



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *X v Canada Employment Insurance Commission*, 2018 SST 1439

Tribunal File Number: GE-16-3529

BETWEEN:

**X**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

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

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DECISION BY: Teresa M. Day

HEARD ON: May 25, 2017 and August 23, 2017

DATE OF DECISION: July 31, 2018

## REASONS AND DECISION

### OVERVIEW

[1] The Appellant, X, was investigated by the Respondent, the Canada Employment Insurance Commission (Commission) for issuing a fraudulent record of employment (ROE) to J. L. J. L. reported that she never worked for X. The Commission investigated, and concluded that the ROE was issued for work that was never performed. The Commission further concluded that X knowingly provided false information when it issued the ROE and during the Commission's investigation, and imposed a penalty on X in the amount of \$16,888.00 pursuant to subsection 39(1) of the *Employment Insurance Act* (EI Act) for doing so. The Appellant asked the Commission to reconsider the decision and penalty on the basis that J. L. had worked for the company and was paid for her work in cash. The Commission maintained its decision to impose a penalty upon the Appellant for knowingly providing false information, but reduced the penalty to \$15,277.00. X appealed the reconsideration decision to the Social Security Tribunal (Tribunal).

[2] The Tribunal must decide whether a penalty should be imposed upon the Appellant pursuant to subsection 39(1) of the EI Act for knowingly making false representations in connection with the ROE issued to J. L.

[3] The Appellant's designated representative, F. K., attended the hearing of the appeal, which took place over two (2) days on May 25, 2017 and August 23, 2017. The hearing was held as an in-person hearing because credibility was expected to be a prevailing issue and because this form of hearing respects the requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

[4] The Tribunal finds that the Appellant knowingly provided false information when it issued the ROE in question to J. L. and when it subsequently provided false documents and statements to the Commission in an attempt to substantiate J. L.'s employment. The Tribunal further finds that the Commission exercised its discretion in a judicial manner when it imposed a

penalty upon the Appellant for doing so, and when it fixed the penalty at \$15,277.00 during the reconsideration process. The reasons for this decision follow.

### **PRELIMINARY ISSUES**

[5] The ROE under investigation was signed by D. K. on behalf of X on August 18, 2014 (GD3-12).

[6] A corporation profile report for X as of April 21, 2015 (GD3-13 to GD3-15) indicated the company was incorporated on September 4, 2012 and listed D. K. as the first and only Director of X.

[7] D. K. was the sole Director of X at the time the ROE in question was issued.

[8] In appeal materials filed by X on September 20, 2016, D. K. designated F. K. as the authorized representative for X (GD2-4).

[9] At the opening of the hearing on May 25, 2017, F. K. stated that D. K. is his mother-in-law.

[10] F. K. further stated that S. K., whose name will come up below, is his wife.

[11] F. K. also stated that he was the current President and “100% owner” of X. F. K. advised that he was previously the “CEO” of X, with “no ownership interest”; and that he was representing X on this appeal because he “was the one who made all the decisions” and could “speak to what happened”.

[12] F. K. also advised that he would be the only person to testify at the hearing in support of X’s appeal.

### **EVIDENCE**

[13] On May 5, 2015, the Commission received a letter from the Real Estate Council of Ontario (RECO) requesting confirmation of the validity of an ROE bearing serial number E28772411 issued by X to J. L. (GD3-3 to GD3-12). In this letter, RECO advised it had received a complaint from J. L. that a real estate agent named S. K. had allegedly provided “a

false employment document” from X, “namely a pay stub” to a prospective lender in support of a mortgage application by J. L., but J. L. maintained she was never employed by X. In response to J. L.’s allegations, S. K. had provided RECO with the ROE in question, a copy of which was attached to the RECO letter (GD3-12).

[14] The ROE indicated that J. L. worked for X from March 17, 2014 to July 18, 2014 and earned \$11,232.00 before she quit the employment (see Code E on the ROE). The ROE was signed by D. K. on behalf of X, and dated August 18, 2014.

[15] RECO asked the Commission:

“Would you be able to confirm if this is a valid ROE issued to X and whether Service Canada has received and/or processed said ROE in respect of employee J. I.” (GD3-4)

[16] When the Commission looked into its own internal records, it discovered that X had ordered three (3) ROEs - on October 1, 2014: serial numbers E28772411, E28772412 and E-28772413 (GD3-17 to GD3-21). Only one of these ROEs was ever issued, and that was the ROE for J. L., which bore the first serial number in the series.

[17] The Commission launched an investigation into the validity of the ROE.

### **First Interview with J. L.**

[18] On September 2, 2015, an Integrity Services Investigator for the Commission (Integrity Investigator) interviewed J. L. The Integrity Investigator’s notes from that interview are at GD3-24 to GD3-25. The Investigator noted J. L. made the following statements:

- a) She and her husband (Mr. L.) were new to Canada.
- b) She never worked for X and does not know the name of the person who signed the ROE, namely D. K.
- c) She and S. K. became friends while they were both working at Walmart. J. L. worked full-time at Walmart. S. K. was a supervisor at Walmart and also worked part-time as a real estate agent.

- d) S. K. told J. L. that she and Mr. L. were spending too much money on rent and that she could help them get a mortgage and buy a house instead of renting.
- e) S. K. found a house for Mr. L. and J. L. to purchase.
- f) S. K. and S. K.'s husband (J. L. said his name was "M.") went with Mr. L. and J. L. to a Royal Bank of Canada (RBC) branch in Mississauga to discuss a mortgage for Mr. L. and J. L. When the mortgage specialist advised they could not qualify for a mortgage due to lack of employment, S. K. spoke up and told J. L. to include her full-time work with X. S. K.'s husband had to leave to take a call. S. K. answered the mortgage specialist's questions about J. L.'s employment at X by reading information off her phone, which her husband was outside texting to her. The mortgage specialist asked why S. K. was answering instead of J. L., but S. K. told him J. L. was new to the country and her English was poor. The mortgage specialist said he would consider the application and get back to them the next day.
- g) Afterwards, a heated argument ensued between Mr. L. and J. L. and S. K. and her husband, but J. L. was told not to worry.
- h) The next day, J. L. gave \$10,000 to S. K. for the down payment on the house.
- i) RBC turned down J. L.'s mortgage application.
- j) S. K. took Mr. L. and J. L. to the Vendor's real estate agent's office, where they signed a bunch of paperwork.
- k) S. K. also took Mr. L. and J. L. to a run-down office, where they were given cheques and J. L. provided identification documents, including her passport, health card, SIN, Driver's license and Citizenship card. S. K. then drove J. L. to a Cash Money store, where J. L. cashed one of the cheques for \$1,200.00 and then immediately gave the cash to S. K.
- l) Mr. L. and J. L. then went to look at the house for the first time.
- m) When they saw it, they thought it was horrible. There were so many lies and they couldn't get a mortgage, so they just wanted their \$10,000.00 back.

- n) S. K. said she would refund their money.
- o) S. K. had Mr. L. and J. L. complete more paperwork, which she told them was for their refund.
- p) A few days later, a Century 21 agent contacted Mr. L. and J. L. and told them their mortgage from Exceed Mortgage was approved. They told the agent they were not proceeding with the sale and were waiting to get their deposit back, but the agent told them it was non-refundable.
- q) Mr. L. and J. L. tried to get a meeting with S. K., but S. K. would not meet with them. S. K. quit Walmart and stopped returning their calls.
- r) Mr. L. and J. L. then advised Exceed Mortgage that the application was fraudulent, and the mortgage was cancelled. They also reported S. K. to RECO.
- s) Mr. L. and J. L. are still trying to get their money back, and have been fighting with everyone for a year now.

[19] J. L. provided the Integrity Investigator with the following documents:

- a) the ROE issued to her (GD3-29);
- b) a X cheque dated July 24, 2014 for \$1,012.96 payable to J. L., with a corresponding paystub (GD3-30 to GD3-31);
- c) a paystub from X to J. L. for a payment of \$1,021.96 on July 10, 2014 (GD3-32); and
- d) various documents from the real estate transaction described by J. L. (GD3-33 to GD3-48), one of which refers to an Agreement of Purchase and Sale signed August 5, 2014 – including a copy of a \$10,000 bank draft issued August 6, 2014 and payable to Century 21 (GD3-27 to GD3-28), and a series of Home Inspection reports dated August 15, 2014 .

[20] By letters dated September 22, 2015, the Integrity Investigator issued directions to D. K. and “M. Khan” to attend for interviews on October 13, 2015 (GD3-49 and GD3-50, respectively). They were directed to bring X’s business plan, 2013 and 2014 tax assessments,

vendor receipts, contracts, payroll, business costs, staff payroll, general ledger, vendor purchase orders, copies of cancelled cheques for all staff for the 2014 fiscal year and the company's business registration documents, permits and licences.

### **Attendance at X's Office**

[21] On September 29, 2015, the Integrity Investigator attended at X's business address in Brampton (see Investigation Information Sheet at GD3-51). The Integrity Investigator noted the lack of signage at the premises for X – or indeed any business at all – and that the office was filled with garbage and broken baffles. Neither D. K. nor F. K. was there at the time, but the Integrity Investigator spoke with a man who identified himself as X's Operations Manager. The Integrity Investigator asked the Operations Manager if he knew J. L. The Operations Manager said he never heard of her. The Operations Manager advised that D. K. was the owner of the company and that he (the Operations Manager) was a family friend.

### **First Interview with F. K.**

[22] Although the directions to attend for interview were issued to D. K. and "M.", both failed to attend their interviews.

[23] However, F. K. showed up on October 13, 2015 and he advised the Integrity Investigator that D. K. was not coming and that "M." was sick. F. K. stated that he was neither their lawyer nor their representative, and not a bookkeeper or an accountant, but that he is good at this stuff and was helping them out so this is fixed. Upon further questioning, F. K. identified himself as a Project Coordinator with X, which he described as helping to get projects organized so they can go ahead as planned.

[24] The Integrity Investigator's notes from the October 13, 2015 interview with F. K. are at GD3-52 to GD3-53. The Investigator noted F. K. made the following statements:

- a) He believes this a misunderstanding.
- b) X is in the business of a mechanical contractor dealing with heating, ventilation, plumbing, sprinklers, duct work and electrical work. The company bids on contracts

through third parties, who then sub-contract with X on projects. X had 9 employees in 2014 and 22 in 2015, all members of local trade unions.

- c) X made \$900,000 in 2014 and is on track to make \$1.9 Million in 2015.
- d) The staff consist of “Lyman”, a project manager; “Sharif”, the bookkeeper; F. K. himself, a supervisor and project coordinator, who also usually deals with X’s CRA stuff; “M.”, who is “Take off Infrastructure”; and D. K., the owner.
- e) M. is D. K.’s son.
- f) S. K. is M.’s wife and D. K.’s daughter-in-law.
- g) He has never met J. L.
- h) He thinks she was a cleaner at one of X’s buildings; she did not work in the office.
- i) J. L. never showed up again for her shifts after her July 24, 2014 pay cheque.

[25] F. K. provided the Integrity Investigator with the 366 pages of documents (GD3-55 to GD3-421), including:

- a) a list of the staff for 2014, with J. L.’s name at the bottom of the list (GD3-67);
- b) a series of 9 paystubs for J. L., all but one with handwritten notes indicating she was paid in cash (GD3-69 to GD3-77);
- c) the 2014 T4 Summary filed by X for 8 employees (GD3-286);
- d) an April 27, 2015 letter from X to Canada Revenue Agency (CRA), which reads in part:  

“With reference to the submission of our T4 slips for 2014, we unfortunately missed to submit one of our employee’s T4 slip. We have attached the T4 for the employee with revised T4 summary. We apologize for the mistake.” (GD3-288);
- e) the 2014 T4 slip issued by X for “JAYASREE K IYER” (GD3-290);



[26] The Integrity Investigator noted a number of instances during the interview when F. K. was *unable* to provide information, including:

- a) The Investigator asked what project X was currently working on, and F. K. said there were a couple of projects. The Investigator asked F. K. to name two. F. K. mentioned a new Mosque on Argentia Road, but stated that he could not think of another one.
- b) The Investigator asked F. K. if there was any other work X did. F. K. said they clean some buildings and perform some maintenance work. The Investigator asked F. K. to name a couple of sites. F. K. stated “right now I can’t think of any” (GD3-53).
- c) The Investigator asked F. K. how X could operate with only one cleaner working for them. F. K. stated that he would have to check.
- d) The Investigator asked F. K. why he initially did not know who the Investigator was talking about when the Investigator asked him about J. L., but then seemed to recall knowing J. L. after further questioning. F. K. said he just forgot.

[27] At the conclusion of the interview, the Integrity Investigator gave F. K. two weeks to provide copies of J. L.’s work schedule and payroll, cancelled cheques and a copy of her personal information which the payroll was generated against; along with the work sites and addresses where she worked so the Investigator could take J. L.’s photo to those sites and make enquiries. The agent noted F. K.’s response as follows:

“No she worked nights, no one will be able to notice her.”

The Investigator suggested F. K. could check with the companies for their agreements with X. F. K. stated that would not be possible because they were verbal agreements, but he would see.

### **Interview with Xceed Mortgage**

[28] On October 28, 2015, the Integrity Investigator met with two representatives of Xceed Mortgage, the mortgage company J. L. indicated had approved her mortgage application based on the false employment document from X. The Investigator documented the meeting in the

Investigation Information Sheet at GD3-422, and noted the following information was provided about J. L.'s mortgage application:

- a) J. L. was listed as a full-time site cleaner with X at a salary of \$31,199.00, with a total employment period of 3 years and six months.
- b) CMHC requested verification of J. L.'s employment.
- c) The broker listed an ROE as proof, but there was no copy of this ROE in the file.
- d) The mortgage application was received on August 15, 2014. When CMHC flagged the file as a security risk, Xceed Mortgage stopped the application. No money was disbursed and they dropped the file. They subsequently also dropped the broker who brought the file to them.

[29] Xceed Mortgage provided the Integrity Investigator with a number of documents, including the following:

- a) Mortgage Commitment between Xceed Mortgage and Mr. L. and J. L. (GD3-428 to GD3-434), for a total loan of \$285,158.17 in connection with the purchase of a Brampton property and a closing date of August 29, 2014; and
- b) Mortgage Application summary (GD3-436 to GD3-439).

[30] Under "Applicant Details" on the Mortgage Application summary, there were two current employments listed for J. L.:

- a) As a full-time cleaner with X for 3 years and 6 months, at an annual income of \$31,199.00; and
- b) As a part-time associate with Walmart for 6 months, at an hourly wage of \$26.00.

**Interview with a former employee of X**

[31] On November 2, 2015, an individual who was attempting to claim employment insurance benefits contacted the Commission because he was unable to obtain an ROE from X. This was

because the Commission had stopped issuing any ROEs to X as a result of the ongoing investigation (see Interview notes at GD3-53 and Record of Decision at GD3-463). The individual stated he was a real staff member who genuinely worked for X as an apprentice electrician. The Integrity Investigator arranged to interview this former employee of X (GD3-465).

[32] On November 5, 2015, the Integrity Investigator interviewed the former employee of X. The Investigator documented the discussion in the Report of Interview at GD3-443 to GD3-445. The former employee provided pay statements, cancelled cheques and emailed photos of his work site (see notes at GD3-466), along with details on how he came to be employed as an electrician by X (after a telephone conversation with “M.”), how he was paid (biweekly cheques, with source deductions) and how he received his instructions (a third party contractor’s site supervisor). The former employee indicated he mostly worked alone and only dealt with the site manager or by email with “M.”, whom he never met. He also made the following statements:

- a) He has never heard of J. L.
- b) He never saw a woman working on any part of the job site.
- c) He has never even heard of a cleaner on a job site.
- d) There were no cleaners on the job sites he has worked at.

When the Investigator asked him if it was possible that J. L. worked as a site cleaner for X, the former employee stated:

“not this site and no one has ever mentioned her name and a cleaner at any active site, cleaning, is not even safe, let alone practical.” (GD3-444)

### **Second Interview with F. K.**

[33] On November 13, 2015, F. K. telephoned the Integrity Investigator, who documented their discussion in the Investigation Information Sheet at GD3-446 to GD3-447. The Investigator noted F. K. made the following statements:

- a) He has done some digging and J. L. was given “piece work” and paid in cash for every room she cleaned, but he did not know how much she was paid per piece of work.
- b) J. L. only worked nights, but had flexible hours and came and went as she pleased. He did not know how she gained access to the buildings she cleaned.
- c) J. L. drove to the sites.
- d) J. L. was paid in cash at her own request, because she did not have a bank account. When the Investigator asked him how Walmart was able to pay J. L. by direct deposit, he said he was not sure.
- e) There were no deductions from J. L.’s pay, but he could not explain how X could issue an ROE for J. L. if the employer had not deducted premiums for employment insurance.
- f) The paystubs might be wrong, as they listed deductions.
- g) He had no response when asked if J. L. was given the coins if her pay was not an even dollar amount but dollars and cents, as on her pay stubs (example given was \$1,045.36).

[34] F. K. provided the Integrity Investigator with the addresses of two (2) buildings J. L. worked at, but advised that she only worked at nights and that the Investigator would not be able to confirm her presence at these sites.

[35] The Integrity Investigator visited both of the addresses provided by F. K., and reported on his findings in the Investigation Information Sheet at GD3-448. The Investigator was unable to access one of the buildings, which was a condominium. The other building was a community centre owned by the City of Toronto as part of Toronto Public Housing, and had unionized staff and a superintendent who did all of the cleaning. The Investigator confirmed that X is not listed as a contractor on the City of Toronto’s website, vendors or tender lists.

**Second Interview with J. L.**

[36] On January 14, 2016, J. L. provided the Integrity Investigator with a letter from Walmart verifying that she is a permanent full-time associate who works 37.5 hours per week and that she had been employed with Walmart since February 14, 2014 (GD3-453).

[37] On January 29, 2016, Mr. L. and J. L. met with the Integrity Investigator again. The Investigator's notes from his second interview with J. L. are at GD3-454 to GD3-455.

[38] The Integrity Investigator confirmed that neither Mr. L. or J. L. owned a vehicle and that they relied on public transit for their transportation needs. The Investigator calculated J. L.'s commute by public transit to either of the two work site addresses provided by F. K. (see paragraphs 34 and 35 above), and determined it would take J. L. between 2.5 and 3 hours just to travel one way to work (GD3-467).

[39] Mr. L. and J. L. had brought a written statement of facts with them to the meeting, which they signed in front of the Investigator (GD3-456 to GD3-459). In their written statement, they reiterated that J. L. never worked for X, and set out a chronology of events with respect to the real estate transaction they were involved in with S. K. As part of their written statement, Mr. L. and J. L. advised:

“Yesterday we lodged a preliminary complaint with Peel Regional Police located opposite Brampton Bus Terminal. The Ref: no. of the complaint is PR 150346362.”  
(GD3-458)

### **The Commission's Initial Decision**

[40] The Commission concluded that the ROE was issued for work that was never performed, and that X “colluded with a real estate broker” to issue a fraudulent ROE for J. L. (GD3-467).

[41] The Commission prepared a detailed 10-page record of its decision (GD3-461 to GD3-270), in which it noted the conflicting information and insufficient evidence provided by X to verify the ROE, including:

- a) The failure of D. K. and “M.” to attend for interviews as directed.

- b) The evasive answers given by F. K. on behalf of X during his interviews, including his statement that X already had problems with CRA and didn't need any more problems (see Interview notes at GD3-53 and Record of Decision at GD3-464).
- c) The 2014 staff list provided by F. K. (at GD3-67), which the Integrity Investigator noted had J. L.'s name added on at the bottom and in a different shade of ink (see Interview notes at GD3-53).
- d) The copies of paystubs provided by F. K. (at GD3-69 to GD3-77), all indicating a gross amount of \$1,200.00, vacation pay, source deductions, a net payable amount of \$1,012.96, and marked "paid in cash".
- e) The failure by X to provide bank account statements to show cash being paid to J. L. or consolidated business account statements showing cash being removed for casual labour and contracts with the buildings J. L. worked at, as requested by the Integrity Investigator (see Interview notes at GD3-446 to GD3-447 and Record of Decision at GD3-466).
- f) The lack of records to support that X employed or hired any cleaners prior to – or following – J. L.'s alleged employment between March and July 2014.

[42] The Commission determined that the work performed as indicated on the ROE was "fictitious" and that X knowingly issued a fraudulent ROE to Ms. Lyer (GD3-467). On this basis, a penalty was warranted against X under the employer penalties provided for in section 39 of the EI Act. The Commission also noted that X's attempts to conceal the fraud during the investigation would be considered in determining the sanctions to be applied.

[43] The Commission identified 9 false statements made in connection with the fraudulent ROE, including the provision of falsified documents to support the ROE and false statements by F. K. on behalf of X during the investigation (see GD3-466 and the list set out at GD3-469). The Commission then calculated that a total penalty of \$16,888.00 was applicable, after determining that there were no mitigating circumstances identified that might reduce the amount of the penalty (see calculations at GD3-469 to GD3-47).

[44] The Commission elected not to impose any penalty on J. L. because she did not utilize the ROE to collect employment insurance benefits and, in fact, came forward to disclose the fraudulent ROE to “all interested parties” (GD3-47). The Commission concluded that J. L. did not collude with X to issue the fraudulent ROE.

[45] By letter dated April 15, 2016 (GD3-47 to GD3-472), X and D. K. were advised of the Commission’s decisions that X had issued a fraudulent ROE for J. L. and that it had knowingly made 9 misrepresentations in connection with the fraudulent ROE, such that a penalty of \$16,888.00 was imposed.

[46] On April 16, 2016, a Notice of Debt was issued to D. K. for \$16,888.00 on account of the penalty imposed in this matter (GD3-473).

### **Request for Reconsideration**

[47] On May 12, 2016, X filed a Request for Reconsideration (GD3-474 to GD3-498), calling the Commission’s decision “unjust” and asserting that J. L. did work for X from March - July, 2014 (GD3-474).

[48] Attached to the Request for Reconsideration was a letter submitted by D. K. (GD3-476 to GD3-478), which contains the following statements:

- a) D. K. was not in the country for the October 13, 2015 interview, so F. K., whom she stated is “our Senior Project Manager”, attended instead (GD3-476).
- b) After the meeting, F. K. made several attempts to get in touch with the Integrity Investigator, who never got back to him.
- c) J. L. “was a family friend”, who is “cleverly using circumstances to get out of a real estate deal” (GD3-476).
- d) S. K. is D. K.’s daughter and is also a signing officer for X “when I am away” (GD3-476).

- e) S. K. worked with J. L. at Walmart. In February 2014, J. L. told S. K. of cash flow problems she was having because she was not getting enough hours at Walmart. S. K. spoke with D. K. about this, and D. K. hired J. L. to “clean up after our construction workers on various job sites” (GD3-476).
- f) D. K. listed 4 addresses where J. L. worked (GD3-476), one of which was X’s office in Brampton.
- g) D. K. stated that J. L. also cleaned a basement rented by X’s crew in Kingston, Ontario and was “always driven there (*sic*) by our Senior project manager whom (*sic*) went there for project site meetings” (GD3-476).
- h) J. L. was given flexible hours so she would not have any conflicts with her Walmart hours.
- i) Due to J. L.’s cash flow problem, she took the money “almost on daily basis”, but was given a paystub at the end of every pay period (GD3-477).
- j) S. K. had shown J. L. a few houses. On August 4, 2015, J. L. sent a house listing to S. K. via email. J. L. and her husband made an offer to purchase this house, conditional on financing and inspection.
- k) J. L. “called our Senior Project Manager” for “the Job Letter”, which was signed by the “Office Manager”. D. K. stated:

“Please note that our office staff have never met our field crew nor our field workers met our office staff. J. L.’s contact in the company was our Senior Project Manager, F. K., whom was responsible to create J. L.’s work schedule and transportation for out of town trips. This is why I gave him an authorization letter to deal with this matter as he is aware (*sic*) of the details.” (GD3-477)
- l) On August 15, 2015, J. L. and her husband signed off the waivers and made a deal with the vendors to buy their furniture.



- m) “Two days later”, S. K. “received a call from the listing agent that J. L. has approached the seller that her husband has got a job offer in Alberta so they can not (*sic*) go thru (*sic*) this deal and they want their deposit back” (GD3-477)
- n) The sellers did not accept J. L.’s request.
- o) D. K.’s letter stated:

“Then J. L. called S. K. and threatened her that she has spoken to some one and she was advised since S. K. has ties with X, it could be a conflict of interest. And she also said unless she gets her \$10,000 back she will deny that she ever worked at X. Upon S. K.’s refusal J. L. called the mortgage company & Reco etc.”  
(GD3-477)
- p) J. L. and her husband have “a strong command on English language” and are both “intelligent enough to know what they were getting into” when they put in an offer to purchase a house with a \$10,000.00 deposit.
- q) X and D. K. are “victim of circumstances” which J. L. used “to get out of the deal”.  
(GD3-447)
- r) X is a reputable contracting firm and “has no motive to ruin its reputation by issuing false controlled documents” (GD3-477).

[49] D. K. requested a meeting to “discuss this matter in person”, claiming “we were never given an opportunity to explain” their position in this matter (GD3-478).

[50] A different agent of the Commission made three attempts to contact D. K. regarding the request for reconsideration, but D. K. never got back to the agent (see Supplementary Record of Claim at GD3-499 and letter sent to D. K. on August 15, 2016 at GD3-504).

### **Third Interview with F. K.**

[51] On August 17, 2016, F. K. contacted the Commission’s agent in response to the agent’s messages for D. K. and the letter sent to D. K. requesting contact regarding the request for reconsideration.

[52] The agent documented her conversation with F. K. in the Supplementary Record of Claim at GD3-499 to GD3-503. The agent noted that F. K. made the following statements:

- a) He is the CEO and runs X; and he completed the Request for Reconsideration and wrote the letter purportedly from D. K. that was attached to it. He could answer the agent's questions.
- b) J. L. worked for X. She was hired to clean various job sites and, once a week, went to Kingston, Ontario to clean a house the company had. The cleaning involved sweeping the floors and cleaning up the construction sites.
- c) One of the sites J. L. worked at was a community centre. F. K. acknowledged it was a City of Toronto property, but stated that he was contracted out by X Contracting who had the bid.
- d) J. L. also worked at X's office, where she cleaned and vacuumed the office and cleaned the bathroom, which took her about 2 hours once per week. F. K. acknowledged what the Integrity Investigator saw at the office, but stated X is a construction company with materials in the office, and J. L. cleaned around it.
- e) J. L. travelled to the local construction sites on her own, but went with F. K. once a week to Kingston.
- f) She was paid \$15.00/hr to sweep construction sites, plus her travel.
- g) F. K. would tell J. L. where she was going to work each day, and she would tell him how many hours she worked.
- h) F. K. denied his prior statement that he did not know J. L.
- i) F. K. denied his prior statement that J. L. was paid by the rooms she cleaned.
- j) F. K. denied his prior statement that J. L. worked only at nights. He stated she sometimes worked during the day.

- k) She worked 40 hours/week, but her hours were flexible and she worked around her part-time schedule at Walmart.
- l) F. K. was asked how J. L. managed to get 40 hours of work in per week. The agent noted his response as follows:

“he stated if he felt a work site would take 6 hours and she did it in 2 she was paid the 6 hours. He was asked why the company would do that and he explained this was an incentive to get the work done and this is what he does with his electrician’s/ plumbers and other employees. So J. L. was paid \$15.00 per hour which included her travel to clean/sweep construction sites, she set her hours and regardless of how long it took to clean she was paid a set time and F. K. indicated yes.” (GD3-500)

- m) The position in Kingston was created for J. L., as she was a friend and they were trying to help her out. X had a cleaning company in Kingston before that, and they have since hired them back.
- n) F. K. was asked why J. L. was paid cash for every pay except once, when she got a cheque. He stated she was having cash problems, so he gave her cash, sometimes daily or every third day, but she wanted one cheque to prove she worked at X in order to get her mortgage for the house she then tried to get out of buying.
- o) F. K. was asked to explain why the pay stub J. L. supplied has a cheque number on it, but the copy submitted by the employer does not. F. K. denied that Ms. Lyer was given that cheque and stated she was paid cash. The agent noted:

“It was explained that upon review of the bank records that cheque was issued to “The House” on 25/7/2014. F. K. was advised when the pay stub that the employer submitted for this period it states “paid cash”, but looking closer at the stub it appears there was something by the “cheque number” and maybe the number was “whited out” F. K. does not know anything about that.”

- p) F. K. was asked how X forgot to include a T4 for “another employee” as set out in their letter to CRA on April 24, 2015. F. K. believed it was missed. The agent noted:

“F. K. was informed that upon review of the documents the amended form has 9 T4s and employment income of \$187,589.03 and the original form as 8 T4s and employment income of \$176,357.03. When the original amount is subtracted from the amended amount it is \$11,232.00. This amount is what the YTD amount is on J. L.’s pay stub is and what the total earnings on the ROE are. F. K. was advised that it appears only J. L.’s “earnings” were missing. F. K. stated he does not know about that.” (GD3-501)

- q) J. L. is “throwing the employer under the bus” because she tried to get out of buying a house (GD3-501). She was the one who sent S. K. the house listing.
- r) S. K. is his (F. K.’s) wife.
- s) F. K. denied his prior statement that S. K. is M.’s (D. K.’s son’s) wife.
- t) F. K. did, in fact, go to the meeting at Royal Bank with S. K. and J. L. and her husband. He had picked up J. L.’s husband, but he never texted S. K. about what to say to the mortgage specialist.
- u) J. L. sat in F. K.’s car and made up fake rent receipts.
- v) J. L. was a friend, but now she is saying she never worked for X because she wanted to get out of buying the house and is trying to get her \$10,000 deposit back. F. K. stated he would have given J. L. the \$10,000.00 if she had come to him, but they do not have this money because it was given to the vendor’s agent.

[53] When the agent advised F. K. that there was a lot of conflicting statements and information, F. K. indicated that he was caught off guard at the first interview when the investigator started asking questions about Ms. Lyer, and had no idea this was what the investigation was about.

### **The Reconsideration Decision**

[54] F. K. was advised during his third interview that the decision was maintained, but that the misrepresentations in the letter to CRA and the tax summary would now be considered as a

single misrepresentation, thereby reducing the number of misrepresentations from 9 to 8, which in turn reduced the total penalty from \$16,888.00 to \$15,277.00.

[55] A detailed record of the Commission's decision and penalty rationale is at GD3-505 to GD3-506, and includes the revised list of the false representations in the calculation of the penalty amount.

[56] By letter dated August 22, 2016 (GD3-507 to GD3-508), the Commission advised D. K. and X that the decision to impose a penalty in connection with the false ROE was maintained, but that the amount of the penalty was reduced upon reconsideration to \$15,277.00.

### **F. K.'s Testimony at the Hearing**

#### **A) On May 23, 2017: 3 hour hearing**

[57] F. K. advised the Tribunal that he is the current President and "100% owner" of X; and that he was previously "CEO" and the person who "made all of the decisions" and can "speak to what happened".

[58] F. K. further advised that he would be the only person testifying on this appeal.

[59] F. K. stated that D. K. is his mother-in-law and S. K. is his wife.

[60] F. K. stated that J. L. was "a friend of mine and S. K.'s before she started working for us".

#### **[61] F. K. testified as follows regarding J. L.'s employment with X:**

- a) He met J. L. 5 or 6 times before she started working at X. These were informal meetings that occurred when he came to see his wife and have coffee at Walmart.
- b) Contrary to what the Integrity Investigator noted at GD3-24, J. L. had a good command of English. F. K. and S. K. spoke to J. L. in English. J. L. herself worked as a cashier at Walmart and spoke to customers in English.

- c) In late February 2014, J. L. told him personally (and told S. K. - who also told him), that she was not getting enough hours at Walmart and “it would be nice to have another part-time job”.
- d) He discussed it with S. K. and D. K. and they said OK. He and S. K. met with J. L. in early March and offered her a job. She started “right away”.
- e) J. L.’s job was to clean the X office and job sites a couple of days a week. She would be paid \$15/hour.
- f) J. L. also started to clean F. K. and S. K.’s house once a week.
- g) J. L. swept construction sites, but did not have the same duties every day. F. K. gave as an example how if X workers had been “cutting out for ducts”, then J. L. would sweep the debris into the corner and put it in a box that would go out. F. K. stated that on every site, they have a shack or corner where they keep materials and job boxes, and the broom was kept there.
- h) These jobs were “new construction” on on-going projects, and X always had labourers on every project. X had to keep the area clean by cleaning either during the day or at the end of the day.
- i) “Very often”, F. K. personally took J. L. to the job sites. He would pick her up from a bus stop near her house and drive her to a different job site. He would show her what to do and leave her there. Sometimes the plumbers would show her what to do. He gave J. L. her instructions and monitored her performance.
- j) “Most often”, F. K. picked J. L. up from the construction site at the end of her day after 5 or 6 or 8 hours of cleaning. He would drop her off at the same bus stop, or at a nearby gas station.
- k) J. L. worked 4 – 5 days per week for them, and continued to work part-time at Walmart. This gave her a set 80-hour bi-weekly payroll.

- l) J. L. received \$120 per day. She was paid in cash, sometimes on a daily basis. She asked for cash because she did not want to deposit the money into her bank account. F. K. agreed to this but told her “it has to be on the books”, so she received pay stubs and every day was \$120 for 8 hours of work, regardless of whether she had actually worked 8 hours. She just had to get the assigned work done and then she would be paid for a day’s work regardless of the time spent.
- m) There were no time sheets, and no records kept of when F. K. gave J. L. cash or even how much cash he gave her. F. K. stated he just carried this information “in my head”. He stated:

“It was me. I saw her. Days never piled up. I paid every couple of days, so I didn’t have to rely on memories.”
- n) “A couple of times”, S. K. also drove J. L. to the X office or to their house or to the construction site.
- o) J. L. relied on F. K. to be told what to do, to get to the job site, and to get paid.
- p) J. L.’s last day of work was “end of July or early August”. F. K. stated that “things happened and she never showed up again”, namely “the thing” with the house, which caused “an issue” between J. L. and S. K. and led to the allegations made by J. L.
- q) J. L. was given a copy of her ROE (GD3-29), which was signed by D. K. on August 18, 2014.

[62] F. K. stated that he disputed much of the information provided by J. L. during her initial interview with the Integrity Investigator (at GD3-24 to GD3-25). He stated that the meeting at RBC was not a pre-approval, but took place after J. L. had seen the house and when she was applying for a mortgage to buy the property; the RBC branch was not located on X but on X; J. L.’s husband was not there; J. L. knew S. K.’s husband was F. K. – not M.; S. K. did not quit Walmart – she still works at the same Walmart and has done so the entire time; they did not walk away from the deal on August 15<sup>th</sup> after seeing the house with R. B. (the home inspector) – they waived the financing and home inspection conditions that day. F. K. stated:

“The entire interview is all lies.”

and

“This whole thing is because they want their money back.”

[63] **F. K. testified as follows about J. L. and the real estate transaction:**

- a) J. L. told the Investigator that they paid a \$10,000.00 deposit without ever seeing the house. F. K. stated this is not true because he (F. K.) was with them when J. L. and her husband saw the house on August 4<sup>th</sup>. F. K. stated that J. L. sent the listing to S. K. on August 4<sup>th</sup> (at GD3-495), then they went to see the house that day, and after that they went to the bank to see about a mortgage.
- b) He personally attended the meeting at RBC with J. L. because “she was a friend”. S. K. was also present at this meeting, as was J. L.’s daughter. F. K. went to the meeting at RBC and then he left to pick up Mr. L. at his work and bring him to RBC. F. K. dropped Mr. L. off at RBC and remained outside because he (F. K.) had things to do. F. K. did not text S. K. during the meeting.
- c) When they came out of RBC, they were very happy and that was when J. L.’s husband asked to see the house. F. K. then took J. L., her husband and her daughter to see the house. F. K. himself knocked on the door and asked the owner if Mr. L. could see the house. They agreed and “we saw it again”.
- d) The Vendors were from Guyana and were retired. F. K. personally met them when he took J. L. and her husband to see the house. F. K. was present when Mr. L. and J. L. “made a deal to buy all of their furniture” because the Vendors were moving back to Guyana.
- e) Mr. L. and J. L. put in a conditional offer in on the house the next day, August 5, 2014 (GD3-496). This was the only house S. K. showed J. L.



- f) RBC required some additional information. Then J. L. called and told S. K. she was not going to deal with RBC for the mortgage. J. L. told S. K. that the listing agent had called her and she was going to use the listing agent's services to get a mortgage.
- g) On August 15, 2014, Mr. L. and J. L. signed the Waiver to waive the financing conditions and the house inspection (GD3-497). J. L. had another mortgage and S. K. had nothing to do with that mortgage.
- h) The closing was set for August 29<sup>th</sup>, but on August 16<sup>th</sup> or 17<sup>th</sup>, the listing agent called S. K. to ask why Mr. L. and J. L. went to see the people who were selling the property and told them that Mr. L. got a job in Alberta and they cannot buy the house. Neither Mr. L. or J. L. ever contacted S. K. about this. S. K. called J. L., but there was no response. S. K. drove to J. L.'s home and saw her there, but J. L. refused to speak to S. K.
- i) Mr. L. and J. L. called up S. K.'s broker and demanded their money back. A meeting took place between Mr. L. and J. L., S. K. and S. K.'s broker. It's not true that S. K. said she would refund their money. S. K. was not in possession of the deposit, the Vendors' agent was.
- j) On August 22, 2014, Mr. L. and J. L. signed the Mutual Release at GD3-498 for the return of their deposit, but the \$10,000.00 was with the listing agent and the sellers never signed. The listing agent refused to give the money back.
- k) Mr. L. and J. L. did not close on the house on August 29, 2014, as they were scheduled to do under the Agreement of Purchase and Sale they signed on August 5, 2014.
- l) Afterwards, when it became apparent to Mr. L. and J. L. that they were not going to get their \$10,000.00 deposit back, they went to RECO and made a complaint against S. K.
- m) S. K. was interviewed by RECO, but there were "no consequences to S. K."
- n) J. L. never moved to Alberta. F. K. "heard" that J. L. now works as a cook in a hospital and that she and her husband bought a different house.

[64] F. K. stated that he believes the Integrity Investigator decided X “was guilty” on September 2, 2015 – the very first time he spoke with J. L. and her husband, as is evident from the Investigator’s notes in the last full paragraph at GD3-25, and his statements that he would “go after the company” and would “like to look at S. K. too and M.” (GD3-25).

[65] F. K. testified at length about the errors and incorrect information he has found in the Commission’s documents, including:

- a) The letter of September 22, 2015 from the Integrity Investigator to “M. K.” requesting he attend for an interview (GD3-50).
  - F. K. advised that “M. K.” is F. K.’s cousin’s son. He was an employee of X and made a call to Service Canada “once”, requesting the ROE forms. He no longer works for X. F. K. asked why the Investigator would want to speak to “M.”?
- b) The Investigation Information Sheet documenting the Investigator’s attendance at X’s business address (GD3-51).
  - F. K. stated that the Investigator focused on the fact there is no store front, but X’s office is not a store. It’s a supporting office for their construction work, and leftover materials are stored there.
  - According to F. K., “Ayman” is a Project Manager – not an Operations Manager.
- c) The Investigation Information Sheet documenting the Investigator’s interview with F. K. on October 13, 2015 (GD3-52)
  - F. K. is very upset and insulted that the Investigator misspelled his name in this report, even after F. K. showed the Investigator his photo ID.
  - F. K. stated that the Investigator treated F. K. “like a criminal” and was very insulting to him during the interview.
  - F. K. believed the Investigator wanted to see if X was a legitimate business. F. K. had all of the documents requested in the directions to attend for interview (at

GD3-49 and GD3-50) and submitted a large package of documents that proved the legitimacy of the business. Contrary to what the Investigator noted at the conclusion of the Investigation Information Sheet at GD3-53, at the end of the interview the Investigator told F. K. that he was satisfied that X was a legitimate business.

- F. K. denied telling the Investigator that M. was S. K.'s husband.
- F. K. denied telling the Investigator that M. was sick. He told the Investigator that M. was just an employee, with no authority. F. K. told the Investigator at the start of the interview that "these are all my decisions and I'm the one to deal with it".
- F. K. told the Investigator that he (F. K.) is CEO and "the one making all the decisions in the company". He was very clear about this, but the Investigator took four (4) paragraphs trying to sort it out.
- F. K. denied that he mentioned sprinklers or electrical work to the Investigator or that he said X gets its work through third parties. X gets invitations to bid for contracts.
- F. K. queried why the number of ROEs issued to X was relevant. X's employees stay a long time. Most are with union Local 30-sheet metal and union Local 46-plumbing, and some ask for ROEs and others don't bother and just go back to the union hall.
- F. K. called the Investigator's comments about X's office "irrelevant". The company bid's on tenders and gets invited to do so. It does not need a storefront.
- F. K. denied that he ever said X did work under verbal agreements. The documents F. K. provided at GD3-307, GD3-301, GD3-300 and GD3-293 all show work being done by written contract.

- F. K. speculated that the Investigator's notes were written by memory or merely a statement of what the Investigator thought a contractor business should be.
- F. K. brought all of the documents at GD3-55 to GD3-421 to the interview, but believes that the Investigator never looked at them when he wrote up the Investigation Information Sheet at GD3-52 to GD3-53.

d) The Report of Interview documenting the Investigator's interview with a former employee of X on November 5, 2015 (at GD3-443):

- F. K. was told at the October 13, 2015 interview that X would not get anymore ROEs until this matter was finalized. He told the Investigator about an apprentice who was returning to school and the Investigator told F. K. to "give him my number". The apprentice's name was R. and he was the person interviewed on November 5, 2015. F. K. stated:

"I've known R. since he was 10 years old, and he cannot give that interview."

- F. K. denied the entire Report of Interview, repeatedly declaring it to be "false" and "not true".

e) The Investigation Information Sheet documenting when F. K. called the Investigator on November 13, 2015 with further information (at GD3-446 to GD3-447):

- F. K. pointed out that this was his second time speaking with the Investigator, who asked F. K. for something that he had, in fact, already submitted at the time of the interview. According to F. K., this shows the Investigator never looked at the documents.
- F. K. was upset and insulted that the Investigator continued to misspell his name and the company's name. F. K. stated:

"You can see how rude he was to me."

- F. K. stated that the Investigator misconstrued the term “piece work”. The term “piece work” refers to “a day’s work”. F. K. merely wanted to see that the employee has fulfilled the day’s work.
- F. K. stated that X does new construction. According to F. K., there are no lockable doors on such job sites, they are just fenced in, and there are no security guards or surveillance cameras.
- F. K. denied the exchange about deductions, and stated that he had already submitted J. L.’s pay stubs at the interview, which once again shows that the Investigator didn’t look at the documents F. K. provided.
- Referring to the last paragraph on GD3-446, F. K. denied that he said he spoke with M. He stated that M. “had no involvement in this and is nobody”. He further stated that M. K. dealt with “safety implementation on jobs”, but it was not a full-time position. He was related to F. K., so F. K. gave him other responsibilities too. But the fact that the Investigator was still “confused” about M. K. and thought maybe he was hiding shows that no weight should be given to the Investigator’s reports.
- F. K. denied that he ever said J. L. did not have a bank account. According to F. K., his wife works at Walmart and is paid by direct deposit, and he knew that J. L. was too.
- F. K. denied giving the address as X, and stated that he had already submitted the evidence of the job sites when he came for the initial interview.
- F. K. denied that he told the Investigator that J. L. worked nights. He stated that J. L. only worked part-time at Walmart and “I know when she worked for me”.
- The Investigator never asked for the bank account statements referred to in the second paragraph at GD3-447.
- He disputed the Investigator’s “conclusion” set out at GD3-447.

[66] The Tribunal asked F. K. what evidence there was amongst the documents he provided to the Commission that proves the truth of the information set out in the ROE, namely that J. L. worked 720 hours of insurable employment between March 17, 2014 and July 18, 2014 and was paid gross earnings of \$11,232.00 before she quit (as per Code E on the ROE). F. K. referred the Tribunal to one thing: the pay stubs at GD3-69 to GD3-77.

[67] The Tribunal then asked F. K. what evidence there was that proves J. L. actually performed work for X. F. K. responded as follows:

“It’s a construction site. Let’s say there’s another employee just called tomorrow and said now I’ll work for you. We are in an industry, guys, there are no security cameras, there are no security guards, no employees of that company. It’s not a corporate space. It’s construction. So you have several different trades. One trade may work one day here, and one day there. Who are - am I really go by and verify this? I can verify for sure for you. I can call up S. M. who was a project manager from Rossclair. We had a project up in Kingston. So I used to go once a week to Kingston. We rented a basement in Kingston for our employees that came from Toronto to Kingston to work there, and I took J. L. with me to clean the basement. I can right now make a call to S. M. and ask S. M. how many times a week the girl came and cleaned the house.”

The Tribunal advised F. K. that he needed to do that.

[68] However, as it was towards the end of the 3-hour appointment, the Tribunal advised F. K. that further hearing time would be needed because he had spent the day’s appointment providing a lot of background information about why J. L. was motivated to make this complaint against X, and setting out his own complaints about the Commission’s Investigator and his belief the Investigator was biased against X. The Tribunal pointed out that F. K. still needed to satisfy the onus on X to prove the validity of the ROE with detailed and credible evidence that J. L. actually performed work for X during the period in question, and that verifies the other information set out on the ROE, namely the number of hours she worked and her earnings.

[69] F. K. stated he could prove:

- a) that he had cleaning companies prior to J. L.’s employment that did the cleaning for X, and that when J. L. was working for X those cleaning companies did not work. Then when she did not work, the cleaning companies did work;

- b) that he had labourers doing similar work on X's payroll before and after J. L.'s employment;
- c) that he had a maid service in Kingston that did the work in Kingston and did not work while she was there; and
- d) that he could call S. M. to testify that he saw J. L. working in Kingston.

[70] The Tribunal advised F. K. that he could bring witnesses and documents, including signed witness statements, to the next hearing appointment, and described the type of evidence that would be needed to support the ROE, including:

- a) proof that J. L. was given the ROE;
- b) proof that J. L. worked for X between March 17, 2014 and July 18, 2014 – the particulars as to who, what, where and when;
- c) proof that the 720 hours listed on the ROE is accurate, with an explanation as to how this number was arrived at; and
- d) evidence that she was at specific work sites and the work she did there.

The Tribunal stated:

“When you come back, you need to say where she worked, and you need to prove that you (X) had a contract to do that.”

The Tribunal explained that a chronological record of the work performed by J. L. would be best, and stated:

“So the idea is, she worked like March whatever, these were our job sites, and here are the contracts to prove I was the contractor for that site. Can we do something like that?”

To which F. K. replied: “YES”.

The Tribunal continued:

“OK. And then do March, April, May, June and into July. So, need the job sites and the contracts for those sites.”

The Tribunal explained that F. K. could either bring in written statements signed by a witness or contact his witness by telephone from the hearing room when the hearing reconvened.

[71] The Tribunal agreed to schedule a further 3-hour appointment. F. K. asked for time to prepare and estimated he would need three months to assemble the evidence and witnesses he intended to put forth. The Tribunal agreed and confirmed that there would be teleconference capability for his witnesses to participate by telephone.

### **F. K.'s Testimony at the Reconvened Hearing**

#### **B) On August 23, 2017: 1 hour hearing**

[72] F. K. offered to “make a couple of calls to a couple of guys” who worked for X at the time and will confirm that J. L. went to Kingston and did the cleaning. F. K. stated that “people somehow don’t want to give written statements”, but further stated that he could “make a call” and then the Tribunal could “verify through CRA that those guys did work for us at the time”. The Tribunal explained that it had no way of verifying such information, but would listen to the evidence given over the telephone and weigh that evidence accordingly. F. K. indicated he wished to proceed by making phone calls to his witnesses.

[73] F. K. advised that he had brought Minutes from a recent site meeting with him and stated that where there is a reference to “cleaning labourer” it “doesn’t mean cleaning toilets”. Rather, cleaning comes under “housekeeping” and it is set out in the Minutes from such meetings. F. K. stated:

“So instead of having a plumber or a sheet metal guy do the labour work, do the sweeping, or moving the boxes, we often have labourers do that work.”



[74] The Tribunal reminded F. K. of the discussions at the conclusion of the prior hearing appointment and that he was to have brought detailed evidence as to the locations of the job sites that J. L. had personally worked at, and on which days; and that he had to prove X had contracts for those job sites by providing copies of those contracts.

[75] The Tribunal reminded F. K. that the period in question was March 17, 2014 to July 18, 2014 and suggested he start “chronologically” with March 2014.

[76] F. K. produced a copy of a subcontract signed March 11, 2014 between X and X for “X” project, which F. K. advised was located at “X”. This document was entered into evidence and can be found at GD6-1 to GD6-8.

[77] When the Tribunal asked F. K. which days J. L. worked at the X job site, he stated:

“As I said, it’s not like, it’s not a steady, construction sites are not a normal household building. It’s not like on Wednesday, 3pm, you have to go clean. Construction sites, construction conditions change day to day. So, today if we chip out the wall to run our services through the wall, we have to clean the debris. So it has to be cleaned right at the end of the day every day. So if a lot of mess made right today, the cleaner or labourer would be present on that job site to do that.”

and

“This job site was 7 days a week. So whenever she was required to do the cleaning, and mind you she also had a part-time job at Walmart.”

[78] When the Tribunal reminded F. K. that he had to prove how many hours J. L. worked at this job site and what period of time she worked there, he stated:

“I cannot prove for any of the employees how many hours they worked on a job site and what, exactly they did. It’s a huge job. It was a \$1.8 Million project.”

[79] When the Tribunal asked whether there were time records, F. K. stated:

“She was paid daily. She was paid daily, believe it or not.”

and

“That’s in cash.”

[80] F. K. then produced a copy of another subcontract with X from March 2014, this one for the “X” project, which F. K. advised was located at “X and X”. This document was entered into evidence and can be found at GD6-9 to GD6-15.

[81] F. K. testified that:

- a) J. L. took public transit, namely the TTC, to both this site and the X site, and “sometimes she went with me”.
- b) There was another job site in X called “X”, which was a project at “X and X”, which J. L. also got to via public transit “or with me”. F. K. produced a one-page document entitled “Purchase Order” in relation to this project. This document was entered into evidence and can be found at GD6-16.

[82] When the Tribunal asked how J. L. got paid when she took public transit to work, F. K. pointed out that J. L. told the Commission that she did not have a car and relied on the TTC, and he stated:

“I saw her every day. I went on every job site, every day. I go on every job site, every day. That’s my job. And these two job sites are 15 – 20 minutes apart.”

[83] F. K. testified that J. L. also went to Kingston with him, “either Tuesdays or Thursdays”, but stated that he did not have any documents with him related to the Kingston project.

[84] F. K. then indicated he would telephone “D. S.”, who is a plumber and a former employee of X, and could testify that J. L. did the cleaning in the basement apartment in Kingston. F. K. reached D. S. and put the call on speaker phone so it could be heard by the Tribunal and recorded. D. S. agreed with F. K.’s statements that he stayed “in the basement” at Kingston, and that “a girl used to come and clean the basement”. However, D. S. stated that he was only there for 3 or 4 weeks and further stated that he couldn’t remember her name. D. S. suggested F. K. try to reach someone named “D.”.

[85] F. K. then indicated he would telephone “D. C.”, who was also a former employee of X who stayed in the basement when he worked on the Kingston project. However, D. C. did not answer the phone call and it went to a voicemail box.

[86] F. K. then made three (3) further telephone calls to three (3) other former employees of X who had also stayed in the basement while working on the Kingston project. However, none of these individuals answered the phone calls, and they went to voicemail boxes.

[87] The Tribunal asked F. K. if there were any mitigating circumstances that should be considered with respect to the penalty that has been imposed in this case. F. K. responded that the ROE is not a false document, so there should be no penalty.

[88] F. K. further stated that X “produced a T4 slip” and submitted the employer contributions “CPP, EI, the taxes” to Canada Revenue Agency “as per the T4 slip”, and queried “how the government can want penalty” on top of that.

[89] F. K. asked if he could make “one or two more calls so you will see that she worked there”? The Tribunal declined his request. The Tribunal reminded F. K. that he had been very clearly advised when the hearing was adjourned on May 23, 2017 that he would have to be prepared to prove J. L.’s employment when the hearing reconvened. The Tribunal advised F. K. it was not going to allow him to continue to make random calls in the hope of finally getting someone to answer the phone.

[90] F. K. stated that X always had a labourer working with them to do the cleaning, and that he employed “people after her” to do that work. F. K. stated that “S. K.”, who was no relation to him, was hired to replace J. L. in July 2014 and she worked for X for “about 2 -3 months”. The Tribunal advised F. K. that he could make a telephone call to S. K.. However, after checking his mobile phone, F. K. stated that he did not have a phone number for S. K..

[91] As a final item of evidence, F. K. produced two documents entitled “Meeting Minutes” for Trade Coordination meetings held on June 29, 2017. These documents were entered into evidence and can be found at GD6-17 to GD6-30. F. K. stated that these documents were from a current contract and:

“This I brought in to show you that, as a trade, we are required to clean up after ourselves.”

## **SUBMISSIONS**

[92] The following submissions were made by F. K. on behalf of the Appellant:

- a) X is a legitimate company and the ROE issued by X accurately represents J. L.’s employment with X. She worked 720 hours of insurable employment between March 17, 2014 and July 18, 2014, and had insurable earnings of \$11,232.00 that were paid to her in cash. The dates of J. L.’s employment, the number of hours she worked and the amount she was paid are backed-up by pay stubs X has provided to the Commission. X also issued a T4 slip for J. L. and has submitted all of the employer contributions for “CPP, EI, and the taxes” to CRA.
- b) The documents produced when the hearing was reconvened on August 18, 2017 prove that X had, and continues to have, labourers on site doing housekeeping - which is actually site clearing – during the period of time covered by the ROE issued to J. L.
- c) The decisions against X were made based on the interviews documented by the Commission, but the Integrity Investigator’s recording of what was said is not accurate and could not have been accurate. The credibility of J. L. and the Commission is in doubt, and this needs to be taken into account to make any decision against X.  
Specifically:
  - i) Right from J. L.’s initial interview with the Integrity Investigator, J. L. was “constantly lying” about “every situation”, and this brings her credibility into question. J. L. was motivated to go after S. K. and X from the outset and purposely orchestrated this. J. L. “manipulated everybody”, including F. K., S. K. and even the Investigator in Service Canada. F. K. stated:

“We are the victims in this whole thing.”

- ii) The Investigator was biased and came to the conclusion that X was guilty after his very first meeting with J. L. Service Canada is such a “powerful organization” and they have ways to find out who D. K., and M., and S. K. are and what their relationships are. The Investigator mixed up who was who, and this shows carelessness in the investigation. He didn’t pay attention to the details, but made a very serious allegation and decision against X based on false information.
- d) Since X paid the wages to J. L. and remitted the employer contributions reported on J. L.’s T4 (at GD3-290), it is not open to the government to now ask for a penalty on top of that.

[93] The Commission made the following submissions:

- a) Under subsection 39(1) of the EI Act, the Commission may impose a penalty on an employer or anyone acting or pretending to be or act on behalf of an employer, who has, in relation to any matter arising under the EI Act:
  - (i) Knowingly made a false or misleading representation;
  - (ii) Knowingly provided false or misleading information;
  - (iii) Knowingly made a false or misleading report;
  - (iv) Knowingly imported or exported a page issued by the Commission, or had it imported or exported, for the purpose of defrauding or deceiving the Commission; or
  - (v) Knowingly participated in, assented to or acquiesced in any of the above-mentioned acts.
- b) The evidence supports the Commission’s determination that the ROE issued by X for J. L. was false and was issued for the sole purpose of supporting pay stubs and other employment information provided by X that was used by J. L. to apply for a mortgage. The Appellant, through its representatives, then gave fraudulent documents and

statements to the Commission in the course of its investigation in an attempt to substantiate the said ROE and the Appellant's claim that J. L. was employed by X.

- c) A penalty is warranted in this case because the evidence also supports the Commission's determination that X, or persons acting on behalf of X, knew the information recorded on the ROE was false at the time the ROE was issued, and knew the information subsequently provided to the Commission during its investigation into the validity of the ROE was false when it was provided.
- d) The Commission exercised its discretion in a judicial manner and considered all pertinent circumstances when it determined the quantum of the penalty and fixed it at \$15,277.00 during the reconsideration process.

## **ANALYSIS**

[94] The relevant legislative provisions are reproduced in the Annex to this decision.

[95] Section 39 of the EI Act allows the Commission to impose a penalty upon employers and those acting for an employer, as well as officers, directors or agents of an employer, for knowingly making false or misleading representations or providing false or misleading information in connection with any matter arising under the EI Act.

[96] The issuance of an ROE is governed by sections 19 to 21 of the EI Regulations and Parts I, III and IV of the EI Act. As such, the issuance of an ROE is a matter arising under the EI Act for which an employer and those acting for an employer may be subject to a penalty pursuant to section 39 of the EI Act.

[97] Similarly, an investigation by the Commission into the validity of an ROE is also a matter arising under the EI Act. As such, an employer or anyone acting for an employer who knowingly provides false or misleading information to the Commission in connection with that investigation may also be subject to a penalty pursuant to section 39 of the EI Act.

[98] In the present case, following X's Request for Reconsideration, the Commission maintained penalties totaling \$15,277.00 against X and D. K. set out in the Supplementary

Record of Claim at GD3-502 and the Penalty Rationale at GD3-505 to GD3-506. The penalties are as follows:

- a) a \$4,000.00 penalty pursuant to subsection 39(4) of the EI Act because it determined that J. L. did **not** work for X and, therefore, the ROE issued to her was a fraudulent misrepresentation of employment (GD3-469 to GD3-470, and GD3-506); and
- b) a further penalty of \$11,277.00 pursuant to subsection 39(2) of the EI Act for seven (7) additional misrepresentations by, or behalf of, X that the Commission determined were knowingly made to try to prove the validity of the fraudulent ROE (GD3-505 to GD3-506), namely:
  - i) one (1) for the falsified pay cheque (#1297) issued to J. L. for the pay period 7/7/14 to 20/7/14 (at GD3-30);
  - ii) one (1) for the falsified pay stubs issued to J. L. for her fictitious employment period (at GD3-31 to GD3-32);
  - iii) one (1) for the falsified T4 issued to J. L. for her fictitious employment in 2014 (at GD3-290);
  - iv) one (1) for the staff/employee list for 2014 to which J. L.'s name was fraudulently added last (at GD3-67);
  - v) one (1) for the falsified letter of April 27, 2015 addressed to CRA indicating that X missed a T4 (which belonged to J. L.) and for the falsified revised tax summary issued to include J. L.'s falsified T4 (at GD3-288 to GD3-289);
  - vi) one (1) for the false statements given at the in-person interview attended by F. K. on behalf of X on October 13, 2015 (see Investigation Information Sheet at GD3-52 to GD3-53); and
  - vii) one (1) for the false statements given during the telephone interview attended by F. K. on behalf of X on November 13, 2015 (see Investigation Information Sheet at GD3-446 to GD3-447).

[99] X appealed the reconsideration decision to the Tribunal.

[100] The initial onus is on the Commission to prove that the representations listed in paragraph 98 above are false. The onus then shifts to X to prove that neither X, nor anyone acting on its behalf, made the representations *knowing them to be false*.

[101] If the Tribunal finds that X or its agent knowingly made false representations to the Commission, then a penalty may be imposed pursuant to section 39 of the EI Act. The Commission has exclusive jurisdiction with respect to the decision to impose the penalty, but it must exercise that discretion in a judicial manner. That is, it must act in good faith, for proper purpose and motive; must take into account any relevant factors and ignore any irrelevant factors; and act in a non-discriminating manner (*Dunham A-708-95, Purcell A-694-94*). The Tribunal can only intervene in the Commission's decision to impose a penalty under section 39 of the EI Act if it determines that the Commission has failed to exercise its discretion judicially.

[102] The employer's lack of intent to defraud the Commission is irrelevant to the imposition of a penalty (*CUBs, 25872, 18063, 46078, 52349, 54343, and 58128*).

**ISSUE ONE: Are the 8 representations identified by the Commission false?**

[103] The Commission has the onus of proving, on a balance of probabilities, that the ROE issued to J. L. and the seven (7) additional representations listed in paragraph 98 above are false.

[104] The Tribunal considered the voluminous evidence in this appeal and finds the Commission has proven that the ROE and the associated documents and statements listed in paragraph 98 above are false.

[105] The Tribunal first considered the following chronology of events:

- a) **August 5, 2014**: Mr. L. and J. L. enter into an Agreement of Purchase and Sale for the real estate transaction they were involved in with S. K. (GD3-496).
- b) **August 15, 2014**: Mr. L. and J. L. sign the Waiver for the financing and inspection conditions in the Agreement of Purchase and Sale (GD3-33 and GD3-497).



- c) **August 19, 2014**: a Mortgage Commitment is issued to Mr. L. and J. L. by Xceed Mortgage Corporation (GD3-428 to GD3-434).
- d) **August 22, 2014**: Mr. L. and J. L. signed a Mutual Release for the return of their \$10,000.00 deposit for towards the purchase (GD3-498).
- e) **August 29, 2014**: Closing date for the said real estate transaction (see Agreement of Purchase and Sale at GD3-496). Mr. L. and J. L. refuse to complete the purchase.
- f) According to F. K.'s testimony at paragraph 63(l) and (m) above, when it became apparent Mr. L. and J. L. that were not going to get their \$10,000.00 deposit back after refusing to complete the purchase, they made a complaint about S. K. to RECO and S. K. was interviewed by RECO.
- g) **October 1, 2014**: X ordered three (3) ROEs from the Commission. The ROEs assigned to X bore the consecutive serial numbers from E28772411, E28772412, and E28772413 (GD3-21).
- h) **April 27, 2015**: X wrote a letter to CRA advising that it had "missed" a T4 for one of their employees for 2014 and enclosed a T4 slip for J. L. (at GD3-288 to GD3-290).
- i) **May 5, 2015**: RECO wrote a letter to the Commission requesting confirmation of the validity of the ROE bearing serial number E28772411 (the first serial number of the three (3) ROEs issued to X on October 10, 2014), which purported to have been issued by X for J. L. on August 18, 2014, with the reason for separation coded in box 16 as "E" for "Quit" (GD3-4 to GD3-5, GD3-12, GD3-29).

The RECO letter included the following particulars:

"I have been assigned to investigate a complaint where the consumer is alleging fraudulent conduct by an Ontario real estate agent named S. K. The complainant, J. K. I. has alleged that *a false employment document, namely a pay slip* was provided to a prospective lender(s) in support of a mortgage application to purchase a residential property. J. I. is adamant that at no time has she ever been employed by X. *In response to the allegations, S. K. provided me with a Record of Employment (ROE), Serial No. E28772411 – see attached.*" (emphasis added) (GD3-4)

The Tribunal noted that while J. L. only reported a false pay slip, it was S. K. who provided RECO with the ROE that became the focus of the Commission's investigation.

The Tribunal further noted that RECO also asked the Commission to confirm the "time restrictions for an employer to submit a ROE for processing once employee employment has ceased." (GD3-4)

[106] **The Tribunal then considered the documentary evidence related to J. L.'s employment that was obtained by the Commission during its investigation and up to the initial penalty decision letter of April 15, 2016, and noted the following:**

- a) At her initial interview, J. L. stated that she never worked for X, but that she was given a single pay cheque and two (2) pay stubs from X so she could obtain a mortgage to complete a real estate transaction arranged by S. K. (GD3-24 to GD3-25). J. L. provided the Investigator with a copy of the paycheque (#1297) and corresponding pay stub for the period July 7, 2014 to July 20, 2014 (GD3-30 to GD3-31); and a further pay stub for the period June 23, 2014 to July 7, 2014, which references a cheque for \$1,012.96 bearing "Cheque number 1266" and "Cheque Date" July 10, 2014 (at GD3-32). J. L. did not have a copy of a cheque numbered 1266.
- b) In the initial letters sent to X, D. K. and "F. K." on September 22, 2015 (GD3-49 and GD3-50), they were asked to bring specific documents to an interview as part of the Commission's investigation into X, its operations and how it generated the ROE for J. L. The letter stated:

"Please bring with you to this meeting, your general ledger, staff list, 2013/14 Tax Assessments, Contracts, Receipts, Vendor Purchase Orders, copies of the cancelled cheques for all staff for the 2014 Fiscal Year and Business Registration Documents, permits and Licenses." (GD3-49 and GD3-50).
- c) Instead, F. K. brought the following documents to the X interview with the Investigator on October 13, 2015:
  - i) Business Consent given by X to CRA authorizing CRA to deal with F. K. with respect to X's accounts, signed April 6, 2015 (GD3-56);

- ii) Statement of Account issued to X by CRA for discrepancies in X's payroll remittances between 2014 and 2015, signed April 8, 2015 (GD3-57);

According to this statement, X had arrears totaling \$54,082.64 for unremitted payroll deductions, a penalty for failure to remit deductions and interest for the calendar year 2014, and \$7,029.10 for the same issues year-to-date for 2015.

- iii) Certificate of Incorporation for X on September 4, 2012, and the Articles of Incorporation (GD3-58 to GD3-66);

- iv) List of Employees for 2014 (GD3-67);

The Tribunal noted the Investigator's comment in the Investigation Information Sheet that J. L.'s name was "added on the list at the bottom, it was a different shade of ink." (GD3-53)

- v) List of Employees for 2015 (GD3-68);

- vi) A series of nine (9) pay stubs for J. L. (GD3-69 to GD3-77).

The Tribunal noted that each one was for exactly 80 hours of work in a two-week period, with net pay of \$1,012.96.

The Tribunal further noted that all but one pay stub had a hand-written notation on it "paid cash". The stub for the pay period July 7, 2014 to July 20, 2014 (GD3-77) did **not** have this notation, and appeared to correspond with the July 24, 2014 pay cheque (#1297) J. L. provided to the Investigator during her initial interview (GD3-30).

However, the Tribunal also noted that all of the pay stubs that F. K. provided to the Commission included the same spelling of J. L.'s name, each one identifying her as "J. K. L.". But both the pay cheque and the two pay stubs provided to the Commission by J. L. herself (at GD3-30 to GD3-31) have her surname misspelled as "I."

As well, the pay stub for the period June 23, 2014 to July 7, 2014 that was provided by F. K. (at GD3-76) did **not** match the copy J. L. had in her possession for the same period (at GD3-32) because F. K.'s copy did **not** have a reference to any cheque number, let alone cheque #1266 (see paragraph 105(a) above).

- vii) Monthly bank account statements for (a) a TD Bank business chequing account in the name of X and D. K., and (b) a Scotiabank account in the name of X, with copies of the fronts and backs of cheques drawn on the account during the monthly period.

The monthly statements and cheques corresponding to the period of employment on the ROE are as follows:

- February 28, 2014 to March 31, 2014 (GD3-274 to GD3-285)
- March 21, 2014 to March 31, 2014 (GD3-270 to GD3-272)
- March 31, 2014 to April 30, 2014 (GD3-248 to GD3-269)
- April 30, 2014 to May 30, 2014 (GD3-224 to GD3-246)
- May 30, 2014 to June 30, 2014 (GD3-198 to GD3-223)
- June 30, 2014 to July 31, 2014 (GD3-176 to GD3-197)
- July 31, 2014 to August 29, 2014 (GD3-158 to GD3-174)

The Tribunal compared the pay cheque J. L. provided to the Investigator (at GD3-30) with the copy of the corresponding cheque number in the documents provided by F. K. (at GD3-196). The Tribunal noted that *they do not match*. The cheque provided by J. L. is cheque # 1297 drawn on the TD account for **\$1,012.98**, and is payable to “J. K. I.” with “Pay Period 07/07/2014 – 20/07/2014” typed in at “Memo”.

However, the July statement for the TD account shows cheque # 1297 as having cleared the TD account on July 28, 2014 in the amount of **\$1,528.00** (see GD3-180). The copy of cheque #1297 included with the bank account statement (at GD3-196), is *not* made out to “J. K. I.” and does *not* include any memo whatsoever, let alone one identifying a pay period. Moreover, it appears to have been made out to and endorsed by the same Payee as in cheque # 1223 (GD3-181) and #1252 (GD3-187), which cleared the TD account on July 2 and 14, 2014 respectively.

The Tribunal also looked for the cheque referenced on the other pay stub J. L. provided to the Commission at her initial interview, namely cheque # 1266 for **\$1,012.96** dated July 10, 2014 (at GD3-32). The Tribunal noted that the July statement for the TD account shows cheque # 1266 as having cleared the TD account on July 29, 2014 in the amount of **\$738.61** (see GD3-180). The copy of cheque #1266 included with the bank account statement (at GD3-197), is *not* made out to J. L. but to payee “THE HOUSE”, at “X”.

Finally, the Tribunal noted that there was no cheque or debit in the amount of \$1,012.96 (the amount payable on the X cheque issued to J. L. on July 24, 2014) from X's account in either July or August

- viii) T4 Summary for X for eight (8) employees in 2014 (GD3-286)
- ix) April 27, 2015 letter from X to CRA advising it "missed" one employee's T4 slip in 2014 and enclosing a Revised T4 summary for nine (9) employees in 2014 and a T4 slip for "J. K. I." (GD3-288 to GD3-290).

The Tribunal noted that the ROE purportedly issued by X on August 18, 2014 had the correct spelling for J. L.'s surname, but the T4 slip provided by X on April 27, 2015 had the incorrect spelling of IYER.

- x) Corporation Notice of Assessment for X for the year ended August 31, 2014 (GD3-291 to GD3-292).
- xi) September 21, 2015 memo from X to "X" regarding "Progress Draw #:1" (GD3-293 to GD3-294).
- xii) Assorted contractual documents between X as "Subcontractor" and various other corporations as "Contractor".

The Tribunal notes that a number of the documents provided relate to periods outside of that on the ROE. However, the following documents correspond to the period of employment on the ROE:

- March 11, 2014 subcontract with X for the X project (GD3-301 to GD3-306).  
  
A further copy of this document was provided by F. K. at the reconvened hearing of this appeal and can also be found at GD6-9 to GD6-14.
- February 18, 2014 Letter of Intent between X and X for "X" (GD3-307 to GD3-310, and GD3-313 to GD3-314).
- April 21, 2014 Progress Draw report for "X" (GD3-315).
- Assorted invoices for equipment rentals and materials purchased by X (GD3-321 to GD3-421).

- d) The electrician formerly employed by X and interviewed by the Investigator on November 5, 2015 had never heard of J. L. and had never heard of a cleaner on site (See Report of Interview at GD3-443 to GD3-44), and described his own on-site work as follows:

“I did all of the electrical work for the engineering equipment, thermostat, elevators, HVAC systems, fans and ceiling exhausts” (GD3-444).

- e) During his second interview with the Investigator on November 13, 2015, F. K. provided the Investigator with addresses for sites J. L. worked at while employed by X (see GD3-447). The Investigator visited each one (See Investigation Information Sheet at GD3-448) and reported that:

- i) X, Toronto: is a condo, and the Investigator could not access it.
- ii) X, Toronto: is a Community Centre owned by City of Toronto, with contracted union staff.
- iii) X & X, Etobicoke: is a private, low-rise building. The Investigator was told by neighbours that there are no staff that come and clean the building because the building superintendent does it.

The Tribunal noted that the Investigator calculated and determined it would take the claimant 2.5 to 3 hours to commute by public transit *one way* to any of the work addresses provided by F. K.

- f) At the conclusion of his second interview on November 13, 2015, F. K. was explicitly advised that the Investigator wanted to see X’s bank account statements to show cash payments to J. L., the contracts with the buildings he claimed she cleaned at, X’s consolidated business account reconciliations to show cash being removed for casual labour, and justification for the issuance of an ROE with no deductions for employment insurance (GD3-447). F. K. was given until November 30<sup>th</sup> to provide these items.

The Tribunal noted that there was no further response from F. K.

[107] **The Tribunal next considered the documentary evidence related to J. L.’s employment that was proffered by F. K. in support of X’s Request for Reconsideration, namely:**

a) The letter of May 9, 2016 signed by D. K. attached to the Request for Reconsideration (at GD3-476 to GD3-478) stated that J. L. was hired to X to “clean up after our construction workers on various job sites” and listed the following addresses for the sites she worked at:

- X, Richmond Hill
- X, Toronto
- X, Brampton
- X, Brampton.
- A basement in Kingston that was rented by X for “our crew”.

The Tribunal noted that:

- i) X, Brampton is F. K.’s residence, as per the photo identification he provided at the commencement of the hearing on May 23, 2017;
  - ii) X., Brampton is the head office for X that was visited by the Investigator (see Investigation Information Sheet at GD3-51);
  - iii) the basement referred to in this letter was the basement apartment identified by F. K. during his testimony as an apartment where X housed its employees who were working on a project in Kingston;
  - iv) X was a Community Centre operated by the City of Toronto; and
  - v) *the only potential job site* of the five (5) addresses listed as “job sites” where J. L. “cleaned up after” X’s “construction workers” *might* have been X, Richmond Hill, but no contract was ever provided to verify that X was engaged in construction on this site.
- b) The letter attached to the Request for Reconsideration also stated that, due to J. L.’s “cash flow problem”, she “took the money almost on daily basis, however was given a paystub at the end of every pay period” (GD3-477). Further copies of the paystubs were attached to the Request for Reconsideration (GD3-482 to GD3-490).

The Tribunal noted that, unlike the copies of the pay stubs that were first provided by F. K. during his interview on October 13, 2015 (at GD3-69 to GD3-77), these copies of the pay stubs did ***not*** have the hand-written notation “paid cash” on any of them.

[108] **The Tribunal also considered the documentary evidence related to J. L.’s employment that was proffered by F. K. at the hearing of the appeal**, and noted the following:

- a) The pages provided by F. K. from the March 11, 2014 subcontract between X and X for the X (GD6-1 to GD6-8) are evidence that X had a contract to do work on that project as of March 11, 2014, but did not include the Appendices or X’s Supplementary Conditions that formed part of the subcontract (at GD6-4).
- b) But the pages provided by F. K. from the March 3, 2014 subcontract between X and X for the X project (GD6-7 to GD6-15) did include an Appendix “A” with general requirements for the subcontractor X (at GD6-12 to GD6=13), with stipulations including:
  - “Subcontractor is to submit and follow project specific Health & Safety Plan but, in case of discrepancy, X Construction’s policy will take precedence.”
  - “All personnel are to attend a formal training class and pass the written test for the TTC Subway/SRT rule book as outlined in Section -1590.”
  - “In addition to current WSIB certificates, Form 1000’s and project specific safety policies, Subcontractors are to submit their billing break down (per TTC requirements), proof of insurance and proof of bonding (where applicable) before first invoice.
  - “X will hold an amount equal to 10% of the subcontract value on billing breakdowns for all TTC approved submittals. This amount will be payable once all submittals have been received and approved by the TTC. In addition to standard construction submittals, this include interference and coordination drawings (where applicable), ***safety policies and related safety documentation***, environmental control plans, waste management plans and methodology statements, to be approved by X and/or the Commission.” (emphasis added).
  - “Disposal of own garbage daily. Documentation regarding waste management in specifications, including waste management plan to be forwarded to X on a monthly basis.”



- “Substantial performance must be met on or before *April 29, 2014*, as per milestone schedule attached.” (emphasis added)
- “PPE including, but not limited to, hard hats, workboots, safety glasses and safety vests are to be worn by all workers, management and anyone else wishing to gain access to the construction site.”

The Tribunal noted the complete absence of any documentation from X to prove that J. L. had ever completed any training or safety sessions, or been issued any “PPE” (which the Tribunal knows to be an acronym for “Personal Protective Equipment”), both of which would have been required for her to gain access to and perform any work at such construction sites.

The Tribunal also noted the complete absence of any WSIB certification specific to J. L., or any documents supporting that she was specifically included under X’s insurance or bonding.

The Tribunal further noted that X required monthly documentation on the disposal of garbage and waste management plan X had in place for the site. Presumably this would have applied for the X project too. Given that J. L. was purportedly X’s site cleaner for these projects, such documentation would have been highly relevant to establishing her employment by X. But no such documentation was produced by F. K.

- c) Within the pages from the Minutes from 2017 Trade Coordination Meetings attended by F. K. (at GD6-17 to GD6-31):
- i) the section on “Safety” (at GD6-23) provided that “Everyone must wear their PPE on the construction site” and “All foremen must submit Job Hazard Assessments for signature prior to start of any work.”
  - ii) the section on “Housekeeping” (at GD6-24) provided that “All trades to ensure daily cleaning is performed throughout the entire building.”

[109] Leaving aside any consideration of the written summaries of the Investigator’s interviews with J. L. and F. K. for the moment, which F. K. alleges are not accurate and show bias against X, there is no credible *documentary* evidence from the Appellant that proves J. L. performed any work for X.

[110] The pay stubs provided by F. K. at his first interview (at GD3-69 to GD3-77) and those provided with the Request for Reconsideration (at GD3-482 to GD3-490) could easily have been

printed from any desk top computer, at any point in time. The same can be said of the T4 F. K. repeatedly pointed to (at GD3-290). Indeed, the differences between the two pay stubs J. L. initially provided to the Commission and the nine pay stubs F. K. produced during the investigation (as described in paragraphs 106(vi) and (vii), and 107(b) above) clearly point to two of the pay stubs having been revised after the failed real estate transaction. The fact that cheque #01297 – the one that was provided to the Commission by J. L. (for \$1,012.98) – was never negotiated is also troubling. Taken with the timing set out in the chronology of events at paragraph 105 above – and especially in light of the fact that J. L. had already complained to RECO, the documentary evidence from the Appellant supports the conclusions, on a balance of probabilities, that:

- a) the ROE prepared by X for J. L. was false and was not generated in August 2014 but at some point after October 1, 2014;
- b) X's communications to CRA on April 27, 2015 regarding the 2014 T4 that X "unfortunately missed" for J. L. (GD3-288) was also erroneous; and
- c) the pay stubs provided by F. K. were also false and were generated solely for purpose of responding to the Commission's investigation into the validity of the ROE for J. L.

[111] The subcontracts F. K. provided to the Commission and at the hearing of this appeal do not all cover the relevant time period, or match the addresses in the letter attached to the Request for Reconsideration. Indeed, the Tribunal wonders why X would have paid J. L. to clean F. K. and S. K.'s personal residence, as this would hardly have been a business expense. But more importantly, in the absence of contemporaneously created time sheets, witness statements from people who observed J. L. working on the contract sites on specific dates, and a cash account reconciliation to substantiate the daily cash wages purportedly paid to J. L. by X, the documents the Appellant relies upon fall far short of proving an employment relationship between X and J. L., let alone that J. L. performed 80 hours of work per week for X from March 17, 2014 to July 18, 2014 (a period of 18 consecutive weeks) and that X paid her \$11,232.00 in gross earnings, as reported in the ROE prepared for her by X.

[112] The Tribunal considered some of the other documentary evidence that X could have produced in support of its appeal. The subcontracts which are relevant clearly required X to provide the general contractors with ongoing reporting and certificates about employee health and safety training, WSIB coverage, issuance of PPE items, and garbage removal/waste management. If J. L. had worked as a cleaner on X's construction projects, there most certainly would have been documentary evidence created contemporaneously with her employment in order for X to comply with the subcontract terms and, more importantly, receive payment thereunder. Copies of these documents could easily have been produced for the Tribunal – either from X's own records or obtained from the general contractor, but none were produced.

[113] The lack of WSIB documentation is particularly telling. The subcontracts required X to provide the general contractors with regular WSIB clearance certificates. A WSIB clearance certificate serves as confirmation that the sub-contractor employer (in this case X) has paid all WSIB premiums and fees for every employee they have working on the project. If J. L. had worked for X on a X project, there would have to be a record of X's WSIB remittance for her. The same goes for workplace health and safety documentation. All employers in Ontario are required by the *Occupational Health and Safety Act* to instruct and train their employees in the proper use, handling and appropriate emergency response for hazardous materials in the workplace. This is commonly referred to as “WHMIS” training (WHMIS being the acronym for “Workplace Hazardous Materials Information System”). For obvious reasons, it is critical that employers involved in the construction industry follow the WHMIS regulations. If J. L. had worked for X on any construction site, there would have to be a record of her WHMIS training; and proof of her training would have been provided to X (or any general contractor X worked with), as the general contractor has a statutory obligation under the *Occupational Health and Safety Act* to obtain and maintain a record of WHMIS training for every individual who enters their site. F. K. has been adamant that X is a legitimate contractor. As such, F. K. would be well aware of the various certifications that would need to have been obtained for J. L. in order for her to do the work he said she did for X. The failure to provide any such documentary evidence is significant.

[114] **The next step in the Tribunal's analysis was a consideration of the “he said/she said” evidence.** Simply put, J. L. told the Investigator that she never worked for X, and that

certain documents portraying her as an employee of X were fabricated to support her mortgage applications for the purchase of a property - for which S. K. was acting as her real estate agent. F. K., on behalf of X, testified that J. L. worked for X as a cleaner on their various construction job sites from March 2014 to July 2014, and was paid \$120/day in cash - on a near-daily basis, before she stopped showing up for work, at which point X prepared an ROE for her. The Tribunal must decide whose version of events is more credible.

[115] The Tribunal considered J. L.'s various statements to the Investigator, as documented in the Investigation Information Sheets at GD3-24 to GD3-25 and GD3-454 to GD3-455, and the detailed written statement she provided to the Commission at GD3-456 to GD3-459. While F. K. submitted that J. L. was "constantly lying" to the Investigator and that her credibility should be questioned because she was motivated to go after S. K. and X from the outset, the Tribunal noted the following:

- a) J. L. is consistent in her denials of the employment and her description of the real estate transaction. She may have gotten some names wrong (for example, confusing the branch manager with home inspector), but she consistently set out the basic chronology of events and didn't gloss over her involvement or her motivation in coming forward to RECO with the fraudulent pay stub and her complaint against S. K.
- b) In her written statement, J. L. described being taken to a "Cash Money" cheque cashing service by S. K., being given a cheque that was payable to her (J. L.), getting the cheque cashed, and turning the funds over to S. K. (see GD3-457). The documents provided by F. K. actually support J. L.'s description of this process. A copy of the front and back of cheque number 01297 (the number on the pay cheque J. L. originally provided to the Integrity Investigator) is at GD3-168. The cheque is dated July 24, 2014 and is payable to "J. K. I.". The back of the cheque is endorsed as "Deposited to the Credit of X", which is a cheque cashing service. The X bank account statement at GD3-160 shows cheque number 01297 clearing the account on August 14, 2015, which corresponds to the timing of the waiver of the financing for the real estate transaction (GD3-33 and GD3-497).
- c) Contrary to F. K.'s allegation that the Investigator was biased against X from the beginning, the Investigator, in fact, told J. L. that he believed she was complicit in the

real estate scheme and “bailed” when she figured out the process and the cost (see Report of Interview at GD3-454 to GD3-455). The Investigator was also clear throughout his dealings with J. L. that he would play no role in helping her to get her \$10,000 deposit back (see Reports of Interview at GD3-24 to GD3-25 and at GD3-4454 to GD3-455).

[116] The Tribunal then considered F. K.’s various statements in the three (3) interviews he had with the Investigator, as documented in the corresponding Investigation Information Sheets prepared by the Investigator; and the letter attached to the Request for Reconsideration – which he admitted was written by him (see GD3-499 to GD3-503). The interviews are so rife with inconsistent statements as to make it impractical to identify them all. The Tribunal will, therefore, highlight just a few examples:

a) In the first interview on October 13, 2015 (at GD3-52 to GD3-53):

- When he arrived, F. K. advised that D. K. and “M.” would not be coming, and that he was helping them out so this is fixed.
- When asked if he was their lawyer or representative, he said No.
- When asked how he was qualified to deal with X’s financial matters, he said he was good at this stuff.
- When pressed by the Investigator, F. K. identified himself as a project coordinator, who helped get projects organized so they could go ahead as planned.
- Later in the interview he said he was a supervisor *and* project coordinator, and also dealt with X’s CRA stuff.
- F. K. stated he has never met J. L.
- When pressed by the Investigator, F. K. said he thinks she was a cleaner at one of their sites, but did not work in the office and never showed up again for her shifts after her July 24, 2014 pay cheque.

b) In the second interview on November 13, 2015 (at GD3-446 to GD3-447):

- F. K. said he had done some digging and told the Investigator he had learned the following about J. L.:
  - (i) that she was given “piece work” and paid in cash for every room she cleaned (but he did not know how much she was paid per piece of work);
  - (ii) that she drove herself to job sites;
  - (iii) that she only worked nights, but had flexible hours and came and went as she pleased (but he did not know how she gained access to the building she cleaned);
  - (iv) that she asked to be paid in cash because she did not have a bank account (but he was unsure how she was able to be paid by direct deposit by Walmart, and had no response when asked if she was given the coins that were shown on the pay stubs previously provided by X);
  - (v) that the pay stubs provided by X might be wrong, as they listed deductions – because there were no deductions from her pay; and
  - (vi) that she worked at two buildings, but no one would be able to confirm her presence at these sites because she only worked nights.

c) In the May 9, 2016 letter attached to the Request for Reconsideration, which F. K. subsequently admitted to writing, he wrote:

- He is X’s “Senior Project Manager”.
- J. L. was a “family friend”, who was hired by X to clean up at construction sites because she was not getting enough hours at Walmart.
- J. L. worked for X at 4 locations, including X’s office (but X’s office staff never met her).
- He was personally responsible for J. L.’s work schedule and transportation for out of town trips, and personally drove her to X’s site in Kingston, Ontario.

- She was paid in cash “almost on a daily basis”, but got a pay stub at the end of every pay period.

d) In the third interview on August 17, 2016 (at GD3-499 to GD3-503), F. K. said:

- He is the CEO of X and runs the business.
- J. L. was a friend they were trying to help out.
- J. L. worked as a cleaner at X’s job sites and their office, and once per week went to Kingston, Ontario to clean a house the company had there. The position in Kingston was created for her.
- J. L. travelled to the local construction sites on her own, but he drove her to Kingston once a week.
- J. L. worked 40 hours per/week, but her hours were flexible and she worked around her part-time schedule at Walmart.
- J. L. was paid for 40 hours per week, regardless of how long it actually took her to travel to and clean/sweep the construction sites.
- J. L. was paid cash for every pay except one – when she got a cheque, which she wanted for her mortgage application so she could prove she worked at X. She was paid in cash every 2-3 days, but she needed a cheque to prove she worked at X in order to get a mortgage.
- He personally attended a meeting at Royal Bank with S. K., J. L. and J. L.’s husband and a mortgage specialist from the bank.
- J. L. sat in his car and made up fake rent receipts.
- J. L. is now throwing X under the bus because she tried to get out of buying the house.

[117] The Tribunal finds no evidence to support F. K.'s allegations that the Commission did not accurately document the interviews and was biased against X. The notes of the Investigator and the agent who undertook the reconsideration are detailed, comprehensive and reflect a genuine effort to try to understand and verify the employment relationship between J. L. and X set out in the ROE under investigation. When the agent conducting the reconsideration pointed out that F. K. had provided a lot of conflicting statements and information in connection with this matter, F. K. explained it by saying he was caught off guard at the first interview when the Investigator started asking questions about J. L. and had no idea what the investigation was about. This is no excuse for deliberately obfuscating and withholding information, which is quite clearly the approach F. K. took in his dealings with the Commission. He chose to reveal different things at different times, and radically changed his story as the investigation unfolded and after the penalty was imposed. While he has taken great offense at the Investigator's inability to correctly spell his name and keep track of the various people connected to X, F. K. takes no responsibility for the obvious role he himself played in these errors.

[118] The Tribunal then considered F. K.'s testimony at the hearing.

[119] The Tribunal repeatedly explained to F. K. that the onus in this appeal was on X to prove the validity of J. L.'s ROE and that there were no misrepresentations knowingly made in connection with that ROE. Nonetheless, F. K. spent an extraordinary amount of time testifying about the real estate transaction and pointing out alleged inaccuracies in the Commission's documents. However, J. L.'s conduct in the real estate transaction is not the issue on this appeal, and for the reasons set out in paragraphs 115 to 117 above, the Tribunal gives very little weight to F. K.'s testimony regarding the alleged errors in the Commission's summaries of his interviews.

[120] **The Tribunal then considered F. K.'s testimony as it related to J. L.'s employment at X.** The Tribunal noted the following:

- a) F. K. testified that he and S. K. met with J. L. in early March and offered her a job at \$15/hour cleaning X's office and job sites a couple of days a week.



- If J. L. only worked a couple of days of week, why do the **pay stubs** from X indicate that she worked – and was paid for – 40 hours per week, every week, from the very start of her employment and continuing for 18 consecutive weeks?
- Why does the **ROE** report that J. L. worked 40 hours of insurable employment in each and every one of those 18 weeks (720 hours of insurable employment between March 17, 2014 and July 18, 2014)?

b) F. K. testified that J. L. started “right away”.

- How could J. L. have started cleaning construction sites right away? Her other job was as a sales associate at Walmart, and there is no evidence she had any knowledge or training as a cleaner in a construction setting. There is also no evidence that she underwent WHMIS or any other safety training, or that she was provided with the PPE required to enter a construction site.

c) F. K. testified that J. L. also started to clean his and S. K.’s house once a week.

- Why would X pay J. L. to clean F. K. and S. K.’s personal residence?
- Why were hours and earnings from house cleaning considered “insurable” and reported by X as such on the ROE? J. L.’s cleaning of F. K. and S. K.’s personal residence would most likely have been a form of casual employment specifically excluded from insurable earnings under section 5 of the EI Act because the employment (cleaning a personal residence) was not within the usual trade or business of the employer (in this case X, whose usual trade was construction) and, therefore, not “insurable” for purposes of an ROE or EI benefits.

d) F. K. testified that J. L. swept construction sites, and that he would show her what to do and leave her there, or sometimes the plumbers would show her what to do.

- Why was F. K. unable to produce any evidence from said plumbers to verify J. L.'s presence on a job site?
  - How would J. L. have been made aware of the many safety hazards and procedures on what F. K. testified were “new construction” job sites? When was J. L. trained with respect to electrical hazards, fire prevention, hazardous materials, manual materials handling, spills, ladders, housekeeping and preventive maintenance? Who did that training? Where are the records of that safety training, which employers are required to maintain under the *Occupational Health and Safety Act*?
  - Why would any general contractor on a project (in one contract it was X) allow an untrained individual, with no safety certification onto their job site?
  - Where are the records to prove J. L. received the site-specific orientations all general contractors are required to provide under the *Occupational Health and Safety Act*?
  - Where are the records to prove J. L. attended the site's weekly “Toolbox Talks”, which all workers on a site are required to sign-in and attend?
- e) F. K. testified that J. L. relied on him to get to the job site, and that “very often” he personally drove J. L. to the job sites and picked her up at the end of her day.
- How could F. K., the CEO of X and the person who ran the company (which had 8 other employees in 2014 – working at various sites), possibly have had time to ferry J. L. back and forth to construction sites “4 -5 days per week” for 18 consecutive weeks?
  - Why would he do this for her and not the other employees?
  - Did X, as J. L.'s employer, declare this as a taxable benefit to J. L. under the *Income Tax Act*? Why does it not appear on her T4?

f) F. K. testified that J. L. was paid \$120/day in cash, sometimes on a daily basis; and that she was given a pay stub which reflected payment for 8 hours per day for 5 days per week, regardless of whether she actually worked for 8 hours/day or 5 days/week. According to F. K., J. L. just had to get the assigned work done and then she would be paid for a day's work, regardless of the time it took her. F. K. stated that he personally paid her, and that he carried the information in his head as to when and how much he paid her. There were no time sheets or records kept to verify the cash payments to J. L.

- If she was paid \$120/day in cash, why do the pay stubs show vacation pay being paid out – over and above her wages – every pay period?
- If she was paid \$120/day in cash, why do the pay stubs show a net payment of only \$1,012.96 due to withholdings from her pay for CPP, EI and federal income tax? And why does her T4 show withholdings from her pay for these items?
- Where is the evidence the CPP, EI and income tax withheld was ever remitted by X?
- If she was paid in cash, where is the cash reconciliation from X's books and records for this period? Where is the record of the accumulated deductions and the employer portion of those deductions?
- Is it even reasonable to think that F. K., with all of his responsibilities at X, could meet up with J. L. at the end of every day to pay her cash? Or that he could do so every day for an 18 week period?

g) F. K. testified that J. L.'s last day of work was "end of July or early August" and that J. L. stopped showing up for work when things went sour with the real estate transaction.

- The ROE states that J. L.'s last day of work was July 18, 2014 and that she quit. Why would she stop showing up for work as of July 18, 2014 allegedly because of problems with the real estate transaction when the Agreement of Purchase and Sale wasn't even signed until August 5, 2014 (with a closing date of August 29, 2014) and her mortgage commitment wasn't issued until August 19, 2014?

- If, as F. K. testified, he knew J. L. needed employment documentation to support her mortgage application (see paragraph 52(n) above), why would D. M. sign an ROE on August 18, 2014 saying J. L. quit her employment at X when J. L. was still waiting for a mortgage commitment?
- h) F. K. testified that D. K. signed the ROE on August 18, 2014.
- How could D. K. have signed the ROE with serial number E28772411 on August 18, 2014 when that particular serial number wasn't even assigned to X until October 2014?
- i) F. K. testified that X was in an industry with “no security cameras, no security guards” and that J. L. came and went from the construction sites without anyone noticing her.
- If, as F. K. testified when the hearing was reconvened on August 23, 2017, J. L. took the TTC to job sites, how did she gain access to the site? Why is there no site log or other record of her coming and going from the site?
  - If she cleaned at night or afterhours, was she given a key? If yes, why are there no records of the key control for the job sites?
  - Given that employers and general contractors are liable for the safety of all employees in the workplace (in this case, construction sites) under the *Occupational Health and Safety Act* (and can be subject to fines, personal liability, criminal charges and potential jail time for violations of the Act), why would X, F. K. or any of the general contractors involved ever countenance – or risk – a scenario where J. L. gained access to and worked on a construction site without anyone's knowledge?
  - Is it reasonable to think that no one supervised J. L. or monitored not only her personal safety but ensured she herself was safely performing her tasks?

[121] As set out in paragraph 120 above, F. K.'s testimony at the hearing only served to raise even more questions about the validity of the ROE and the subsequent representations made to support that ROE. These questions bring F. K.'s credibility into serious doubt.

[122] But it is his testimony to the effect that J. L. was somehow able to come and go from construction sites as she pleased, without anyone being the wiser, that the Tribunal is most troubled by. Such an idea is simply absurd.

[123] Given the nature of the work described by the former employee of X (GD3-443 to GD3-445), and the description of the work in the sub-contracts provided by F. K. (GD3-296 to GD3-320, and GD6-1 to GD6-16), as well as the equipment rentals and materials purchased by X to do that work (as per the documents provided by F. K. at GD3-321 to GD3-421), it is clear that heavy duty and dangerous construction was being undertaken on the construction projects X was involved in. It is preposterous to suggest that J. L., as an untrained worker, with no experience in construction, no safety equipment or training, and no supervision, could wander onto such a construction site and clean it up. It is even more outrageous to suggest that J. L. would be allowed to do so without anyone knowing. It is far more likely that a new cleaner for X, which J. L. purportedly was, would have had to report to the site Superintendent or supervisor, sign in, produce proof of her WHMIS and other safety training and WSIB certification, receive a site orientation and adhere to the daily logs for the site. There would be no other way to ensure J. L.'s own safety, let alone those of the other workers on site. There would undoubtedly have been people who met J. L. in this process – and documentary records – especially over the 18 weeks she purportedly worked for X as a site cleaner. The fact that no such evidence was provided by X – even after F. K. was given three (3) months between the first and second hearing dates to obtain witness statements from people who saw J. L. at work – is significant and telling.

[124] For the reasons set out in paragraphs 121 to 123, the Tribunal gives greater weight to J. L.'s statements to the Commission than to F. K.'s testimony at the hearing.

[125] Regardless of J. L.'s motives for making the complaint to RECO that led to the Commission's investigation into the validity of the ROE issued by X, a decision was made by the Commission that the ROE was false and that penalties should be imposed upon X and D. K.

for misrepresentations in connection with the ROE. X appealed those decisions to the Tribunal, and has the onus of proof on the appeal. The Tribunal agrees with the Commission that insufficient evidence has been provided by X to prove that its employment of J. L., as reported on the ROE, was genuine. To the contrary, the documentary evidence, F. K.'s prior statements to the Commission and his testimony at the hearing all point rather obviously to the conclusion that the employment reported on the ROE was fictitious and fabricated for purposes of the real estate transaction that J. L. and S. K. were involved in.

[126] The Tribunal finds that J. L. was never employed by X.

[127] The Tribunal further finds that J. L. did not perform any work for X that could be considered insurable employment for purposes of section 5 of the EI Act and, in particular, for purposes of issuing an ROE pursuant to sections 19 - 21 of the *Employment Insurance Regulations*. The Tribunal therefore finds that the ROE issued by X for J. L. reporting 720 hours of insurable employment and \$11,232.00 in insurable earnings between March 17, 2014 to July 18, 2014 is false.

[128] Having found that the ROE is false, the Tribunal also finds that the documents and statements proffered by X and F. K. in an attempt to prove the validity of that ROE are also false. In particular, the Tribunal finds that the eight (8) representations listed in paragraph 98 above are false and constitute false representations for purposes of subsection 39(1) of the EI Act.

**ISSUE TWO: Were the eight false representations made with the knowledge they were false?**

[129] Section 39 of the EI Act allows the Commission to impose a penalty on X – as the employer, or any other person acting on behalf of X, including D. K. as the Director of X, for knowingly making false or misleading representations or providing false or misleading information in connection with any matter arising under the EI Act. This section covers both the issuance of an ROE and any information provided in connection with an investigation into the validity of an ROE.

[130] The initial onus is on the Commission to prove the representations are false. The onus then shifts to X to prove that neither X, nor anyone acting on its behalf, made the representations *knowing them to be false*.

[131] The Tribunal has found that J. L. was not employed by X, that the ROE issued to her by X was false, and that the representations made by and on behalf of X in an attempt to persuade the Commission as to the validity of the ROE were also false.

[132] The Tribunal has no hesitation in finding that the eight (8) false representations identified in paragraph 98 above were made by X and F. K. (on behalf of X) with the knowledge they were false.

[133] The Tribunal accepts F. K.'s repeated statements that he was the person at X who ran the business, dealt with J. L., and made all of the decisions in relation to J. L.

[134] F. K. was also, by his own admission, not only running things at X but closely involved in the real estate transaction that his wife, S. K., had arranged for J. L. He stated that J. L. was a friend that he and S. K. wanted to help. He also stated that he paid J. L. in cash except for the one time he gave her a cheque because she needed it for her mortgage (see GD3-500). And he allowed her to sit in his car and make up false rent receipts (see GD3-502).

[135] F. K. was also the authorized representative of X for purposes of responding to the Commission during its investigation into the validity of the ROE. The authorization letter dated October 12, 2015 signed by D. K. and X authorizing F. K. to represent them in the matter of ROE Serial #E28772411, Case #06116952m6" is at GD3-494.

[136] A lengthy and detailed analysis of the evidence provided by X and F. K. is set out under ISSUE ONE above, along with the Tribunal's conclusions with respect to F. K.'s credibility on the issue of J. L.'s employment by X.

[137] At paragraph 125 above, the Tribunal concluded that J. L.'s alleged employment with X was most likely fabricated for purposes of the real estate transaction and, more specifically, for obtaining a mortgage in order to complete that transaction. The Tribunal is further supported in its analysis by the fact that J. L.'s name is misspelled as "I." on the pay cheque and pay stub she

provided to RECO and the Commission at the outset, as well as all of the real estate documents; but her name appears correctly as “L.” on the ROE, pay stubs, employee list and other documents subsequently provided to the Commission by F. K. (with the exception of the T4). This further supports the conclusion that the I. documents were all created in August 2014 around the real estate transaction, and the L. documents were created later, in response to the RECO complaint and the Commission’s investigation into the validity of the ROE. The Tribunal also notes that the letter from X to CRA advising it had forgotten a T4 for an employee in 2014, and attaching the T4 for J. L., is dated April 24, 2015. The RECO investigation was likely well underway by then, given the May 5, 2015 letter from RECO to the Commission and the statements by both J. L. and F. K. regarding her complaint to RECO when she realized her \$10,000.00 deposit was gone.

[138] For the reasons set out under ISSUE ONE above and in paragraphs 133 to 137 above, the Tribunal finds that X knowingly issued a false ROE for J. L. The Tribunal further finds that the documents and statements subsequently provided by X and F. K. on behalf of X during the Commission’s investigation into the ROE were provided with the knowledge they were false and in an attempt to conceal the fraudulent nature of the ROE. A penalty may, therefore, be imposed pursuant to section 39 of the EI Act.

**ISSUE THREE: Did the Commission exercise its discretion in a judicial manner when it imposed the penalty for the 8 false representations?**

[139] The Tribunal recognizes that in exercising its exclusive jurisdiction to impose a penalty and determine the amount of that penalty, the Commission must do so in a judicial manner. That is, the Commission must act in good faith, for proper purpose and motive; must take into account any relevant factors and ignore any irrelevant factors; and act in a non-discriminating manner (*Dunham, supra*, and *Purcell, supra*).

[140] The Tribunal has reviewed the Supplementary Record of Claim and Penalty Rationale from the reconsideration process (at GD3-499 to GD3-502 and GD3-505 to GD3-506, respectively), and notes the Commission did not identify any mitigating factors to consider with respect to the imposition or quantum of the penalty.



[141] F. K. submitted it is not open to the Commission to seek a penalty in this case because X paid wages to J. L. and remitted the employer contributions reported on the T4. The Tribunal notes that no evidence was presented to prove if or when these remittances were made. The Tribunal further notes that, even if they were made, this would not mitigate against the imposition of a penalty in any event because they would be nothing more than yet another attempt to cover up the fraudulent nature of the ROE.

[142] The Tribunal also considered F. K.'s submissions that the Commission was biased against X and blindly relied on false statements by J. L. in coming to its decision. For the reasons set out under ISSUE ONE above, the Tribunal finds no evidence to support either allegation. The Commission's agents conducted a detailed and thorough investigation in the investigation and during the reconsideration process. Although the Investigator was frustrated at times by F. K.'s lack of forthrightness, he was nonetheless aware that J. L. was not an innocent party in all of this and had her own motivation for bringing her complaint forward.

[143] No evidence was presented at the hearing to prove that the Commission failed to act in good faith, or failed to take into account any relevant factors and ignore any irrelevant factors, or failed to act in a non-discriminating manner. Having reviewed and considered all of the documentary evidence and testimony in this case, the Tribunal finds no evidence that the Commission failed to act in a judicial manner.

[144] The Tribunal therefore finds that the Commission exercised its discretion in a judicial manner at the reconsideration stage when it determined that a penalty was warranted and that the amount of the penalty imposed upon X and D. K. would be \$15,277.00.

[145] Having found that the Commission exercised its discretion judicially in connection with both the imposition and the quantum of the penalty imposed pursuant to subsections 39(2) and (4) of the EI Act, the Tribunal cannot interfere with the Commission's decision.

## **CONCLUSION**

[146] The Tribunal finds that:

- a) J. L. did not work for X and was never employed by X;

- b) the ROE for J. L. (at GD3-12) was a false representation of employment;
- c) the X pay cheque (#1297) for J. L. covering the pay period 7/7/14 to 20/7/14 (at GD3-30) was a false representation of employment;
- d) the X pay stubs for J. L.'s fictitious employment (at GD3-31 to GD3-32) were false representations of employment;
- e) the T4 generated by X for J. L.'s fictitious employment in 2014 (at GD3-290) was a false representation of employment;
- f) the X staff/employee list for 2014 to which J. L.'s name was added last (at GD3-67) was a false representation of employment;
- g) the letter of April 27, 2015 from X to CRA indicating that X missed a T4 (which belonged to J. L.) and the revised tax summary issued to include J. L.'s falsified T4 (at GD3-288 to GD3-289), were both false representations of employment;
- h) there were numerous false representations made by F. K. at the in-person interview he attended on behalf of X on October 13, 2015 (see Investigation Information Sheet at GD3-52 to GD3-53); and
- i) there were numerous false representations made by F. K. during the telephone interview he attended on behalf of X on November 13, 2015 (see Investigation Information Sheet at GD3-446 to GD3-447).

[147] The Tribunal further finds that:

- a) the eight (8) false representations identified in paragraphs 98 and 146 above were made by X, and F. K. on behalf of X, with the knowledge they were false;
- b) a penalty may be imposed pursuant to section 39 of the EI Act; and
- c) the Commission exercised its discretion in a judicial manner at the reconsideration stage when it determined that a penalty of \$15,277.00 should be imposed for the eight (8) false representations.

[148] The appeal is dismissed.

**Teresa M. Day**

**Member, General Division - Employment Insurance Section**

## ANNEX

### THE LAW

#### Employment Insurance Act

**39 (1)** The Commission may impose on an employer, or any other person acting for an employer or pretending to be or act for an employer, a penalty for each of the following acts if the Commission becomes aware of facts that in its opinion establish that the employer or other person has

(a) made, in relation to any matter arising under this Act, a representation that the employer or other person knew was false or misleading;

(b) being required under this Act or the regulations to provide information, provided information or made a representation that the employer or other person knew was false or misleading;

(c) in relation to any matter arising under this Act, made a declaration that the employer or other person knew was false or misleading because of the non-disclosure of facts;

(d) imported or exported a document issued by the Commission, or had it imported or exported, for the purpose of defrauding or deceiving the Commission; or

(e) participated in, assented to or acquiesced in an act mentioned in paragraphs (a) to (d).

(2) The Commission may set the amount of the penalty for each act at not more than nine times the maximum rate of weekly benefits in effect when the penalty is imposed.

(3) If the Commission becomes aware of facts that in its opinion establish that a corporation has committed an act described in subsection (1) and that any officer, director or agent of the corporation has directed, authorized, assented to, acquiesced in or participated in the act, the Commission may impose a penalty on the officer, director or agent, whether or not a penalty has been imposed on the corporation.

(4) Notwithstanding subsection (2), if the act involves the provision of information about any matter on which the fulfilment of conditions for the qualification and entitlement for receiving or continuing to receive benefits depends, the Commission may set the amount of the penalty at not more than the greater of

(a) \$12,000, and

(b) the amount of the penalty imposed under section 38 on any person who made a claim for benefits based on the information provided.

(5) Notwithstanding subsection (2), the Commission may set the amount of the penalty at an amount required or authorized by the regulations if the act is a major contravention, as defined

under the regulations.

## **Employment Insurance Regulations**