[TRANSLATION]

Citation: *E. M. B. v. Canada Employment Insurance Commission*, 2014 SSTGDEI 147

Appeal No.: GE-14-1544

BETWEEN:

E. M. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance

SOCIAL SECURITY TRIBUNAL MEMBER:	Normand Morin
HEARING DATE:	September 30, 2014
TYPE OF HEARING:	Teleconference
DECISION:	Appeal allowed in part

PERSONS IN ATTENDANCE

[1] The Appellant, E. M. B, participated in the telephone hearing (teleconference) held on September 30, 2014.

DECISION

[2] The Social Security Tribunal of Canada (the Tribunal) concludes that the Appellant's appeal regarding the disentitlement from receiving Employment Insurance benefits imposed on him for failing to prove his availability for work while attending a training course has no merit under paragraph 18(1)(*a*) of the *Employment Insurance Act* (the Act).

[3] The Tribunal also concludes that the appeal of the decision of the Canada Employment Insurance Commission (the Commission) to impose on the Appellant a penalty for having committed an act or omission by making representations that he knew were false or misleading has merit in part under section 38 of the Act.

[4] The Tribunal further concludes that the appeal concerning the issuance of a notice of violation to the Appellant following a penalty imposed on him for having committed an act or omission has merit under section 7.1 of the Act.

INTRODUCTION

[5] On May 15, 2012, the Appellant filed an initial claim for benefits, effective May 6, 2012 (Exhibits GD3-2 to GD3-10).

[6] On January 20, 2014, the Commission notified the Appellant that it could not pay him Employment Insurance benefits as of August 30, 2012, because he was attending a training course on his own initiative and because he failed to prove that he was available for work. The Commission also notified the Appellant that it could not pay him Employment Insurance benefits as of August 17, 2012, because he refused to return to work for his employer, René Matériaux Composites Ltée, as his training course started on August 30, 2012, and that, for this reason, he had failed to prove that he was available for work (Exhibits GD3-114 and GD3-115).

[7] On January 20, 2014, the Commission notified the Appellant that it could not pay him Employment Insurance benefits as of August 12, 2012, because, on August 17, 2012, he voluntarily stopped working for employer René Matériaux Composites Ltée without just cause within the meaning of the *Employment Insurance Act*. The Commission also notified the Appellant that, contrary to what he had stated, he was attending a training course and was not available for work. The Commission informed the Appellant that he had not reported his earnings from employer René Matériaux Composites Ltée in wages and vacation pay for the weeks starting July 8, 2012, and August 12, 2012. The Commission explained that it had adjusted the total amount of his earnings based on new information provided by the employer. The Commission concluded that the Appellant had made 18 false statements, for which a $5,000.00 penalty was imposed on him. A notice of "very serious violation" was also sent to the Appellant (Exhibits GD3-116 to GD3-119).

[8] On February 21, 2014, the Appellant submitted a Request for Reconsideration of an Employment Insurance (EI) decision (Exhibits GD3-124 to GD3-130).

[9] On March 27, 2014, the Commission notified the Appellant that it was maintaining the decision made in his case on February 20, 2014 [January 20, 2014] concerning his availability for work. The Commission also notified the Appellant that it was maintaining the decision made in his case on January 20, 2014, concerning the penalty imposed on him and the notice of violation issued to him (Exhibits GD3-134 and GD3-135).

[10] On April 2014, the Appellant presented a Notice to Appeal to the Employment Insurance Section of the Tribunal's General Division (Exhibits GD2-1 to GD2-21).

TYPE OF HEARING

[11] The hearing was held by teleconference for the reasons set out in the Notice of Hearing dated September 9, 2014 (Exhibits GD1-1 to GD1-3).

ISSUES

[12] The Tribunal must determine whether the appeal of the Commission's decision has merit with respect to the following three issues:

(a) The imposition on the Appellant of a disentitlement from receiving Employment Insurance benefits under paragraph 18(1)(*a*) of the Act because he failed to prove that he was available for work while attending a training course;

(b) The imposition on the Appellant of a penalty under section 38 of the Act for having committed an act or omission by making representations that he knew were false or misleading;

(c) The issuance of a notice of violation to the Appellant under section 7.1 of the Act following a penalty imposed on him for having committed an act or omission.

APPLICABLE LAW

[13] The provisions related to availability for work are set out in section 18 of the Act.

[14] With respect to "disentitlement to benefits," paragraph 18(1)(*a*) of the Act provides that:

> A claimant is not entitled to be paid benefits for a working day in a benefit period for which the claimant fails to prove that on that day the claimant was (*a*) capable of and available for work and unable to obtain suitable employment.

[15] With respect to the imposition of "penalties," section 38 of the Act provides the following:

> (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).

[16] With respect to the "increase in required hours," the paragraphs in section 7.1 of the Act, which are relevant to this case, provide the following:

(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. […] (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; […] (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; […] (6) The value of a violation is the total of (*a*) the amount of the overpayment of benefits resulting from the acts or omissions on which the violation is based, and (*b*) if the claimant is disqualified or disentitled from receiving benefits, or the act or omission on which the violation is based relates to qualification requirements under section 7, the amount determined, subject to subsection (7), by multiplying the claimant's weekly rate of benefit by the average number of weeks of regular benefits, as determined under the regulations. (7) The maximum amount to be determined under paragraph (6)(*b*) is the amount of benefits that could have been paid to the claimant if the claimant had not been disentitled or disqualified or had met the qualification requirements under section 7.

EVIDENCE

[17] The evidence on file is as follows:

(a) In two similar documents titled "Request for Payroll Information" and completed on October 3, 2013, employer René Matériaux Composites Ltée declared that the Appellant had voluntarily left and that he was no longer available because he was going to school (Exhibits GD3-104 to GD3-107);

(b) On October 8, 2013, employer René Matériaux Composites Ltée stated that the Appellant had been off work for one month starting June 11, 2012. The employer specified that the Appellant subsequently returned to work on July 11, 2012, and completed 8.25 hours of work on that day. The employer stated that the Appellant had submitted another medical certificate on July 16, 2012, prescribing that he take leave for one month. The employer stated that, on July 17, 2012, the Appellant informed him that he would not be returning to work because he would be attending courses on a full-time basis starting August 30, 2012 (Exhibit GD3-108);

(c) With his Request for Reconsideration of an Employment Insurance (EI) decision submitted on February 21, 2014, the Appellant enclosed a copy of a medical

certificate completed by Dr. Louis Pomerleau on July 16, 2012 prescribing that the Appellant take leave for one month (Exhibit GD3-130);

(d) In a document on the details of the notice of debt (DH009) dated January 25, 2014, and reproduced on March 28, 2014, the Appellant's total debt amount was established at $15,659 (Exhibits GD3-120 and GD3-121);

(e) In two similar undated documents titled "Internet Reporting System (IRS) Record of Declaration – Full Text Screen – Electronic Report," the Commission noted that claimants who use the Internet Reporting System to make their reports receive written instructions on how to access the system, complete the electronic reports and make changes as needed (Exhibits GD3-11 to GD3-14 and GD3-50 to GD3-52).

(f) On March 28, 2014, the Commission stated that, for the periods of August 5, 2012, to September 15, 2012, September 30, 2012, to October 13, 2012, and February 17, 2013, to March 30, 2013, the Appellant's electronic reports and the certification provided by an officer of the Commission (the copies of questions and answers provided by the Appellant were reproduced on March 28, 2014) show that the Appellant declared that he was ready, willing and capable of working every day, Monday through Friday, during the periods in question (except the period of September 30, 2012, to October 13, 2012, according to Exhibit GD3-29) and that he did not declare that he was enrolled in studies or in a training course during those periods (Exhibits GD3-15 to GD3-49);

(g) On March 28, 2014, the Commission stated that, for the periods of September 16, 2012, to September 29, 2012, and October 14, 2012, to February 16, 2013, the Appellant's automated telephone reports and the certification provided by an officer of the Commission (the copies of questions and answers provided by the Appellant were reproduced on March 28, 2014) show that the Appellant declared that he was ready, willing and capable of working every day, Monday through Friday, during the periods in question and that he did

not declare that he was enrolled in studies or in a training course during those periods (Exhibits GD3-53 to GD3-103);

(h) In two documents regarding, respectively, the rationale to support the decision concerning the penalty and the rationale to support the decision concerning the violation, the Commission explained the elements it took into consideration and the calculations made to establish the penalty amount of $5,000 imposed on the Appellant. The Commission also contended that it had exercised its discretionary power in a judicial manner when it issued the notice of violation to the Appellant and that that decision was neither abusive nor unduly severe. It explained that the classification of the violation as "very serious" in this case depended strictly on the amount of the overpayment arising from the act or omission, except in the case of a subsequent violation. It added that, because this case concerned an initial offence and the overpayment amount was established at $10,403.00, the violation was classified as "very serious" (Exhibits GD3-122 and GD3-123);

(i) On March 24, 2014, employer René Matériaux Composites Ltée stated that the Appellant had been laid off in May 2012 and called back on July 11, 2012, to work at the plant in X, near the plant in X, because there were positions to be filled there. The Commission explained that, on August 16, 2012, the Appellant sent it a letter confirming his enrolment in the school he planned to attend in the fall. It explained that the Appellant subsequently asked the employer whether he could work weekend shifts, but that none could be offered, and that he was aware of this situation (Exhibit GD3-132);

(j) With his Notice of Appeal, submitted on April 14, 2014, the Appellant enclosed a copy of the following documents:

i. A certificate confirming a hospital stay issued by the Thetford region health and social services centre, dated August 9, 2013, and providing the dates of the Appellant's stays at and visits to the centre during the period from February 7, 2011, to August 1, 2013 (Exhibits GD2-5 and GD2-6);

ii. A letter from the Appellant to the Commission including his Request for Reconsideration of an Employment Insurance (EI) decision (Exhibits GD2-7 to GD2-16);

iii. A letter written by Dr. David Philibert, a nephrologist with the Thetford region health and social services centre, dated December 16, 2013, and stating that the Appellant is a user who receives hemodialysis treatments at the centre three days per week and that he has been treated for end-stage renal disease since August 1, 2013 (Exhibit GD2-17);

iv. A letter from the Commission (decision under reconsideration) dated March 27, 2014, and indicating that it had reviewed its position in his favour with respect to his voluntary departure (Exhibit GD2-18);

v. A letter from the Commission (decision under reconsideration) dated March 27, 2014, and indicating that it was maintaining its decision in the Appellant's case with respect to his availability for work, the penalty imposed on him and the notice of violation issued to him (Exhibits GD2-19 and GD2-20);

vi. A medical certificate completed by Dr. Louis Pomerleau, dated July 16, 2012, and prescribing that the Appellant take leave for one month (Exhibit GD2-21 and Exhibits GD2-1 to GD2-21).

[18] The evidence presented at the hearing is as follows:

(a) The Appellant recalled the key points of the case and the circumstances that led him to give up his training course in April 2013, which he had begun on August 30, 2012;

(b) He presented reasons to obtain a reduction of the amount being claimed from him (overpayment and penalty).

SUBMISSIONS OF THE PARTIES

[19] The Appellant presented the following observations and submissions:

(a) He explained that, when he worked for employer René Matériaux Composites Ltée, his work consisted in washing materials with chemical products and that he developed an intolerance to the products he was using. He submitted that he had felt intoxicated by the products, as though he had been inebriated, and that he had had to go outside to breathe. He explained that he first obtained a month of leave in June 2012 for medical reasons. He stated that he subsequently received a telephone message from the employer on July 11, 2012, informing him that, as of that point, he would be working at the plant in X (Exhibit GD3-131). He explained that, at the end of his first work day on July 11, 2012, he again went to the hospital, where the doctor he saw recommended that he take one month off. He explained that, had he not been ill and never taken sick leave, he would not have decided to change course, enrol in school or resign from the job he had. He added that this was the main reason he gave up his employment (Exhibits GD3-130 and GD3-131);

(b) He stated that, following his work stoppage for medical reasons, he notified his employer that he would not be returning to work because he would soon begin full-time courses on August 30, 2012, and that he would therefore no longer be available for work (Exhibits GD3-110, GD3-130 and GD3-131);

(c) He explained that, on August 30, 2012, after his recovery, he started a training course on assisting seniors at home. He stated that he devoted 30 hours per week to his studies, Monday through Friday, mornings and afternoons. He added that he could not have changed his course schedule. He stated that he had received a $2,000.00 bursary. He stated that he had no history of working while attending school on a full-time basis. He stated that he did not conduct any job searches while he attended his training course and that his primary intention was to take his courses, not to work on a full-time basis. He further explained that he could not work and attend training courses at the same time. He stated that he would rather go to school on a full-time basis to attend his training course. He also pointed out that his wages

had significantly decreased, that the new plant to which he had been assigned was further away [from his home] and that getting there cost him more in gas (Exhibits GD3-110, GD3-130 and GD3-133);

(d) He stated that he ended his training course in April 2013 and did not complete the exams at the end of the training period, scheduled for June of that year. He added that he did not take the additional training course offered subsequent to the course he had started in August 2012 and which led to another diploma. He explained that he was hospitalized in June and July 2013 and that, therefore, he could not take the scheduled exams (Exhibits GD3-110 and GD3-133);

(e) He explained that, between April 2013 and June 2013, he had several medical appointments and was unable, during that period, to work or conduct job searches. He added that his health deteriorated between April 2013 and June 2013. He explained that he started hemodialysis treatments on July 7, 2013, three times per week. He explained that each treatment lasted four hours, along with a recovery period of nearly two hours, including the time it took to return home, for a total of nearly six hours each time. He stated that he felt very tired after his treatments. He submitted that he was available for work and seeking employment throughout his training course. He added that he declared this fact when he completed his reports (Exhibits GD3-130 and GD3-131);

(f) He argued that he was available for work two days per week in spite of the hemodialysis treatments he was receiving. He stated that he would be capable of working in a seated position, but not while standing. He added that he was unable to engage in physical effort to accomplish his work. He stated that other medical exams were scheduled to verify whether he has prostate cancer;

(g) He explained that he conducted job searches before starting hemodialysis treatments (July 7, 2013) and before being admitted to the school. He added that he submitted several resumés, applied to DST (a parts manufacturer) and signed on to an Emploi-Québec job-search program. He stated that he was not called for work;

(h) He explained that he knew that he had made a mistake in his reports by failing to declare that he was studying and by indicating that he was available for work. He stated that it was the first time he received Employment Insurance benefits and that he did not know that he could not receive benefits while attending his training course. He explained that he learned in a letter from the Commission that he was accused of having made false or misleading statements. He stated that he repeatedly answered in the negative to a question as to whether he was attending a training course when he was indeed attending one. He stated that he did not know the exact amount of money he had received as Employment Insurance benefits. He also explained that he failed to declare that he was attending training courses because he had asked his cousin to complete his reports for him, since he did not have a computer and did not know what to do, as this was his first Employment Insurance claim (Exhibit GD3-133);

(i) He submitted that he has been unable to work since July 2013 and that he does not have the money required to repay the amounts claimed from him. He added that the amount claimed from him was very high. He stated: [translation] "It is a hefty amount." He submitted that this was not the only debt he owed, that he was [translation] "full of debts" (Exhibits GD3-24 to GD3-130);

(j) He stated that his spouse had been working five days per week and that she was now working three days per week;

(k) He explained that he had a mortgage to pay. He stated that he had an [translation] "immigration debt" in the amount of $9,000.00. He explained that this debt represented the cost of his children's travel tickets so that they could come to Canada in 2012, as they had been in Africa for 11 years. He stated that his spouse had $10,000.00 on her credit card and that he had $5,000.00 on his credit card. He stated that he also had another amount of $2,900.00 to repay because of a credit card theft involving one of his children;

(l) He submitted that, with such obligations, he could not cope unless he had a job that could help him. The Appellant stated: [translation] "It is impossible to cope right

now[…] I do not know what we will do." He added that he was [translation] "debt-ridden." He asked that the amount claimed from him be reduced.
He submitted that this amount should be established based on what he could pay. He added that this was the first time he was receiving benefits. He confirmed that he knew that he had made a mistake when he answered in the negative to a question as to whether he was attending training courses while receiving benefits and that he had exercised poor judgment in this regard;

(m) He stated that he understood that a notice of violation had been issued to him.

[20] The Commission presented the following observations and submissions:

(a) It submitted that the Appellant had failed to rebut the presumption of non-availability while he was attending a full-time course. It stated that the Appellant had confirmed that he started a training course on August 30, 2012, 30 hours per week, Monday through Friday. It noted that he did not present any new facts regarding job searches while he was studying. The Commission explained that, during an investigation it conducted, the Appellant clearly stated that he would not give up his course for a full-time job and that his intention was to attend school rather than to seek employment. It also stated that he did not give up his training course in February 2013 as he told the Commission during the investigation. It submitted that the facts gathered as part of the administrative review were to the effect that, in April 2013, the Appellant was still in training and even had to write exams that had been moved forward to June 2013. The Commission added that, since the Appellant had received his last week of benefits for the week ending March 30, 2013, it could not terminate his disentitlement because he was still in training (Exhibit GD4-7);

(b) It submitted that the facts clearly show that the Appellant attended school on a full-time basis and that his intention was to continue this training. The Commission also explained that the facts clearly show that, as soon as the Appellant notified his

employer that he would not return to work on August 17, 2012, because he would soon start school, he showed that he was not available for work (Exhibit GD4-7);

(c) It submitted having demonstrated that the Appellant made representations that he knew were false or misleading. It pointed out that he had declared on 17 occasions that he was ready, willing and capable of work every day, Monday through Friday, between August 17, 2012, and March 30, 2013, whereas, in fact, he was not and his intention was to devote himself to his training course. The Commission further stated that the Appellant also failed to indicate on 16 occasions that he was in training during the period of August 30, 2012, to March 30, 2013. It stated that, each time the Appellant completed an electronic report, he was informed of the consequences of making false statements (Exhibits GD3-19, GD3-23, GD3-27, GD3-33, GD3-38, GD3-43, GD3-48, GD3-55, GD3-60, GD3-65, GD3-70, GD3-75, GD3-80, GD3-85, GD3-90, GD3-95, GD3-100, GD4-7 and GD4-8);

(d) It explained that, effective June 1, 2005, it adopted the following policy concerning the calculation of penalties: For a first act or omission, the amount of the penalty may be set at up to 50% of the amount of the overpayment resulting from this act or omission. For a second act or omission, the amount of the penalty may be set at up to 100% of the amount of the overpayment. For a third or subsequent act or omission, the amount of the penalty may be set at up to 150% of the amount of the overpayment. The Commission specified that these were maximum amounts that it had established by policy and that it was only after taking into consideration all the mitigating circumstances that the penalty amount was calculated (Exhibit GD4-8);

(e) It submitted that it had exercised its discretionary power in a judicial manner, as it had considered all the relevant circumstances at the time it set the penalty amount (Exhibit GD4-8);

(f) It submitted that one of its principles was to limit the penalties based on the level of the act or omission. It pointed out that, since this case concerned an initial act or omission, the maximum had been set at $5,000.00 (Exhibit GD4-8);

(g) It also explained that, effective July 8, 2010, notices of violation are no longer issued automatically when the Commission imposes a penalty, issues a warning letter or takes legal action. The Commission explained that, when the decision is made to impose a sanction because of a false statement, it must determine whether or not a notice of violation should be issued in accordance with subsection 7.1(4) of the Act. It explained that, in making the decision to issue a notice of violation, the mitigating circumstances must have been taken into account. It added that another factor to consider was the overall impact of issuing a notice of violation to the claimant, including his ability to establish a benefit claim in the future (Exhibit GD4-9);

(h) It stated that it issued a notice of very serious violation to the Appellant because of a $10,403.00 overpayment (Exhibits GD3-119 and GD4-9);

(i) It submitted that it had exercised its discretionary power in a judicial manner when it decided to issue the notice of violation. It explained that, after having considered the overall impact of issuing a notice of violation to the Appellant, including the mitigating circumstances, previous violations and the impact of the notice of violation on his ability to qualify for future claims, it was determined that a notice of violation applied in this case (Exhibits GD3-123 and GD4-9);

(j) It pointed out that, to intervene in its decision, the Tribunal had to determine that the Commission had not exercised its discretionary power in a judicial manner when it issued a notice of violation to the Appellant (Exhibit GD4-10).

ANALYSIS

1. Availability for work

[21] In the absence of a definition of the notion of "availability" in the Act, the criteria developed in the case law can be used to establish a person's availability for work as well as their entitlement to receiving Employment Insurance benefits. Availability is a question of fact which comprises three necessary criteria established in the case law.

[22] In ***Faucher*** **(A-56-96)**, the Federal Court of Appeal (the Court) set out three factors to be considered in determining whether a claimant has proved his or her availability for work:

> There being no precise definition in the Act, this Court has held on many occasions that availability must be determined by analyzing three factors - the desire to return to the labour market as soon as a suitable job is offered, the expression of that desire through efforts to find a suitable job, and not setting personal conditions that might unduly limit the chances of returning to the labour market - and that the three factors must be considered in reaching a conclusion.

[23] In ***Bertrand*** **(A-613-81**), the Court stated:

> The question of availability is an objective one – whether a claimant is sufficiently available for suitable employment to be entitled to unemployment insurance benefits – and it cannot depend upon the particular reasons for the restrictions on availability, however these may evoke sympathetic concern. If the contrary were true, availability would be a completely varying requirement depending on the view taken of the particular reasons in each case for the relative lack of it.

[24] In ***Cornellisen-O'Neill*** **(A-652-93)**, the Court cited the Chief Umpire's decision in ***Godwin*** (**CUB 13957)**, that:

> … the Act is quite clear that to be eligible for benefits a claimant must establish his availability for work, and that requires a job search.

[25] In ***De Lamirande*** **(2004 FCA 311)**, the Court stated:

> The case law holds that a claimant cannot merely wait to be called in to work but must seek employment in order to be entitled to benefits.

[26] Other decisions rendered by the Court also upheld or reiterated the principle that a person enrolled in a course of full-time study is presumed not to be available for work and that this presumption is refutable only in "exceptional circumstances" (***Landry***, **A-719-91**, ***Gagnon***, **2005 FCA 321**, and ***Lamonde***, **2006 FCA 44**).

[27] There is also the presumption that a claimant (the Appellant) is not available for work when attending a full-time course on his own initiative, without having been referred by the Commission or another authority designated by the Commission **(*Landry*, A-719-91**, ***Lamonde*, 2006 FCA 44**, ***Gagnon*, 2005 FCA 321**, and ***Paxton*, 2002 FCA 360)**.

[28] According to consistent case law, the Employment Insurance system is not meant to pay benefits to people who take courses on their own initiative, but to those who are actively seeking employment.

[29] In its assessment of the evidence, the Tribunal considered the three criteria mentioned above that are used to establish a person's availability for work. These three criteria are: the desire to return to the labour market as soon as a suitable job is offered; the expression of that desire by making efforts to find a suitable job; and remaining free of personal requirements which would unduly limit the opportunities for returning to the labour market.

[30] The question as to whether a person enrolled in a course of full-time study is available for work is a question of fact that must be determined in light of the specific circumstances of each case but based on the criteria set out in the case law.

[31] In this case, the Appellant did not meet any of the above criteria during his training period, that is, from August 30, 2012, to March 30, 2013, on which date he stopped receiving benefits. The Appellant ended his training in April 2013 for health reasons.

The desire to return to the labour market as soon as a suitable job is offered

[32] The Appellant failed to show his "desire to return to the labour market" as soon as a suitable job was offered (***Primard*, A-683-01**).

[33] The Appellant stated that his primary intention was to attend his training courses, not to work on a full-time basis. He also explained that he could not work and attend his training courses at the same time. He thus stated that his priority was to attend school on a full-time basis to take his training course. Although he also stated several times when completing his reports that he was available for work, the Appellant explained that he had made a mistake by

making such statements. Employer René Matériaux Composites Ltée also stated that the Appellant was not available for work because he had decided to go to school.

[34] The Appellant's explanations show that, while he was attending school, his priority was to devote his time to his training course rather than to seeking full-time employment (***Bertrand***, **A-613-81**).

The expression of that desire by making efforts to find a suitable job

[35] The Appellant also did not express his desire to return to the labour market by making significant efforts to find a suitable job on each working day of his benefit period (***Primard,*** **A-683-01**).

[36] The Appellant explained that he conducted job searches before starting his hemodialysis treatments on July 7, 2013, and before being admitted to the school. He submitted that he had sent out several resumés, applied to employer DST and subscribed to an Emploi-Québec job-search program. However, the Tribunal finds that, during his training period, the Appellant's availability for work did not translate into concrete and sustained searches for employment with potential employers.

[37] The Appellant was responsible for actively seeking a suitable job in order to be able obtain Employment Insurance benefits (***Cornelissen-O'Neil***, **A-652-93**, and ***De Lamirande***, **2004 FCA 311**). The evidence shows that the Appellant did not discharge that responsibility during his training period.

Remaining free of "personal requirements" which would unduly limit the opportunities for returning to the labour market

[38] By enrolling in a training program, which started on August 30, 2012, the Appellant from that moment set "personal requirements" that unduly limited his opportunities for returning to the labour market (***Faucher***, **A-56-96**).

[39] The Appellant failed to show his availability for full-time work due to course schedule requirements, that is, 30 hours per week, Monday through Friday. According to the Act, he was not sufficiently available for work (***Primard***, **2003 FCA 349**, ***Bertrand***, **A-613-81**, ***Vézina***,

2003 FCA 98, and ***Gagnon***, **2005 FCA 321)**. In fact, he notified his employer that he would not be returning to work after his one-month work stoppage starting July 16, 2012.

[40] There is no evidence to show that he was referred to the course by or that it was recommended by Emploi-Québec—the appropriate designated authority. This "personal requirement" represents additional evidence demonstrating that the Appellant was not available for work. Therefore, the Appellant failed to rebut the presumption that a person enrolled in a full-time training course on their own initiative is not available for work **(*Landry*, A-719-91**, ***Lamonde***, **2006 FCA 44**, ***Gagnon***, **2005 FCA 321**, and ***Paxton***, **2002 FCA 360)**.

[41] The Appellant clearly expressed his intention not to leave his training course in order to return to the labour market. Furthermore, the Appellant notified his employer that he would not be returning to work after his one-month work stoppage starting July 16, 2012.

[42] The Tribunal finds that the Appellant's primary intention was to complete his training and that, in this context, he unduly limited his availability for work.

[43] The interest shown and priority given by the Appellant to his training program represent personal requirements within the meaning of the Act that unduly limited his opportunities for returning to the labour market during the training period.

[44] Availability for work is also measured by four principles related to returning-to-studies cases that can rebut the presumption of non-availability (***Landry***, **A-719-91**, ***Gagnon***, **2005 FCA 321**, ***Lamonde***, **2006 FCA 44**, and ***Floyd***, **A-168-93**). These principles are:

- the attendance requirements of the course;
- the claimant's willingness to give up his studies to accept employment;
- whether or not the claimant has a history of being employed at irregular hours; and
- the existence of "exceptional circumstances" that would enable the claimant to work while taking his course.

[45] With respect to the "attendance requirements of the course," the Appellant stated that he had to take his training according to a specific schedule—mornings and afternoons, 30 hours per week—while specifying that he could not change his course schedule. The attendance

requirements of the Appellant's training course are incompatible with the establishment of his availability for full-time work.

[46] With respect to the question relating to the Appellant's willingness to give up his studies to accept employment, he clearly stated that he intended to devote his time to his studies. He decided not to resume his job with his employer after the one-month recovery period which began in July 2012.

[47] With respect to the question as to whether or not the Appellant has a history of being employed at irregular hours while attending a training program, the evidence on file shows that this is not the case.

[48] The Appellant failed to show that he had a history of working while attending school (work-study history) that could demonstrate his availability for work while attending a training course or program (***Lamonde***, **2006 FCA 44**).

[49] The Appellant also failed to demonstrate the existence of "exceptional circumstances" that could have enabled him to work while taking his course (***Landry***, **A-719-91**, ***Gagnon,* 2005 FCA 321**, and ***Lamonde***, **2006 FCA 44**).

[50] The Appellant clearly showed that his priority was to devote his time to his courses rather than to seeking full-time employment, and he failed to establish the existence of such "circumstances."

[51] Therefore, during the period in which he took a training course, namely, from August 30, 2012, to April 2013, or until the end of his benefit period on March 30, 2013, the Appellant did not meet any of the above-mentioned criteria—either those related to availability for work (***Faucher***, **A-56-96**) or those applying specifically to students enrolled in a training program—which could have made it possible to rebut the presumption of non-availability (***Landry***, **A-719-91**, ***Gagnon***, **2005onCA0321**, ***Lamonde***, **2006ndeilit**, and ***Floyd***, **A-168-93)**.

[52] Although the Appellant stated that he gave up his training in April 2013, without providing a specific date to that effect, the evidence on file shows that the last week in which he received

benefits was the week of March 30, 2013. The Tribunal also finds as fact that the Appellant gave up his training course in April 2013 after receiving a final week of benefits.

[53] In this regard, the Commission made the following clarification:

> [Translation]
> Since the claimant received his final week of benefits for the week ending March 30, 2013, the Commission cannot terminate his disentitlement, given that the claimant was still in training. (Exhibit GD4-7).

[54] In summary, although the Appellant had excellent reasons for attending a training course in order to ensure a better occupational future for himself, the Tribunal finds that this initiative cannot exempt him from the requirements of the Act with regard to demonstrating his availability for work.

[55] Consequently, the Tribunal finds that the disentitlement imposed on the Appellant under paragraph 18(1)(*a*) of the Act effective August 30, 2012, is justified because he was attending a training program starting on that date and therefore was not available for work throughout his benefit period, until March 30, 2013, inclusively.

[56] The appeal on this issue has no merit.

2. Penalty

[57] The Court confirmed the principle that there can be no false or misleading statements unless claimants subjectively know that the information they have given or the statements they made (or statements made about them) were false (***Mootoo v. Canada (AG)***, **2003 FCA 206**, and ***Canada (PG) v. Gates***, **A-600-94**).

[58] In ***Gagnon* (A-52-04)**, Justice Létourneau of the Court explained how the Commission was justified in establishing its own guidelines on the imposition of penalties so as to ensure some consistency nationally and avoid arbitrariness in such matters.

[59] The Court also confirmed the principle according to which the Commission has the discretionary power to impose the penalty set out in subsection 38(1) of the Act. The Court

further stated that no Court, Umpire or Tribunal 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 discretionary power "in a judicial manner." In other words, the Commission must demonstrate that it acted in good faith, took into account all the relevant factors and ignored irrelevant factors (***Canada (AG) v. Uppal***, **2008 FCA 388**, and ***Canada (AG) v. Tong***, **2003 FCA 281**).

[60] In ***Gauley*** **(2002 FCA 219)**, the Court stated:

> I am satisfied that the Umpire erred in interpreting the Board's statutory mandate as permitting the reduction of the penalties to zero. I would therefore allow the application, set aside the decision of the Umpire and refer the matter back to the Chief Umpire or to an Umpire designated by him for re-hearing and re-determination on the basis that the Board of Referees lacked the power to reduce the amount of the penalties to zero.

[61] In ***Gray*** **(FCA 464)**, the Court recalled the following:

> Such was the situation facing the Board of Referees and the Umpire in *Stark v. Canada (Minister of National Revenue)*, [1997] F.C.J. No. 637, Court file No. A-701-96 (C.A.). The Board of Referees refused to reduce the amount of the penalty on the basis of "financial hardship" and, instead, recommended that the Commission do so. The Commission rejected the recommendation. The claimant then appealed the Board's decision to an umpire who allowed it. While this Court set aside that decision on the ground that the Board had not made a "decision or order" that could be appealed to the Umpire, it referred the matter back to the Umpire for remission to the Board of the Referees on the grounds that the Board of Referees did possess "authority to vary the penalty in exceptional circumstances" and that the Board had not exercised that jurisdiction. This Court then directed that the Board should review the amount of the penalty in light of the hardship argument and decide whether the penalty "should be varied or be allowed to stand" ... It is not apparent that the Board of Referees turned its mind to the "hardship argument" put before it by the respondent. This resulted in a failure to exercise jurisdiction. In our view, therefore, the Board should be required to consider whether or not the respondent's claim of "inability to pay" is a mitigating factor that merits a reduction of the penalty.

[62] The evidence on file clearly shows that, for the periods between August 5, 2012, and March 30, 2013, the Appellant did not declare that he was attending a training course. The Appellant answered in the negative to an unequivocal question asking him (script No. 1150), "Did you attend school or a training course during the period of this report?"

[63] Furthermore, the Appellant answered in the affirmative to a question asking him (script No. 1170), "Were you ready, willing, and capable of working each day, Monday through Friday, during this period?" except for the weeks between September 30, 2012, and October 13, 2012, when he was attending a training course during the day, Monday through Friday.

[64] The Tribunal finds that the Appellant was well aware that he was required to make his reports accordingly and that he cannot evade responsibility for the actions of which he is accused.

[65] Given all the very clear messages he received when he was completing his reports, the Appellant could not ignore the fact that he was making false statements.

[66] Although the Appellant submitted that this was his first claim for benefits, the Tribunal finds that he was well aware of his responsibility to declare the fact that he was attending a training course during the period in question.

[67] In fact, the Appellant acknowledged that he had made a [translation] "mistake" by failing to report that he was attending a training program.

[68] In its submissions, the Commission explained that it did not factor in any mitigating circumstances when it established the Appellant's penalty amount (Exhibit GD4-8).

[69] However, at the hearing, the Appellant clearly outlined the heavy financial obligations he was facing and how the imposition of a monetary penalty of nearly $5,000.00 would cause him major money problems.

[70] In this case, the Tribunal is considering the Appellant's argument with respect to his financial difficulties as well as the detailed picture he provided at the hearing of his situation in this regard concerning the consequences of an additional burden of over $15,000.00 (combined

overpayment and penalty amount) to repay in full the amount being claimed from him by Employment Insurance.

[71] At the hearing, the Appellant submitted that, because of his health, he had been unable to work since July 7, 2013, and that he did not have the financial resources to repay the amount claimed from him. He also submitted that his spouse, who had been working five days per week, was now working only three days per week.

[72] The Appellant further submitted that he had incurred an [translation] "immigration debt" of $9,000.00 to cover transportation costs for his children, who had been in Africa for 11 years, so that they could come to Canada in 2012. He also submitted that he and his spouse had accumulated several thousand dollars in debt arising from the use of several different credit cards. He noted that he was [translation] "debt-ridden."

[73] The facts raised by the Appellant at the hearing with respect to his precarious financial situation were not brought to the Commission's attention before it presented its arguments in this case and established the penalty amount imposed on the Appellant. The Tribunal finds that these facts were not fully known before the hearing and that the Commission was unable to take them into consideration or assess their full extent.

[74] The Tribunal is of the opinion that these facts represent exceptional circumstances and very strong mitigating factors that warrant its intervention to substantially change the penalty amount (***Gray***, **2003 FCA 464**, and ***Gauley***, **2002 FCA 219**).

[75] The Tribunal thus takes into account the fact that, at the hearing, the Appellant demonstrated that, because of his inability to work, his spouse's reduced time at work and the debts they had accumulated, it would be very difficult for them to [translation] "cope."

[76] These facts constitute a very strong mitigating factor that could warrant reducing the penalty imposed on the Appellant given the undue financial hardship that it could cause him. In this context, the Tribunal finds that the $5,000.00 penalty could cause undue financial hardship to the Appellant.

[77] The Tribunal is of the opinion that, by setting the Appellant's penalty amount at $5,000.00, the Commission did not exercise its discretionary power in a judicial manner on this point. The Commission was unable to take into account all the relevant facts on file, in particular with respect to the explanations the Appellant provided at the hearing regarding his inability to work due to his health problems and the potential consequences of the situation on his ability to repay the sums being claimed from him and the debts he had accumulated.

[78] The Appellant did not submit any new evidence specifically regarding the financial obligations he described. However, the Tribunal presumes that the explanations he provided at the hearing to demonstrate that his medical condition and the resulting disability (e.g., working in a seated position that does not require physical effort) have a negative impact on his ability to assume such obligations are true. At the hearing, the Appellant also submitted that he might be afflicted with another health problem, in addition to those that had already been diagnosed.

[79] Le Tribunal finds that the health problems the Appellant faced and still faces have hijacked his ability to assume his financial obligations and that these problems could increase the Appellant's monetary difficulties over time. The medical evidence on file supports the statements in this regard that the Appellant made at the hearing. The Tribunal takes into account the medical evidence showing that, on December 16, 2013, the Appellant received hemodialysis treatments at the Thetford region health and social services centre and that he had been undergoing medical treatment for renal failure since August 1, 2013. The document states:

> [Translation]
> Mr. E. M. B. is receiving treatment three days per week. In addition, he has been treated for renal failure since August 1, 2013. (Exhibit GD2-17)

[80] The Tribunal finds that the Appellant's prolonged medical condition further undermines his financial situation and, consequently, significantly reduces his ability to repay in full the amount being claimed from him.

[81] The Tribunal finds that setting the penalty at the symbolic amount of $1.00 is an appropriate measure and perfectly adequate in the circumstances (***Gauley***, **2002 FCA 219**).

[82] The appeal on this issue has merit in part.

3. Notice of violation

[83] On the basis of its analysis of subsection 7.1(4) of the *Employment Insurance Act*, the Court determined in ***Gill*** **(2010 FCA 182)** that, in situations which require the imposition of a sanction, the issuance of the notice of violation is not mandatory or automatic under subsection 7.1(4) of the Act and that the Commission may exercise its [translation] "discretionary" power in the circumstances.

[84] The Tribunal finds that the notice of violation issued to the Appellant under section 7.1 of the Act following a penalty imposed on him for committing an act or omission is unjustified in the circumstances.

[85] The Tribunal finds that it must take into account the mitigating factors, similar to those used in the determination of the penalty amount with a view to issuing a notice of violation (***Gill***, **2010 FCA 182**).

[86] The Commission issued a notice of violation to the Appellant without additional justification. The Commission indicated only to the Appellant that a notice of violation, classified as a "very serious violation" had been issued to him because of a $10,403.00 overpayment (Exhibits GD3-119 and GD4-9).

[87] In this case, the Tribunal is of the opinion that the Commission did not exercise its discretionary power in a judicial manner because it was unable to take into account all the relevant facts or the Appellant's testimony at the hearing, in particular his explanation regarding his health and the harmful financial effects that the decision to impose a significant monetary penalty could have on him and his family.

[88] The Tribunal finds that the notice of violation issued to the Appellant should not be upheld.

[89] The appeal on this issue has merit.

CONCLUSION

[90] With respect to the three issues brought before it, the Tribunal concludes the following:

[91] With respect to the imposition on the Appellant of a disentitlement from receiving Employment Insurance benefits under paragraph 18(1)(*a*) of the Act because he failed to prove his availability for work while attending a training course, the appeal is dismissed.

[92] With respect to the issue regarding the imposition of a penalty on the Appellant under section 38 of the Act for committing an act or omission by making representations that he knew were false or misleading, the appeal is allowed in part.

[93] With respect to the issue regarding the notice of violation that was issued to him under section 7.1 of the Act following a penalty imposed on him for committing an act or omission, the appeal is allowed.

Normand Morin
Member, General Division

DATE OF REASONS: December 24, 2014