than \$31.00 per hour.

[79] The Claimant's representative argues that the Claimant has rebutted the presumption. He says the Claimant has proven he was not operating the business; he did not rely on his self-employment as his principal means of his livelihood; he did not work more than 8 hours a week at the store; and he was not involved in the set-up of the business because it is primarily his wife's business. He also submits that the Claimant has shown his willingness to return to work. The representative relies on three Federal Court of Appeal decisions<sup>26</sup> in support of his

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<sup>26</sup> The representative cited *Martens v Canada (Attorney General)*, 2008 FCA 240; *Charbonneau v Canada (Attorney General)*, 2004 FCA 61; and *Marlowe v Canada (Attorney General)*, 2009 FCA 102, in support of his submission that the Claimant rebutted the presumption that he worked full workweeks.

arguments that the most important factors are the amount of time the Claimant spent in the business and his willingness to seek other employment.

[80] I agree that the Federal Court of Appeal has upheld that the most important factors are time spent and a willingness to seek other employment. However, I find that the Claimant has failed to prove he was working or engaged in the operation of his business for less than 10 hours a week. Rather, I find he was self-employed and engaged in the operation of his business, working a full working week. As set out above under the subheading, Time Spent Working in the Self-Employment, I find the Claimant's testimony about his engagement in his self-employment was not credible. Rather, I determined that, on a balance of probabilities, the Claimant worked more than 30 hours per week engaged in self-employment and the operation of his businesses, during the period he was in receipt of EI benefits.

[81] Further, I find that the Claimant could normally rely upon this self-employment as his principal means of livelihood, as it has provided for him since within 16 days after his EI claim ended. I also recognize that there is undisputed evidence that his corporations hired and paid other employees at the time the Claimant was collecting EI benefits. The test is not whether the Claimant chose not to rely on his self-employment as a means of livelihood, while collecting EI benefits. Rather, the test is whether his self-employment could normally be relied upon as a principal means of livelihood.

[82] As stated above, I find the Claimant's self-employment and engagement in the operation of his business was not minor in extent. This means that the Claimant is not entitled to the regular EI benefits he received from March 27, 2016, to March 28, 2017. This is because his self-employment and engagement in the operation of his businesses were not minor in extent and he has failed to rebut the presumption that he was working full workweeks during the entire period he was collecting EI benefits, from March 27, 2016, to March 25, 2017. This means that the Claimant is liable to repay the amounts the Commission paid to him as EI benefits to which he is not entitled to receive.<sup>27</sup>

**Did the Commission prove the Claimant knowingly provided false or misleading information on his biweekly claim reports?**

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<sup>27</sup> See paragraph 43(b) of the *Act*.

[83] Yes. To impose a penalty, the Commission has to prove that the Claimant knowingly provided false or misleading information.<sup>28</sup> To be subject to a penalty, the Commission has to show that it is more likely than not that the Claimant provided the information, knowing that it was false or misleading.<sup>29</sup>

[84] I do not need to consider whether the Claimant intended to defraud or deceive the Commission when deciding whether he is subject to a penalty.<sup>30</sup> Rather, if it is clear from the evidence, that the questions were simple and the Claimant answered incorrectly, then I can infer that they knew the information was false or misleading. Then, the Claimant must explain why they gave incorrect answers and show that they did not do it knowingly.<sup>31</sup>

[85] The burden rests upon the Claimant to ensure he completes his claims truthfully, as supported by the attestation he agreed to when completing each biweekly report. That attestation states, in part, "...that giving false information for myself or someone other than myself constitutes fraud. I also understand there are penalties for knowingly making false statements."

[86] The Commission submits that they met their burden of proving the Claimant knowingly made a misrepresentation because he failed to declare he was self-employed and had worked, on his biweekly reports. They state that the Claimant knew he is self-employed, and regardless of the fact that he may have worked without remuneration, he also knew that he had worked at his business while claiming EI benefits.

[87] The Commission provides copies of all 27 biweekly reports completed by the Claimant for the period from March 27, 2016, to April 1, 2017. On every report, the Claimant answered "No" to the question, "Are you self-employed?" He also answered "No" to the question, "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."

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<sup>28</sup> As per section 38 of the *Act*.

<sup>29</sup> *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.

<sup>30</sup> *Canada (Attorney General) v Miller*, 2002 FCA 24.

<sup>31</sup> *Nangle v Canada (Attorney General)*, 2003 FCA 210.

[88] The Claimant states that his sincere belief was that he was not self-employed because he was not significantly involved in his “wife’s business.” He asserts that he is a silent shareholder. As set out above, I do not find these statements to be credible. Rather, I favoured the Claimant’s initial statements to the Tribunal where he states, “I volunteered to take a lay-off...I decided to start my own business...I incorporated my first business and opened it a few months later...I worked in this business with absolutely no pay.” I also give weight to his initial answers to the Commission’s questions where he states that he, “did go to the store on a regular basis, but it was more on a volunteer basis.”

[89] I find that the Claimant’s answers on his 27 biweekly claims were misrepresentations, knowingly made. This is because the Claimant clearly knew he owns 50% of his first and second corporation, he was working without remuneration while engaged in the operation of both corporations during the period under review, ending March 25, 2017. Despite his involvement in both corporations, the Claimant made no attempt to clarify his circumstances with the Commission. Rather, he knowingly answered “No” to the questions, “Are you self-employed?” and “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.”

[90] I find it is clear from the totality of the evidence that the Claimant knowingly provided 27 false or misleading information on his biweekly claims. This means that the Commission may impose a penalty for each false statement made within 36 months of imposing the penalty. The Commission informed the Claimant they were imposing the penalty, in their March 19, 2020, letter. I will now determine whether the Commission properly determined the penalty.

**Did the Commission properly decide to impose a penalty?**

[91] Yes, the Commission properly decided the penalty. The Commission’s decision on imposing a penalty is discretionary.<sup>32</sup> This means that it is open to the Commission to set the penalty they think is correct. I have to look at how the Commission exercised its discretion. I can

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<sup>32</sup> *Canada (Attorney General) v Kaur*, 2007 FCA 287.

only change the penalty if I first decide that the Commission did not exercise its discretion properly when it decided to issue the penalty.<sup>33</sup>

[92] The Commission may impose a penalty for each false or misleading statement knowingly made. However, the Commission can only impose a monetary penalty within 36 months from the day on which the Claimant knowingly provided the false or misleading information.<sup>34</sup> The law provides that the Commission may issue a non-monetary penalty in the form of a warning, up to 72 months after the day on which the act or omission occurred.

[93] The Commission submits that they imposed a \$269 penalty for the last false report submitted by the Claimant. They state that this last false report fell within the 36 months prior to their date of adjudication. They also imposed a non-monetary penalty in the form of a warning letter for the 26 false statements that occurred more than 36 months prior to their adjudication date and less than 72 months after the day on which the act or omission occurred.

[94] I find that the Commission properly imposed the monetary penalty within the 36-month time limit. The Claimant completed his last biweekly report on April 2, 2017.<sup>35</sup> This report covers the two-week period from March 19, 2017, to April 1, 2017. The Commission informed the Claimant they were imposing the \$269 penalty in their March 19, 2020, decision letter. The Commission set the penalty amount at 50% of the related \$537 overpayment for the benefits paid for the week of March 25, 2017.

[95] The Commission states they set the penalty amount after considering the Claimant knowingly made 27 false statements relating to the facts that he was self-employed and engaged in the operation of two businesses. They also considered that this is the Claimant's first occurrence of making misrepresentations. They say he was reasonably aware that he was self-

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<sup>33</sup> *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.

<sup>34</sup> See paragraph 40(b) of the *Act*.

<sup>35</sup> See pages GD3-181 to GD3-186.

employed during his claim, he was working at his business (regardless that he wasn't drawing a wage), so he would have known to report this.

[96] The Commission maintained the penalty amount upon reconsideration. During the reconsideration process, they considered all of the Claimant's statements, including how he states he did not consider himself self-employed because he was not paid.

[97] The Claimant says in his appeal to the Tribunal that after filing for EI and not finding work, he started his own business. However, the facts, as set out above, show that he started his first corporation in July 2015, prior to applying for benefits. He then started his second corporation and opened the second retail store while collecting EI benefits.

[98] I find that the Commission exercised their discretion properly when setting the monetary penalty at \$269 and issuing the warning letter. This is because they considered all relevant factors. Specifically, they considered the time limits to issue the penalties and the fact that the Claimant knew he was self-employed owning 50% of each corporation. They also considered that despite the Claimant saying he worked without pay as a volunteer, he still knew he was self-employed and conducting work. In addition, they considered that the Claimant had no previous occurrences of misrepresentations. So I find that the Commission considered all relevant factors when determining the \$269 penalty amount and when issuing the warning letter.

**Can I write off or reduce the overpayment and penalty?**

[99] No. I do not have jurisdiction to decide on matters relating to a debt write off or reduction. That authority belongs to the Commission.<sup>36</sup>

[100] As stated earlier, I commend the Claimant for starting his own businesses when he realized that his chosen profession would not be sustainable in the oil industry. However, this does not change the facts that he collected EI benefits he is not entitled to receive. Nor does it change the fact that he knowingly provided false or misleading information by failing to report his self-employment and unpaid work. Although he may perceive this as an unjust result, my decision is not based on fairness. Rather, my decision is based on the facts before me and the

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<sup>36</sup> Section 56 of the *Regulations*.



application of the EI law. I cannot interpret or rewrite the *Act* in a manner that is contrary to its plain meaning, even in the interest of compassion.<sup>37</sup>

**CONCLUSION**

[101] I am dismissing the appeal in its entirety. The Claimant was self-employed and engaged in the operation of a business while collecting EI benefits. His involvement in his self-employment was not minor in extent and he failed to rebut the presumption that he was working a full workweek while collecting EI benefits. This means the Claimant is liable to repay the \$25,132.00 of EI benefits he is not entitled to receive.

[102] The Commission has proven that the Claimant knowingly provided false or misleading information on his biweekly reports. The Commission properly issued the \$269 penalty and the warning letter.

[103] I do not have jurisdiction to write off or reduce the overpayment or penalty.

Linda Bell

Member, General Division - Employment Insurance Section

HEARD ON:	March 10, 2021
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	J. A., Appellant (Claimant)  Zayd Memom, Law Student Representative for the Appellant  G. A., Witness for the Appellant

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<sup>37</sup> *Canada (Attorney General) v Kneé*, 2011 FCA 301.