



Citation: *DM v Canada Employment Insurance Commission*, 2023 SST 1060

## **Social Security Tribunal of Canada General Division – Employment Insurance Section**

# **Decision**

**Appellant:** D. M.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (564802) dated January 17, 2023 (issued by Service Canada)

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**Tribunal member:** Gary Conrad

**Type of hearing:** Teleconference

**Hearing date:** May 30, 2023

**Hearing participant:** Appellant

**Decision date:** June 2, 2023

**File number:** GE-23-303

## **Decision**

[1] The appeal is dismissed.

[2] The Appellant cannot be paid benefits for the time she was outside Canada. She also does not meet any of the exemptions that would allow her to be paid benefits while she is outside the country. However, I am modifying the disentitlement for being outside Canada to end on July 28, 2019, as she was back in Canada on July 29, 2019.

[3] The Appellant has also not proven that she was available for work, so the disentitlement issued by the Commission for not being available is upheld.

[4] Finally, the Commission has proven the Appellant knowingly provided false information when she completed her claimant reports and failed to report she was outside of Canada.

[5] The Commission also acted properly when issuing the warning letter, which means I cannot interfere in their decision, so the warning letter will remain on the Appellant's file.

## **Overview**

[6] While in receipt of Employment Insurance (EI) benefits the Appellant took a trip to Alaska with her mother. She did not tell the Commission about this trip.

[7] The Commission became aware that the Appellant had been outside of Canada while in receipt of EI benefits and asked her why she had not reported this to them.

[8] The Appellant told the Commission that her trip was a last-minute trip she had made to spend time with her mother as her mother was very ill. She did not report the trip to the Commission because she had other things on her mind, she thought Alaska was in Canada, and she had already filed her claimant reports prior to the trip so could not have reported on them that she was outside Canada.

[9] The Commission decided that the Appellant was not payable benefits for the period she was outside Canada, was not available for work while she was outside Canada, and had knowingly made false statements to them, so they issued a warning letter.

[10] The Appellant argues that the Commission should have switched her to compassionate care benefits due to her taking care of her ill mother as that would have solved the issue.

## **Matters I have to consider first**

### **Issues under appeal**

[11] The Appellant has argued that the Commission should have switched her to compassionate care benefits as that would have been the better option because she was taking care of her dying mother.

[12] However, I find I cannot decide on whether the Appellant should have been given compassionate care benefits because she never applied for them and no decision by the Commission has been made on her eligibility for them.

[13] My jurisdiction, in other words what I can consider in making my decision, flows from the reconsideration decision, and the reconsideration decision was made on the Appellant's entitlement to regular benefits, so that is what I will be looking at in this decision.

### **50(8) disentitlement**

[14] In their submissions the Commission states they disentitled the Appellant under subsection 50(8) of the *Employment Insurance Act* (Act). Subsection 50(8) of the Act relates to a person failing to prove to the Commission that they were making reasonable and customary efforts to find suitable employment.

[15] In looking through the evidence, I do not see any requests from the Commission to the Appellant to prove her reasonable and customary efforts, or any explanations

from the Commission to the Appellant about what kind of proof she would need to provide to prove her reasonable and customary efforts.

[16] While not bound by it, I find the reasoning in *TM v Canada Employment Insurance Commission*, 2021 SST 11 persuasive, in that it is not enough for the Commission to discuss job search efforts with the Appellant, instead they must specifically ask for proof from the Appellant and explain to her what kind of proof would meet a “reasonable and customary” standard.

[17] I also do not see any discussion about reasonable and customary efforts during the reconsideration process<sup>1</sup> or explicit mention of disentitling the Appellant under section 50(8) of the Act, or anything about the Appellants lack of reasonable and customary efforts in the reconsideration decision.

[18] Based on the lack of evidence the Commission asked the Appellant to prove her reasonable and customary efforts to find suitable employment under subsection 50(8) of the Act, the Commission did not disentitle the Appellant under subsection 50(8) of the Act. Therefore, it is not something I need to consider.

## **Issues**

[19] Can the Appellant be paid benefits when she was outside of Canada?

[20] Was the Appellant available for work?

[21] Did the Commission prove the Appellant knowingly provided false or misleading information on her claimant reports?

[22] Did the Commission act properly when they decided to issue a warning letter?

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<sup>1</sup> GD03-30

## Analysis

### Benefits outside of Canada

[23] The Appellant cannot be paid benefits when she was outside of Canada; however, I am modifying the disentitlement to end on July 28, 2019, as the Appellant was back in Canada on July 29, 2019.

[24] Generally, a person is not entitled to receive benefits when they are outside of Canada, although there are some exceptions to this rule.<sup>2</sup>

[25] The Appellant says that she left Canada on July 14, 2019, to go on a trip with her mother to Alaska and returned on July 29, 2019.

[26] The Appellant says the trip (vacation) was a last-minute thing to spend some more time with her mother who was very ill. They flew to Seattle and then from Seattle they flew to Alaska.

[27] The Commission says they disentitled the Appellant from July 15 to July 29, 2019, because she was outside Canada, and the reason she was outside Canada is not one of the exceptions that allow for benefits to be paid to someone outside the country.

[28] Unfortunately for the Appellant, I find that for the period she was outside Canada, she cannot be paid benefits because going on a vacation with her mother, even though her mother was terminally ill, is not one of the exceptions that allows for benefits to be paid while outside of Canada.

[29] However, I am modifying the period of the disentitlement as the Appellant was back in Canada by July 29, 2019, so she should only be disentitled from July 15 to July 28, 2019, the dates she was actually outside the country.

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<sup>2</sup> Subsection 37(b) of the *Employment Insurance Act*

[30] I understand the Appellant has argued that she thought Alaska was part of Canada, but Alaska is part of the United States of America, so is Seattle. So, for the period of July 15 to July 28, 2019, the Appellant was undeniable outside of Canada.

## **Availability for work**

[31] Case law sets out three factors for me to consider when deciding whether the Appellant was capable of and available for work but unable to find a suitable job. The Appellant has to prove the following three things:<sup>3</sup>

- a) She wanted to go back to work as soon as a suitable job was available.
- b) She made efforts to find a suitable job.
- c) She didn't set personal conditions that might have unduly (in other words, overly) limited her chances of going back to work.

[32] When I consider each of these factors, I have to look at the Appellant's attitude and conduct for the entire period of the disentitlement,<sup>4</sup> (July 15 to July 29, 2019).

### **– Wanting to go back to work**

[33] I find the Appellant has not shown she had a desire to return to work because she was on vacation with her mother, and she says her focus was on spending time with her mother.

### **– Making efforts to find a suitable job**

[34] The Appellant did not make any efforts to find a suitable job.

[35] The Appellant says that she had brought her laptop with her so she could check in with work because even though she was laid off over the summer and not getting

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<sup>3</sup> These three factors appear in *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96. This decision paraphrases those three factors for plain language.

<sup>4</sup> Two decisions from case law set out this requirement. Those decisions are *Canada (Attorney General) v Whiffen*, A-1472-92; and *Carpentier v Canada (Attorney General)*, A-474-97.

paid, there was still things she needed to handle to be ready for when she came back in the fall.

[36] The Appellant says that while on vacation she would stop off at internet cafes and log in to her work account to handle any sort of issues that came up. She says she would do this a couple times a week.

[37] I find that the Appellant logging into her work account and spending a day or two dealing with work issues does not constitute searching for work or excuse her from the requirement to search for a suitable job. Even if she was guaranteed to be called back to work in the fall, she still must be searching for work.<sup>5</sup>

[38] Since the Appellant made no efforts to look for work, she cannot satisfy this factor of availability.

– **Unduly limiting chances of going back to work**

[39] I find the Appellant did set personal conditions that were unduly, or over limited her chances of returning to the labour market.

[40] I find her personal condition of being on vacation, and not making efforts to look for work, would overly limit her chances of returning to the labour market as it is rather hard to return to the labour market if you are not looking for work.

[41] I can completely understand the Appellant's desire to spend time with her mother, due to how sick her mother was, but the vacation and decision to not look for work were still person conditions that would overly limit her chances of returning to the labour market.

– **So, was the Appellant capable of and available for work?**

[42] Based on my findings on the three factors, I find that the Appellant has not shown that she was capable of and available for work but unable to find a suitable job.

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<sup>5</sup> De Lamirande v Canada (Attorney General), 2004 FCA 311

## Knowingly providing false or misleading information

[43] The Appellant did knowingly provide false or misleading information.

[44] To impose a penalty, the Commission has to prove that the Appellant knowingly provided false or misleading information.<sup>6</sup>

[45] It is not enough that the information is false or misleading. In order to issue a penalty the Commission has to show that it is more likely than not that the Appellant provided the information knowing it was false or misleading.<sup>7</sup>

[46] If it is clear from the evidence the question asked of the Appellant was 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 she gave incorrect answers and show she did not do it knowingly.<sup>8</sup>

[47] I do not need to consider whether the Appellant intended to defraud or deceive the Commission when deciding whether she is subject to a penalty.<sup>9</sup>

[48] The Commission says the Appellant made false representations when she failed to disclose her exit from Canada and said she was available for work on her claimant reports.

[49] The Commission says the Appellant's claim she thought Alaska was part of Canada is not credible because she traveled with her passport and even completed a customs declaration for the day she left Canada and the day she returned.

[50] The Commission says the Appellant's statement she was available for work were also false since she was on vacation.

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<sup>6</sup> See section 38 of the *Employment Insurance Act*. While the Commission did not issue a monetary penalty, and instead issued a warning letter, the warning letter simply replaces the monetary amount, there is still the requirement for a penalty to be issued. (See section 41.1 of the *Employment Insurance Act*).

<sup>7</sup> *Bajwa v Canada*, 2003 FCA 341

<sup>8</sup> *Nagle v Canada (Attorney General)*, 2003 FCA 210

<sup>9</sup> *Canada (Attorney General) v Miller*, 2002 FCA 24



[51] Finally, the Commission says the Appellant's argument that she had already completed her claimant reports prior to the trip, so could not have reported she was outside Canada, is not correct, as she completed the claimant reports after she returned from her trip.

[52] I find the Appellant did not knowingly provide false information on her claimant reports for the period of July 14 to 27, 2019, and July 28 to August 10, 2019, when she declared she was available for work.

[53] I find her testimony credible that because she had her laptop with her and was dealing with work issues while on vacation, she felt she was available for work. While that may not satisfy the legal test for "availability" that is not what is at issue here. What matters is whether the Appellant knowingly provided false information and I find she did not do so knowingly.

[54] However, I find the Appellant did knowingly provide false information when she answered "no" to the question "Were you outside Canada between Monday and Friday during the period of this report?" for the periods of July 14 to 27, 2019, and July 28 to August 10, 2019.

[55] First, these claimant reports were completed on July 29, 2019,<sup>10</sup> and August 9, 2019,<sup>11</sup> respectively, so the Appellant completed them after her trip was over which means she was not prevented from accurately reporting her absence from Canada on these reports.

[56] I also do not find the Appellant's testimony credible that she thought Alaska was part of Canada, as this is such a commonly known fact, it is not possible to accept she was ignorant of this fact. Further, the Appellant completed a customs declaration when she returned to Canada. She completed this declaration on July 29, 2019. If, as she says, only going to Seattle was entering the United States, and when she flew from Seattle to Alaska she was crossing back into Canada, then it would not make sense for

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<sup>10</sup> GD03-20

<sup>11</sup> GD03-25

her to have completed this declaration on July 29, 2019, as she would have returned to Canada much earlier (as in when she went to Alaska).

[57] However, even if I give the Appellant the benefit of the doubt and assume that somehow, she was completely unaware that Alaska was a part of the United States, she still says that she was aware Seattle was in the United States, so she still would have knowingly provided false information on her claimant report when she said she was not out of the country.

[58] Finally, I do not find the Appellant's testimony credible that due to her mother's illness and the last-minute nature of this trip her mind was elsewhere so she just answered the questions as normal and was not really thinking about it.

[59] She completed the first claimant report the day she returned from the trip and the other a couple weeks later, so it is not credible that she could have forgotten about the trip she just took out of the country when she was completing her claimant reports.

## **Properly issuing a warning letter**

[60] The Commission decided to issue warning letter, as the timeline to issue a monetary penalty had passed.

[61] The Commission's decision to issue a warning letter is discretionary.<sup>12</sup> This means they can decide to issue one if they want, but they do not have to. I can only interfere in the Commission's decision if they exercised their discretion improperly when they made their decision to issue a warning letter.<sup>13</sup>

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<sup>12</sup> *Canada (Attorney General) v Kaur*, 2007 FCA 287

<sup>13</sup> *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, or for an improper purpose or motive, took into account an irrelevant factor or ignored a relevant factor or acted in a discriminatory manner: *Attorney General of Canada v Purcell*, A-694-94

[62] The Appellant says that while she feels the Commission did not act in bad faith, or for an improper purpose or motive, she feels they ignored a relevant factor, considered an irrelevant factor, and discriminated against her.

### **Ignored a relevant factor**

[63] The Appellant says that the Commission ignored the fact they could have switched her to compassionate care benefits and did not tell her in detail what she would need to do to get on those benefits.

[64] I find the Commission did not ignore the Appellant's comments about switching to compassionate care benefits and took them into account when they made their decision as they mention as such in their Record of Decision.<sup>14</sup>

### **Considered irrelevant factor**

[65] The Appellant says the Commission did not listen to her side of the story and simply ignored her. She says they also had no empathy towards what she was going through at the time with her mother.

[66] I find the Appellant has not raised an irrelevant factor that the Commission considered; she has actually just raised more issues she feels the Commission ignored.

[67] However, in considering these issues I do not see the Commission as ignoring her side of the story because they listened to the information she provided and considered it in making their decision.<sup>15</sup> The fact the Commission did not agree with the Appellant does not mean they ignored her.

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<sup>14</sup> GD03-47

<sup>15</sup> See the record of decision on GD03-46 and 47

**Discrimination**

[68] The Appellant says she feels the Commission discriminated against her as they gathered all this information from her, but it did not change anything. She feels they did not consider her side of the story.

[69] I find the Appellant has not demonstrated the Commission discriminated against her. Just because they did not change their decision based on all the information she provided does not mean they discriminated against her.

**So, did the Commission decide act properly when issuing a warning letter?**

[70] I find the Commission did act properly as the Appellant has not demonstrated the Commission failed to act judicially and I do not see anything that would suggest to me the Commission failed to act judicially.

[71] Since the Commission acted properly when they issued the warning letter I cannot intervene in their decision. This means the warning letter will remain on the Appellant's file.

## Conclusion

[72] The appeal is dismissed.

[73] The Appellant cannot be paid benefits for the time she was outside Canada as she does not meet any of the exemptions that allow for this to happen. However, I am modifying the disqualification for being outside Canada to end on July 28, 2019, as she was back in Canada on July 29, 2019.

[74] The Appellant has also not proven that she was available for work for the period of July 15 to 29, 2019, so the disqualification issued by the Commission for not being available is upheld.

[75] Finally, the Commission has proven the Appellant knowingly provided false information when she completed her claimant reports and failed to report she was outside of Canada. The Commission also acted properly when issuing the warning letter, which means I cannot interfere in their decision, so the warning letter will remain on the Appellant's file.

Gary Conrad

Member, General Division – Employment Insurance Section