Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *ST v Canada Employment Insurance Commission*, 2018 SST 1433

Tribunal File Number: GE-17-3172

BETWEEN:

S. T.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Teresa Day

HEARD ON: April 6, 2018

DATE OF DECISION: April 23, 2018

Canada

REASONS AND DECISION

OVERVIEW

[1] The Appellant established a claim for regular employment insurance benefits (EI benefits) effective September 14, 2014, but failed to report that he was outside of Canada for two periods while on claim and in receipt of EI benefits: from November 18, 2014 to February 10, 2015 and again from April 17, 2015 to the end of his 42-week benefit period on July 25, 2015. The Commission disentitled him to EI benefits during both periods because he was outside of Canada and because he was not available for work while he was outside of Canada. The Commission also imposed a penalty for false representations and a very serious violation in connection with is claim. These decisions resulted in an overpayment of EI benefits to the Appellant in the amount of $13,570.00 and a penalty of $4,071.00 on his claim. The Appellant asked the Commission to reconsider its decision on the basis that he had provided the documents necessary to "excuse" his absence, which was not supposed to have been longer than two weeks, but the Commission maintained all of the decisions. The Appellant appealed the reconsideration decision to the General Division of the Social Security Tribunal of Canada (Tribunal), but was late in doing so. The General Division initially denied his request to extend the time for filing an appeal, but he appealed to the Appeal Division of the Tribunal and the matter was returned to the General Division for reconsideration on the issue of the late filing of his appeal. The General Division granted an extension of time to file the appeal.

[2] The Tribunal must decide:

a) whether the Appellant is disentitled to EI benefits from November 18, 2014 to February 10, 2015 and again from April 17, 2015 to the end of his 42-week benefit period on July 25, 2015 because he was outside of Canada and did not prove his availability for work;

b) whether a penalty should be imposed upon the Appellant for knowingly making false representations in connection with his claim and, if so, whether the Commission exercised its discretion judicially when it imposed the $4,071.00 penalty; and

c) whether a violation should be imposed upon the Appellant and, if so, whether the Commission exercised its discretion judicially when it imposed the very serious violation.

[3] The Appellant attended the hearing by teleconference on April 6, 2018. The hearing was held by teleconference because that 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. The Appellant was assisted by Fahim Zaywari (Mr. Zaywari), an Interpreter who was provided by the Tribunal. Mr. Zaywari translated between English and Farsi.

[4] The Tribunal finds that the Appellant was outside of Canada from November 18, 2014 to February 10, 2015 and again from April 17, 2015 to the end of his 42-week benefit period on July 25, 2015 and is, therefore, disentitled to EI benefits during these periods pursuant to section 37 of the *Employment Insurance Act* (EI Act) and section 55 of the *Employment Insurance Regulations* (EI Regulations). The Tribunal further finds that the Appellant is disentitled to EI benefits during these periods because he failed to prove his availability for work pursuant to s. 18 of the EI Act. Therefore, the Appellant is liable for an overpayment on account of the receipt of EI benefits that he was not entitled to during the periods of disentitlement imposed on his claim.

[5] The Tribunal finds that the Appellant knowingly made false statements to the Commission when he failed to report his absences from Canada on his claimant reports during his benefit period and, therefore, that a penalty may be imposed pursuant to section 38 of the EI Act. However, the Tribunal finds that the Commission did not exercise its discretion properly when it imposed a penalty of $4,071.00 upon the Appellant, and the Tribunal reduced the penalty to $3,393.00. Finally, the Tribunal finds that the Commission exercised its discretion properly when it imposed a "very serious" violation. The reasons for this decision follow.

EVIDENCE

[6] The Appellant applied for EI benefits (GD3-3 to GD3-10) and established a benefit period for his claim commencing on September 14, 2014 (GD4-1).

[7] On his application, the Appellant confirmed that he had read, understood and accepted his responsibilities in connection with his claim for EI benefits, which were listed within the application and specifically included the responsibility to "report any absences from Canada" (GD3-6 to GD3-7).

[8] The Appellant made bi-weekly electronic claimant reports via the Government of Canada's internet reporting service for employment insurance claimants (E-reports). His E-reports for the periods November 16, 2014 to February 21, 2015 and April 5, 2015 to July 25, 2015 are transcribed at GD3-14 to GD3-89.

[9] The Appellant successfully filed his E-reports to claim EI benefits for the periods he was outside of Canada. In each of these E-reports, the Appellant was asked if he was outside Canada for the two-week period in question.

[10] In each bi-weekly E-report, the Appellant answered "No" to this question.

[11] In each bi-weekly E-report, the Appellant was also asked if he was "ready, willing and capable of working each day, Monday through Friday during each week of this report".

[12] In each bi-weekly E-report, the Appellant answered "YES" to this question.

[13] At the conclusion of each bi-weekly E-report, the Appellant was asked to confirm his acceptance of the following statement*: "I declare that the answers provided to the questions on the Employment Insurance online report are true to the best of my knowledge. I understand 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."*

[14] In each E-report, the Appellant answered "I Accept" and submitted the E-report for processing.

[15] The Appellant's claim ended on July 25, 2015 and he was paid his full entitlement of 42 weeks of EI benefits (GD3-93).

[16] The Commission informed the Appellant that Canada Border Services Agency had informed it he travelled outside of Canada from November 18, 2014 to February 10, 2015, and advised the Appellant that his entitlement to EI benefits during this period was under review (GD3-90 to GD3-91). The Appellant was asked to complete an enclosed questionnaire to explain his absence.

[17] The Appellant telephoned the Commission on August 13, 2015 about his absence from Canada (see Investigation Information Sheet at GD3-92 to GD3-93), and stated:

a) He could not stay in Canada because his daughter was experiencing a mental illness and he needed to be with her because her doctor said she shouldn't be left alone.

b) He did not know it was that big of a deal to be outside of Canada while on claim. He was planning to return, but was not able to.

c) He really needed EI benefits, as this is the only income his family has. His wife is a student taking a course and will only be graduating in October.

The Appellant subsequently sent a letter to the Commission (at GD3-94), with the following further particulars about his absence from Canada:

> "Because my daughter illness is savior and possibly life threatening, her doctor strongly recommended that she wouldn't be left alone. As this was on emergency situation for my family, I made the mistake of not informing you about my departure from Canada, and It has been my plan to fly back as soon as possible, but because I cannot leave my daughter alone and my wife is a full time student in Canada, I am stuck here. I would like to thank you for help and apologize for my mistake."

[18] The Appellant also completed the questionnaire regarding his absence from Canada (GD3-97 to GD3-98), in which he confirmed that he had been in Iran from November 18, 2014 to February 10, 2015. The Appellant stated the purpose of his trip was his daughter's illness, which was "life threatening", and further stated that he did not report his absence from Canada because he was involved in this family emergency and "I didn't think it would be a big deal" (GD3-98), and because he was laid off and had no income.

[19] The Appellant also reported that he was outside of Canada for the additional period of April 17, 2015 to October 7, 2015 (GD3-98).

[20] With respect to issue of his availability while he was outside of Canada, the Appellant cited his daughter's illness and said the answer was "sometimes Yes, sometimes No" (GD3-98).

[21] The Appellant attached a variety of medical documentation about his daughter's condition (GD3-99 to GD3-101).

[22] An agent of the Commission spoke with the Appellant by telephone on two (2) occasions (see Investigation Information Sheets at GD3-95 to GD3-96, and at GD3-102 to GD3-103). The agent noted the Appellant stated:

a) His daughter is 17 years old. She was living in Canada with him. Her grandfather passed away and she really wanted to go see him. Her doctors do not want her to be alone, so he has to stay with her (GD3-95).

b) He was aware he had to report his absences from Canada, but did not think it was a big deal (GD3-102).

c) He did not check with Service Canada before leaving Canada because he did not think it was a big deal (GD3-102).

d) He contacted one of his friends in his trade and asked him to let him know if a job opportunity came up. He also asked his wife to come back to Iran as soon as she could, but she was in University until October 2015. He did not know if he could have returned within 24 to 48 hours if a job opportunity came up. His daughter wasn't in a good condition, but maybe if the job was a really good one (GD3-103).

e) He cannot say he was always available for work because he was not in a normal state. He was physically able to work and could have worked, but for the situation with his daughter.

f) He had no other options. He is sorry for the mistake and wants to solve this situation.

[23] The agent prepared a Record of Decision for the penalty (GD3-105), in which she noted that a penalty would be imposed as follows:

> "Claimant stated he failed to report his absence from Canada because he did not think it was a big deal and needed the money. As he has answered NO to a direct question, clear

> and easy to understand asking "were you outside of Canada" during the period in question when he/she completed his 15 reporting cards, this constitutes a false statement made knowingly. Claimant received 42 weeks of benefits and was in Iran for 25 of the 42 weeks. A sanction will be imposed."
>
> and
>
> "Claimant also made a false statement when he answered YES to the availability question when he in fact was not. A sanction will be imposed. Claimant stated he was "stuck" in Iran because he could not leave his daughter alone."

For mitigating circumstances, the Commission noted:

> "Claimant's monetary penalty will be reduced by 20% given the purpose of his absence and his mental state of mind at the time. Claimant was also in a bad financial situation. He apoligies *(sic)* for his mistake".

The Commission noted the overpayment of EI benefits to the Appellant was $13,570.00, and fixed the penalty at $4,071.00.

[24] The agent also prepared a Record of Decision for the violation (GD3-106), in which she noted that a very serious violation would be imposed as follows:

> "The Commission took into consideration the claimant's personal situation where he failed to report two absences from Canada creating an overpayment of $13,570 and a penalty of $4,071. After considering the overall impact to the claimant, the imposing of a violation, including mitigating circumstances provided, and the impact on the ability of the claimant to qualify on future claims, it is determined that a violation is applicable in this case due to the seriousness of the offence. The Commission contends therefore that its decision to impose a violation is justified and that it has exercised its discretion judiciously as all the pertinent circumstances were considered prior to issuing the violation."

[25] By letter dated October 22, 2015 (GD3-107 to GD3-109), the Appellant was advised of the disentitlements imposed upon his claim for the periods November 18, 2014 to February 10, 2015 and April 17, 2015 to the end of his 42-week benefit period on July 25, 2015, and that the Commission had imposed a penalty of $4,071.00 for knowingly making 15 false representations in connection with the reporting on his claim, along with a very serious violation. The Appellant was also advised that he would have to repay any EI benefits he had received but was not entitled to. A Notice of Debt was subsequently issued to the Appellant (GD3-110) in the amount of

$17,641.00 on account of the $13,570.00 overpayment of EI benefits to him and the $4,071 penalty imposed on his claim.

[26] The Appellant filed a Request for Reconsideration (GD3-111 to GD3-113), in which he stated that he disagreed with the decisions on his claim because:

> "I have provided all the documents to prove that I have made a mistake, when I was in a very difficult situation. My daughter was severely ill and I had to immediately leave with her because my wife couldn't. I never planned on staying in Iran for too long, that is why on my reports I answered available to work. This mistake was not made "knowingly", and it was only a mistake." (GD3-113)

The Appellant also cited his difficult financial situation and inability to repay the overpayment and penalty on his claim.

[27] A different agent of the Commission attempted to speak with the Appellant about his request for reconsideration but was unable to make contact with him (see Supplementary Record of Claim at GD3-114 and Call Back at GD3-118). By letter dated January 27, 2016 (GD3-115 to GD3-116), the Appellant was advised that the Commission was maintaining the disentitlement, penalty and violation decisions on his claim.

[28] In his Notice of Appeal (GD2), the Appellant stated that his mistakes in the reporting were made "subconsciously without any deliberate attempts to break the law" (GD2-3), and including additional medical documentation about his daughter's condition (GD2-5 to GD2-11).

At the Hearing

[29] The Appellant testified as follows regarding his travel outside of Canada while on claim:

a) A few days after he was laid off, his wife's father passed away. His daughter, who had a "psychological problem" and had had been going through "a really bad period", insisted on returning to Iran after her grandfather died because she loved him a lot and wanted to spend some time in Iran with her grandmother.

b) He and his daughter agreed they would go to Iran for a short period and then return to Canada. They left for Iran together on November 16, 2014. His wife, who was a student, stayed behind in Canada.

c) After they got to Iran, he tried to convince his daughter to return to Canada because he had no job, no money and no house in Iran. But his daughter wanted to remain in Iran.

d) He completed his E-reports while he was in Iran. The Appellant stated:

> "I was sure I had paid for unemployment insurance and it was my right to get it anywhere."

e) He doesn't want to do anything "against the law", but since he has submitted the medical documents about his daughter's condition, "they are treating me like a criminal".

f) Nobody told him that he was not allowed to travel outside of Canada while in receipt of EI benefits.

g) He returned to Canada on February 21, 2015 because a friend contacted him in Iran and advised he might have a chance to work with his former employer again. The Appellant returned to Canada to follow-up on this and because he wanted to see his wife.

h) His daughter remained in Iran with her grandmother.

i) He traveled to Iran again on April 5, 2015 because he realized he was not going to be re-hired by his former employer and because his daughter's mental health was not very good. His daughter was sick in Iran and his wife was a student in Canada, and he was "lost between these two people".

j) He returned to Canada on July 25, 2015 because "this case was started already", and because he had no job in Iran and wanted to be in Canada.

k) His daughter remained in Iran after he left, and continued to live there for two (2) more years, eventually earning "her diploma" there. His daughter was in Iran for a total of three (3) years before returning to Canada, where she is now a student.

[30] The Appellant testified as follows about his job search efforts while in Iran:

a) He signed up for Workopolis while he was in Iran and looked for work through this online service.

b) He matched to some jobs, but they were outside of X and for low wages.

c) He was busy caring for his daughter while he was in Iran. She had a "psychological problem", and if she was under stress and left alone, she "scratched the back of her hand with the nail of her other hand". Her doctor told him not to leave her alone.

d) If he had found a job on Workopolis that was in his field, with good pay, he would have returned to Canada as soon as possible, but this never happened. He could have brought his daughter with him, but there was no such job offer.

e) His daughter eventually "got better" and he could have returned then.

[31] The Appellant testified as follows about the penalty imposed on his claim:

a) What he did was not done knowingly. He didn't want to break the law.

b) He wants to the Tribunal to "forgive me" and he wants "not to pay this penalty".

[32] The Appellant was asked why he requested an Interpreter for the hearing of this appeal when he had previously communicated with the Commission in English without the assistance of an Interpreter. The Appellant stated that he understands English, and that he was able to read and complete both the initial application form for EI benefits and the claimant reports he filed from Iran. However, "juridical" or "legal" words are difficult for him, so he asked for an Interpreter to be at the hearing. The Appellant stated that he didn't want to say anything that is "not correct".

[33] The Appellant was referred to the first claimant report at GD3-16 and asked to explain why he had answered "NO" to the question "Were you outside of Canada" during the reporting period. The Appellant answered that he thought it was his "right" to receive EI benefits even if he was outside of Canada, and that this is why he answered "NO" to the question even when he was outside of Iran. He stated that he "didn't know this was against the law".

[34] The Appellant further stated that he likes Canada, he likes working, he feels very badly about what happened, and he is very sorry for his actions. He is 55 years old and has credit card and other debts to pay, including his own student loans for the gas technician courses he took. His brother is helping him out financially, but he is asking the Tribunal to "cancel the penalty and the debt" because he is not able to repay it.

SUBMISSIONS

[35] The Appellant submitted that he left Canada because his daughter wanted to travel to Iran, but she was sick and could not be left alone. He did not intend to break the law. Rather, he believed he was entitled to receive EI benefits even if he was outside of Canada, and this is why he failed to report his absences. He has no way of repaying the overpayment and penalty on his claim, and asks for the full amount of his indebtedness to be cancelled.

[36] The Commission made the following submissions:

a) The Appellant is disentitled to EI benefits from November 18, 2014 to February 10, 2015 and from April 17, 2015 until the end of his 42-week benefit period on July 25, 2015 because he was outside of Canada and does not meet any of the exceptions provided for in section 55 of the EI Regulations. The Appellant cannot bring himself within the exception provided for in paragraph 55(1)(d) of the EI Regulations, namely a period of not more than seven (7) days to visit a family member who is seriously ill or injured, because he was not otherwise available for work in Canada - which is a condition that must be met before the exceptions in section 55 of the EI Regulations can be applied.

b) The Appellant is similarly disentitled because he has not proven that he was available for work while he was in Iran. The Appellant was not actively seeking suitable employment, and his absence from Canada to care for his daughter was a personal condition that unduly limited his chances of returning to the labour market.

c) It has met the onus on it to prove that Appellant knowingly made misrepresentations in connection with his claim. The Appellant failed to report on 15 occasions that he was outside of Canada and not available for work while outside of Canada. He had to have known he was making a false representation each and every time he answered "NO"

when asked if he was outside of Canada during the reporting period. A penalty may, therefore, be imposed.

d) It rendered its decision to impose a penalty of $4,071.00 in a judicial manner, as all the pertinent circumstances were considered when assessing the penalty amount. However, upon review of the appeal, the Commission recommends a further reduction of 5% of the overpayment on account of the Appellant's financial situation. This would reduce the penalty to $3,393.00.

e) It exercised its discretion in a judicial manner when issuing the Notice of Violation, after considering mitigating circumstances, prior offences and the impact on the ability of the Appellant to qualify on future claims.

ANALYSIS

[37] The relevant legislative provisions are reproduced in the Annex to this decision.

Outside of Canada

[38] Section 37 of the EI Act is clear that benefits are not payable to claimants while they are outside of Canada except as specifically prescribed in section 55 of the EI Regulations (*Attorney General of Canada v. Bendahan 2012 FCA 237*). The onus is on the claimant to prove that he meets the requirements of one or more of the exceptions in the EI Regulations (*Attorney General of Canada v. Peterson A-370-95*). Additionally, in order to qualify for an exemption in subsection 55(1) of the EI Regulations, a claimant must still prove their availability for work.

[39] The Appellant admits he was outside of Canada from November 18, 2014 to February 10, 2015 and again from April 17, 2015 until the end of his 42-week benefit period on July 25, 2015. The Appellant has been clear and consistent that his reason for being outside of Canada during this period was to care for his daughter, who was suffering from a mental illness and wanted to travel to Iran, but whom doctors had advised should not be left alone. While paragraph 55(1)(d) of the EI Regulations does allow for a claimant to be outside Canada for a period of 7 days to visit an immediate family member who is seriously ill or injured, such a claimant must be otherwise available for work, i.e. searching for and ready to accept suitable employment, in

order to benefit from the exceptions in subsection 55(1) of the EI Regulations. Badges of availability in such an instance could include having made arrangements to be reached during the absence from Canada if offered a job and the ability to return home within 24 to 48 hours should an employment opportunity arise (see *Canada (Attorney Genera) v. Elyoumni, 450 N.R. 175 (FCA)*). In the present case, the Appellant stated that he had no choice but to be outside of Canada with his daughter because she insisted on travelling to Iran, but was suffering from a mental illness and could not be left alone. The Appellant stated that during the time he was in Iran, he was engaged with caring for his daughter. He could not return to Canada within 24 to 48 hours, even if he had a job interview or an offer of employment, because he was required to be with his daughter at all times, and she was in Iran and wished to remain there. By his own admission, he was unsuccessful in convincing her to return to Canada after an initial short period in Iran, and was unable to return to Canada until some months later. The Appellant, therefore, cannot prove he was otherwise available for work for purposes of qualifying for an exemption in paragraph 55(1)(d) of the EI Regulations.

[40] The Appellant has proffered no evidence or made any submissions to bring himself within any of the other exceptions provided for in subsection 55(1) of the EI Regulations.

[41] The disentitlement provisions in section 37 of the EI Act and section 55 of the EI Regulations are very specific, and the Tribunal has no authority or discretion to modify the clear provisions of the EI Act or EI Regulations. The Tribunal finds that the Appellant has not brought himself within any of the exceptions provided for in subsection 55(1) of the EI Regulations and is, therefore, disentitled to EI benefits from November 18, 2014 to February 10, 2015 and again from April 17, 2015 until the end of his 42-week benefit period on July 25, 2015 pursuant to paragraph 37(b) of the EI Act because he was not in Canada.

Availability

[42] The Appellant applied for regular EI benefits and, in order for a claimant to be entitled to regular EI benefits, he must demonstrate that he is capable of and available for work and unable to obtain suitable employment (*Attorney General of Canada v. Bois 2001 FCA 175; Attorney General of Canada v. Cornelissen-O'Neil A-652-93; Attorney General of Canada v. Bertrand A-631-81*).

[43] The EI Act does not provide a definition for availability, but the Federal Court of Appeal has consistently held that availability must be determined by analyzing three (3) factors:

1) the desire to return to the labour market as soon as a suitable job is offered;

2) the expression of that desire through efforts to find a suitable job; and

3) not setting personal conditions that might unduly limit the chances of returning to the labour market.

(*Attorney General of Canada v. Faucher A56-96; Attorney General of Canada v. Poirier A57-96*). Additionally, availability is to be assessed by considering each working day in the claimant's benefit period (*Cloutier 2005 FCA 73*).

[44] The Tribunal notes that the Appellant has been consistent in his statements to the Commission and in his testimony at the hearing: during the two periods of time that he was outside of Canada, he was caring for his daughter who was sick and could not be left alone. While the Appellant testified that he liked Canada and liked working, his efforts to find a job while he was outside of Canada consisted of monitoring one (1) online job site (Workopolis) and staying in touch with a former colleague. The Appellant provided no verifiable evidence of *bona fide* job search efforts undertaken while he was in Iran during the respective periods in question.

[45] The Federal Court of Appeal has held that a claimant must seek suitable employment for every day in a benefit period in order to be entitled to EI benefits, and only those who are genuinely unemployed and actively seeking work will receive EI benefits (*Cornelissen-O'Neil, supra*). The Tribunal notes the abundant jurisprudence to the effect that the determinative factor in assessing availability is an active, serious, continual and intensive job search, demonstrated by a verifiable record of job applications (*see CUBs 12381, 18243, 17843, 18691, and Cutts v. Canada (A.G.) A-239-90*). In order to be entitled to EI benefits, it is essential for a claimant to actively seek work, and passive efforts or reliance upon others to find work is not sufficient.

[46] The Appellant failed to provide any evidence of that, while he was outside of Canada between November 18, 2014 to February 10, 2015 and again from April 17, 2015 until the end of

his 42-week benefit period on July 25, 2015, he engaged in any of the reasonable and customary efforts to obtain suitable employment, such as assessing specific employment opportunities, preparing a resume or cover letter, registering for multiple job search tools or job banks or employment agencies, attending job search workshops or job fairs, networking, contacting prospective employers, submitting job applications, or attending interviews. The Tribunal finds Appellant's efforts fall far short of those required to prove an active job search.

[47] The Tribunal further finds that by setting the condition upon himself of caring for his sick daughter while she remained in Iran, he unduly limited his chances of returning to the labour market in Canada. The fact that the Appellant was already receiving EI benefits when he elected to go to travel to Iran with his daughter does not change the statutory requirement to qualify for regular EI benefits under subsection 18(1) of the EI Act.

[48] The Tribunal finds that, with the exception of an expressed willingness to return to the labour market, the Appellant does not meet the second and third factors for availability set out in *Faucher, supra* for the periods of time he was outside of Canada while on claim. The Tribunal therefore finds that he has not met the onus upon him to demonstrate that he was capable of and available for work and unable to obtain suitable employment from November 18, 2014 to February 10, 2015 and again from April 17, 2015 until the end of his 42-week benefit period on July 25, 2015, as required under paragraph 18(1)(a) of the EI Act.

Liability for Overpayment

[49] The Appellant was not entitled to be paid EI benefits from November 18, 2014 to February 10, 2015 and again from April 17, 2015 until the end of his 42-week benefit period on July 25, 2015 because he was outside of Canada and unable to prove his availability for work. The Appellant has not challenged the $13,570.00 figure or provided any evidence to dispute this amount.

[50] However, unfortunately for the Appellant, section 43 of the EI Act explicitly establishes that liability for an overpayment of EI benefits is on the claimant, and section 44 of the EI Act clearly states that it is the person who received EI benefits in excess of their entitlement who must return the excess amount without delay. Both sections 43 and 44 apply to the Appellant's

situation, and the Tribunal does not have discretion to waive the liability for an overpayment or to otherwise vary the clear wording in the legislation, no matter how compelling the circumstances. The Tribunal is supported in its analysis by the Supreme Court of Canada's statement in *Granger v. Canada (CEIC), [1989] 1 S.C.R. 141*, that a judge is bound by the law and cannot refuse to apply it, even on grounds of equity.

[51] The Tribunal acknowledges the Appellant's testimony regarding his personal circumstances and finances, and encourages the Appellant to apply for forgiveness of this debt by contacting Canada Revenue Agency's debt recovery service.

Penalty

[52] Section 38 of the EI Act states that the Commission may impose a penalty on a claimant, or any other person acting for a claimant, for each of the acts or omissions stated in that section, one of which is, in relation to a claim for benefits, making a representation that the claimant knew was false or misleading (paragraph 38(1)(a) EI Act).

[53] The initial onus is on the Commission to prove that a claimant knowingly made a false or misleading statement or representation. The onus then shifts to the claimant to provide a reasonable explanation to show that the statements or representations were not knowingly made (*Purcell A-694-94, Gates A-600-94*).

[54] In the present case, there is undisputed evidence that the Appellant repeatedly answered "NO" when asked if he was outside Canada on the E-reports he completed covering the periods from November 18, 2014 to February 10, 2015 and again from April 17, 2015 until the end of his 42-week benefit period on July 25, 2015. The Tribunal therefore finds that the Appellant misrepresented his absence from Canada during those periods.

[55] The issue then becomes whether the Appellant "knowingly" misrepresented his absences from Canada. For purposes of section 38 of the EI Act, "knowingly" means that, on a balance of probabilities, the evidence shows the claimant made an objectively false statement that misleads the Commission and results in the real or possible payment of EI benefits to which the claimant was not entitled to, and that the claimant knew the information was untrue when it was provided. There is no element of intent in this consideration.

[56] As the onus is initially on the Commission, the Tribunal considered the Commission's submissions that the Appellant knew he was out of the country and yet repeatedly misrepresented his absence on 15 E-reports, and that it was not until the initial information from Canada Border Services Agency was brought to his attention that he advised there was, in fact, an additional period of time when he was outside of Canada while receiving EI benefits. The Commission also submitted that, on his application for benefits, the Appellant confirmed he had read, understood and accepted his rights and responsibilities, one of which was to report his absence from Canada; and that he was reminded every time he completed an E-report to answer the questions truthfully and was warned that giving false information constitutes fraud and could result in penalties. Nonetheless, when asked the simple question **"*Were you outside Canada between Monday and Friday during the period of this report?*"**, the Appellant repeatedly answered "NO" .

[57] The Tribunal then considered whether the Appellant had a reasonable explanation for the misrepresentations made on his E-reports. The Appellant repeatedly stated that he knew of his obligation to report but did not think it was a big deal to be outside of Canada while on claim (GD3-92 to GD3-93, GD3-98 and GD3-103), and testified that he believed he was entitled to receive EI benefits even if he was outside of Canada. The Appellant also stated that his failure to disclose his absences from Canada was a mistake, and that he did not knowingly mislead the Commission for the purposes of obtaining EI benefits.

[58] The Tribunal noted the plain language contained in the Appellant's application for benefits: **"You must report any absences from Canada."** The Tribunal also noted the plain language in the question on the E-Report: **"Were you outside Canada between Monday and Friday during the period of this report?"**, as well as the Appellant's testimony as to his facility with the English language. The Appellant's subsequent statement during his testimony that no one told him that he could not be outside of Canada while on claim is not credible in light of his earlier admissions to the Commission. Moreover, the Tribunal is deeply troubled by the Appellant's deliberate disregard for the plain and obvious question on his E-reports because he personally believed that he was entitled to EI benefits whether he was in Canada or not. The Tribunal finds that the Appellant knew at the most basic level that the information he was giving (when he said he was not outside of Canada was untrue when it was provided. As such, the

Appellant has failed to provide a reasonable explanation for or prove that the misrepresentations made to the Commission were not knowingly made.

[59] The Tribunal finds that, on a balance of probabilities, the Appellant knowingly made false representations to the Commission when he failed to report his absence from Canada during the periods November 18, 2014 to February 10, 2015 and again from April 17, 2015 until the end of his 42-week benefit period on July 25, 2015. The Tribunal therefore finds that a penalty may be imposed pursuant to section 38 of the EI Act.

[60] The Tribunal recognizes that in determining the penalty amount, the Commission must exercise its discretion in a judicial manner. In other words, it must act in good faith, proper purpose and motive; must take into account any relevant factors and ignore any irrelevant factors; and act in a non-discriminating manner (*Dunham A-708-95, Purcell A-694-94*).

[61] In the present case, the Commission recognized that the purpose of the Appellant's travel was to care for his daughter, as well as his financial situation and the fact that it was a first offence (see GD3-105), and reduced the penalty from 50% to 30% of the overpayment on account of these mitigating factors.

[62] The Tribunal then considered whether the Appellant identified any additional mitigating factors in his testimony at the hearing that were not before the Commission when it made its decision to impose the penalty in this case. While the Appellant showed remorse for his reporting errors, and asked the Tribunal to consider his current personal circumstances, including his continued unemployment and other debts he has accrued, the Tribunal is mindful of the need to safeguard the integrity of the employment insurance program and, in particular, the obligation on a claimant to report accurately while on claim. Although some of these details were not before the Commission when the penalty decision was made, it nonetheless cannot be said that the Commission considered all relevant factors. The Tribunal therefore finds that the Commission did not exercise its discretion in a judicial manner in its decision as to the quantum of the penalty to be imposed upon the Appellant ($4,071.00), and agrees with the Commission's submission on this appeal (at GD4-8) that a further reduction in the penalty is warranted. The Tribunal finds that a penalty in the amount of $3,393.00 is appropriate in light of the additional mitigating factors the Appellant testified about at the hearing.

Notice of Violation

[63] The Federal Court of Appeal has ruled that the Commission has the discretion to determine whether or not to issue a notice of violation, and that it is neither mandatory nor automatic under subsection 7.1(4) of the EI Act. While the Tribunal does have jurisdiction to set aside a notice of violation, it can only do so if it determines that the Commission did not exercise its discretion in a judicial manner (*Gill A-483-08*).

[64] The Tribunal reviewed the Record of Decision for the violation (GD3-106) and noted that the Commission specifically considered the mitigating factors that led to a reduction in the penalty imposed (from 50% to 30% of the overpayment), but found that these same factors did not mitigate against the imposition of a violation. The Commission submitted that it exercised its discretion judicially, having considered the overall impact to the Appellant of imposing a violation, the fact that this was the Appellant's first offence, and the impact on the ability of the Appellant to qualify for EI benefits on future claims. The Tribunal finds that the Commission exercised its discretion in a judicial manner when it issued a notice of violation and, therefore, cannot intervene in this decision.

[65] The Tribunal further finds that the classification of the violation issued to the Appellant as "very serious" is the correct classification. In the present case, the amount of the Appellant's overpayment is $13,570.00 and, in accordance with subsections 7.1(5) and (6) of the EI Act, a violation of $5,000.00 or more is a "very serious" violation.

CONCLUSION

[66] The Tribunal finds:

a) the Appellant was outside of Canada for the periods November 18, 2014 to February 10, 2015 and again from April 17, 2015 to the end of his 42-week benefit period on July 25, 2015 and is, therefore, disentitled to EI benefits for these periods pursuant to section 37 of the EI Act and section 55 of the EI Regulations;

b) the Appellant failed to prove his availability for the two periods he was outside Canada (set out in paragraph 64(a) above) and is, therefore, disentitled to EI benefits for these periods pursuant to paragraph 18(1)(a) of the EI Act;

c) the Appellant is liable for an overpayment in the amount of $13,570.00 on account of the receipt of EI benefits during the periods of disentitlement during his claim, namely November 18, 2014 to February 10, 2015 and again from April 17, 2015 to the end of his 42-week benefit period on July 25, 2015;

d) the Appellant knowingly made false statements or representations to the Commission in connection with the reporting on his claim and, therefore, a penalty may be imposed pursuant to section 38 of the EI Act;

e) the Commission did ***not*** exercise its discretion in a judicial manner in its decision as to the quantum of the penalty to be imposed upon the Appellant, and that a penalty in the amount of **$3,393.00** (reduced from $4,071.00) is appropriate in light of the additional mitigating factors identified by the Appellant in his appeal and during his testimony at the hearing;

f) the Appellant is liable for a penalty in the amount of $3,393.00 for knowingly making false representations to the Commission on his claim; and

g) the Commission exercised its discretion when it imposed a notice of very serious violation upon the Appellant.

[67] The appeal is dismissed, with a modification to the penalty.

Teresa M. Day

Member, General Division - Employment Insurance Section

ANNEX

THE LAW

Employment Insurance Act

Employment Insurance Regulations