



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *C. H. v. Canada Employment Insurance Commission*, 2015 SSTGDEI 209

Date: November 30, 2015

File number: GE-15-2069

GENERAL DIVISION - Employment Insurance Section

Between:

C. H.

Appellant

and

Canada Employment Insurance Commission

Respondent

Decision by: Joanne Blanchard, Member, General Division - Employment Insurance Section

Heard by Teleconference on October 26, 2015

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Appellant, Mrs. C. H., attended the scheduled teleconference hearing.

INTRODUCTION

[1] The Appellant established an initial claim for employment insurance benefits effective July 6, 2014 (GD3-3 to GD3-11).

[2] Information obtained from the Canada Border Services Agency confirmed that the Appellant was outside of Canada from August 19, 2013 to August 26, 2013 and again from August 12 to August 20, 2014. The Canada Employment Insurance Commission (the Commission) noted that the Appellant did not declare her absence from Canada.

[3] The Commission concluded that the Appellant was not entitled to employment insurance benefits while outside of Canada and thus a disentitlement was imposed for the periods from August 19, 2013 to August 26, 2013 and again from August 12 to August 20, 2014, pursuant to section 37 of the *Employment Insurance Act* (the EI Act) and to section 55 of the *Employment Insurance Regulations* (the EI Regulations).

[4] The Commission also concluded that the Appellant failed to prove she was available for work. The Commission imposed a disentitlement during this period pursuant to subsection 18(a) of the *EI Act*. (GD3-22).

[5] The Commission also concluded that the Appellant knowingly made several misrepresentations by providing false or misleading information on her claimant's reports when she omitted to report that she went out of Canada during those periods. The Commission therefore imposed two penalties in the amounts of \$360.00 and \$246.00 (GD3-23). The Appellant was also issued a Notice of Violation pursuant to subsection 7.1(4) of the EI Act as it was determined that the Appellant made a misrepresentation by knowingly providing false or misleading information when she failed to report her two absences from Canada (GD3-24).

[6] The Appellant submitted a Request for Reconsideration of the Commission's initial decisions rendered on May 7, 2015 (GD3-25 to GD3-29). On June 10, 2015, the Commission informed the Appellant that it was maintaining its initial decisions regarding the absence from Canada, the availability, the penalty and violation (GD3-31 and GD3-32).

[7] The Appellant is appealing the Commission's final decisions regarding her absence from Canada, the availability, the penalty and Notice of Violation before the Social Security Tribunal (GD2).

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

- a) The complexity of the issues under appeal.
- b) The fact that the appellant will be the only party in attendance.
- c) The information in the file, including the need for additional information.

ISSUES

[9] The Appellant is appealing four issues:

1. A disentitlement imposed pursuant to section 37 of the EI Act and section 55 of the EI Regulations because she was absent from Canada.
2. A disentitlement imposed pursuant to subsection 18(a) of the EI Act for failing to prove her availability for work.
3. The imposition of a penalty pursuant to section 38 of the EI Act for making a misrepresentation by knowingly providing false or misleading information to the Commission.
4. The Notice of Violation issued pursuant to section 7.1 of the EI Act.

THE LAW

Absence from Canada

[10] According to subsection 37(b) of the EI Act: « Except as may otherwise be prescribed, an Appellant is not entitled to receive benefits for any period during which the Appellant is not in Canada ».

[11] Under section 55 of the EI Regulations: « Subject to section 18 of the Act, a Appellant is not disentitled from receiving benefits for the reason that the Appellant is outside Canada (a) for the purpose of undergoing, at a hospital, medical clinic or similar facility outside Canada, medical treatments that is not readily or immediately available in the Appellant's area of residence in Canada, if the hospital, clinic or medical facility is accredited to provide the medical treatment by the appropriate government outside Canada; (b) for a period of not more than seven consecutive days to attend the funeral of a member of the Appellant's immediate family , (c) for a period of not more than seven consecutive days to accompany a member of the Appellant'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 government authority outside Canada; (d) for a period of not more than seven consecutive days to visit a member of the Appellant's immediate family who is seriously ill or injured. (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 Appellant's immediate family whom the Appellant visits under paragraph (1)(d) is the person whose funeral the Appellant attends under paragraph (1)(b).

[12] Subsection 49(1) of the EI Act sets out that the Appellant must prove that the requirements for receiving benefits are met, and there are no disentitling or disqualifying conditions.

Availability

[13] According to subsection 18(a) of the *EI Act*, 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 capable of and available for work and unable to obtain suitable employment.

[14] *Reasonable and customary efforts* have been defined at section 9.001 of the *Employment Insurance Regulations* (Regulations) as the following : (a) the claimant's efforts are sustained, (b) the claimant's efforts consist of (i) assessing employment opportunities; (ii) preparing a resumé or cover letter; (iii) registering for job search tools or with electronic job banks or employment agencies; (iv) attending job search workshops of job fairs; (v) networking; (vi) contacting prospective employers; (vii) submitting job applications; (viii) attending interviews, and (ix) undergoing evaluations of competencies and (c) the claimant's efforts are directed toward obtaining suitable

[15] Subsection 9.002 of the Regulations has determined what constitutes suitable employment for the purposes of paragraph 18(a) of the Act. In particular, subsection 9.002(e) outlines that the employment is of a type referred to in section 9.003. Subsection 9.003(f) specifies that the offered earnings correspond to the scale set out in section 9.004 and the claimant, by accepting the employment, will not be put in a less favourable financial situation than the less favourable of: (i) the financial situation that the claimant is in while receiving benefits, and (ii) that which the claimant was in during their qualifying period.

[16] Subsection 9.003(1)(c) of the Regulations outlines the type of employment for claimant's to whom neither paragraph (a) or (b) applies : (i) during the first six weeks of the benefit period, the same occupation, (ii) after the sixth week and until the 18th week of the benefit period, a similar occupation, and (iii) after the 18th week of the benefit period, any occupation in which the claimant is qualified to work.

Penalty

[17] According to subsection 38(1) of the EI Act, the Commission may impose on a Claimant, or any person acting for a Claimant, a penalty if the Commission becomes aware of

facts that in its opinion establish that the Claimant or other person has « *knowingly* » provided information to the Commission which he knew to be false or misleading.

Violation

[18] Pursuant to paragraph 7.1(4)(a) of the EI Act, an insured person accumulates a violation if the Commission issues a Notice of Violation to the person who has been imposed a penalty under section 38, 39, 41.1 or 65.1, as a result of acts or omissions mentioned in section 38, 39, or 65.1.

EVIDENCE

[19] The Appellant filed an initial application for employment insurance benefits effective July 6th, 2014 (GD3-3 to GD3-11).

[20] On May 7th, 2015, the Commission informed the Appellant that she was not entitled to benefits from August 19, 2013 to August 26, 2013 and again from August 12 to August 20, 2014 because she was outside of Canada. A disentitlement was imposed for these periods, pursuant to section 37 of the EI Act and section 55 of the EI Regulations.

[21] The Canada also concluded that the Appellant failed to prove she was available for work during this period. The Commission imposed a disentitlement during this period pursuant to subsection 18(a) of the *EI Act*. (GD3-22).

[22] The Commission also concluded that the claimant knowingly made several misrepresentations by providing false or misleading information on her claimant's reports when she omitted to report that she went out of Canada during those periods. The Commission therefore imposed two penalties in the amounts of \$360.00 and \$246.00 (GD3-23). The Appellant was issued a Notice of Violation pursuant to subsection 7.1(4) of the Act as it was determined that the Appellant made a misrepresentation by knowingly providing false or misleading information when she failed to report her two absences from Canada (GD3-24).

[23] A Notice of Debt was sent to the Appellant (GD3-21).

[24] The Appellant made a Request for Reconsideration of the Commission's initial decisions. She submitted that elementary schools are closed in the summer and she is laid off for 8 weeks, 6 of which are covered by employment insurance. Her start and end dates are well known. She has tried to find employment during this time but employers are reticent to hire an employee for 8 weeks. She waits until the last week before her return to work to go on family vacation. She feels that school support staff is being punished. The rules should be different with regards to school staff laid off during the summer. She considered herself ready, willing and capable of working each day. She also had her cell phone with her while in Florida in the event that an employer called. She feels it is unfair that she would not be penalized for travelling to British Columbia which is further than Florida (GD3-25 to GD3-29).

[25] On June 10, 2015, the Commission informed the Appellant that it was maintaining its initial decision regarding the absence from Canada, the availability, the penalty and violation (GD3-31 and GD3-32).

[26] The Appellant's electronic reports were produced into evidence (GD3-37 to GD3-52).

[27] The Appellant is appealing the Commission's final decisions regarding her absence from Canada, the availability, the penalty and Notice of Violation before the Social Security Tribunal (GD2).

SUBMISSIONS

Appellant submissions

[28] The Appellant submitted that she was absent from Canada for one week in August 2013 and one week in August 2014.

[29] She works at a school and she is laid off in the summer for 8 weeks, of which 6 weeks are covered by employment insurance. She does look for work during the summer, mostly in retail but no one is willing to hire her for such a short period of time. She tried looking at seasonal summer work, but the employers start to hire in May and she generally works until July. She does actively look for work and does not feel that availability applies to her. She leaves for vacation when she has only one week left.

[30] She did not declare her absence because she thought it would cancel her employment insurance benefits which she needs. She feels that her situation with a seasonal lay-off is different. She knows when she will be out of work and when she will return. She should be entitled to 6 weeks as it is very likely that she will not find work during those weeks.

[31] The question should be clarified. The government is penalizing people who leave the country on vacation as opposed to people who chose to take vacation in Canada. There is no question that says: where you away from your area of residence in Canada for vacation?

[32] The penalty is ridiculous in her situation. She pays into employment insurance all year long for those 6 weeks and she feels that she is entitled to benefits. She is at a disadvantage not being able to find a job for 8 weeks.

Respondent submissions:

Absence from Canada

[33] « The Commission maintains that the claimant is free to enter, remain in and leave Canada at her discretion. She is just not protected from the economic disadvantage associated with her choice to leave Canada for vacation purposes. 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. The claimant travelled on both occasions for a family vacation in Florida. This situation does not meet the exceptions specified in Regulation 55. The Commission submits that the claimant is subject to a disentitlement under subsection 37(b) of the Act because she was outside of Canada for a family vacation. »

Availability

[34] « Availability also refers to a dynamic desire to work and not just to an expression of a passive state towards accepting work. The claimant clearly does not think the issue of being ready, willing and capable of working each day applies to her. The claimant's situation is no different than anyone else who is laid off and applies for benefits. The fact that her lay off occurs in the summer does not negate the need for her to prove availability. »

Penalty

[35] « The Commission submits that in the case at hand, it has met the onus of establishing that the claimant knowingly made a misrepresentation. Specifically, the claimant misrepresented her absence from Canada. The claimant acknowledged that she received and understood her rights and responsibilities as per her application. The claimant was advised that she must report any absence from her area of residence or any absence from Canada. There is no indication the claimant made any attempts to report her absence or to return the benefits she 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. The claimant herself stated that she did not report her absences because she did not want to lose a week of her EI benefits. She made the deliberate decision to not report her absence and this is evidence that she knowingly did not do so. If the Tribunal maintains that a penalty is warranted, it must then determine whether or not the Commission exercised its discretion in a judicial manner when it determined the quantum of the penalty. The Commission 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 claimant knew, or should have known, that the representations were false. The penalty amount was calculated as 50% of the resulting net overpayments for a first offence. There were no mitigating factors to consider. The fact that the claimant in her initial statement said she did not report the absence because she did not want to lose a week of benefits is deemed as aggravating and evidence that she knowingly did not report. »

Notice of Violation

[36] « In the case at hand it is submitted that the Commission exercised its discretion in a judicial manner as all the pertinent circumstances were considered when issuing the Notice of Violation. The Commission concluded that there were no mitigating factors that would preclude the Commission from issuing a notice of violation (GD3-20). The facts on this issue are undeniable; the claimant knew she was out of the country during the time periods in question

and did not inform the Commission otherwise. The claimant therefore provided false and misleading information to the Commission when filling her reports. There were no mitigating factors that would preclude the Commission from issuing a penalty and a notice of violation. The Commission maintains that it rendered its decision in a judicial manner when imposing a penalty and a notice of violation. »

ANALYSIS

Absence from Canada

[37] Pursuant to subsection 37(b) of the EI Act, an Appellant outside of Canada is not entitled to benefits except as provided under section 55 of the *EI* Regulation. Under subsection 49(1) of the EI Act, the Appellant must prove that the requirements for receiving benefits are met, and there are no disentitling or disqualifying conditions.

[38] It is undisputed that the Appellant travelled outside of Canada from August 19, 2013 to August 26, 2013 and again from August 12 to August 20, 2014. The Appellant submits that she travelled to Florida on both occasions for a family vacation. According to section 37 of the EI Act, Appellants are not entitled to benefits when they are outside Canada except as provided under section 55 of the EI Regulation. Accordingly, the Tribunal finds that the Appellant is not entitled to employment insurance benefits for the period while she travelled outside of Canada because she was away on vacation with her family. Although the Appellant submits that she is entitled to vacation and that she would not be penalized had she travelled within Canada, her motives for leaving the country are not prescribed by section 55 of the EI Regulations.

Availability

[39] The Federal Court of Appeal (FCA) has determined that availability is described as : (1) a sincere desire to work; (2) accompanied by reasonable efforts to find work ; and (3) a willingness to work under normal conditions without unduly limiting the chances of obtaining employment (*Faucher v. Commission de l'emploi et de l'immigration*), A-56-96).

[40] Availability is a question of fact, which the Tribunal must dispose of on the basis of an assessment of the evidence. The onus of proof lies with the Appellant to demonstrate her

availability during regular hours for every working day (*Canada (AG) v. Cloutier*, 2005 FCA 73).

[41] At the hearing, the Appellant submitted that she is laid off for 8 weeks every summer and she actively searches for employment during this time. She also stated that she traveled outside of Canada for a family vacation on the last week of her lay off period knowing no one would have hired her for one week of work. She stated that she had a cell phone with her in the event that an employer would have attempted to reach her.

[42] In *Faucher*, the FCA had held that the onus rests on the Appellant to demonstrate the following: the desire to return to the labor market as soon as possible, the demonstration of this desire by making reasonable and customary efforts to find suitable employment and remaining free of personal requirements which would unduly limit the opportunities for work.

[43] Due consideration has been given to the evidence provided and the Tribunal finds that for the period of August 19, 2013 to August 26, 2013 and again from August 12 to August 20, 2014 the Appellant has not demonstrated her desire to return to the labor market as soon as possible and has not demonstrated making reasonable and customary efforts to find suitable employment. The evidence presented clearly demonstrates that while she contacted retail and seasonal employers in an attempt to find employment during the summer months, she has not demonstrated any efforts to find employment while she was on family vacation for the period of August 19, 2013 to August 26, 2013 and again from August 12 to August 20, 2014.

[44] Given the Appellant's absence from Canada from August 19, 2013 to August 26, 2013 and again from August 12 to August 20, 2014, the Tribunal finds that for this period the Appellant has not discharged the onus placed upon her to prove her availability.

[45] The evidence clearly indicates that the Appellant did limit her chances of obtaining employment while she was outside of the Canada. Therefore, the Tribunal finds that the Appellant has not proven her availability for work from August 19, 2013 to August 26, 2013 and again from August 12 to August 20, 2014, pursuant to subsection 18(a) of the *Act*.

Penalty

[46] When reviewing the imposition of a penalty, the Tribunal must decide if the false statement was made *knowingly*, pursuant to subsection 38(1) of the EI Act. According to the FCA, to provide information *knowingly* is determined on the balance of probabilities on the circumstances of each case or the evidence of each case (*Canada (AG v. Gates*, 1995 FCA 600).

[47] The evidence shows that the Appellant did in fact provide false statements to the Commission when she failed to declare her absence from Canada on her electronic reporting questionnaire for the period from August 19, 2013 to August 26, 2013 and again from August 12 to August 20, 2014.

[48] All claimants are made aware of their rights and responsibilities, as well as the consequences of not being forthcoming with information regarding any absences from Canada and their job search. When asked to explain her rationale for failing to inform the Commission that she was travelling outside of Canada, the Appellant stated that she did not want to lose her employment insurance benefits for these periods. Therefore, it is clear that the Appellant was aware that she was *knowingly* providing inaccurate information to the Commission.

[49] Although the Appellant stated that the question should be clarified to ask if the Claimants are on vacation, the Tribunal finds that the questions asked in the Internet questionnaire are clear and specific. The fact that the Appellant did not want to lose her benefits while travelling outside of Canada does not justify her lack of transparency when answering the questionnaire. The evidence clearly indicates that she was aware of her rights and responsibilities in this regard. The Tribunal finds that the Appellant did not discharge the onus placed upon her to explain the reasons for making the false statements regarding her absence from Canada.

[50] The Tribunal finds that the Appellant had subjective knowledge that the information she was providing was inaccurate. The Tribunal is supported in this finding by the FCA which has held that common sense as well as objective factors should be taken into account when determining if the Claimant had subjective knowledge that the information she provided was false (*Canada (AG v. Gates*, 1995 FCA 600).

[51] Moreover, the Tribunal finds that no additional mitigating factors were presented to the Commission or to the Tribunal which could warrant a review of the penalty amount. The Appellant clearly indicated that she did not declare her absence as she did not wish to lose her benefits during this period. Therefore, the Tribunal determines that the Commission has exercised its discretion in a judicial manner when assessing the penalty amount.

Notice of Violation

[52] The FCA has outlined in *Gill v. Canada (AG)*, 2010 FCA 182, that when particular circumstances justify the imposition of a penalty pursuant to section 38 of the EI Act, it is the Commission's jurisdiction to determine if a Notice of Violation is appropriate as an additional sanction. The intent of section 7.1 of the EI Act is to deter abuse of the employment insurance system. In this regard, the Tribunal only has jurisdiction to determine whether the Commission has exercised its discretion in a judicial manner when issuing a Notice of Violation.

[53] In the present case, the Commission has not considered any mitigating circumstances. The Appellant has stated that she did not report her absence as she did not want to lose her benefits while absent from Canada. The Tribunal finds that the Appellant has not provided additional information at the hearing which could be considered as mitigating.

[54] The Tribunal concludes that a Notice of Violation is warranted in this case and that the Commission has exercised its discretion in a judicial manner when it decided to issue the Notice of Violation.

CONCLUSION

[55] The appeal is dismissed.

Joanne Blanchard
Member, General Division - Employment Insurance Section