



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *G. L. v Canada Employment Insurance Commission*, 2019 SST 1645

Tribunal File Number: GE-19-1832

BETWEEN:

G. L.

Claimant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Gary Conrad

HEARD ON: August 19, 2019

DATE OF DECISION: August 21, 2019

DECISION

[1] The appeal is dismissed with modification.

OVERVIEW

[2] After an investigation the Canada Employment Insurance Commission (Commission) became aware the Claimant was in receipt of earnings while receiving Employment Insurance (EI) benefits and did not report his earnings. The Commission determined the Claimant had knowingly provided false information and levied a penalty and issued a notice of violation.

[3] The Commission also disentitled the Claimant from benefits for the period of July 2, 2018, to July 13, 2018, as they determined he was not available for work or making reasonable and customary efforts to find employment.

PRELIMINARY MATTERS

[4] The Claimant failed to appear for his scheduled hearing. An email containing the notice of hearing was sent to the Claimant on August 12, 2019, to the email address he supplied to the Social Security Tribunal (Tribunal). The Tribunal also attempted to contact the Claimant by phone on August 12, 2019, but the number was no longer registered to the Claimant.

[5] Subsection 12(1) of the *Social Security Tribunal Regulations* provides that if a party fails to appear at a hearing, I may proceed in the party's absence if I am satisfied that the party received notice of the hearing. I am satisfied, based on the notice of hearing being sent by email to the Claimant, no evidence the email was not received, and the Claimant having successfully receiving email at that address before, that the Claimant received notice of the hearing and, pursuant to subsection 12(1) of the *Social Security Tribunal Regulations* proceeded with the hearing.

ISSUES

1. Did the Claimant prove that he was making reasonable and customary efforts to find suitable employment?

2. Did the Claimant prove that he was capable of and available for work, but unable to obtain suitable employment?
3. Did the Claimant knowingly make false statements and if so, did the Commission act judicially in their decision to levy a penalty and issue a notice of violation?

ANALYSIS

1. Did the Claimant prove that he was making reasonable and customary efforts to find suitable employment?

[6] No, the Claimant did not prove that he was making reasonable and customary efforts to find suitable employment as he was not undertaking any efforts to find employment while caring for his child.

[7] For the purpose of proving that the Claimant is available for work and unable to obtain suitable employment, the Commission may require him to prove that he is making reasonable and customary efforts to obtain suitable employment (subsection 50(8) of the *Employment Insurance Act (Act)*).

[8] For the purposes of subsection 50(8) of the Act, Section 9.001 of the *Employment Insurance Regulations (Regulations)*, outlines the criteria for determining whether the efforts that the Claimant is making to obtain suitable employment constitute reasonable and customary efforts.

[9] The Commission submits the Claimant did not work for the weeks of July 1-14, 2018, as he stated he was looking after his girlfriend who was having pregnancy complications and having to look after his son.

[10] I note the Claimant only agreed he was not at work for the days of July 9, 10, and 17, 2018, when speaking to the Commission. I find that this agreement, in conjunction with the earnings reported from the employer that the Claimant had no earnings for the period of July 1, 2018, to July 14, 2018, earnings the Claimant agreed with, supports the Commission's submission the Claimant did not work for those weeks.

[11] I note the burden is on the Claimant to prove that he was making reasonable and customary efforts to find suitable employment. I find the Claimant has failed to prove that. I do not doubt that he may have wanted to work, or that he needed to care for family, but he has not provided any evidence to support he was making reasonable and customary efforts to find employment. As such I find the disentitlement for the period of July 2-13, 2018, under 50(8) is to be upheld.

2. Did the Claimant prove that he was capable of and available for work but unable to obtain suitable employment?

[12] No, the Claimant did not prove that he was capable of and available for work but unable to obtain suitable employment.

[13] The 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 he was capable of and available for work and unable to obtain suitable employment (paragraph 18(1)(a) of the Act).

[14] The term “availability” is not defined in the Act, it is a question of fact determined in accordance with the factors outlined by the Federal Court of Appeal (FCA) in *Faucher v. Canada (Employment and Immigration Commission)* A-56-96; the three factors to consider in order for a person to be found available for work are:

1. Have a desire to return to the labour market as soon as suitable employment is offered;
2. Express that desire through efforts to find a suitable employment; and
3. Not set personal conditions that might unduly limit their chance of returning to the labour market.

[15] Availability is assessed on the basis of attitude and conduct, taking into account all circumstances specific to each case, (*Carpentier v. Canada (Attorney General)* A-474-97 and *Canada (Attorney General) v. Whiffen* A-1472-92).

[16] The burden of proof for proving availability rests on the Claimant, (*Canada (Attorney General) v. Renaud* 2007 FCA 328, and *Canada (Attorney General) v. Stolniuk* A-686-93).

[17] The Commission submits the Claimant did not work for the weeks of July 1-14, 2018, as he stated he was looking after his girlfriend who was having pregnancy complications and having to look after his son.

[18] The Commission submits that the Claimant could not be regarded as having met the requirements of section 18 of the Act to show that he was available to accept employment during that period of time and he also stated that he was a single father who could not obtain childcare during his hours of work.

[19] In order to determine availability under section 18(1)(a) of the Act, the general approach is to analyze the factors set forth in the court case *Faucher v. Canada (Employment and Immigration Commission)* A-56-96. However, I find that as there is no dispute the Claimant was employed for the period of July 1-14, 2018, but simply chose not to attend work, it does not make sense to consider section 18(1)(a) in that way for the period of the disentitlement.

[20] I find the central point of the disentitlement under 18(1)(a) was not about the Claimant's efforts to find work, but whether he was unable to obtain suitable employment.

[21] In considering section 18(1)(a) of the Act I find the Claimant was clearly capable of working, as he had been doing so; however, he was not unable to find suitable employment, as he had found employment for the period of July 2-13, 2018, he just chose not to attend it. Therefore, I find he does not meet all the requirements set out in section 18(1)(a) to be considered available as he was not unable to find suitable employment.

[22] I understand this may seem confusing so hopefully I can provide some clarity. Being found unavailable while employed may seem impossible, but to understand it, the key is not to get hung-up on the word "availability" and instead understand that availability is a concept. Section 18(1)(a) of the Act outlines what it means to meet the concept of availability and part of that concept is being unable to find suitable employment.

[23] In the Claimant's case being unable to find suitable employment is where, as he was employed, he fails to meet the concept of availability. Since he had employment he clearly **was** able to find suitable employment for himself.

[24] I do not doubt the Claimant was facing a sudden situation outside of his control and had to return home to take care of his family. Despite that, even where the Claimant had a legitimate need to care for his child, he must still be available for work in order to receive benefits, (*Canada Attorney General v Faltermeier*, A-479-94).

3. Did the Claimant knowingly make false statements and if so, did the Commission act judicially in their decision to levy a penalty and issue a notice of violation?

[25] I find that the Claimant did knowingly make false statements as he was aware he was working and had earnings when he completed his reports and stated that he was not. I note the Claimant agreed he had earnings and failed to report them when he spoke to the Commission on October 11, 2018. I further find that the Commission did not act judicially in their decision to levy a penalty and issue a notice of violation and as they failed to take into account relevant factors.

[26] The Commission may impose a penalty if it becomes aware of facts that in its opinion establish that the Claimant has, in relation to a claim for benefits, made a representation that the Claimant knew was false or misleading (paragraph 38(1)(a) of the Act).

[27] An insured person accumulates a violation if in any of the following circumstances the Commission issues a notice of violation to the person, (a) one or more penalties are imposed under section 38 as a result of acts of omissions mentioned in section 38, (paragraph 7.1(4)(a) of the Act).

[28] The initial onus is on the Commission to prove that the Claimant knowingly made a false or misleading statement.

[29] I must decide, on a balance of probabilities, whether the Claimant subjectively knew that a false or misleading statement had been made, (*Canada (Attorney General) v Purcell* A-694-94).

[30] In *Canada (Attorney General) v. Purcell* A-694-94, the FCA stated that in deciding whether there was subjective knowledge by the Claimant I:

“...may take into account common sense and objective factors. In other words, if a claimant claims to be ignorant of something that the whole world knows, the fact finder could rightly disbelieve that claimant and find that there was, in fact, subjective knowledge, despite the denial. Not to know the obvious, therefore, might properly lead to an inference that the claimant is lying. This does not make the test objective; it does, however, take into account objective matters in coming to a decision on subjective knowledge.”

[31] The Commission submits that it has met the onus of establishing the Claimant made a misrepresentation when he confirmed he knowingly failed to report his work and earnings due to financial pressure. The Commission submits the Claimant knew he was making false or misleading statements.

[32] The Claimant told the Commission on October 11, 2018, that he understood the question on the reports he completed that asked him: Did you work or earn wages during the period covered by the report. The Claimant told the Commission he answered “no” to that question as he was struggling with money issues. The Claimant told the Commission he understood that he was answering the questions falsely on his reports.

[33] The Claimant told the Commission on November 1, 2018, that he agreed the earnings reported by his employers for the weeks of June 3-16, 2018, and June 17 to July 21, 2018, were correct.

[34] I find the Claimant did knowingly make false representations as, on a balance of probabilities, the Claimant subjectively knew that he was making a false statement when he answered “no” to the questions “Did you work or earn wages during the period...” on the reports he completed for the periods of June 3, 2018, to June 16, 2018, June 17, 2018, to June 23, 2018, June 24, 2018, to July 7, 2018, and July 8, 2018, to July 21, 2018, as he was aware he was working and had earnings at the time he completed the reports. I rely on the Claimant’s

statements to the Commission that he understood the question asked and agreed that he had knowingly made false reports about his work and earnings.

[35] Having found the Claimant knowingly made false statements in relation to his claim for benefits I will next look at whether the Commission acted judicially in their decision to levy a penalty.

[36] I cannot interfere with the amount of a penalty unless it can be shown that the Commission exercised its discretionary power in a non-judicial manner or acted in a perverse or capricious manner without regard to the material before it, *Canada (Attorney General) v. Uppal*, 2008 FCA 388).

[37] In *Canada (Attorney General) v. Purcell*, A-694-94 the FCA stated that for a discretionary power to be exercised “judicially” the decision-maker must not have acted in bad faith or for an improper purpose or motive, took into account an irrelevant factor or ignored a relevant factor or acted in a discriminatory manner.

[38] The Commission submits that it rendered its decision in a judicial manner as all the pertinent circumstances were considered when assessing the penalty amount.

[39] The Commission submits that no mitigating circumstances were considered in the client’s failure to report earnings; however, there were mitigating circumstances stated by the Claimant of being a single father having financial issues. The Commission recommends the penalty be reduced from 50% of the \$1,885.00 overpayment to 25% for this offence, and that the penalty be reduced further to \$471.00.

[40] I find the Commission failed to act judicially when it made its decision to levy a penalty as they ignored relevant factors as they did not take into consideration the mitigating circumstances raised by the Claimant of his money issues. I find this relevant factor was not considered by the Commission when levying the penalty as they are not mentioned in the Commission’s Record of Decision dated March 22, 2019. I further rely on the Commission’s submission that no mitigating circumstances were considered in the Claimant’s failure to report his earnings, but that mitigating circumstances were raised.

[41] Having found that the Commission failed to act “judicially” when making its decision to levy a penalty I will give the decision the Commission should have given pursuant to subsection 54(1) of the *Department of Employment and Social Development Act*.

[42] I find that while a penalty is appropriate, as the Claimant was aware he was knowingly making false statements when completing his reports, I agree with the submission of the Commission that the penalty should be further reduced in light of the mitigating circumstances of the Claimant’s money issues.

[43] I further find that I agree with the submission of the Commission that the penalty should be reduced to \$471.00.

[44] I will next consider whether the Commission acted judicially in their decision to issue a notice of violation.

[45] The decision by the Commission to issue a notice of violation is discretionary, (*Gil v. Canada (Attorney General)*, 2010 FCA 182). I cannot interfere with a discretionary decision unless it can be shown that the Commission exercised its discretionary power in a non-judicial manner or acted in a perverse or capricious manner without regard to the material before it.

[46] The Commission submits that the discovery of a misrepresentation resulted in an overpayment of \$1,885.00, and the Claimant was therefore issued a serious violation; subsection 7.1(5) of the Act categorizes the violation according to the severity of the misrepresentation. The Commission submits that the classification of the violation was determined only in accordance with the amount of the overpayment resulting from the misrepresentation.

[47] The Commission submits they exercised their discretion in a judicial manner when issuing the notice of violation. The Commission submits that after considering the overall impact to the Claimant of issuing a notice of violation, including mitigating circumstances, prior offences and the impact on the ability of the Claimant to qualify on future claims, they determined that a violation is applicable in this case.

[48] I find that the Commission did not act judicially in there decision to issue a violation as they ignored the relevant factor of the Claimant’s money struggles as their Record of Decision,

dated March 22, 2019, makes no mention of that mitigating circumstance. I further rely on the Commission's submission the Claimant did raise mitigating circumstances.

[49] Having found that the Commission failed to act "judicially" when making its decision I will give the decision the Commission should have given pursuant to subsection 54(1) of the *Department of Employment and Social Development Act*.

[50] I find that in this situation a violation is appropriate as while the Claimant was having money issues he was aware that he was knowingly making false representations when he was completing his reports and yet continued to do so. I sympathize with the financial struggles of the Claimant, but those struggles do not absolve him from having knowingly made false statements.

[51] I further find that I agree with the submission of the Commission that that the notice of violation would be classified as serious pursuant to subparagraph 7.1(5)(a)(ii) of the Act due to the amount of the overpayment.

[52] **CONCLUSION**

[53] The appeal is dismissed with modification.

[54] I find the Claimant did not prove that he was making reasonable and customary efforts to find employment and therefore the disentitlement under subsection 50(8) of the Act is upheld.

[55] I further find the Claimant did not prove that he was capable of and available for employment and unable to obtain suitable employment. Therefore the disentitlement under paragraph 18(1)(a) of the Act is upheld.

[56] I find the Claimant knowingly made false statements when he completed his claims for benefits. I further find the Commission did not act judicially when they made their decision to levy a penalty and find the penalty should be reduced to \$471.00.

[57] I further find the Commission did not act judicially when they issued a notice of violation but find that the issuance of a notice of violation is appropriate in the Claimant's case.

Gary Conrad

Member, General Division - Employment Insurance Section

HEARD ON:	August 19, 2019
METHOD OF PROCEEDING:	In person
APPEARANCES:	N/A