Citation: *BS v Canada Employment Insurance Commission*, 2021 SST 920

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	B. S.
Representative:	Robert Morrissey
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (418153) dated March 22, 2021 (issued by Service Canada)

Tribunal member:	Raelene R. Thomas
Type of hearing:	Teleconference
Hearing date:	July 6, 2021
Hearing participants:	Appellant Appellant's Representative
Decision date:	August 16, 2021
File number:	GE-21-637

Decision

[1] B. S.R is the Appellant in this appeal. I will call him the Claimant.

[2] The Canada Employment Insurance Commission, is the Respondent in this appeal. I will call it the Commission.

[3] The Claimant's appeal of the Commission's decision that he voluntarily left his employment is dismissed. I do not agree with the Claimant.

[4] The Claimant's appeal of the Commission's decision to impose a penalty on him for a misrepresentation on a claim report is allowed in part. The Claimant made a misrepresentation when he failed to report that he stopped working. The penalty is reduced from $859 to $430.

[5] The Claimant's appeal of the Commission's decision to impose a serious notice of violation on him is allowed.

Overview

[6] The Claimant was working away from his home province in the fall of 2020. He became concerned about COVID-19 and whether his employer could protect him on the job site. He was also concerned he might give the disease to his elderly father when he returned home. The Claimant stopped working and returned to his home province. He did not report that he stopped working on his claim report on his existing claim for employment insurance (EI) benefits. He finished the existing claim for EI benefits and then made a new claim.

[7] The Commission decided that the Claimant had knowingly made a misrepresentation when he failed to report on the claim report that he stopped working. It decided to impose a penalty of $859.50 on the Claimant and a serious notice of violation. The serious notice of violation means the Claimant has to work more hours (or earn more money fishing) to qualify for EI benefits in the future.

[8] When the Claimant completed a new application for EI benefits he reported that he had quit work due to his concerns about COVID-19 at the work site and the possibility of giving his father, who is immunocompromised, the disease. His employer issued a Record of Employment (ROE) saying that he quit his job.

[9] The Commission decided that the Claimant did not have just cause for leaving his job when he did. The Claimant disagrees. He says that he did not quit. He says that he was laid off from his job. He says he returned home for a break at Christmas and was not called back to work.

Matter I have to consider first

I will accept documents received after the hearing

[10] At the hearing, the Representative said that he did not have the Commission's Representations to the Social Security Tribunal. I offered an adjournment to allow the Representative and the Claimant an opportunity to review the Commission's Representations. The Representative and the Claimant declined the adjournment and agreed to go ahead with the hearing.

[11] I summarized the Commission's Representations on the voluntary leaving issue and the Representative responded during the hearing. The Commission's Representations on the misrepresentation, the penalty and violation were too lengthy to summarize.

[12] In the interests of natural justice, I arranged for the Commission's Representations on both issues to be sent again via email to the Representative and gave him an opportunity to provide written comment following the hearing. The Representative's comments were received by the Tribunal on July 13, 2021. I am admitting those comments into evidence because the comments summarize the Claimant's position regarding the issues under appeal.

[13] The Commission provided an Additional Representation in response to the Representative's written comments on July 22, 2021. In those Representations, the

Commission maintained that its original decision to disentitle the Claimant was supported by the Claimant's statements and the case law. The Commission submitted that despite the amended ROE, the evidence on file showed it was the Claimant who initiated the separation from employment. I am admitting this document into evidence because it provides the Commission's view with respect to the amended ROE.

Issue

[14] I have to decide, if under the *Employment Insurance Act* the Claimant had just cause to voluntarily leave his employment. This decision takes two steps. First, I have to see if the Claimant chose to leave his job. Second, I have to see if the Claimant had just cause for leaving his job.

[15] I also have to decide if the Claimant knowingly made a misrepresentation on his claim report when he failed to report that he stopped working. If I find that he knowingly made the misrepresentation, then I have to decide if the Commission acted judicially when it exercised its discretion to calculate the penalty amount and to impose a notice of violation.

Analysis ~ Voluntary Leaving

[16] The law says that if you quit your job without just cause, you cannot receive EI benefits.[1]

The Claimant voluntarily left his job

[17] To decide if the Claimant voluntarily left his employment, the question to be asked is whether he had a choice to stay in or leave that employment.[2]

[18] I find that it is more likely than not the Claimant voluntarily left his employment. My reasons for this finding follow.

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[1] *Employment Insurance* Act, section 30(1). This is how I refer to the law that applies to this appeal.
[2] *Canada (Attorney General) v. Peace*, 2004 FCA 56. This how I refer to the court cases that contain principles I am applying to this appeal.

[19] The Claimant said that he did not quit work. Rather, he left work for the Christmas break and was not recalled to his job.

[20] The Claimant was working away from his home province during the winter months. He fishes commercially during the spring and summer. He said that the type of work he was doing required that he work in close quarters with other employees. In the weeks before he stopped working he had been tested for COVID-19 and had to self-isolate. He was concerned that he might get COVID-19 or that he might bring the disease home to his elderly father with whom he resides. He returned to the work site after he completed the self-isolation.

[21] The Claimant testified that he discussed his concerns with the supervisor. He said that the supervisor told him that if he did not feel comfortable that he could leave work and it would be okay. Before he left work for the Christmas break, the Claimant said that he had a good discussion with the supervisor. He said the supervisor told him that he did not know if there would be employment after Christmas.

[22] The Claimant testified that when he stopped working on December 10, 2020, it was because of the Christmas break. He returned to his home province and testified that he expected to return to work on January 4, 2021. He said that he was not called to return to work. The Claimant said that when the supervisor did not reach out to him he figured it was a layoff. The Claimant testified that he contacted his supervisor later before he applied for EI benefits. He said the supervisor told him then there was no work.

[23] The Representative submitted that the Claimant was laid off from work. The Representative referred to the amended ROE issued by the employer on June 16, 2021. The amended ROE showed that the Claimant stopped working because of a shortage of work and not because of a quit as was indicated on the original ROE.

[24] The Claimant said that the ROE was amended after he was talking to the supervisor.

[25] The Claimant has provided conflicting information about why he stopped working. His statements in his application for EI benefits, his conversations with the Service Canada agents, his statements in his request for reconsideration and in his appeal to the Tribunal about the reasons he stopped working all contradict the testimony that he gave at the hearing. His statements cannot all be true. This makes it difficult for me to decide which of the Claimant's statements are reliable.

[26] The Claimant indicted he quit on his application for EI benefits. The form asked the Claimant for the reason he quit his job. He wrote:

> I didn't feel safe at my job due to COVID. There were active cases of COVID on the job site. I was sent to isolate for a week and had to get tested twice after clear testing I was instructed to go back to site work. Coming on to the end of the project cases were increasing and I knew I had to return home to live with my father who is vulnerable. I no longer feel safe at my work. My employer told me that if at any time I didn't feel safe or doing unsafe work that I could refuse unsafe work. I do have a guaranteed job offer beginning the first of May 2021.

[27] The Claimant wrote on his application for EI benefits that he spoke to the supervisor about the situation and that he, the Claimant, was under the impression that everything was good. The Claimant also wrote that he had to return home because of COVID and wrote that he had a guaranteed job offer for May 2021.

[28] The Representative said the Claimant was not obligated to provide care for his father. He said the Claimant did not leave his job for that reason. The Claimant testified that he worked for four or five days after he finished isolation and then left to come home for the Christmas break.

[29] The Claimant stopped working on December 10, 2020. His employer initially issued an ROE on December 17, 2020. The reason for issuing on that ROE is "Quit." The ROE was amended on June 16, 2021, to show "Shortage of work / End of contract or season" as the reason for issuing.

[30] In his application for EI benefits, the Claimant indicated that he was no longer working because he quit. I asked the Claimant why he did not indicate that he was no longer working due to a shortage of work as that was the first option on the application. The Claimant replied, "I completed the form to the best of my ability."

[31] Service Canada agents contacted the Claimant to discuss why he did not indicate on his claim report that he had quit.

[32] A Service Canada agent asked the Claimant why did he fail to declare his quit on the claimant report he submitted on December 19, 2020. He replied, "I didn't know you had to. I didn't see that it asked. I thought I didn't have to declare it until a new claim started." The Service Canada agent asked if there was any information the Claimant wanted considered if a penalty was to be imposed. The Claimant replied he came home because of COVID.[3]

[33] In a second conversation with the Service Canada agent, the Claimant said that he quit because he was scared he was going to get it (meaning COVID-19). He said he was living in a hotspot and could not go back and forth. He was concerned he or his father would get COVID. The Commission asked the Claimant if there was an end date to the job. He replied, "There was no end date. It wasn't discussed anyway. It usually just stops when it's done."[4]

[34] During this second conversation, the Claimant said he "told his employer that if we felt unsafe we could refuse." He told his employer two weeks from the 10th and went home on 10th December. He did not think he would "get a quit" (meaning that his ROE would state that he quit). He said, "It wasn't just me that decided to not work anymore."[5]

[35] The Claimant also told the Service Canada the work site got shutdown for Christmas.[6]

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[3] See page GD3A-37 for this conversation which took place on February 11, 2021
[4] See page GD3A-40 for this conversation which took place on February 18, 2021
[5] See page GD3A-41 for this conversation which took place on February 18, 2021
[6] See page GD3A-41 for this conversation which took place on February 18, 2021

[36] The Service Canada agent noted that he reviewed the Claimant's statements with the Claimant. The Claimant added that he "had no plans on coming home but it (meaning COVID-19) got so bad that I basically had to or I would be staying in my apartment not working."[7]

[37] The Claimant wrote in his request for reconsideration, made on March 5, 2021, that he "did not expect to have "quit" written on my ROE as I had a civil conversation with my employer about why I was leaving."[8]

[38] The Claimant made an appeal to the Tribunal on April 7, 2021. He wrote in his appeal that he left his job in early December solely due to the pandemic and the situation close to his camp with rising cases. The Claimant wrote that he discussed with his supervisor who agreed that it was okay to leave and return to his home province because he felt it was unsafe at the campsite due to the COVID-19 pandemic. The Claimant wrote, "I found out recently in talking to my supervisor again that it was his superiors who disagreed with me leaving and put quit on my ROE!"[9]

[39] I asked the Claimant why he did not tell the Service Canada agents that he was not working because there was a shortage of work. He replied because he got a quit on the ROE. The Representative noted that it is the agent's version of the conversations in the appeal file. I note the Claimant did not dispute the contents of the conversations as recorded by the Service Canada agents. The Representative said that the Claimant's conversation with the employer was uncertain. COVID-19 was a big reason for the Claimant's return home and that he ended up in isolation.

[40] The Representative said that the employer could not put in place the necessary protocols and that the company could not guarantee the work. The Representative said the Claimant left the job for the normal Christmas shutdown. He said the employer was unsure of the road ahead due to COVID-19. The Representative said that the employer communicated this to the Claimant.

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[7] See page GD3A-41 for this conversation which took place on February 18, 2021
[8] See page GD3A-48
[9] See page GD2-5 of the Claimant's appeal to the Tribunal

[41] The Claimant's Representative submitted an amended ROE, dated June 16, 2021, that says the Claimant stopped working due to a shortage of work. The Representative says that the amended ROE supports that the Claimant was laid off.

[42] I recognize that the ROE has been amended to say shortage of work. But, the ROE is just one piece of evidence that can be used to determine if a claimant voluntarily left their employment. In this case, I am placing less weight on the ROE because it contradicts the Claimant's statements on his application for EI benefits, his statements to Service Canada agents, his statements in his request for reconsideration and in his appeal to the Tribunal.

[43] The Representative said that the Claimant did not leave the job due to COVID-19 but due to the normal break that the company took for all employees. He submits the Claimant's employer could not guarantee continued work. The Representative submitted that in these circumstances, it should follow the documentation that the company laid off the Claimant because it could not predict its future work requirements during an unprecedented pandemic and it was already struggling with COVID-19 in the camp.

[44] I think that if the Claimant thought that he was laid off when he stopped working in December 2020 he had ample opportunities to state that was the case. He could have indicated that he was laid off in his application for EI, he could have told the Service Canada agents during his interviews that the ROE was not correct, and he could have said that was the case when he filed his reconsideration request or when he filed his appeal with the Tribunal. He did not.

[45] I note the Claimant wrote in his application for EI benefits that he was no longer working because he quit. The Claimant gave detailed reasons for leaving his job on the application for EI benefits. His reasons for quitting and coming home were related to his concerns that he might get COVID-19, he might give it to his elderly father who was immunocompromised and that he was told he could leave work if he felt unsafe.

[46] The Claimant testified that he expected to return to work on January 4, 2021. He said he spoke to his supervisor before he applied for EI. He applied for EI benefits on January 6, 2021. He said that he and the supervisor spoke about work. There was no work. Yet, the Claimant indicated on his EI application that he was not working because he quit. If it was the case that the Claimant was expecting a call back to work, and he was aware from January 4, 2021, onward that the employer was not calling him back, there was no reason for him to indicate on his application for EI benefits that he quit.

[47] In addition, in January 2021 and February 2021 the Claimant continued in his conversations with Service Canada agents to speak to the reasons that he left his employment as being related to COVID-19. The Claimant told one Service Canada agent that it was not only him who decided to not work anymore. The Claimant wrote in his request for reconsideration that he "did not expect to have "quit" written on my ROE as I had a civil conversation with my employer about why I was leaving."[10] He wrote in his appeal to the Tribunal that he left his job in early December … this was solely due to the pandemic and the situation close to our camp with rising cases.[11] This evidence, taken together with the Claimant's written statements, tells me that the Claimant initiated his separation from his employment when he decided that he would not work anymore and told the supervisor he would be leaving his job due to his concerns with COVID-19 at the work site. This means that the Claimant chose to leave his employment. Accordingly, I find that the Claimant voluntarily left his employment on December 10, 2020.

[48] Having decided that the Claimant voluntarily left his employment, I must now decide if he had just cause for leaving.

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[10] See page GD3A-48, for the Request for Reconsideration which is dated March 5, 2021
[11] See page GD2-5, of the Claimant's appeal which is dated April 17, 2021

The parties do not agree that the Claimant had just cause

[49] The parties do not agree that the Claimant had just cause for voluntarily leaving his job when he did.

[50] The law says that you are disqualified from receiving benefits if you left your job voluntarily and you didn't have just cause.[12] Having a good reason for leaving a job is not enough to prove just cause.

[51] The law explains what it means by "just cause." The law says that you have just cause to leave if you had no reasonable alternatives to quitting your job when you did. It says that I have to consider all the circumstances.[13]

[52] It is up to the Claimant to prove that he had just cause.[14] He has to prove this on a balance of probabilities. This means that he has to show that it is more likely than not that he had no reasonable alternatives to quitting his job.

[53] When I decide whether the Claimant had just cause, I have to look at all of the circumstances that existed when the Claimant quit. The circumstances I have to look at include some set by law.[15] Even if I decide any of the listed circumstances apply to the Claimant, he still has to show that there were no reasonable alternatives to leaving his job.

[54] A claimant can have more than one reason for leaving a job.

[55] The Claimant's application for EI benefits indicated that he left his job because he did not feel safe at his job due to COVID. He wrote there were active cases of COVID on site and he had to isolate for week after being tested. He said the cases were increasing and that he knew he had to return home to live with his father who is

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[12] Section 30 of the *Employment Insurance Act* (Act) explains this.
[13] See *Canada (Attorney General) v White*, 2011 FCA 190 at para 3; and section 29(c) of the *Employment Insurance Act*.
[14] See *Canada (Attorney General) v White*, 2011 FCA 190 at para 3.
[15] Section 29(c) of the *Employment Insurance Act* has a list of circumstances

vulnerable. He wrote that his employer told him if at any time he did not feel safe or doing unsafe work he could refuse unsafe work.

[56] The law says that a person who has an obligation to care for a member of their immediate family has just cause for leaving their job if there are no reasonable alternatives to leaving.[16] The Representative submitted that the Claimant did not leave his job to provide care for his father. As a result, I find the Claimant cannot rely on this provision to establish just cause.

[57] The law says that a person who has reasonable assurance of another employment in the immediate future has just cause for leaving their job if there are no reasonable alternatives to leaving.[17]

[58] The Claimant wrote in his application for EI benefits that he had a guaranteed job offer for May 2021. The Commission contacted the Claimant's employer for more information on why he left his job. The employer representative said the Claimant had left to go fishing. A Service Canada agent asked the Claimant why his employer would tell the Commission that he had quit to go fishing. The Claimant replied that was false because fishing did not start until May.[18] The Claimant testified that he did not leave his job for other employment. The job offer he wrote about in the application for EI benefits was in relation to his work as a commercial fisherman. That work is seasonal. He did discuss going fishing with the supervisor, who is also from the Claimant's home province. In light of the Claimant's evidence that he did not quit to go fishing, I find that the Claimant cannot rely on this provision to establish just cause.

[59] The Claimant's statements in his application for EI benefits and to the Service Canada agents were that he was concerned about catching COVID-19 at his work site. He testified that he worked in a small space with other workers and that it was not possible for him to maintain 6 feet distance from other workers. He said that the

[16] Section 29(c)(v), *Employment Insurance Act*
[17] Section 29(c)(vi), *Employment Insurance Act*
[18] See page GD3A-37 for this conversation which took place on February 11, 2021

employer did provide masks and glasses for him and his coworkers to wear at the worksite.

[60] The Claimant testified that he was tested for COVID-19 while he was working. He had to isolate in his apartment. His test was negative and he was required to return to the worksite. He said that he returned to the worksite and worked for four or five days before he stopped working on December 10, 2020. He said that he had to return to his home province because of his concern that he might catch COVID-19 in the province where he was working. The Claimant testified that he did not stop work, he was leaving because of the COVID-19 situation.

[61] The Claimant said that he discussed his concerns with the supervisor. I asked the Claimant if he made any suggestions to the supervisor about how the unsafe work could be made safe. The Claimant replied it was not his job to do that. The Claimant testified that he did not have any medical conditions that made the work he was doing unsafe for him.

[62] The Claimant wrote in his application or EI benefits that his employer told him he could refuse unsafe work.

[63] The Commission says the Claimant did not have just cause for leaving his job because he did not exhaust all reasonable alternatives prior to leaving. Specifically, it says the Claimant could have continued working while trying to remedy his concerns with his employer, whether it be through requesting enhanced health and safety protocols or by requesting a period of temporary leave to search for other work that the Claimant deemed more suitable.

[64] The Representative submitted that the Claimant put forth a document, the ROE, that he did not voluntarily leave his job. He said the employer was not able to ensure that the Claimant and other workers could be safe at work. He said the Claimant did not immediately leave his job due to COVID-19, it was the holiday break. The Representative said that the employer could not guarantee work, the Claimant did not leave a job with continued work.

[65] Just cause is not the same as a good reason. The question is not whether it was reasonable for the claimant to leave his employment, but rather whether leaving his employment was the only reasonable course of action open to him, having regard to all the circumstances.[19]

[66] There is no evidence that the Claimant would have been granted a temporary leave to search for other work. As a result, I find that requesting a temporary leave to search for other work is not a reasonable alternative to the Claimant leaving his employment.

[67] Consideration must be given to whether the fact that the claimant voluntarily left his employment as a result of fears he had of dangerous conditions at his work was the only reasonable alternative.[20]

[68] I recognize that the Claimant had concerns related to COVID-19 and his employer's ability to ensure his safety with respect to catching COVID-19 while at work. He testified that his employer provided masks and glasses to him and his coworkers while they were working in a small space. The workspace was such that he and his coworkers could not keep 6 feet apart while working.

[69] The Claimant said that he discussed his concerns with his supervisor. He told a Service Canada agent that he had that discussion about 2 weeks before he stopped working on December 10, 2020. The Claimant testified that he did not make any suggestions to the supervisor about how the work could be made safer, because he did not think it was his job to do so. The Claimant also indicated on his application for EI benefits that he did not bring his concerns about the worksite and COVID-19 to an outside agency because "there was no agency to consult."

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[19] *Canada (Attorney General) v. Imran*, 2008 FCA 17; *Canada (Attorney General) v. Laughland*, 2003 FCA 12

[20] *Canada (Attorney General) v. Hernandez,* 2007 FCA 320

[70] The Claimant also told a Service Canada agent that he was living in one of the biggest hot spots in North America. He was ordering groceries on line. There were a lot of new rules coming in with construction sites. He said, “we wouldn’t get shut down.”

[71] I think that it would have been reasonable for the Claimant to ask his employer what safety protocols the employer could put in place to address his concerns about catching COVID-19. While the Claimant did tell his employer that he was leaving because of his concerns about COVID-19 there is no evidence that he asked to have those concerns addressed before he left his job. By not asking that his concerns be addressed, the Claimant has failed to address this conflict in his workplace.[21] This means the Claimant did not exhaust this reasonable alternative prior to leaving his job.

[72] I find that, having regard to all the circumstances, the Claimant has not proven he had no reasonable alternatives to leaving his employment when he did. It would have been reasonable for the Claimant to ask his employer to address his concerns. He did not do that. Accordingly, I find the Claimant’s decision to leave his employment does not meet the test of just cause to voluntarily leave employment as required by the *Employment Insurance Act* and case law described above.

Analysis ~ Misrepresentation and Penalty

[73] The Commission may impose a penalty on a claimant, or any other person acting for a claimant, for each act or omission they knew was false or misleading.[22]

[74] It is not enough that the statement or omission be false or misleading, the claimant must knowingly make the false or misleading statement or representation (emphasis added). Knowingly means the claimant knew the information provided was untrue when he made the statement, and does not include any element of intention to deceive.[23]

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[21] The claimant has an obligation, in most cases, to attempt to resolve workplace conflicts with an employer, or to demonstrate efforts to seek alternative employment before taking a unilateral decision to quit a job. (*Canada (Attorney General) v. White*, 2011 FCA 190)
[22] *Employment Insurance Act*, section 38(1).
[23] *Attorney General of Canada v. Gates,* A-600-94.

[75] The Commission has the burden to show the statement or representation is false or misleading and that the claimant made the misrepresentation with the knowledge that it was false or misleading.[24] If proven, the burden then shifts to the claimant to prove the statements were not made knowingly and to provide a reasonable explanation for the incorrect information.[25]

[76] The burden of proof in this case is a balance of probabilities, which means it is "more likely than not" the events occurred as described.

[77] I do not have to determine that there was an intention to deceive in order to conclude that a false statement was knowingly made.[26]

[78] The decision to impose a monetary penalty and the calculation of the penalty amount are discretionary decisions of the Commission.[27] This means that it is open to the Commission to set the penalty at an amount it thinks is correct. I have to look at how the Commission exercised its discretion. I can only change the penalty amount if I first decide that the Commission did not exercise its discretion properly when it set the amount.[28]

[79] If the Commission acted in bad faith or for an improper motive, took into account irrelevant factors or failed to consider relevant factors, or if it acted in a discriminatory manner, then it did not exercise its discretion judicially.[29] If I find the Commission did not exercise its discretion judicially, I may make the decision the Commission should have made.

[80] In these cases, I am respectful of the Commission's discretion to assess a penalty, and recognize that the law has clarified that I have the ability to modify a

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[24] *Mootoo v. Canada (Minister of Human Resources Development)*, 2003 FCA 206
[25] *Canada (Attorney General) v. Purcell* A-694-94, *Attorney General of Canada v. Gates,* A-600-94
[26] *Attorney General of Canada v. Gates,* A-600-94
[27] *Canada (Attorney General) v. Gauley*, 2002 FCA 219
[28] *Canada (Attorney General) v. Kaur*, 2007 FCA 287
[29] *Canada (Attorney General) v. Purcell*, A-694-94

penalty under the circumstances above, but I cannot negate a penalty if I find the Commission had a legal basis to impose it.[30]

The Claimant made a misrepresentation

[81] The Representative submitted that the Commission made its decision that there was a misrepresentation on the basis of an ROE issued in error by the Claimant's employer. That ROE was later changed. The Representative submitted that the changed ROE removed the basis for the Commission's decision that a misrepresentation occurred.

[82] The Representative said that the information provided by the Claimant was accurate. The ROE confirms that the information provided by the Claimant was accurate and he did not provide false information. The Representative wrote that the Claimant reiterated that he never provided false or misleading information to the Commission, that being that he did not report he stopped working for his employer. The Representative wrote that the Claimant did not feel that the legislation applied and the penalty should be removed.

[83] At the hearing, the Claimant testified that he had filed a claim for EI benefits in December 2019. He was receiving EI benefits when he returned to work in October 2020. He reported his earnings on his bi-weekly claim reports. The Claimant could not recall if he completed the claim report filed on December 19, 2020, by phone or on-line.[31]

[84] The appeal file shows the claim report filed on December 19, 2020, covered the two-week period from November 29, 2020 to December 12, 2020. The Claimant answered yes to the question had worked during those two weeks and if he had earnings. He reported his hours worked and the earnings he received for the first week and second week of the report's period.

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[30] *Canada (Attorney General) v. Gauley*, 2002 FCA 219
[31] The claim report filed on December 19, 2020, is on pages GD3B-36 to GD3B-43

[85] The appeal file shows the claim report prompted, “The following question will give you the opportunity to inform us of any loss of employment that you have not already reported to us. Have you stopped working for any employer during the period of this report?” The Claimant responded “No.”

[86] The claimant testified that he did not understand that he was laid off on December 10, 2020, when he stopped working. He was coming home for Christmas. He expected to return to work in the New Year and to get a call back to work after January 4, 2021.

[87] The Claimant’s application for EI benefits, made on January 4, 2021, stated that he quit his employment due to reasons related to COVID-19. That application was completed 24 days after the Claimant completed his claim report.

[88] A Service Canada agent asked the Claimant why did he fail to declare his quit on the claimant report he submitted on December 19, 2020. He replied, “I didn’t know you had to. I didn’t see that it asked. I thought I didn’t have to declare it until a new claim started.”[32]

[89] During a second conversation with the Service Canada agent, the Claimant said he “told his employer that if we felt unsafe we could refuse.” He told his employer two weeks from the 10th and went home on 10th December. He did not think he would “get a quit” [meaning that his ROE would state that he quit]. He said, “It wasn’t just me that decided to not work anymore.”[33]

[90] I do not accept the Representative’s argument that the amended ROE means that no misrepresentation occurred. The ROE changed the reason for issuing. It did not change the fact that the Claimant stopped working on December 10, 2020.

[91] I find that the Claimant was aware when he filed the report on December 19, 2020, that he had quit his employment on December 10, 2020. His awareness of quitting on December 10, 2020, is reflected in the application for EI benefits,

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[32] See page GD3A-37 for this conversation which took place on February 11, 2021
[33] See page GD3A-41 for this conversation which took place on February 18, 2021

conversations he had with Service Canada agents, his request for reconsideration and is appeal to the Tribunal. He consistently indicated that he stopped working due to reasons related to COVID-19. His last date of employment was December 10, 2020, which fell within the two-week period covered by the claim report. The Claimant replied "No" to the question "Have you stopped working for any employer during the period of this report?" As a result, I find that the Claimant replied "No" with the knowledge that the statement was false or misleading. Accordingly, I find that the statements were knowingly made, and as a result, a penalty is warranted.

The Commission did not judicially exercise its discretion when calculating the penalty

[92] I find the Commission did not judicially exercise its discretion when it calculated the penalty amount. As a result, I may determine the penalty to be imposed.

[93] The Commission may impose a penalty on a claimant, or any other person acting for a claimant, for each act or omission they knew was false or misleading.[34] The Commission may issue a warning instead of setting a penalty.[35]

[94] The Commission submitted that it rendered its decisions in this case in a judicial manner, as all the pertinent circumstances were considered when assessing the penalty amount. It says the Claimant's statement misled the Commission and resulted in the payment of benefits which the Claimant was not entitled to receive. The Claimant's statement was one that he knew did not accurately reflect the facts at the time it was given. The Commission submitted that the penalty amount was 50% of the overpayment of $1,719, because there were no mitigating circumstances provided by the Claimant to take into consideration.

[95] The appeal file has a Record of Decision for the penalty that was imposed on the Claimant. Under the heading Rational (*sic*) there is a reference to the Claimant's failure

[34] Section 38, *Employment Insurance Act*
[35] Section 41.1, *Employment Insurance Act*

to report his quit for his employer which is a named trucking firm.[36] The Claimant testified that he did not know of the trucking firm nor had he worked for that firm. The Representative said that stating the Claimant's employer was a trucking led him to question the total accuracy of the transcript of the decision.

[96] I accept the Claimant's evidence that he did not work for the trucking firm. The evidence is clear that he worked for another firm in a different industry outside of his home province.

[97] I do not agree that the naming of the trucking firm in the Record of Decision calls into question the accuracy of the transcript of the decision. The Claimant's actual employer is named in the Facts section and the dates of his claim report and stopping work are correct. As a result, I find that naming another employer is not determinative of the issue of whether the Commission acted judicially when it calculated the penalty amount.

[98] The Rationale section states that the Claimant failed to provide an explanation for failing to disclose the quit. The Rationale section goes on to state, "Based on the facts, it can be concluded that it is more probable than not that the client made the false statements knowingly as no concrete explanation was given for the omissions." That is not the case. A Service Canada agent asked the Claimant why did he fail to declare the quit on his claim report. The Claimant replied, "I didn't know you had to. I didn't see that it asked. I thought I didn't have to declare it until a new claim started." This evidence tells me that the Claimant did provide an explanation for not reporting the quit. In my opinion, the Claimant's reasons for not reporting the quit are a relevant consideration to be taken into consideration when determining a penalty. Whether those reasons are acceptable to the Commission is a consideration that may inform the Commission's decision to impose a penalty. By not considering the Claimant's explanation for not reporting the quit on the Claim report, the Commission failed to

[36] The Record of Decision in on page GD3B-47

consider a relevant factor in reaching its decision to impose a penalty on the Claimant for knowing making a misrepresentation.

[99] There is no evidence the Commission considered irrelevant factors or acted in bad faith when it reached its decision.

[100] The Commission would not have been aware at the time it reached the decision that the Claimant believed himself to be laid off from his employment. This is because the Claimant failed to tell the Commission that he thought he was laid off despite being given a number of opportunities to do so. As noted above, I have found that the Claimant did voluntarily leave his employment and did so without just cause. Accordingly, I do not consider that the Claimant's evidence and argument made at the hearing that he did not quit is a relevant consideration when assessing the penalty.

[101] I find that the Commission is allowed to impose a penalty. However, because it failed to consider the relevant factor of the Claimant's explanation for not reporting the quit on the claim report it did not properly exercise its discretionary power when it calculated the penalty amount.

[102] I have found that the Claimant knowingly made a misrepresentation when he failed to report that he had stopped working on the claim report he submitted on December 19, 2020. The Commission was aware but chose not consider the Claimant's explanation for failing to report the quit. As a result, I find that the penalty is more appropriately set at $430.[37]

Analysis - Notice of Violation

[103] The purpose of the law that allows the Commission to impose a notice of violation on a claimant is "to deter abuse of the employment insurance scheme by imposing an additional sanction on claimants who attempt to defraud the system."[38]

[37] This amount is 25% of the $1,719 overpayment rounded to the nearest dollar
[38] *Gill v. Canada (Attorney General)*, 2010 FCA 182

The Court further reaffirmed that the power to issue a notice of violation is a discretionary power that belongs to the Commission.[39]

[104] I have the jurisdiction to determine whether the Commission has exercised its discretion in a judicial manner when issuing a notice of violation.[40]

[105] For me to intervene with the Commission's decision, I must first determine that the Commission did not exercise its discretion in a judicial manner when it decided to issue the notice of violation. As noted above, if the Commission acted in bad faith or for an improper motive, took into account irrelevant factors or failed to consider relevant factors, or if it acted in a discriminatory manner, then it did not exercise its discretion judicially.[41]

[106] The Commission submitted that it exercised discretion in a judicial manner when issuing the notice of violation. It says that after considering the overall impact to the Claimant of issuing a notice of violation, including mitigating circumstances, prior offences and the impact on the ability of the Claimant to qualify on future claims, it determined that a violation was applicable in the Claimant's case. The Commission said that the it determined because the Claimant had accumulated 1,820 hours of insurable employment at the time he applied foe benefits, the increased hours [required by a notice of violation] would not impact the Claimant's ability to establish future claims.

[107] The Representative submitted that the amended ROE addressed all sections of the *Employment Insurance Act* in the Commission's submission in GD4B.

[108] The appeal file has a Record of Decision (ROD) - Violation.[42] The ROD notes that this is the Claimant's first case of misrepresentation and the overpayment of EI benefits was $1,719. Under the heading "Decision" there is an X next to "Not allowed – Classification" and "Serious – total actual and/or potential O/P is between $1,000 to

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[39] See section 7.1(4), *Employment Insurance Act* and *Gill v. Canada (Attorney General)*, 2010 FCA 182
[40] *Gill v. Canada (Attorney General)*, 2010 FCA 182
[41] *Canada (Attorney General) v. Purcell*, A-694-94
[42] See page GD3B-38

$4,999." Under the heading "Rationale" is the statement "No mitigating circumstances given by the client, therefore a violation will be imposed."

[109] When the Claimant contacted the Commission on February 5, 2021, to ask about the status of his new claim for EI benefits he said that he was finding it difficult financially. He was dependent on his parents for assistance.[43] In my opinion, the Claimant's financial circumstances are a mitigating factor to be taken into account when assessing a notice of violation.

[110] An additional factor to be considered is the overall impact the violation will have on the claimant, including their ability to establish a future claim.[44] In this case, the serious violation means that the Claimant will be required to accumulate 50% more hours to establish a future claim. Despite the Commission's submission that the number of hours of insurable employment the Claimant used to establish a new claim was considered, there is no evidence in the ROD the Commission considered this factor when reaching its decision to impose a serious notice of violation.

[111] By not considering the Claimant's financial circumstances and the impact of the serious notice of violation on the Claimant's ability to establish a future claim, the Commission failed to consider a relevant factor. As a result, I find that the Commission did not exercise its discretion in a judicial manner when it imposed a serious notice of violation.

[112] The Claimant experienced financial difficulty when he was not able to establish a new claim for EI benefits. He is required to repay the EI benefits received from December 10, 2020, onward. He is a seasonal commercial fisherman who obtains employment outside his home province in the off season. He was not able to find other work until he started fishing in May 2021. Given these circumstances, I find that issuing a serious notice of violation would have significant consequences for the Claimant's

[43] This conversation is at page GD3A-34
[44] *Gill v. Canada (Attorney General)*, 2010 FCA 182

future employment insurance claims. Therefore, I find that due to these mitigating circumstances a notice of violation should not be imposed.

Conclusion

[113] On the issue of voluntarily leaving employment, the appeal is dismissed.

[114] On the issue of misrepresentation and penalty, the appeal is allowed in part to reduce the penalty from $859 to $430.

[115] On the issue of the serious notice of violation, the appeal is allowed.

Raelene R. Thomas

Member, General Division – Employment Insurance Section