

Citation: *P. A. v. Canada Employment Insurance Commission*, 2014 SSTGDEI 89

Appeal #: GE-13-1804

BETWEEN:

**P. A.**

Appellant  
Claimant

and

**Canada Employment Insurance Commission**

Respondent

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

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SOCIAL SECURITY TRIBUNAL MEMBER: Michael Sheffe

HEARING DATE: July 31, 2014

TYPE OF HEARING: Teleconference

DECISION: Dismissed

## **PERSONS IN ATTENDANCE**

The Appellant did not attend the hearing.

## **DECISION**

[1] The Member finds that all three issues of the appeal are dismissed.

## **INTRODUCTION**

[2] The Appellant submitted an initial claim for employment insurance benefits (benefits) on January 12, 2013 (Exhibit GD3-10). On June 19, 2013, she received a decision from the Canada Employment Insurance Commission (Commission) denying her benefits and imposing a penalty and a notice of violation (Exhibit GD3-22 to GD3-24). The Appellant requested a reconsideration of this decision October 15, 2013 (Exhibits GD3-25 and GD3-26). On October 22, 2013 the Appellant received a reconsideration decision which upheld the original decision denying her benefits, while she was out of Canada, except for 7 days to care for her ailing father, and it was also determined that she was available for work. In addition, the penalty imposed had been reduced to \$518.00 (Exhibits GD2-4 and GD2-5). The Appellant appealed this decision to the Social Security Tribunal (Tribunal) on November 6, 2013 (Exhibits GD2-1 and GD2-2).

[3] The Appellant was sent a notice of hearing by Priority Post, dated December 6, 2013, to the address the Tribunal had on file, for a hearing which was to be held on January 8, 2014. This notice of hearing was returned to the Tribunal on January 6, 2014. The hearing was adjourned.

[4] The instructions for the completion of the Notice of Appeal to the Tribunal advise the parties, as per section 6 of the *Social Security Tribunal Regulations*, to keep the Tribunal informed of any changes to their contact information without delay and that the failure to do so may have a detrimental impact on the appeal.

[5] A Case Management Officer (CMO) subsequently, tried to contact the Appellant by telephone on two occasions. Each time, the CMO got a "Customer not available" message.

[6] A CMO unsuccessfully tried to reach the Appellant by telephone on two more occasions, on February 20, 2014.

[7] The Appellant was sent a notice of hearing by Priority Post, to the address the Tribunal had on file. The hearing was scheduled for April 3, 2014. The notice was returned to the Tribunal on March 31, 2014.

[8] Subsequently, the notice of hearing was sent, by regular mail, to the Appellant for a hearing which was scheduled for May 8, 2014. It also was returned.

[9] A notice of hearing was sent to the Appellant, by registered mail, on July 9, 2014, to the address the Tribunal has on file.

[10] The CMO tried to contact the Appellant on July 30, 2014 to remind her that her hearing was scheduled for the following day. She was not able to reach the Appellant. The notice of hearing was subsequently returned.

[11] The Appellant has not contacted the Tribunal from January 2014 to the date of the hearing. The teleconference hearing was held on July 31, 2014. The Appellant did not attend.

## **FORM OF HEARING**

[12] The hearing was in the form of a teleconference for the reasons provided in the notice of hearing.

## **ISSUES**

[13] Issue 1: Whether a disentitlement imposed pursuant to section 37 of the *Employment Insurance Act (Act)* and section 55 of the *Employment Insurance Regulations (Regulations)* because the Appellant was out of Canada, should be upheld.

[14] Issue 2: Whether the imposition of a penalty pursuant to section 38 of the *Act* for making a misrepresentation by knowingly providing false or misleading information to the Commission should be upheld.

[15] Issue 3: Whether the Notice of Violation issued to the Appellant, pursuant to section 7.1 of the *Act*, should be upheld.

## **THE LAW**

[16] The *Social Security Tribunal Regulations* states, at paragraph 3(1) (a), “The Tribunal

(a) must conduct proceedings as informally and quickly as the circumstances and the considerations of fairness and natural justice permit;”

[17] The *Social Security Tribunal Regulations* states, at paragraph 3 (2),” If a question of procedure that is not dealt with by these Regulations arises in a proceeding, the Tribunal must proceed by way of analogy to these Regulations.”

[18] Section 6 of the *Social Security Tribunal Regulations* states, “A party must file with the Tribunal a notice of any change in their contact information without delay.”

[19] Section 12 of the *Social Security Tribunal Regulations* states,

“(1) If a party fails to appear at a hearing, the Tribunal may proceed in the party’s absence if the Tribunal is satisfied that the party received notice of the hearing.

(2) The Tribunal must proceed in a party’s absence if the Tribunal previously granted an adjournment or postponement at the request of the party and the Tribunal is satisfied that the party received notice of the hearing.”

[20] Section 37 (b) of the *Act* states, “Except as may otherwise be prescribed, a claimant is not entitled to receive benefits for any period during which the claimant is not in Canada.

[21] Section 55 (1) of the *Regulations* states, “ Subject to section 18 of the *Act*, a claimant who is not a self- employed person is not disentitled from receiving benefits for the reason that the claimant is outside Canada

(a) for the purpose of undergoing, at a hospital, medical clinic or similar facility outside Canada, medical treatment that is not readily or immediately available in the claimant’s area of residence in Canada, if the hospital, clinic or facility is accredited to provide the medical treatment by the appropriate governmental authority outside Canada;

(b) for a period of not more than seven consecutive days to attend the funeral of a member of the claimant’s immediate family or of one of the following persons, namely,

(i) a grandparent of the claimant or of the claimant’s spouse or common-law partner,

(ii) a grandchild of the claimant or of the claimant’s spouse or common-law partner,

(iii) the spouse or common-law partner of the claimant’s son or daughter or of the son or daughter of the claimant’s spouse or common-law partner,

(iv) the spouse or common-law partner of a child of the claimant’s father or mother or of a child of the spouse or common-law partner of the claimant’s father or mother,

(v) a child of the father or mother of the claimant’s spouse or common-law partner or a child of the spouse or common-lawpartner of the father or mother of the claimant’s spouse or common-law partner,

(vi) an uncle or aunt of the claimant or of the claimant's spouse or common-law partner, and

(vii) a nephew or niece of the claimant or of the claimant's spouse or common-law partner;

(c) for a period of not more than seven consecutive days to accompany a member of the claimant's immediate family to a hospital, medical clinic or similar facility outside Canada for medical treatment that is not readily or immediately available in the family member's area of residence in Canada, if the hospital, clinic or facility is accredited to provide the medical treatment by the appropriate governmental authority outside Canada;

(d) for a period of not more than seven consecutive days to visit a member of the claimant's immediate family who is seriously ill or injured;

(e) for a period of not more than seven consecutive days to attend a *bona fide* job interview; or

(f) for a period of not more than 14 consecutive days to conduct a *bona fide* job search.

[22] Section 38 of the *Act* states, “ (1) The Commission may impose on a claimant, or any other person acting for a claimant, a penalty for each of the following acts or omissions if the Commission becomes aware of facts that in its opinion establish that the claimant or other person has

(a) in relation to a claim for benefits, made a representation that the claimant 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 claimant or other person knew was false or misleading;

(c) knowingly failed to declare to the Commission all or some of the claimant's earnings for a period determined under the regulations for which the claimant claimed benefits;

(d) made a claim or declaration that the claimant or other person knew was false or misleading because of the non-disclosure of facts;

(e) being the payee of a special warrant, knowingly negotiated or attempted to negotiate it for benefits to which the claimant was not entitled;

(f) knowingly failed to return a special warrant or the amount of the warrant or any excess amount, as required by section 44;

(g) 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

(h) participated in, assented to or acquiesced in an act or omission mentioned in paragraphs (a) to (g).

(2) The Commission may set the amount of the penalty for each act or omission at not more than

(a) three times the claimant's rate of weekly benefits;

(b) if the penalty is imposed under paragraph (1) (c),

(i) three times the amount of the deduction from the claimant's benefits under subsection 19(3), and

(ii) three times the benefits that would have been paid to the claimant for the period mentioned in that paragraph if the deduction had not been made under subsection 19(3) or the claimant had not been disentitled or disqualified from receiving benefits; or

(c) three times the maximum rate of weekly benefits in effect when the act or omission occurred, if no benefit period was established.

(3) For greater certainty, weeks of regular benefits that are repaid as a result of an act or omission mentioned in subsection (1) are deemed to be weeks of regular benefits paid for the purposes of the application of subsection 145(2).”

[23] Section 7.1 of the *Act* states in part,” (1) The number of hours that an insured person, other than a new entrant or re-entrant to the labour force, requires under section 7 to qualify for benefits is increased to the number provided in the following table if the insured person accumulates one or more violations in the 260 weeks before making their initial claim for benefit.

(2) The number of hours that an insured person who is a new entrant or re-entrant to the labour force requires under section 7 to qualify for benefits is increased if, in the 260 weeks before making their initial claim for benefit, the person accumulates

(a) a minor violation, in which case the number of required hours is increased to 1,138 hours;

(b) a serious violation, in which case the number of required hours is increased to 1,365 hours; or

(c) a very serious violation, in which case the number of required hours is increased to 1,400 hours.

(2.1) A violation accumulated by an individual under section 152.07 is deemed to be a violation accumulated by the individual under this section on the day on which the notice of violation was given to the individual.



(3) A violation may not be taken into account under subsection (1) or (2) in more than two initial claims for benefits under this Act by an individual if the individual who accumulated the violation qualified for benefits in each of those two initial claims, taking into account subsection (1) or (2), subparagraph 152.07(1) (d) (ii) or regulations made under Part VIII, as the case may be.

(4) An insured person accumulates a violation if in any of the following circumstances the Commission issues a notice of violation to the person:

(a) one or more penalties are imposed on the person under section 38, 39, 41.1 or 65.1, as a result of acts or omissions mentioned in section 38, 39 or 65.1;

(b) the person is found guilty of one or more offences under section 135 or 136 as a result of acts or omissions mentioned in those sections; or

(c) the person is found guilty of one or more offences under the *Criminal Code* as a result of acts or omissions relating to the application of this Act.

(5) Except for violations for which a warning was imposed, each violation is classified as a minor, serious, very serious or subsequent violation as follows:

(a) if the value of the violation is

- (i) less than \$1,000, it is a minor violation,
- (ii) \$1,000 or more, but less than \$5,000, it is a serious violation, or
- (iii) \$5,000 or more, it is a very serious violation; and

(b) if the notice of violation is issued within 260 weeks after the person accumulates another violation, it is a subsequent violation, even if the acts or omissions on which it is based occurred before the person accumulated the other violation.

## **EVIDENCE**

[24] The Appellant accepted her rights and responsibilities when she completed her initial claim for benefits. One of these responsibilities was to “report any absences from your area of residence and/or any absence from Canada;” (Exhibits GD3-6 to GD3-8).

[25] The Appellant was absent from Canada from March 31, 2012 to June 1, 2012 while at the same time receiving benefits. She advised the Commission that she was caring for her ailing father and she herself was receiving medical treatment. There was no one else to care for her father. She completed the weekly reports, using the Internet, while she was in Nigeria, caring for her father. She advised the Internet connection was slow and this may have been the reason why she did not answer the out-of –Canada questions properly (Exhibit GD3-27).

[26] The explanation regarding the use of the on-line system; the instructions provided to claimants using this system to report; and how the system works are reported and delineated by Manon Courcelle, Manager of Electronic Services for the Employment Insurance Internet Reporting Service (Exhibits GD3-32 to GD3-37), along with copies of the relevant questions and answers (Exhibits GD3-39 to GD3-59).

[27] J. Fisher, employed by the Commission, certified the copies of the questions and answers (Exhibit GD3-38).

[28] While the Appellant was out of Canada, she completed her weekly reports indicating that she was in Canada. The Appellants answered “No” to the question on line 1038 which reads, “Were you outside Canada between Monday and Friday during the period of this report?” on exhibits GD3-40, GD3-45, GD3-50, and GD3-55.

[29] The Appellant believes that she did report her absence from Canada and that there must have been a system error (Exhibit GD3-28).

[30] The Appellant was provided an opportunity to explain the reasons why she did not report her absence from Canada on a form which she was sent to her from the Commission, dated, December 17, 2012. The form was not completed (Exhibit GD3-17).

[31] It was noted on a Record of Decision, dated June 18, 2012 that the Appellant received 15 weeks of sickness benefits from February 5, 2012 to May 19, 2012. The claim was renewed and converted to regular benefits effective June 3, 2012. The Appellant answered “No” to being out of Canada on her weekly reports. She had already completed 4 weekly reports and thus an overpayment of \$2,016.00 was created. A penalty was calculated (Exhibit GD3-19).

[32] On her request for reconsideration, the Appellant advised that she did not receive the letter dated June 19, 2013, at exhibit GD3-22, until October 7, 2013. She was out of Canada from April 2, 2013 to June 1, 2013 taking care of her ailing father (Exhibit GDs GD3-25 and GD3-26).

[33] Following her reconsideration request and an in-depth review of her case, the Commission allowed 7-days for the Appellant to be out of Canada and receive benefits because she was caring for her ailing father. The issue of availability was overturned.

[34] The penalty imposed was reduced to \$518.00 for 4 false representations and the notice of violation has been maintained (Exhibits GD3-4 and GD3-5). The Commission also reduced the overpayment to \$1,727.00 because of the modification of the period of time the Appellant was not entitled to receive benefits while she was out of Canada (Exhibit GD4- 8).

## **SUBMISSIONS**

[35] The Claimant submitted that:

- a) She indicated on her report that she was not in Canada and if there were any technical difficulties, she was not aware of them and they would have been beyond her control.
- b) The Appellant advised that she was in Nigeria to care for ailing father.
- c) She herself became ill while she was in Nigeria and had to have medical treatments.

[36] The Respondent submitted that:

- a) The Appellant did not inform the Commission that she was out of Canada while, she was receiving benefits.
- b) Only the first 7 days of her absence from Canada would be allowed to care for her ailing father according to the *Regulations*.
- c) The Appellant ought to have known that the information she provided when she completed her reports, regarding her absence from Canada, was untrue.
- d) The Appellant acknowledged that she received, understood, and accepted her rights and obligations, one of which was to inform the Commission of any absence from Canada (Exhibits GD3-6 and GD3-7).
- e) The Commission submitted that it exercised its discretion when it issued a notice of violation

## **ANALYSIS**

[37] Following internal procedures adopted by the Tribunal, multiple attempts have been made to deliver the Notice of Hearing to the Appellant and to contact the Appellant by telephone, Priority Post. However, the Tribunal has been unsuccessful in delivering the Notice of Hearing or locating the Appellant.

[38] The Tribunal is required to conduct proceedings as informally and quickly as the circumstances and the considerations of fairness and natural justice permit. At the same time, the Appellant is required to keep the Tribunal informed of changes to their contact information. The Appellant has failed to do so. [39] The SST Regulations do not specify how to proceed if an appellant cannot be located or given notice. However, under subsection 3(2) the Tribunal has the authority to proceed by way of analogy where a question of procedure arises which is not dealt with by the Regulations. Thus, being satisfied that the Tribunal is unable to locate the Appellant, the Tribunal is proceeding in the absence of the Appellant

Issue 1:

[41] The Federal Court of Appeal, in *Gibson* (2012 FCA 166) upheld the principle that except as otherwise prescribed; a claimant is not entitled to receive benefits while outside Canada.

[42] The Appellant advised that she went to Nigeria to care for her father and the Commission allowed her 7 days of benefits according to paragraph 55 (2) (d) of the *Regulations*.

[43] The Member finds that the Appellant does not meet any other of the exceptions as provided in the *Regulations*.

[44] The Member finds that the Appellant is not eligible for benefits for the rest of the time that she was out of Canada as she has already exhausted the only exception applicable.

Issue 2:

[45] In *Mootoo* (2003 FCA 206), the Federal Court of Appeal confirmed the principle, established in *Gates* (A-600-94), that for a finding of misrepresentation, claimants must have subjective knowledge that the representations made by them or on their behalf, were false.

[46] The Federal Court of Appeal in *Caverly* (2002 FCA 92) instructed that the questions and answers had to be presented as exhibits in the same manner it was done involving paper declarations.

[47] In *Lavoie* (2005 FCA 18), the Federal Court of Appeal concluded that a confirmation of the questions asked by the automated system, the possible answers to the questions, a screen of the declarations reproducing the answers provided by the claimant to the questions asked by the system and the certification by a Commission's agent met this requirement.

[48] In *Dunham* (A-708-95), the Federal Court of Appeal upheld the principle that the Commission has sole discretion to impose a penalty pursuant to subsection 38(1) of the Act. The Court further stated that no Court, Umpire or Board of Referees is entitled to interfere with the Commission's ruling with respect to a penalty so long as the Commission can prove that it exercised its discretion "in a judicial manner". In other words, the Commission must demonstrate that it acted in good faith, taking into account all relevant factors and ignoring irrelevant factors

[49] The question asked of the Appellant regarding her being in Canada or not, is straight forward. She answered "no" to being out of Canada, while completing her reports from Nigeria.

[50] The Appellant did not consider there were technical difficulties associated with answering all of the other questions on each occasion. She stated that just this question had a technical problem. There is no evidence to support this claim.

[51] On the balance of probabilities, the Member finds that there were no technical problems which would explain that the Appellant answered "No" to the out of Canada question on each separate occasion that she was asked this.

[52] The Appellant ought to have known she was providing false or misleading information to the Commission in answering in this way.

[53] The Member finds that the Commission rendered its decision in a judicial manner, as all the pertinent circumstances were considered when assessing the penalty amount. The penalty was imposed only after having been presented with evidence which could reasonably lead to the conclusion that the claimant knew, or should have known, that the representations were false. Upon receiving a reconsideration request and an in depth review of the case the Commission considered the Appellant's illness and current financial situation. It reduced the penalty to \$518.00.

[54] The Commission also reduced the overpayment to \$1,727.00 because of the period of time the Appellant was not entitled to receive benefits while she was out of Canada

[55] The Member finds that the Commission exercised its discretion in a judicial manner when it set the penalty.

Issue 3:

[56] The Appellant's misrepresentations caused an overpayment of \$2,016.00.

[57] In *Gill* (2010 FCA 182) The Federal Court of Canada upheld the principle that the Commission has the discretion to determine whether or not to issue a notice of violation. A notice of violation is not mandatory or automatic under subsection 7.1 (4) of the *Act*.

[58] This is a serious violation according to subsection 7.1 (5) (a) of the *Act*.

[59] The Commission exercised its discretion in a judicial manner when it issued the Notice of Violation. After considering the overall impact to the Appellant regarding issuing a notice of violation, including mitigating circumstances, prior offences and the impact on the ability of the Appellant to qualify on future claims, it was determined that a violation is applicable in this case.

[60] The Member finds that the Commission used its discretion in a judicial manner in imposing a notice of violation.

## **CONCLUSION**

[61] All three issues of the appeal are dismissed.

Michael Sheffe  
Member, General Division

DATED: August 15, 2014