

Citation: *P. R. v. Canada Employment Insurance Commission*, 2015 SSTGDEI 98

Date: May 29, 2015

File number: GE-14-3023

GENERAL DIVISION – Employment Insurance Section

Between:

P. R.

Appellant

and

Canada Employment Insurance Commission

Respondent

Decision by: Normand Morin, Member, General Division - Employment Insurance Section

Heard by Teleconference on April 16, 2015

REASONS AND DECISION

PERSONS IN ATTENDANCE

[1] The Appellant, Mrs. P. R., attended hearing held on April 16, 2015.

[2] Mr. Theresian Raphaël Selvakumar, official Tamil interpreter, was also present.

DECISION

[3] The Social Security Tribunal of Canada (the “Tribunal”) finds that a disqualification imposed against the Appellant because she was absent from Canada is justified, pursuant to section 37 of the *Employment Insurance Act* (the “Act”) and section 55 of the *Employment Insurance Regulations* (the “Regulations”).

[4] The Tribunal determines that the imposition of a penalty against the Appellant, for making a misrepresentation by knowingly providing false or misleading information to the Commission is not justified, pursuant to section 38 of the Act.

[5] The Tribunal also concludes that the notice of violation issued to the Appellant is not justified, pursuant to section 7.1 of the Act.

INTRODUCTION

[6] An initial claim for employment insurance benefits was established starting on June 12, 2011 (Exhibit GD3-3 to GD3-11).

[7] On December 11, 2012, the Commission informed the Appellant that a declaration card from the Canada Border Services Agency indicated that she had travelled outside Canada from January 27, 2012 to March 5, 2012. The Commission asked the Appellant to complete a questionnaire and return it by December 28, 2012 (Exhibit GD3-33 to GD3-35).

[8] On May 26, 2014, the Appellant was verbally informed by the Commission, that they were unable to pay her Employment Insurance benefits from February 3, 2012 to March 5, 2012 because she was not in Canada during that period, contrary to what the Appellant told them. The Commission concluded that she knowingly made four false representations for which a penalty amount of \$469.00 was imposed. The Commission also imposed a notice of violation to the Appellant, classified as a “minor violation”. The Appellant indicated that she did not receive the initial decision rendered on that matter on May 5, 2014. On June 17, 2014 The Commission sent a letter to the Appellant about that matter (Exhibits GD3-40 to GD3-42 and GD3-44 to GD3-46).

[9] On June 4, 2014, the Appellant sent a request for reconsideration of an Employment Insurance (EI) Decision Commission’s decision (Exhibit GD3-44 to GD3-46).

[10] On July 14, 2014, the Commission informed the Appellant that the decision rendered on May 5, 2014, regarding the period outside Canada would be maintained (Exhibit GD3-48 and GD3-49).

[11] On July 29, 2014, the Appellant appealed the Commission’s decision before the Tribunal (Exhibits GD2-1 to GD2-6).

FORM OF HEARING

[12] The hearing of this appeal was held by way of teleconference for the following reasons:

- a) The cost-effectiveness and expediency of the hearing choice;
- b) The fact that the Appellant will be the only party in attendance (Exhibit GD1-1 to GD1-4).

ISSUES

[13] The Tribunal has to determine whether the appeal before the Commission is justified regarding the following three issues:

- a) A disentitlement imposed, pursuant to section 37 and section 55 of Regulations, because the Appellant was absent from Canada ;
- b) 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 and ;
- c) The notice of violation issued pursuant to section 7.1 of the Act.

THE LAW

[14] The relevant provisions of the legislation regarding the imposition of a disentitlement because a person is absent from Canada are described into section 37 of the Act and section 55 of the Regulations.

[15] Concerning “Prison inmates and persons outside Canada”, subsection 37(b) of the Act states that “[...] Except as may otherwise be prescribed, a claimant is not entitled to receive benefits for any period during which the claimant [...] (b) is not in Canada.”

[16] For “Claimants not in Canada” subsections 55(1) and 55(2) of the Regulations specify that:

(1) 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-law partner 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. (1.1) Only the periods set out in paragraphs (1)(b) and (d) may be cumulated during a single trip outside Canada, and only if the member of the claimant's immediate family whom the claimant visits under paragraph (1)(d) is the person whose funeral the claimant attends under paragraph (1)(b). (2) For the purposes of subsections (1) and (1.1), the following persons are considered to be members of the claimant's immediate family: (a) the father and mother of the claimant or of the claimant's spouse or common-law partner; (b) the spouse or common-law partner of the father or mother of the claimant or of the claimant's spouse or common-law partner; (c) the foster parent of the claimant or of the claimant's spouse or common-law partner; (d) a child of the claimant's father or mother or a child of the spouse or common-law partner of the claimant's father or mother; (e) the claimant's spouse or common-law partner; (f) a child of the claimant or of the claimant's spouse or common-law partner; (g) a ward of the claimant or of the claimant's spouse or common-law partner; and (h) a dependant or relative residing in the claimant's household or a relative with whom the claimant permanently resides.

[17] The relevant section of the legislation for making a misrepresentation by knowingly providing false or misleading information to the Commission are described into section 38 of the Act.

[18] Regarding "Penalties", including "Penalty for claimants, etc.", "Maximum penalty" and "Determination under subsection 145(2)", section 38 of the Act indicates that:

[...] (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).

[19] The relevant section of the legislation for issuing a notice of violation since a penalty was imposed for making a misrepresentation is described into section 7.1 of the Act.

[20] About the "Increase in required hours", section 7.1 of the Act indicates that:

[...] (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."

TABLE / TABLEAU

Regional Rate of Unemployment / <i>Taux régional de chômage</i>	Violation			
	minor / <i>mineure</i>	serious / <i>grave</i>	very serious / <i>très grave</i>	subsequent / <i>subséquente</i>
6% and under/ <i>6 % et moins</i>	875	1050	1225	1400
more than 6% but not more than 7%/ <i>plus de 6 % mais au plus 7 %</i>	831	998	1164	1330
more than 7% but not more than 8%/ <i>plus de 7 % mais au plus 8 %</i>	788	945	1103	1260
more than 8% but not more than 9%/ <i>plus de 8 % mais au plus 9 %</i>	744	893	1041	1190
more than 9% but not more than 10%/ <i>plus de 9 % mais au plus 10 %</i>	700	840	980	1120
more than 10% but not more than 11%/ <i>plus de 10 % mais au plus 11 %</i>	656	788	919	1050
more than 11% but not more than 12%/ <i>plus de 11 % mais au plus 12 %</i>	613	735	858	980
more than 12% but not more than 13%/ <i>plus de 12 % mais au plus 13 %</i>	569	683	796	910
more than 13%/ <i>plus de 13 %</i>	525	630	735	840

EVIDENCE

[21] The evidence in the docket is as follows:

- a) An initial claim for employment insurance benefits was established starting June 12, 2011 (Exhibit GD3-3 to GD3-11) ;
- b) A document titled “Full Text Screens – Internet Reporting Service – Electronic Record Certification” indicates the rules for the Employment Insurance Internet Reporting Service and explains how the claimants should provide information about their continuing eligibility to benefits (Exhibit GD3-12 to GD3-14) ;
- c) On August 26, 2014, an agent of the Commission indicated that the Appellant stated that she was not outside Canada from January 15, 2012 to March 10, 2012. It was therefore discovered the Appellant had not declared the situation to the Commission as she had been paid employment insurance benefits for the same period (Exhibit GD3-15 to GD3-31) ;
- d) A copy of a “Canada Border Services Agency — Declaration Card” indicates that the Appellant left Canada on January 27, 2012 (Exhibit GD3-32) ;
- e) On December 11, 2012, the Appellant had to complete a questionnaire and return it by December 28, 2012 (Exhibit GD3-33 to GD3-35) ;
- f) The document titled “Reasoning – Penalty Amount Decision” indicates how the penalty in the amount of \$469.00 imposed against the Appellant was calculated (Exhibit GD3-38) ;
- g) The document titled “Reasoning – Violation Decision” indicates that a notice of violation was applicable in that case (Exhibit GD3-39) ;
- h) A document titled “Notice of Debts Details (DH009)” indicates that the total debt of the Appellant was established to \$2031.00 (Exhibit GD3-43) ;

- i) On July 29, 2014, the Appellant sent, for a second time, with her notice of appeal, a copy of the request for reconsideration of an employment insurance decision (Exhibit GD2-5 and GD2-6) ;
- j) On August 13, 2014, the Appellant sent to the Tribunal “a copy of the reconsideration decision being appealed” (Exhibit GD2A-1).

[22] At the hearing:

- a) The Appellant stated again the information that she previously described in her appeal letter (Exhibit GD3-36, GD3-37 and GD2-1 to GD2-6).

SUBMISSIONS

[23] The Appellant submitted that:

- a) Initially, she was supposed to be into Sri Lanka, for two weeks because her husband’s father (father-in-law) was very sick and had to have a surgery. Her husband couldn’t go there because he couldn’t take a leave of absence. She was the only one available (Exhibits GD3-36, GD3-37 and GD3-44 to GD3-46);
- b) While she was there, her mother also got sick and had to undergo surgery as well. That’s why the Appellant couldn’t come back immediately, after the two weeks (Exhibit GD3- 47);
- c) She therefore did not declare that she was outside Canada and she takes responsibility for her mistake. She explained that at that time, she was new in Canada and she had problems understanding English. In that period of time, her husband never received work offers on her behalf and he was always in touch with her. Her husband didn’t have a good understanding of the language and of the person (Commission agent) who guided him through the unemployment insurance process (to fill out the forms), (Exhibits GD3- 44 to GD3-47);

- d) She and her husband were new in X and she didn't understand French very much and understood English a little bit. She stated that they didn't have the knowledge or the guidance to seek advice. She added that it was her first mistake and that she did not understand the insurance benefits rules (Exhibits GD3-36, GD3-37 and GD3-44 to GD3- 46);
- e) She explained to her husband how to complete the reports and told him he had to answer the same things on all reports. She specified that her husband completed all her declarations while she was outside Canada (Exhibits GD3-36, GD3-37 and GD3-47);
- f) She received a document indicating that she has 21 days of overpayment to pay back, which represent \$1562.00 and a \$469.00 penalty;
- g) She asked to reduce the 21-day overpayment to 14 days and to cancel the penalty. She indicated that she would pay according to her income (Exhibit GD2-1 to GD2-6);
- h) She has not started to pay back the overpayment amount and the penalty.

[24] The Respondent (the Commission) submitted that:

- a) Except as otherwise prescribed by the legislation, a claimant is not entitled to receive employment insurance benefits for any period during which the claimant is not in Canada (Exhibit GD4-4);
- b) Whether the Appellant went outside Canada to visit her sick mother or father-in-law, is not clear, although but both are considered as immediate family members as per Regulation 55(2)a). When contacted to verify her availability during that period, the Appellant mentioned she would have been able to return to Canada promptly and be available for a job interview or a job (Exhibits GD3-36, GD3-37 and GD4-4);
- c) The Appellant did prove passive availability during that time as per section 18 of the Act, and therefore meets the provisions under section 55 of the Regulations. A period of seven days was initially allowed and the disentitlement was imposed on February 4, 2012 (Exhibit GD4-4);

- d) Regarding the overpayment amount, it was calculated as follows: Since the Appellant's absence covered 21 days, starting the next business day following the disenitment, which was February 6, 2012. Her rate was \$372.00 per week, therefore equals \$74.40 per day ($\$372.00 / 5$ days per week). $21 \times \$74.40 = \1562.40 rounded to \$1562.00 (Exhibit GD4-4);
- e) The Appellant's rights and responsibilities were explained to her at the time she filed for employment insurance benefits (Exhibit GD3-6 to GD3-8). Her obligations included the obligation to report any absence(s) from Canada (Exhibit GD4-5);
- f) Evidence in the file clearly indicates that the Appellant did not in any way notify the Commission of her absence from Canada for the period at issue (Exhibits GD3-16 to GD3-31 and GD4-5);
- g) The decision complies with the legislation and case law. The Appellant's overpayment amount is relevant with the period outside Canada after having allowed the seven (7) days to assist her ill mother, (Exhibit GD4-5);
- h) Due to Commission's error, only the issue of "Out of Canada" was quoted in the notice sent to the Appellant following the administrative review (Exhibit GD3-48 and GD3-49), however, the Commission made an implied decision at the time that the penalty and violation should also be maintained. Upon review of all facts on file during preparation of the appeal to the General Division, it is the Commission's revised position that the Appellant provided a plausible explanation as to why she did not declare being outside of Canada during the period under review (Exhibit GD3-36 to GD3-37), therefore the evidence does not support a finding that the Appellant knowingly provided false information. For that reason, the Commission recommends that the Appellant's appeal on the issue of penalty be allowed (Exhibit GD4-5);
- i) In view of the Commission's revised position on the issue of penalty, the issue of violation should also be allowed (Exhibit GD4-5);

- j) The Commission indicated that that a clerical error was made in the notice sent to the Appellant (Exhibit GD3-40). This notice indicates “*we are unable to pay you Employment Insurance benefits from February 3rd, 2012 to March 5, 2012*” whereas it should have stated “*we are unable to pay you Employment Insurance benefits from February 4th, 2012 to March 5, 2012*”. In ***Desrosiers (A-128-89)***, the Federal Court of Appeal (the “Court”) confirmed the principle established by Justice Pinard in CUB 16233 that an error which does not cause prejudice is not fatal to the decision under appeal, and therefore the Tribunal can and should maintain the decision (Exhibit GD4-2).

ANALYSIS

Absence from Canada

[25] The Federal Court of Appeal (the “Court”) confirmed the principle that employment insurance benefits are not payable to those persons not in Canada except as specifically prescribed by the Regulations (***Gibson, 2012 FCA 166, Bendahan, 2012 FCA 237***).

[26] In ***Bendahan (2012 FCA 237)***, the Court stated: “[...] Under paragraph 37(b) of the *Employment Insurance Act*, S.C. 1996, c. 23 (the EIA), a claimant is not entitled to receive benefits for any period during which he or she was outside Canada.”

[27] The Court further confirmed that the onus is on the claimant to prove that her absence outside Canada met the exceptions prescribed by the Regulations (***Peterson, A-370-95***).

[28] In the present case, the Appellant was outside of Canada from January 27, 2012 to March 5, 2012. According to paragraph 55(1)(d) of the Regulations, the Appellant is entitled to receiving employment insurance benefits for a period of “seven consecutive days”, beginning on Friday, January 27, 2012, date of her departure to Sri Lanka (Exhibit GD3-36 and GD3-37).

[29] The Appellant explained that she was outside Canada because her husband’s father was very sick and had to have a surgery and to attend her mother’s side as she also had to have a surgery (Exhibits GD3-36, GD3-37 and GD3-44 to GD3-46).

[30] The Tribunal also considers that the Appellant did prove passive availability during this time as per section 18 of the Act, and therefore meets the provisions under section 55 of the Regulations. She demonstrated her availability to work when she explained that she would have been able to return to Canada promptly and be available for a job interview or a job (Exhibit GD3-36 to GD3-37).

[31] Paragraphs 55(1)(d) and 55(2)(a) of the Regulations specifies that:

(1) 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 [...] (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; [...] (2) For the purposes of subsections (1) and (1.1), the following persons are considered to be members of the claimant's immediate family:
(a) the father and mother of the claimant or of the claimant's spouse or common-law partner [...]"

[32] A seven-day period was initially allowed by the Commission and the disentanglement was imposed on the eighth day, which was February 4, 2012 (Exhibit GD4-4).

[33] The Tribunal finds that beyond this period of "seven consecutive days" allowed under paragraph 55(1)(d), the Appellant is not entitled to receiving employment insurance benefits during the time she was outside Canada. Her situation does not correspond to the exceptions described into section 55 of the Regulations.

[34] Therefore, a disentanglement must be imposed to the Appellant, after that period of "seven consecutive days" (Exhibit GD4-4).

[35] The Commission explained that: "Since the claimant's absence covered 21 days, starting the next open day following the disentanglement, which was February 6th, 2012. Her rate was 372\$ per week, therefore equals 74.40\$ per day. $(372\$ / 5 \text{ days per week}) \times 21 = 1562.40\$$ rounded to 1562\$" (Exhibit GD4-4).

[36] Even if the Appellant asked the Tribunal to reduce the 21-day overpayment to 14 days, the Tribunal is bound by the legislation and cannot intervene on that matter.

[37] Consequently, the Commission's decision to impose a disentitlement is justified in the circumstances (*Gibson*, 2012 FCA 166, *Bendahan*, 2012 FCA 237, *Peterson*, A-370-95).

[38] The appeal, on that issue, is not justified.

Penalty – False or misleading representation

[39] In *Mootoo* (A-438-02), the Court 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.

[40] In *Gagnon* (A-52-04), the Court supported the Commission's policy of establishing guidelines to ensure a certain level of consistency and to avoid capriciousness in matters involving the imposition of penalties.

[41] In *Dunham* (A-708-95), the Court indicated that the Commission has sole discretion to impose a penalty pursuant to section 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 (*Purcell*, A-694-94 and *Schembri*, A-578-02).

[42] In the present case, the Tribunal considers the Commission is not justified in imposing a penalty to the Appellant pursuant to section 38 of the Act, for making a misrepresentation by knowingly providing false or misleading information to the Commission.

[43] The evidence indicates that the Appellant's husband did not declare that the Appellant was absent from Canada when he filled out the Appellant's declarations.

[44] Despite the situation, the Tribunal considers the Appellant's explanation plausible about the language barrier and the fact that she and her husband, were new in Canada and didn't have the knowledge to properly understand the employment insurance rules (*Mootoo*, A-438-02, *Gates*, A-600-94).

[45] In that context, the Tribunal finds the Appellant did not knowingly provide false or misleading information due to the language barrier. The Appellant did not subjectively know that the information given was false and could penalise her (*Mootoo, A-438-02, Gates, A-600-94*).

[46] Given these circumstances, the imposition of a penalty is not justified pursuant to section 38 of the Act.

[47] The appeal, on that question, is allowed.

Notice of violation

[48] In *Gill (2010 FCA 182)*, the Court rendered a decision that the issuance of the notice of violation is not mandatory or automatic under subsection 7.1(4) but discretionary on the part of the Commission. In cases where a penalty (including a warning letter, monetary penalty or prosecution) has been imposed, the Commission will be required to render a separate decision in regards to whether or not a notice of violation should also be issued taking into account all mitigating factors, similar to those used in the determination of the penalty amount. The Board of Referees will be required to decide whether or not the Commission exercised its discretion judiciously in issuing the notice of violation.

[49] As the Tribunal determined the Appellant did not knowingly provide false or misleading information, the issuing of a notice of violation is not justified pursuant to section 7.1 of the Act.

[50] The appeal, on that aspect, is allowed.

CONCLUSION

[51] Concerning a disentitlement imposed to the Appellant, because she was absent from Canada, pursuant to section 37 of the Act and section 55 of the Regulations, the appeal is dismissed.

[52] Regarding the imposition of a penalty to the Appellant, for making a misrepresentation by knowingly providing false or misleading information to the Commission, pursuant to section 38 of the Act, the appeal is allowed.

[53] Concerning the notice of violation issued to the Appellant, pursuant to section 7.1 of the Act, the appeal is allowed.

Normand Morin

Member, General Division - Employment Insurance Section