



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *S. L. v. Canada Employment Insurance Commission*, 2018 SST 1009

Tribunal File Number: GE-18-2296

BETWEEN:

S. L.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Teresa M. Day

HEARD ON: October 11, 2018

DATE OF DECISION: October 15, 2018

DECISION

[1] The appeal is dismissed. The Appellant is disentitled to employment insurance benefits for the period of time she was outside of Canada during her benefit period. She is also subject to a \$304.00 penalty for misrepresenting her absence from Canada while on claim.

OVERVIEW

[2] The Appellant established a claim for employment insurance sickness benefits (sickness benefits) effective March 12, 2017. She was outside of Canada from March 19, 2017 to March 29, 2017, when she travelled to England to visit her daughter. The Appellant failed to report her absence from Canada on her bi-weekly electronic claimant reports. The Respondent, the Canada Employment Insurance Commission (Commission), imposed a disentitlement on the Appellant's claim from March 20 – 28, 2017 because she was not in Canada. The Commission also imposed a penalty of \$380.00 for knowingly providing false information when she failed to report her absence from Canada while on claim. The Appellant argued that her trip to England was therapeutic in a nature and not a vacation, and that she did not intend to mislead the Commission, but did not realize being outside of Canada would impact her eligibility for sickness benefits. The Commission maintained the disentitlement on her claim, but reduced the penalty to \$304.00. The Appellant appealed to the Social Security Tribunal (Tribunal).

ISSUES

[3] Is the Appellant disentitled to sickness benefits for the portion of her benefit period that she was outside of Canada, namely from March 20 – 28, 2017?

[4] Did the Commission exercise its discretion in a judicial manner when it imposed a penalty on the Appellant?

ANALYSIS

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

[6] Section 37 of the *Employment Insurance Act* (EI Act) states that benefits are not payable to claimants while they are outside of Canada except as specifically prescribed in section 55 of

the *Employment Insurance Regulations* (EI Regulations) (*Attorney General of Canada v. Bendahan 2012 FCA 237*).

[7] The onus is on the Appellant to prove she meets the requirements of one or more of the exceptions in the EI Regulations (*Attorney General of Canada v. Peterson A-370-95*).

[8] Section 38 of the EI Act states that the Commission may impose a penalty on a claimant for each of the acts or omissions set out 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). The initial onus is on the Commission to prove the 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 statement or representation was not knowingly made (*Purcell A-694-94, Gates A-600-94*).

Issue 1: Does the Appellant come within any of the exceptions provided for claimants travelling outside of Canada?

[9] Subsection 55(1) of the EI Regulations allows a claimant to receive EI benefits while outside of Canada *if* the travel is for one of the specific purposes listed therein, namely:

- to undergo medical treatment that is not readily available in Canada
- to attend the funeral of an immediate family member (7 days),
- to accompany an immediate family member to a hospital for medical treatment that is not available in Canada (7 days),
- to visit a family member who is seriously ill or injured (7 days)
- to conduct a bona fide job search (14 days) or attend a bona fide job interview (7 days)

[10] The Tribunal finds that the Appellant's absence from Canada does not come within any of the exceptions provided for in subsection 55(1) of the EI Regulations.

[11] The Appellant's evidence regarding the purpose of her travel is as follows:

Statements to the Commission:

- She went to London, England to visit her daughter living there. It was an unplanned, last minute trip that was given to her as a gift (GD3-29).
- In December 2017, she had 3 traumatic experiences within 4 weeks: her brother died from cancer, her son was diagnosed with cancer, and her father had a heart attack. By March 2017, she was unable to work because of these events and her doctor recommended she go on medical leave (GD3-36).
- She applied for sickness benefits in March 2017.
- Her husband purchased a flight for her to go and visit her daughter in England, where her daughter had been working for the past year. He thought that the change of scenery and being close to her daughter would be very therapeutic. It was not a vacation (GD3-36).

Testimony at the hearing:

- She was having “a mental breakdown” in March 2017, and is still dealing with the toll the traumatic events have taken on her and her family.
- Her daughter was also “mentally distraught” by the traumatic events, and it was very hard for the Appellant to help her daughter over the telephone. They needed to be together to console each other.
- Her daughter was working as an “au pair” and couldn’t leave England. The Appellant didn’t think it really mattered if she was outside of Canada because she was on sick leave and there was “no issue” of looking for work. So she went to be with her daughter.
- It was not a vacation.
- She was outside of Canada for “a medical reason” because the trip was for “my health and my daughter’s health” and to get the Appellant to the point where she “felt comfortable” leaving her daughter and coming back home.
- The Appellant asked “How do they (the Commission) know my daughter wasn’t suicidal?”

[12] The Tribunal asked the Appellant if she had any medical evidence that her daughter was experiencing serious illness and under medical care at the time of she travelled to England. The

Appellant did not. She stated that her daughter was “halfway across the world and emotionally broken down and needed comfort”.

[13] The Tribunal acknowledges the Appellant experienced a series of traumatic events and understandably wished to be with her daughter during this difficult time for both of them. However, the purpose of the Appellant’s travel to England does not fall within any of the exceptions provided in subsection 55(1) of the EI Regulations. While the Appellant asked for some empathy and understanding in light of what she has been going through, the Tribunal simply does not have the discretion to expand or vary the exceptions on compassionate grounds – no matter how compelling the circumstances may be.

[14] Having failed to bring her travel within any of the exceptions provided for in subsection 55(1) of the EI Regulations, the Tribunal finds that section 37 of the EI Act applies to her claim and that the Appellant is disentitled to sickness benefits from March 20 – 28, 2017 because she was outside of Canada.

Issue 2: Did the Appellant knowingly misrepresent her absence from Canada such that a penalty may be imposed on her?

[15] The Commission submits that the Appellant knowingly made 2 false representations when she filed her bi-weekly claimant reports for the periods March 12 – 25, 2017 and March 26 to April 1, 2017 and failed to report her absence from Canada during that time. This caused the Appellant to be overpaid \$760.00 in EI benefits that she was not entitled to. As such, a penalty may be imposed on her pursuant to section 38 of the EI Act.

[16] To establish that a false statement was knowingly made by the Appellant, the Commission must prove, on a balance of probabilities, that:

- a) an objectively false statement was made;
- b) that it misled the Commission;
- c) that it resulted in the real or possible payment of EI benefits to the Appellant to which he was not entitled to; and

d) that at the time of the statement, the Appellant knew it did not accurately reflect the facts.

[17] The onus of proof then shifts to the Appellant to prove the false statements were not knowingly made (*Mootoo v. Canada (AG)*, 2003 FCA 206; and *Canada (AG) v. Gates*, A-600-94).

[18] The Tribunal finds that, on a balance of probabilities, the Appellant knowingly made the 2 false representations identified by the Commission and, therefore, a penalty may be imposed on her.

[19] The Appellant does not dispute that she was outside of Canada during the period in question. However, when she was asked the following question on each of the 2 electronic claimant reports covering this period of her claim, namely the reports for the weeks of March 12, to April 1, 2017 (see transcriptions of the Appellant's claimant report at GD3-14 to GD3-24):

“Were you outside Canada between Monday and Friday during the period of this report?”

The Appellant repeatedly answered: “NO”.

[20] The Tribunal also notes that the Appellant completed both of the claimant reports in question on March 31, 2017 – *when she was back in Canada after spending 10 days in England between March 19 – 29, 2017.*

[21] The Appellant's answers were objectively false, since she left Canada on March 19, 2017 and didn't return until March 29, 2017 (as confirmed on her response sheet at GD3-29). The Commission was misled into processing the Appellant's claim on the basis that she was in Canada (see payment history at GD3-27). This resulted in the overpayment of \$760 in benefits to the Appellant – benefits she was not entitled to because she was outside of Canada while on claim.

[22] The Tribunal finds the Appellant misrepresented her absence from Canada to the Commission for the period of March 19 - 29, 2017.

[23] The issue then becomes whether the Appellant “knowingly” misrepresented her absence from Canada. As the onus is initially on the Commission, the Tribunal considered the Records

of Decision and the rationale for the penalty set out therein for the original decision (at GD3-30) and at the reconsideration stage (at GD3-41 to GD3-42).

[24] The Tribunal then considered whether the Appellant had a reasonable explanation for the misrepresentations she made.

[25] The Appellant's evidence with respect to reporting her absence from Canada is as follows:

Statements to the Commission

- She thought reporting an absence was for regular EI benefits and not sickness benefits. Since she was not looking for work, "it wouldn't matter" (GD3-29).
- She was not aware she could not leave Canada while on sickness benefits. She didn't think it would be an issue because she was on a medical leave and would not be looking for work (GD3-36).
- She didn't try to do something illegal. It wasn't her intention to falsify her claim. If she thought it would be an issue, she would have contacted EI to clarify (GD3-36).
- Her failure to report was an oversight and not done in malice. She is sorry for not clarifying before she left Canada (GD3-36).

Testimony at the Hearing

- She wasn't thinking clearly when she filed her reports. She was dealing with her breakdown at the time.
- She didn't deliberately lie.
- She was on medical leave and "didn't think it really mattered" if she was outside of Canada because there was "no issue of looking for work".
- She "just checked the box" thinking it didn't pertain to sick leave because she'd "been on EI before" and knew about the availability and job search requirements for regular benefits.
- The Appellant stated that with sickness benefits "you get 15 weeks and don't have to look for work".

- The Appellant stated “The least of my concerns was checking off that box. What if my daughter was suicidal?”
- She is still “off work because of this trauma”.

[26] The Tribunal does not find this to be a reasonable explanation to prove that her misrepresentations were not knowingly made.

[27] The Appellant is an intelligent individual, clearly capable of reading and understanding her rights and responsibilities in connection with her claim for sickness benefits. She was made aware of her obligation to report any absences from Canada when she applied for *sickness benefits* (see her application at page GD3-6). The questions on the claimant reports are very simple and are not qualified or limited in any way to regular benefits. The fact that a query about absence from Canada is the very first “reporting” question on every report – regardless of the type of benefits the claimant is receiving - signifies its significance. It was not reasonable for the Appellant to assume that she didn’t have to report her absence from Canada just because she was receiving sickness benefits and not looking for work. And if she was reporting based on this assumption, it would have been reasonable for her to confirm her understanding with the Commission prior to reporting, or to clarify with the Commission and correct the reporting as soon as possible. She did not do either of these things.

[28] The Tribunal finds that, on a balance of probability, the Appellant knowingly made 2 false representations on her claimant reports for the weeks of March 12, to April 1, 2017. As a result, a penalty may be imposed on her pursuant to section 38 of the EI Act.

Issue 3: Did the Commission exercise its discretion judicially when it imposed the monetary penalty upon the Appellant?

[29] The Commission must exercise its exclusive jurisdiction to impose a penalty and to determine the amount of that penalty in a judicial manner. That is, the Commission must act in good faith, for proper purpose and motive; must take into account any relevant factors and ignore any irrelevant factors; and act in a non-discriminating manner (*Purcell, supra*).

[30] In its review of the Records of Decision for the original decision (at GD3-30) and at the reconsideration stage (at GD3-41 to GD3-42), the Tribunal noted the Commission considered two mitigating factors at the reconsideration stage, namely the Appellant's explanation that she believed being outside of Canada would not affect her claim and her financial circumstances. These mitigating factors resulted in a reduction of the penalty by 10% to \$304.00. In her testimony, the Appellant reiterated the explanation she gave to the Commission and stated that she is still experiencing financial strain of being off work. However, both of these circumstances were before the Commission when it made its decision, and no additional mitigating circumstances were identified by the Appellant in her appeal materials or during her testimony at the hearing.

[31] The Tribunal finds that the Commission exercised its discretion in a judicial manner when it determined that a penalty was warranted and set the penalty at \$304.00.

[32] Having found that the Commission exercised its discretion judicially in connection with both the imposition and the quantum of the penalty imposed pursuant to section 38 of the EI Act, the Tribunal cannot interfere with the Commission's decision.

CONCLUSION

[33] The Tribunal finds the Appellant is disentitled to EI benefits from March 20 – 28, 2017 because she was outside of Canada and failed to prove that she qualified for any of the statutory exemptions provided for in subsection 55(1) of the EI Regulations.

[34] The Tribunal further finds that the Appellant knowingly made 2 false representations to the Commission in connection with reporting her absence from Canada while claiming sickness benefits and, therefore, a penalty may be imposed pursuant to section 38 of the EI Act. The Tribunal also finds that the Commission exercised its discretion judicially when it determined that the penalty imposed on the Appellant would be \$304.00.

[35] The appeal is dismissed.

Teresa M. Day
Member, General Division - Employment Insurance Section

HEARD ON:	October 11, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	S. L., Appellant

ANNEX

THE LAW

Employment Insurance Act

37 Except as may otherwise be prescribed, a claimant is not entitled to receive benefits for any period during which the claimant

- (a) is an inmate of a prison or similar institution; or
- (b) is not in Canada.

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

- (a) in relation to a claim for benefits, made a representation that the claimant or other person knew was false or misleading;
- (b) being required under this Act or the regulations to provide information, provided information or made a representation that the claimant or other person knew was false or misleading;
- (c) knowingly failed to declare to the Commission all or some of the claimant's earnings for a period determined under the regulations for which the claimant claimed benefits;
- (d) made a claim or declaration that the claimant or other person knew was false or misleading because of the non-disclosure of facts;
- (e) being the payee of a special warrant, knowingly negotiated or attempted to negotiate it for benefits to which the claimant was not entitled;
- (f) knowingly failed to return a special warrant or the amount of the warrant or any excess amount, as required by section 44;
- (g) imported or exported a document issued by the Commission, or had it imported or exported, for the purpose of defrauding or deceiving the Commission; or
- (h) participated in, assented to or acquiesced in an act or omission mentioned in paragraphs (a) to (g).

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

- (a) three times the claimant's rate of weekly benefits;
- (b) if the penalty is imposed under paragraph (1)(c),

(i) three times the amount of the deduction from the claimant's benefits under subsection 19(3), and

(ii) three times the benefits that would have been paid to the claimant for the period mentioned in that paragraph if the deduction had not been made under subsection 19(3) or the claimant had not been disentitled or disqualified from receiving benefits; or

(c) three times the maximum rate of weekly benefits in effect when the act or omission occurred, if no benefit period was established.

(3) For greater certainty, weeks of regular benefits that are repaid as a result of an act or omission mentioned in subsection (1) are deemed to be weeks of regular benefits paid for the purposes of the application of subsection 145(2).

Employment Insurance Regulations

55 (1) Subject to section 18 of the Act, a claimant who is not a self-employed person is not disentitled from receiving benefits for the reason that the claimant is outside Canada

(a) for the purpose of undergoing, at a hospital, medical clinic or similar facility outside Canada, medical treatment that is not readily or immediately available in the claimant's area of residence in Canada, if the hospital, clinic or facility is accredited to provide the medical treatment by the appropriate governmental authority outside Canada;

(b) for a period of not more than seven consecutive days to attend the funeral of a member of the claimant's immediate family or of one of the following persons, namely,

(i) a grandparent of the claimant or of the claimant's spouse or common-law partner,

(ii) a grandchild of the claimant or of the claimant's spouse or common-law partner,

(iii) the spouse or common-law partner of the claimant's son or daughter or of the son or daughter of the claimant's spouse or common-law partner,

(iv) the spouse or common-law partner of a child of the claimant's father or mother or of a child of the spouse or common-law partner of the claimant's father or mother,

(v) a child of the father or mother of the claimant's spouse or common-law partner or a child of the spouse or common-law partner of the father or mother of the claimant's spouse or common-law partner,

(vi) an uncle or aunt of the claimant or of the claimant's spouse or common-law partner, and

(vii) a nephew or niece of the claimant or of the claimant's spouse or common-law partner;

(c) for a period of not more than seven consecutive days to accompany a member of the claimant's immediate family to a hospital, medical clinic or similar facility outside Canada for medical treatment that is not readily or immediately available in the family member's area of residence in Canada, if the hospital, clinic or facility is accredited to provide the medical treatment by the appropriate governmental authority outside Canada;

(d) for a period of not more than seven consecutive days to visit a member of the claimant's immediate family who is seriously ill or injured;

(e) for a period of not more than seven consecutive days to attend a *bona fide* job interview; or

(f) for a period of not more than 14 consecutive days to conduct a *bona fide* job search.

(1.1) Only the periods set out in paragraphs (1)(b) and (d) may be cumulated during a single trip outside Canada, and only if the member of the claimant's immediate family whom the claimant visits under paragraph (1)(d) is the person whose funeral the claimant attends under paragraph (1)(b).

(2) For the purposes of subsections (1) and (1.1), the following persons are considered to be members of the claimant's immediate family:

(a) the father and mother of the claimant or of the claimant's spouse or common-law partner;

(b) the spouse or common-law partner of the father or mother of the claimant or of the claimant's spouse or common-law partner;

(c) the foster parent of the claimant or of the claimant's spouse or common-law partner;

(d) a child of the claimant's father or mother or a child of the spouse or common-law partner of the claimant's father or mother;

(e) the claimant's spouse or common-law partner;

(f) a child of the claimant or of the claimant's spouse or common-law partner;

(g) a ward of the claimant or of the claimant's spouse or common-law partner; and

(h) a dependant or relative residing in the claimant's household or a relative with whom the claimant permanently resides.

(3) [Repealed, SOR/2001-290, s. 3]

(4) A claimant who is not a self-employed person is not disentitled from receiving benefits in respect of pregnancy, the care of a child or children referred to in subsection 23(1) of the Act, the

care or support of a family member referred to in subsection 23.1(2) of the Act or of a critically ill child or while attending a course or program of instruction or training referred to in paragraph 25(1)(a) of the Act for the sole reason that the claimant is outside Canada, unless their Social Insurance Number Card or the period of validity of their Social Insurance Number has expired.

(5) A major attachment claimant who is not a self-employed person and whose most recent interruption of earnings before making a claim for benefits is from insurable employment outside Canada is not disentitled from receiving benefits for the sole reason that the claimant is outside Canada if

(a) the benefits are in respect of pregnancy, the care of a child or children referred to in subsection 23(1) of the Act or the care or support of a family member referred to in subsection 23.1(2) of the Act or of a critically ill child;

(b) the claimant proves that they are incapable, by reason of illness, injury or quarantine, from performing the duties of their regular or usual employment or of other suitable employment.

(6) Subject to subsection (7), a claimant who is not a self-employed person and who resides outside Canada, other than a major attachment claimant referred to in subsection (5), is not disentitled from receiving benefits for the sole reason of their residence outside Canada if

(a) the claimant resides temporarily or permanently in a state of the United States that is contiguous to Canada and

(i) is available for work in Canada, and

(ii) is able to report personally at an office of the Commission in Canada and does so when requested by the Commission; or

(b) the claimant is qualified to receive benefits under Article VI of the *Agreement between Canada and the United States respecting Unemployment Insurance*, signed on March 6 and 12, 1942, and resides temporarily or permanently in one of the following places in respect of which the Commission has not, pursuant to section 16 of the *Employment and Immigration Department and Commission Act*, suspended the application of that Agreement, namely,

(i) the District of Columbia,

(ii) Puerto Rico,

(iii) the Virgin Islands, or

(iv) any state of the United States.

(7) Subject to subsection (10), the maximum number of weeks for which benefits may be paid in a benefit period, in respect of a claimant referred to in subsections (5) and (6) who is not disentitled from receiving benefits, is

(a) in the case of benefits that are paid for a reason referred to in subsection 12(3) of the Act, the applicable number of weeks referred to in subsections 12(3) to (6) of the Act; and

(b) in any other case, in respect of the number of hours of insurable employment in the claimant's qualifying period set out in column I of the table to this subsection, the corresponding number of weeks set out in column II of that table.

TABLE

Item	Column I Number of Hours of Insurable Employment	Column II Number of Weeks of Benefits
1	420 - 454	10
2	455 - 489	10
3	490 - 524	11
4	525 - 559	11
5	560 - 594	12
6	595 - 629	12
7	630 - 664	13
8	665 - 699	13
9	700 - 734	14
10	735 - 769	14
11	770 - 804	15
12	805 - 839	15
13	840 - 874	16
14	875 - 909	16
15	910 - 944	17
16	945 - 979	17
17	980 - 1,014	18
18	1,015 - 1,049	18
19	1,050 - 1,084	19
20	1,085 - 1,119	19
21	1,120 - 1,154	20
22	1,155 - 1,189	20
23	1,190 - 1,224	21
24	1,225 - 1,259	21
25	1,260 - 1,294	22
26	1,295 - 1,329	22
27	1,330 - 1,364	23
28	1,365 - 1,399	23
29	1,400 - 1,434	24
30	1,435 - 1,469	25
31	1,470 - 1,504	26
32	1,505 - 1,539	27
33	1,540 - 1,574	28
34	1,575 - 1,609	29
35	1,610 - 1,644	30

36	1,645 - 1,679	31
37	1,680 - 1,714	32
38	1,715 - 1,749	33
39	1,750 - 1,784	34
40	1,785 - 1,819	35
41	1,820 or more	36

(8) Subject to subsection (10), a claimant referred to in subsections (5) and (6), for whom a benefit period has been established and who subsequently becomes resident in Canada, continues to be entitled to receive benefits for not more than the maximum number of weeks referred to in subsection (7).

(9) Subject to subsection (10), the maximum number of weeks for which benefits may be paid in the benefit period, in respect of a claimant for whom a benefit period has been established in Canada and who subsequently becomes a claimant referred to in subsection (6), is the greater of

(a) the number of weeks for which the claimant has already received benefits in Canada; and

(b) the number of weeks to which the claimant would have been entitled under subsection (7) if the claimant had been temporarily or permanently resident in a place referred to in subsection (6) when the benefit period was established.

(10) In a claimant's benefit period, a claimant who is not in Canada or a claimant referred to in subsection (8) may, subject to the applicable maximums set out in paragraphs (7)(a) and (b), combine weeks of benefits to which they are entitled, but the maximum number of combined weeks is 50. If the benefit period is extended under subsection 10(13) of the Act, the maximum number of combined weeks equals the maximum number of weeks calculated under subsection 10(15) of the Act less two weeks.

(11) A claimant who is not a self-employed person is not disentitled from receiving benefits for the sole reason that the claimant is outside Canada if the claimant is outside Canada, with the approval of the Commission, in the course of the claimant's employment under the Self-employment employment benefit established by the Commission under section 59 of the Act or under a similar benefit that is provided by a provincial government or other organization and is the subject of an agreement under section 63 of the Act.

(12) Subject to subsection (13), where a claimant makes a claim for the purposes of this section, the claim shall be sent in an envelope or package addressed to the Commission, by mail or by means of a confirmed delivery service.

(13) Where a claim is sent by the claimant to the Commission in a manner other than the manner required by subsection (12), the claim shall be reviewed by an employee of the Commission at the time of importation.