**Citation:** ***T. O. v. Canada Employment Insurance Commission*****, 2015 SSTGDEI 185**

**Date: November 5, 2015**

**File number: GE-15-1332**

**GENERAL DIVISION – Employment Insurance Section**

**Between:**

**T. O.**

**Appellant**

**and**

**Canada Employment Insurance Commission**

**Respondent**

**Decision by: Joseph Wamback, Member, General Division - Employment Insurance Section**

**Heard by Teleconference on November 3, 2015, Toronto, Ontario.**

## REASONS AND DECISION

## PERSONS IN ATTENDANCE

T. O., the Appellant attended the Teleconference Hearing.

## INTRODUCTION

[1] The Appellant filed for benefits in July 2012. He began receiving benefits, and the Respondent determined that he was outside of Canada while reporting and collecting benefits. The Respondent re-examined the Appellant's claim and issued a notice of debt. The Appellant requested reconsideration and was denied by the Respondent at that level. The Appellant filed an appeal to the Tribunal and a Teleconference Hearing was scheduled.

[2] The hearing was held by Teleconference for the following reasons:

a) The fact that the credibility may be a prevailing issue.

b) The form of hearing respects the requirement under the Social Security Tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

## ISSUE

[3] The Appellant is appealing the Respondent's decision resulting from his request for reconsideration under Section 112 of the *Employment Insurance Act* (the Act) regarding imposition of a penalty pursuant to section 38 of the Act for knowingly providing false or misleading information to the Respondent.

## THE LAW

[4] Section 38 of the Act states:

(1) The Respondent may impose on an appellant, or any other person acting for an appellant, a penalty for each of the following acts or omissions if the Respondent becomes aware of facts that in its opinion establish that the appellant or other person has:

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

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

(d) made a claim or declaration that the appellant 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 appellant was not entitled;

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

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

or

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

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

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

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

(i) three times the amount by which the appellant's benefits were reduced under subsection 19(3), and

(ii) three times the benefits that would have been paid to the appellant for the period mentioned in that paragraph if the benefits had not been reduced under subsection 19(3) or the appellant 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.

[5] Section 112 of the Act:

(1) An appellant or other person who is the subject of a decision of the Respondent, or the employer of the appellant, may make a request to the Respondent in the prescribed form and manner for a reconsideration of that decision at any time within

(a) 30 days after the day on which a decision is communicated to them; or

(b) any further time that the Respondent may allow.

(2) The Respondent must reconsider its decision if a request is made under subsection (1).

(3) The Governor in Council may make regulations setting out the circumstances in which the Respondent may allow a longer period to make a request under subsection (1).

**EVIDENCE**

[6] The Appellant filed for regular benefits on July 9, 2012. He sated he was ready, willing, and capable of working immediately; looking for the same type of work and wages as in his previous employment or other suitable work for which he has the necessary skills, is looking for work in an area where his choice of work is now available and he is available for work. (GD3-7). He stated he would report any absences from his area of residence and/or absence from Canada and acknowledged that if he knowingly hold back information or make false or misleading statements, he would have committed an act or omission that could result in an overpayment of benefits and severe penalties or prosecution. (GD3-11)

[7] The Appellant completed 4 reports during the period he was outside of Canada. He answered the question "Were you outside Canada between Monday and Friday during the period of this report? With a "No" answer. He answered the question "Were you ready, willing and capable of working each day, Monday through Friday during each week of this report? With a "Yes" answer. The Appellant acknowledged on each report that he understands this information will be used to determine my eligibility for employment insurance benefits. "I understand the information I have provided is subject to verification and that giving false information for myself or someone other than myself constitutes fraud. I also understand there are penalties for knowingly making false statements used to determine my eligibility for employment insurance benefits. I understand the information I have provided is subject to verification and that giving false information for myself or someone other than myself constitutes fraud. I also understand there are penalties for knowingly making false statements". (GD40 through 59)

[8] Border Service's Canada advised that the Appellant was outside of Canada from December 9, 2012 through January 22, 2013 and he was requested to complete a questionnaire describing his absence. He stated he was outside of Canada for the period in question in Nigeria due to a death in his family. He stated he kept in touch with his employment counselor and followed up on all interview requests and postponed such until January, 2013. (GD3-15, 16)

[9] The Appellant advised the Respondent's investigators on March 3, 2014 that he can't explain why he completed his reports stating he was not outside of Canada during his period of absence and that he probably didn't realize what he was doing. He stated that "he guesses he will have to give a refund". (GD3-17)

[10] The Appellant advised the Respondent that he was available for interviews by email and kept in touch with his employment counsellor by phone and that he was able to return to Canada within 24-48 hours as he had an open airplane ticket. The Appellant provided a copy of email correspondence surrounding a job application and a scheduled interview dated January 15, 2013 as well as correspondence with his employment counselor.

[11] The Appellant confirmed to the Tribunal that the date shown on exhibit GD3-21 acknowledging he will be available for an interview on January 3, 2015 was a typographical error.

[12] The Respondent notified the Appellant on December 12, 2014 that they have re-examined his claim, which began on June 24, 2012, and are unable to pay Employment Insurance benefits from December 17, 2012 to January 22, 2013 because according to their records he was not in Canada. The Employment Insurance law sometimes allows payment of benefits during all or some part of an absence from Canada. In this case, he was allowed seven days to attend the funeral of a member of his immediate family. They are acting based on the information they have on hand and the explanation he provided. They have concluded that he knowingly made 4 false representations in 4 reports to claim benefits. A notice of debit in the amount of $3,929.00 was issued. (GD3-28, 29, 30)

[13] The Appellant requested reconsideration on February 26, 2015. He stated he provided information indicating a sudden but tragic death in the family warranted his immediate attention to travel outside the country. While outside the country he provided information indicating that he actively searched for work. This aspect of his complaint was not considered in the decision reached to penalize him to the amount of $1310.00 (GD3-31 to GD3-32)

[14] The Appellant advised the Respondent on March 18, 2015 that he misunderstood the question referring to the statements “Were you outside Canada between Monday and Friday during the period of this report?” “Were you ready, willing and capable of working each day, Monday through Friday during each week of this report?” (GD3-33)

[15] The Respondent notified the Appellant on March 18, 2015 that have performed an in-depth review of the circumstances of the case and of any supplementary information provided and based on their findings and the legislation, they have not changed the decision as communicated to him on December 12, 2014. (GD3-34)

[16] The Appellant filed an appeal to the Tribunal on April 14, 2015. He argues that the Respondent's decision is disproportionate and unjust in response to his request for reconsideration. He disagrees with the penalty on the grounds that the decision is not consistent assuming he was a Canadian-born citizen with equal rights and privileges. As a naturalized citizen, he still has family members back in his home country who when death comes for them, he has to be physically present to pay his last respect. Given that he had to leave the shores of Canada to travel thousands of kilometers for the burial of a family member, it is unfair and unjust to ask that he repay the employment insurance funds made to him while he was away on bereavement. A Canadian born citizen under similar circumstances and fate with family member in Canada would not be penalized the same way. The Appellant further states that while he has since provided sufficient information to include his active search for work to the Respondent he has no reason to contest the penalty for not informing the authorities while outside the country. He failed in his due diligence to follow through with reporting his absence from the country for reasons beyond his control. In other words, his exercise of responsible citizenship should not be punished for entitlements rightly deserved for being a naturalized citizen. While the Employment Insurance Act and its Regulations means well for Canadians, its framing and implementation especially for non- Canadian born citizen on issues of bereavement outside of Canada needs reconsideration and redress in the Employment Insurance Act and its Regulations. He humbly requests that the decision to repay what was paid to him as employment insurance entitlements during his absence from Canada be overturned and the penalty for not informing the authorities be upheld by the Social Security Tribunal – General Division. He makes this request knowing it is unfair and unjust to be treated differently for being outside a geographical location for circumstances beyond his control. In exercising his responsibility as a citizen and in accordance with the Act and its Regulations he did not allow his geographical location to undermine his responsibility in doing what is right. In a globalized work, the Employment Insurance Act and its Regulations should accommodate citizen (with similar issues like him) to conduct their affairs outside the shores of Canada without being penalized. A decision contrary to any form of reasonable accommodation in the circumstance would be viewed as discriminatory and in violation of his Charter rights (GD2-1 to GD2-7).

[17] The Tribunal scheduled a pre-hearing conference to review and discuss the Appellant allegations of a violation of his Canadian Chartered Rights. The pre-hearing conference was recorded and the Appellant informed the Tribunal Member that he does not wish to raise a constitutional issue that falls under paragraph 20(1)(a) of the Social Security Tribunal Regulations as part of this appeal. (GD6-1)

[18] The Tribunal scheduled a teleconference hearing.

[19] The Appellant advised the Tribunal that he submits to the Respondent's position, but he stated that he misunderstood the question and he did not lie. He stated that he did not knowingly make false statements and that he did so due to his grief experienced with the passing of his relatives.

**SUBMISSIONS**

[20] The Appellant submitted that;

a) The decision is disproportionate and unjust in response to his request for reconsideration. He disagrees with the penalty on the grounds that the decision is not consistent assuming he was a Canadian-born citizen with equal rights and privileges. As a naturalized citizen, he still has family members back in his home country who when death comes for them, he has to be physically present to pay his last respect. Given that he had to leave the shores of Canada to travel thousands of kilometers for the burial of a family member, it is unfair and unjust to ask that he repay the employment insurance funds made to him while he was away on bereavement. A Canadian born citizen under similar circumstances and fate with family member in Canada would not be penalized the same way The Appellant further states that while he has since provided sufficient information to include his active search for work to the Respondent he has no reason to contest the penalty for not informing the authorities while outside the country.

b) He failed in his due diligence to follow through with reporting his absence from the country for reasons beyond his control. In other words, his exercise of responsible citizenship should not be punished for entitlements rightly deserved for being a naturalized citizen. While the Act and its Regulations means well for Canadians, its

framing and implementation especially for non- Canadian born citizen on issues of bereavement outside of Canada needs reconsideration and redress in the Employment Insurance Act and its Regulations.

c) He humbly requests that the decision to repay what was paid to him as Employment Insurance entitlements during his absence from Canada be overturned and the penalty for not informing the authorities be upheld by the Social Security Tribunal – General Division. He makes this request knowing it is unfair and unjust to be treated differently for being outside a geographical location for circumstances beyond his control. In exercising his responsibility as a citizen and in accordance with the Act and its Regulations he did not allow his geographical location to undermine his responsibility in doing what is right. In a globalized work, the Act and its Regulations should accommodate citizen (with similar issues like him) to conduct their affairs outside the shores of Canada without being penalized. A decision contrary to any form of reasonable accommodation in the circumstance would be viewed as discriminatory and in violation of his Charter rights (GD2-1 to GD2-7).

[21] The Respondent submitted that;

a) In his initial request the Appellant requested reconsideration of the penalty only. He now states he has no reason to contest the penalty as he failed in his due diligence to report his absence. He requests that the decision to repay his employment insurance entitlements during his absence be overturned. The Respondent notes that reconsideration has not been requested on the issue of the disentitlements for the period out of Canada. Therefore this is not an issue to be considered in this appeal

b) The burden of proof rests with the Respondent to show that an appellant knowingly provided false or misleading information. The standard of proof required to meet this burden is the balance of probabilities. However, jurisprudence has also established that the Respondent does not have to prove the existence of an intention to deceive to show that an appellant knowingly provided false or misleading information. Thus, the fact-finder must decide on the balance of probabilities that the appellant subjectively knew that the information given was false in order to penalize him or her. When speaking to

the Appellant the agent asked why he did not report his absence and why he answered NO each time when asked if he was out of Canada (GD3-33). The Appellant stated the he misunderstood the question but clearly as evidenced by his written statement included with the appeal literacy is not an issue.

c) The Respondent submits that in the case at hand, it has met the onus of establishing that the Appellant knowingly made a misrepresentation. Specifically, the Appellant misrepresented his absence from Canada. The Appellant acknowledged that he received and understood his rights and responsibilities as per his application (GD3-9 and GD3-12).

d) The Appellant was advised that he must report any absence from his area of residence or any absence from Canada. There is no indication the Appellant made any attempts to report his absence or to return the benefits he was not entitled to. The sanctions provided by the Act must be viewed not so much as punishment, but as a deterrent necessary to protect the whole scheme whose proper administration rests on the truthfulness of its beneficiaries. Each time the Appellant completed an electronic report he was instructed to answer the questions truthfully and was warned that giving false information constitutes fraud. The Appellant was specifically asked if he was outside Canada during the periods of these reports and he answered "NO". The Respondent maintains the question is too simple and answering "NO" to the question "Were you outside Canada during the period of this report on four separate occasions is not simply an error. Three of the four reports were completed while the Appellant was out of the country.

e) If the Tribunal maintains that a penalty is warranted, it must then determine whether or not the Respondent exercised its discretion in a judicial manner when it determined the quantum of the penalty. Since June 1st, 2005, the Respondent follows this policy when calculating the penalty amount: For a first misrepresentation, the penalty amount may be up to 50% of the overpayment caused by the misrepresentation. For a second misrepresentation, the penalty amount may be up to 100% of the overpayment caused by the misrepresentation. For a third or more misrepresentation, the penalty amount may be up to 150% of the overpayment caused by the misrepresentation. These are maximums

that the Respondent established by policy and it is only after considering all mitigating circumstances that the penalty amount is calculated.

f) The Federal Court of appeal, in *Gagnon* (A-52-04), has supported the Respondent policy of establishing guidelines to ensure a certain level of consistency and to avoid capriciousness in matters involving the imposition of penalties.

g) The Respondent submits that it rendered its decision in this case 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 Appellant knew, or should have known, that the representations were false.

h) The Respondent submits that the jurisprudence supports its decision. The Federal Court of Appeal confirmed the principle, that for a finding of misrepresentation, Appellants must have subjective knowledge that the representations made by them, or on their behalf, were false. (*Mootoo v. Canada* (AG), 2003 FCA 206; *Canada (AG) v. Gates*, A-600-94)

i) In the Dunham decision (A-708-95), the Federal Court of Appeal indicated that the Respondent 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 Respondent's ruling with respect to a penalty so long as the Respondent can prove that it exercised its discretion “in a judicial manner”.

j) In other words, the Respondent 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).

k) The Appellant throughout his appeal alleges that by disentitling him for the period out of Canada his Charter rights are violated and he is being discriminated against. Although the issues of out of Canada and availability while out of Canada are not an issue in this appeal the Respondent wishes to note that jurisprudence has supported that the appellant is free to enter, remain in, and leave Canada at his discretion. But the Charter does not

protect the appellant from economic disadvantage associated with his choice to leave Canada for personal reasons. The Federal Court of Appeal (A-401-99) confirmed this. In the Court's decision, it is stated:

> "We are in substantial agreement with the thorough reasons of the learned Umpire and it would serve no useful purpose to attempt saying in our own words what he so ably put in his. We would only add that, to the extent that paragraph 32(b) of the Unemployment Insurance Act provides a disincentive for Ms. Smith not to exercise her right to leave Canada, it is not sufficiently significant to constitute a breach of her right under subsection 6(1) of the Charter."

**ANALYSIS**

[22] The issue before the Tribunal is the imposition of a penalty for making false and misleading statements to the Respondent by failing to report the Appellant's absence from Canada.

[23] The Tribunal scheduled a pre-hearing conference to review and discuss the Appellant's allegations of a violation of his Canadian Chartered Rights. The pre-hearing conference was recorded and the Appellant informed the Tribunal Member that he does not wish to raise a constitutional issue that falls under paragraph 20(1)(a) of the Social Security Tribunal Regulations as part of this appeal. (GD6-1)

[24] Section 38 of the Act allows the Respondent to impose a monetary penalty on an appellant who makes a false or misleading statement or representation or who provides false information to the Respondent. The sanctions provided by the legislation are not so much a punishment, but rather a deterrent necessary to protect the whole legislative scheme whose proper administration depends upon the truthfulness of appellants. In order for a penalty to be imposed, it must be clear that the appellant intended to make a false statement or to provide false or misleading information to the Respondent.

[25] The Tribunal finds that the Appellant read and understood the statements on his application for benefits which states; he would report any absences from his area of residence and/or absence from Canada and acknowledged that if he knowingly hold back information or

make false or misleading statements, he would have committed an act or omission that could result in an overpayment of benefits and severe penalties or prosecution. (GD3-11)

[26] The Tribunal finds that the Appellant acknowledged on each report that he understands this information provided will be used to determine his eligibility for Employment Insurance benefits. "I understand the information I have provided is subject to verification and that giving false information for myself or someone other than myself constitutes fraud. I also understand there are penalties for knowingly making false statements used to determine my eligibility for employment insurance benefits. I understand the information I have provided is subject to verification and that giving false information for myself or someone other than myself constitutes fraud. I also understand there are penalties for knowingly making false statements". (GD40 through 59)

[27] By allowing for the imposition of a financial penalty, the section implies that some improper conduct has taken place; that is, that the appellant acted in bad faith or, in other words, dishonestly. There must be subjective knowledge of falsity. In (*Mootoo v. Canada (Minister of Human Resources Development*)), The Federal Court of Appeal stated as follows:

> ... In order to be subject to a penalty under section 38(1)(a) it is not enough for the representation to be false or misleading; it must be made by the applicant with the knowledge that it is false or misleading. In *Canada (A.G.) v. Gates*, [1995] 3 F.C. 17 (C.A.) and *Canada (A.G.) v. Purcell*, [1996] 1 F.C. 644 (F.C.A.), this Court made clear that the knowledge of the applicant concerning the falsity of the offending statement had to be decided on a subjective basis.

[28] The same Court in (*Gauley*, 2002 FCA 219), further commented on the inappropriateness of reducing penalties substantially, without any new exceptional circumstances not previously reviewed by the Respondent. The Court added, in effect, the penalty should only be reduced to a token amount in highly exceptional circumstances or out of humanitarian concerns.

[29] The Respondent does not have to prove the existence of an intention to deceive to show that an appellant knowingly provided false or misleading information.

[30] The Tribunal finds that the Respondent correctly determined that the Appellant had made false or misleading statements knowingly when he failed to report his absence from Canada.

[31] The Tribunal must decide on a balance of probabilities that the particular appellant subjectively knew that a false or misleading statement had been made.

[32] To establish a false statement knowingly made, the evidence must show an objectively false statement that misleads the Respondent, resulting in the real or possible payment of benefits to which the appellant was not entitled and, at the time of the statement, the appellant knew it did not accurately reflect the facts. In this case the Tribunal finds that the Appellant made false statements on his reports that misled the Respondent resulting in payment of benefits that the Appellant was not entitled to. The Tribunal also finds that the Appellant is aware that his statements were false.

[33] While the Tribunal finds that the Appellant may have completed his reports without clear thought due to his grief it finds his evidence contradictory. His initial statement to the Respondent was that he did make false statements and that he did so due to his grief experienced with the passing of his relatives. He further stated that he can't really explain why he completed his reports incorrectly and that he probably didn't realize what he was doing and he suggested he will have to give a refund. (GD3-17) During the hearing the Appellant advise the Tribunal that he "just made a mistake". The Tribunal finds that the last report completed by the Appellant was completed in Canada 3 days after he returned from his 4 week absence from the country and he still stated that he was not outside of Canada between Monday and Friday during the period of the report. The Tribunal finds that the evidence provided by the Appellant in support of his job search (GD3-21 through 25) demonstrates that the Appellant was thinking clearly while searching for employment opportunities during the period he was outside of Canada. The Tribunal finds that on the balance of probabilities that the Appellant knew his statements on his reports were false. The Tribunal finds no evidence of any mitigating circumstances submitted by the Appellant to support his contention that he was incapacitated by

grief when he completed his reports as he was still able to correspond with his employment counsellor and potential employers about job opportunities in Canada.

[34] A mitigating circumstance is a situation or condition that explains the misrepresentation but does not remove a finding of knowingly made. The Respondent also considers an appellant's current circumstances when a penalty is assessed. Mitigating circumstances can exist when an appellant makes a misrepresentation or at the time the penalty is imposed. The Tribunal finds in this case that there were no mitigating circumstances that would have prevented the Appellant from completing his reports in a quiet environment where he could have concentrated on his response. The Tribunal notes that a mitigating circumstance does not change a finding of misrepresentation, or false statement knowingly made, to a finding of innocent error.

[35] With respect to the issue of the penalty, some improper conduct must be shown, that is, knowingly to misrepresent the facts. This is because the questions in the report cards are very simple and it is difficult to believe that anyone would not know the answers to them. Moreover, because the test of knowledge is subjective, as a practical matter only the Appellant can explain the reason for the wrong answers. In this case the Appellant advised the Respondent on his reports that he was not outside of Canada while the agreed facts show that he was outside of Canada on family matters. The Appellant's evidence clearly demonstrates that he is aware that answering NO to those questions is misrepresentation of the facts and that the statements were false.

[36] Reducing the penalty amount is discretionary. The manner in which a penalty is reduced is set out by policy, but the adjudicator determines if facts on a file warrant a lesser penalty. When the Appellant submits an explanation for a misrepresentation, or if an explanation is evident on the claim file, the Respondent must address these facts. If the circumstance is mitigating, the Respondent reduces the percentage of the penalty value.

[37] The Tribunal finds that Respondent acted 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 Appellant knew, or should have known, that the representations were false. The penalty amount was calculated as 50% of the resulting net overpayment for a first offence and deemed

to be $1310.00. The Appellant did not provide any additional facts or submissions as evidence to the Tribunal during the hearing.

[38] In this case, the Respondent assessed the penalty at 50% of the weekly benefit. The Tribunal finds the penalty to be fair.

[39] The Tribunal upholds the Respondent's decision to impose a penalty in the amount of $1,310.00 which is 50% of the Appellants' overpayment. The Tribunal concludes that the Respondents decision to impose a penalty in the amount of $1,310.00 was calculated in a judicial manner. The Member dismisses the appeal on the issue of imposition of a penalty pursuant to section 38 of the EI Act.

**CONCLUSION**

[40] The appeal is dismissed.

Joseph Wamback
Member, General Division - Employment Insurance Section