Citation: *AH v Canada Employment Insurance Commission*, 2022 SST 61

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	A. H.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (436637) dated October 7, 2021 (issued by Service Canada)

Tribunal member:	Linda Bell
Type of hearing:	Questions and answers
Decision date:	January 31, 2022
File number:	GE-21-2148

Decision

[1] I am allowing the appeal in part.

[2] The Appellant, A. H., has shown that he was temporarily residing in Pennsylvania, USA from December 29, 2017, to January 25, 2018. This means he is exempt from disentitlement from Employment Insurance (EI) benefits while outside Canada.

[3] The Appellant has shown that he meets the availability requirements from December 29, 2017, to January 25, 2018. This means he isn't disentitled from EI benefits for this reason.

[4] The Commission acted judicially (properly) when imposing the non-monetary penalty in the form of a warning. This means I can't remove this penalty.

Overview

[5] The Appellant normally resides in Calgary, AB, but works in remote areas of Canada. When his employer laid him off in November 2017, he applied for regular EI benefits listing his Calgary address. The Commission established his claim effective November 19, 2017.

[6] While on claim, the Appellant left Canada on December 29, 2017. He resided temporarily with his mother in Pennsylvania, USA, until his return to Canada on January 25, 2018. He was visiting and assisting his mother who was seriously ill and attending medical treatment. The Appellant didn't declare that he was outside Canada on his biweekly reports.

[7] The Commission received information from the Canada Border Services Agency (CBSA). It conducted a review of the Appellant's claims. It initially determined that the Appellant was not entitled to benefits for the entire period he was outside Canada from December 29, 2017, to January 25, 2018.

[8] The Commission imposed two retroactive disentitlements. The first disentitlement was because the Appellant was outside Canada. The second disentitlement was because the Commission determined that the Appellant failed to meet the availability requirements.

[9] The Commission also determined that the Appellant knowingly made a false representation because he failed to declare he was outside Canada on his biweekly reports. It imposed a non-monetary penalty in the form of a warning.

[10] The Commission amended the periods of disentitlement upon reconsideration. It determined that the Appellant qualified for a 7-day exemption. So, it didn't impose the disentitlement for the first 7 days he was outside Canada, not including his departure date. The Commission determined the exemption period was from December 30, 2017, to January 5, 2018. It maintained the disentitlement for being outside Canada from January 6, 2018, to January 25, 2018.

[11] The Commission maintained the second disentitlement from January 1, 2018, to January 24, 2018. This is because it determined that the Appellant failed to meet the availability requirements.

[12] The Commission didn't change its decision regarding misrepresentation. It maintained the issuance of the non-monetary penalty in the form of a warning.

[13] The Appellant disputes the Commission's decisions. He appeals to the Social Security Tribunal. In his appeal documents, he says that he was ready willing and able to return to Canada within 48 hours so he thought he was abiding by the EI rules. He also says that had he known the maximum allowable time outside Canada was only 7 days when helping a sick relative, he would have taken alternative actions. He argues that he was not able to resolve these issues because the Canada Revenue Agency (CRA) has recorded his birthdate incorrectly.

Matters I must consider first

Jurisdiction

[14] The Social Security Tribunal (Tribunal) is an independent administrative tribunal. This means the Tribunal and its Members operate separately from the Canada Employment Insurance Commission and the CRA.

[15] The Tribunal's authority to determine issues under appeal stems from section 113 of the *Employment Insurance Act* (Act). The Act also states that if a party is dissatisfied with the Commission's reconsideration decision they may appeal to the Tribunal.[1]

[16] The Tribunal Member determines the issues under appeal, based on a balance of probabilities, and renders a decision in accordance with the law.[2]

[17] In this case, the Commission reconsidered its decisions to issue a non-monetary penalty and impose two disentitlements for the period the Appellant was outside Canada and unable to meet the availability requirements. In his appeal documents, the Appellant states, in part, that he would like to appeal the Commission's decision due to these factors:

- His date of Birth on file with CRA is incorrect therefore preventing him from paying and accessing information regarding his accounts…
- The amounts owed have not been updated with CRA…[3]

[18] As stated above, the issues that I must determine relate to the Commission's reconsideration decision. In this case, the reconsideration decision relates to the penalty and disentitlements. I don't have jurisdiction to determined issues that the Appellant may have with the CRA, even though the Appellant may argue that such decisions

[1] See sections 112 and 113 of the Act.
[2] On a balance of probabilities means that it is more likely than not. The law comes from the Act, the *Employment Insurance Regulations* (Regulations), and applicable case law.
[3] See page GD2-5.

should be made.[4] If the Appellant has ongoing issues with the CRA, he is at liberty to contact them directly.

[19] I must consider the evidence that is relevant to the issues before me and render a decision in accordance with the law. In this case, the Appellant must show, on a balance of probabilities, that he meets the entitlement requirements for EI benefits, while outside Canada.[5] The Commission bears the burden of showing that the Appellant knowingly made a declaration that was false or misleading.

[20] I will now determine the merits of the appeal. I have considered all relevant evidence and submissions when rendering this decision, even though I may not list everything below.

Issues

[21] Has the Appellant shown he is exempt from disentitlement while outside Canada?

[22] Does the Appellant meet the availability requirements for EI benefits while outside Canada?

[23] Did the Commission reconsider the claims within the allowable timeframe?

[24] Did the Commission show that the Appellant knowingly provided false or misleading information on his claim reports?

[25] If so, did the Commission impose the non-monetary penalty judicially?

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[4] *Hamilton v. Canada (Attorney General),* A-175-87.
[5] This means the Appellant must show that it is more likely than not that he is entitled to EI benefits.

Analysis

Outside Canada

[26] The general rule is that you can't get EI benefits if you are outside Canada.[6] But the law includes exemptions. For example, you can get up to 7 days of EI benefits if you are outside Canada to visit an immediate family member who is seriously ill or injured.[7]

[27] You might also qualify for an exemption from disentitlement if you temporarily reside in a state of the United States that is contiguous to Canada. That is if you are available for work in Canada and are able to report personally, and do report to a Commission's office when requested, and reside in a state of the United States that is contiguous to Canada.[8]

[28] The parties do not dispute that the Appellant departed Canada on December 29, 2017. He travelled to Pennsylvania, USA where he resided with his mother who was seriously ill and undergoing medical treatment. He remained outside Canada until his return on January 25, 2018.

[29] The Commission determined that the Appellant qualified for a 7-day exemption from disentitlement from December 30, 2017, to January 5, 20218. This is because it accepted that the Appellant was outside Canada to visit his mother who was seriously ill and undergoing medical treatment.[9]

[30] The Commission says the Appellant remains disentitled from January 6, 2018, to January 25, 2018. This is because it determined that he didn't meet any other exemptions while outside Canada during this period.

[31] The Appellant disagrees. He says he qualifies for an exemption for the entire period he was outside Canada from December 29, 2017, to January 25, 2018. This is because he was temporarily residing in the state of Pennsylvania, USA, which is

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[6] See section 37(b) of the Act.
[7] See section 55 of the Regulations.
[8] See section 55(6)(a) of the Regulations.
[9] See section 55(1)(d) of the Regulations.

contiguous to Canada, was available for work in Canada, able to report to a Commission office in Canada if requested. While residing there temporarily, he was looking for work and visiting with his mother who was seriously ill and undergoing medical treatment.

[32] I recognize that the reason the Appellant provided for being outside Canada recently changed. I find that the explanation he provided for this change is credible because it is forthright and plausible. Specifically, when asked to explain why he changed his reasons, the Appellant replied that his change in wording results from his recent "consideration of the statutory legislation and his use of the correct vernacular when describing his situation."

[33] I also recognize that there is no indication that the Commission discussed section 55(6) of the Regulations with the Appellant. So he wasn't made aware of it until he reviewed the Commission's written submissions.[10]

[34] I find that the facts in this case, support a finding that the Appellant is exempt from disentitlement, for the reason of being outside Canada, from December 29, 2017, to January 25, 2018. This is because he was:

- not self-employed,
- temporarily residing outside Canada in Pennsylvania, USA, a state of the United States that is contiguous to Canada,
- able to report to a Commission office in Canada, within 24 to 48 hours if requested, and
- available for work in Canada (I set out my findings on the Appellant's availability in more detail below).

[10] See pages GD8-2 and GD1A-2.

[35] The Federal Court of Appeal (FCA) has specifically addressed the meaning of the word contiguous.[11] Based on that meaning, I accept that the state of Pennsylvania, USA is contiguous to Canada because it shares a geographical border.

[36] It appears that there are no FCA decisions that define temporary or permanent residence, as it directly relates to section 55(6)(a) of the Regulations. There is one Tribunal decision that refers to a definition of a resident. In that decision the Tribunal considered a Supreme Court of Canada definition of "ordinarily resident" as discussed for tax purposes.[12] Upon review that definition, the Appellant admits that it would not be possible for him to establish an ordinary residence in the USA. But this doesn't change the fact that he was temporarily residing in a state of the United States that is contiguous to Canada.

[37] I agree with the Appellant when he says that the Tribunal's decision in *J.L.L. v Canada Employment Insurance Commission* has similar facts to his situation.[13] Specifically, *J.L.L.* was temporarily residing with friends in a state contiguous to Canada, for only three weeks, and the Tribunal found they were exempt from disentitlement.[14]

[38] I have also considered that there are previous decisions from Canadian Umpire Benefits (CUB) hearings that dealt with similar circumstances.[15] In those cases, the Umpires determined that the claimants were required to meet a test for availability in the USA and have a valid work permit to engage in the exception. While these decisions may be persuasive, they relate to older versions of the law and are not precedent. So, I am not required to follow their principles.

[39] After consideration of the current version of law, and relevant cases in the application of section 55(6)(a) of the Regulations, I find that the Appellant qualifies for

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[11] *Canada (Attorney General) v. Bendahan,* 2012 FCA 237.
[12] See pages GD07-2 and GD07-3 and *Thomson v. The Minister of National Revenue*, [1946] S.C.R. 209.
[13] See *J.L.L. v Canada Employment Insurance Commission*, 2014 SSTGDEI 91.
[14] See section 55(6) of the Regulations.
[15] See CUBs 12946,12206, 22493, 22762, and 20367.

an exemption from disentitlement to EI benefits, while temporarily residing outside Canada, from December 29, 2017, to January 25, 2018.

[40] In making this decision I considered that the current Regulations only require that the Appellant temporarily or permanently reside in a state of the USA that directly borders Canada, be able to report to a Commission office in Canada within 48 hours if requested, and meet the availability requirements for work in Canada. The current version of the law doesn't require that he meet a test for availability to work in the USA or have a valid work permit to engage in the exception.

[41] I will now determine whether the Appellant meets the availability requirements for work in Canada, while temporarily residing outside Canada.

Availability requirements for EI benefits

[42] Two different sections of the law that require claimants show that they are available for work. The first requires claimants to prove they are capable of and available for work, and unable to obtain suitable employment.[16] The second says that the Commission may require a claimant to prove they are making reasonable and customary efforts to obtain suitable employment.[17]

[43] I make no findings relating to section 50(8) of the Act. This is because there is no evidence that the Commission made a decision on this issue.[18] I will now determine whether the Appellant has shown he was capable of and available for work, and unable to obtain suitable employment.[19]

Capable of and available for work and unable to find suitable employment

[44] I must consider whether the Appellant has shown he was capable of and available for work and unable to find suitable employment while he was temporarily

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[16] See section 18(1)(a) of the Act.
[17] Subsection 50(8) of the Act.
[18] Section 113 of the Act provides the Social Security Tribunal the authority to determine issues under appeal that the Commission determined and reconsidered.
[19] This is required under section 18 of the Act.

residing outside Canada from December 29, 2017, to January 25, 2018.[20] The Appellant has to prove three things to show he was available under this section:

a) A desire to return to the labour market as soon as a suitable job is available

b) That desire is expressed through efforts to find a suitable job

c) No personal conditions that might unduly limit their chances of returning to the labour market

[45] I have to consider each of these factors to decide the question of availability,[21] looking at the attitude and conduct of the Appellant.[22]

– **Did the Appellant have a desire to return to the labour market as soon as a suitable job is available?**

[46] Yes. The Appellant has shown he had a desire to return to the labour market as soon as a suitable job was available.

[47] The Appellant consistently says that he was available for work during the periods he was out of Canada. He arranged for employers to contact him by telephone or email and was able to return to Canada for any employment opportunity within 24 hours.

[48] The Appellant says that he was searching for work, and was ready, able and willing to work, while he was outside Canada. He submitted a screenshot of a list of emails from December 8, 2017, to January 30, 2018. This document shows that he was communicating with prospective employers and applying for posted positions.[23]

[49] After consideration of the foregoing, I find that the Appellant has shown he had a desire to return to the labour market as soon as a suitable job was available, while he was outside Canada from December 29, 2017, to January 25, 2018.

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[20] Paragraph 18(1)(a) of the Act.
[21] *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.
[22] *Canada (Attorney General v Whiffen*, A-1472-92 and *Carpentier v The Attorney General of Canada*, A-474-97.
[23] See page GD8-5

– **Has the Appellant made efforts to find a suitable job?**

[50] Yes. The Appellant was making efforts to find a suitable job. I believe him when he says he continued to look for work while outside Canada, as supported by his emails listing his job search activities.

[51] While they are not binding when deciding this particular requirement, I have considered the list of job-search activities outlined below, as guidance when deciding this second factor.

[52] The Regulations lists nine job-search activities I have to consider. Some examples of those activities are[24]

- assessing employment opportunities
- creating a resume
- registering for job-search tools or with on-line job banks or employment agencies
- applying for jobs

[53] The Appellant says that despite his line of work being seasonal in nature, he continued to pursue job opportunities globally. His job search emails support that he had created cover letters and a resume. He was using job-search tools and applying for advertised jobs for pilots.

[54] I find that the Appellant's efforts are enough to meet the requirements of this second factor. This is because he was actively seeking suitable employment even when he was outside Canada.

[24] See section 9.001 of the Regulations.

– **Did the Appellant set personal conditions that might unduly limit his chances of returning to the labour market?**

[55] No. I find that the Appellant didn't set personal conditions that might have unduly limited his chances of returning to the labour market from December 29, 2017, to January 25, 2018.

[56] The Commission submits that the Appellant cannot prove his availability for work while living outside Canada with the purpose to care for his mother.

[57] I disagree with the Commission. This is because the Appellant has shown that he was actively seeking and available to accept suitable employment, while temporarily residing outside Canada.

[58] I recognize that the Appellant was visiting and providing care for his mother who was seriously ill and attending medical treatment. This said the Appellant has provided credible evidence that he was able to return to Canada within 24 to 48 hours to accept employment.

– **Was the Appellant capable of and available for work and unable to find suitable employment?**

[59] Yes. After considering my findings on each of the three factors together, I find that the Appellant has shown he was capable of and available for work and unable to find suitable employment, while temporarily residing outside Canada from December 29, 2017, to January 25, 2018.[25] This means he has met the availability requirements so he isn't subject to a disentitlement for this reason.

Did the Commission conduct their review within the required time limit?

[60] Yes. The law states that the Commission has 36 months after paying EI benefits, to reconsider a claim for benefits.[26] This period is extended to 72 months in cases where, if

[25] See section 18(1)(a) of the Act.
[26] Section 52 of the Act.

in the opinion of the Commission, a false or misleading statement or representation has been made in connection to a claim.[27]

[61] The law recognizes that the Commission cannot review changes to claims at the exact time they happen. It is precisely for that reason that the Act allows the Commission time to rescind or amend any decision given in any particular claim for EI benefits. The Act provides significant delays of between 36 months and 72 months to allow the Commission time to retrace its steps and make retroactive adjustments.[28]

[62] In this case, the Commission conducted a review of the Appellant's claims after receiving information from the CBSA that the Appellant had travelled outside Canada. It commenced that review on May 15, 2019, for claims covering periods upwards of 16 months earlier (December 29, 2017, to January 25, 2018). The Commission issued its initial decision, imposing retroactive disentitlements, amending the payment of those claims, and issued a non-monetary penalty on July 29, 2021. This is 42 months after the period, which the claims were paid.

[63] The Commission says that the Appellant failed to report his absence to the Commission so it determined that he had provided false or misleading statements when he answered "No" to the question, "Were you outside Canada between Monday and Friday during the period of this report?"

[64] Based on the above, I find that the Commission conducted its review within the required 72-month time limit. This is because the Commission has opined that the Appellant had made a false or misleading statement or representation on his claims, as set out below.

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[27] See subsection 52(5) of the Act.
[28] *Canada (Attorney General) v Landry*, A-532-98.

Did the Appellant knowingly provide false or misleading information*?*

[65] Yes. I find that the Commission has proven the Appellant knowingly provided false or misleading information.

[66] A penalty can be monetary or non-monetary in the form of a warning. To impose a penalty, the Commission has to prove that the Appellant knowingly provided false or misleading information.[29] The Commission also has to show that it is more likely than not that the Appellant provided the information, knowing that it was false or misleading.[30]

[67] If it is clear from the evidence that the questions were simple and the Appellant answered incorrectly, then I can infer that the Appellant knew the information was false or misleading. Then, the Appellant must explain why he gave incorrect answers and show that he did not do it knowingly.[31]

[68] The Commission may impose a penalty for each false or misleading statement knowingly made by the Appellant. I do not need to consider whether the claimant intended to defraud or deceive the Commission when deciding whether he is subject to a penalty.[32]

[69] The burden rests upon the Appellant to ensure that his claims are completed truthfully. This is supported by the attestation on the reports that includes, in part, "…that giving false information for myself or someone other than myself constitutes fraud. I also understand there are penalties for knowingly making false statements."

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[29] Section 38 of the Act.
[30] *Bajwa v Canada*, 2003 FCA 341; the Commission has to prove this on a balance of probabilities, which means it is more likely than not.
[31] *Nangle v Canada (Attorney General)*, 2003 FCA 210.
[32] *Canada (Attorney General) v Miller*, 2002 FCA 24.

[70] The Commission submits that the Appellant made false statements on his reports when he answered "No" to the question about being out of Canada, for the period from December 29, 2017, to January 25, 2018.[33]

[71] The Commission provides copies of the Appellant's reports covering the period from December 29, 2017, to January 25, 2018.[34] On each report, the Appellant answered "No," to the question, "Were you outside Canada between Monday and Friday during the period of this report?"

[72] The Appellant doesn't dispute that he answered "No" to the question, "Were you outside Canada between Monday and Friday during the period of this report," during the period he was outside Canada. Instead, he says that he answered "No" because the system didn't permit him to answer in any other way or to explain the Claimant's absence.

[73] I find it is clear from the evidence that the Appellant knowingly provided false or misleading information on his biweekly claims. I favoured the Commission's documentary evidence over the Appellant's statement that the system didn't allow him to answer in any other way. Although the system didn't allow him to provide an explanation it did allow him to answer "Yes" to the question "Were you outside Canada between Monday and Friday during the period of this report," which would have been truthful because he was in fact outside Canada during the periods of the reports.

[74] The question, "Were you outside Canada between Monday and Friday during the period of this report," is not ambiguous, requiring an explanation. Either the Appellant was outside Canada or he wasn't. Accordingly, I find that the Commission has proven the Appellant knowingly provided false or misleading information on his biweekly reports, for the period under review. This means the Commission may impose a penalty.

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[33] See page GD3-36.
[34] See pages GD3-12 to GD3-26.

Did the Commission decide the penalty properly?

[75] Yes. I find that the Commission decided the penalty properly.

[76] The Commission's decision to issue a penalty, in the form of a warning is discretionary.[35] This means that it is open to the Commission to issue a monetary penalty or non-monetary penalty in the form of a warning.

[77] I have to look at how the Commission exercised its discretion. I can only change the penalty if I first decide that the Commission did not exercise its discretion properly when it set the amount.[36]

[78] The Commission considered the Appellant's circumstances when deciding to impose a penalty in the form of a warning. Specifically it considered the following:

- that this was the first incident of misrepresentation,
- it's the first time the Appellant claimed EI benefits,
- the Appellant was outside Canada visiting his mother who was seriously ill and undergoing medical treatment, and
- the Appellant said he tried different ways to complete his reports but was not provided the right questions that fit his circumstances.

[79] The Commission also considered that the biweekly report for this period of absence directly asked the Appellant if they were outside Canada during the period of their report. By responding "No" to this question, the Commission determined that the

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[35] *Canada (Attorney General) v Kaur*, 2007 FCA 287.
[36] *Canada (Attorney General) v Kaur*, 2007 FCA 287. The Commission's decision can only be interfered with if it 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 Tong*, 2003 FCA 281. Discretion is exercised in a non-judicial manner if, the decision maker acted in bad faith, for an improper purpose or motive, took into account an irrelevant factor or ignored a relevant factor or acted in a discriminatory manner (*Canada* (*Attorney General) v Purcell*, A-694-94).

Appellant knowingly provided false information to the Commission. As well, the Appellant failed to respond to a questionnaire sent by the Commission in April 2019.

[80] The Appellant presented no evidence that the Commission was motivated by an improper or discriminatory motive, or that the Commission acted in bad faith when imposing the penalty in the form of a warning. He didn't point out any irrelevant factors the Commission relied on or relevant factors that were before them that they failed to consider when issuing the penalty. This means I can't interfere with the Commission's decision to impose the warning.

Conclusion

[81] The appeal is allowed in part.

[82] The Appellant has proven he is entitled to an exemption from disentitlement while temporarily residing outside Canada from December 29, 2017, to January 25, 2018.

[83] The Appellant meets the availability requirements, while temporarily residing outside Canada from December 29, 2017, to January 25, 2018. This means he is not disentitled for this reason.

[84] The penalty issued on July 29, 2021, in the form of a warning, remains in full force and effect.

Linda Bell

Member, General Division – Employment Insurance Section