Citation: *ML v Canada Employment Insurance Commission*, 2022 SST 1040

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant: M. L.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (446273) dated January 8, 2022 (issued by Service Canada)

Tribunal member: John Noonan

Type of hearing: Teleconference
Hearing date: March 30, 2022
Hearing participants: Appellant
Decision date: April 7, 2022
File number: GE-22-537

Decision

[1] The appeal is dismissed.

Overview

[2] The Appellant, M. L., a worker in ON, was upon reconsideration by the Commission, notified that it was unable to pay him Employment Insurance benefits from March 30, 2018 to April 2, 2018 because you were not in Canada. Additionally, from March 29, 2018 to April 3, 2018 you were on vacation and therefore could not prove your availability for work. which is , a condition of being eligible to receive benefits and we have concluded that you knowingly made false representations resulting in a non-monetary penalty. The Appellant maintains he did not feel obligated to look for work on the statutory holiday as businesses were closed. The Tribunal must decide if the Appellant has proven his availability pursuant to sections 18 and 50 of the Employment Insurance Act (the Act) and sections 9.001 and 9.002 of the Employment Insurance Regulations (the Regulations) and if the Appellant is disentitled to EI benefits because he was outside of Canada and should the notice of violation issued pursuant to the Act stand?

Issues

[3] Issue # 1: Was the Appellant available for work?

Issue #2: Was he making reasonable and customary efforts to obtain work?

Issue #3: Did he set personal conditions that might unduly limit his chances of returning to the labour market?

Issue # 4. Is the Appellant disentitled to EI benefits because he was outside of Canada? If so, for what period? Does the Appellant come within the exception to section 37(b) of the Act provided for claimants travelling outside of Canada as per section 55 of the Regulation?

Issue # 5. Were there any misrepresentations made by the Appellant, either by knowingly providing false or misleading information to the Commission or by withholding correct information which should result in a penalty pursuant to section 38 and an overpayment being assessed on this claim? If so should the notice of violation issued pursuant to the Act stand?

Analysis

[4] The relevant legislative provisions are reproduced at GD-4.

[5] In order to be found available for work, a claimant shall: 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 chances of returning to the labour market. All three factors shall be considered in making a decision. **(Faucher A-56-96 & Faucher A-57-96)**

[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) (**see Attorney General of Canada v. Bendahan 2012 FCA 237).**

[7] **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 in irrelevant factor or ignored a relevant factor or acted in a discriminatory manner: **Attorney General of Canada v Purcell, A-694-94.**

Issue 1: Was the Appellant available for work?

[8] No.

[9] In this case, by the Appellant’s statements and submissions, he was not seeking full time work due to his being outside Canada from March 29, 2018 through to April 3, 2018.

[10] However he testified that two of the days involved were statutory holidays and therefore should not have been considered by the Commission. He reported his part time work at Wal-Mart and had he been scheduled to work he would not have taken the trip to New York.

[11] He testified that there is nothing in the Commission’s policy regarding having to be available on statutory holidays.

[12] The Commission cannot be expected to, in any policy statement, cover all possible scenarios as they pertain to the Act and the Regulations. It was explained that the courts have ruled these platforms are not designed to address all circumstances.

[13] Incomplete or misleading information from Commission is not a ground for entitlement (**2002 FCA 325 and CUB 39123).**

[14] I find that the actions or lack thereof on the part of the Appellant during the period in question do not show a sincere desire to return to the labour market as soon as suitable full time employment is offered.

Issue 2: Was he making reasonable and customary efforts to obtain work?

[15] No.

[16] As per her submissions and testimony at the hearing, the Appellant has not been conducting a comprehensive job search during the period in question.

[17] The Appellant’s submissions and testimony at the hearing indicate no on-going effort on the Appellant’s part to obtain employment during this period.

[18] I find that the Appellant has not, shown that he was making reasonable and customary efforts to obtain suitable employment.

Issue 3: Did he set personal conditions that might unduly limit his chances of returning to the labour market?

[19] Yes.

[20] Again, the Appellant's submissions and testimony at the hearing indicate no on-going effort on the Appellant's part to obtain employment.

[21] He was outside Canada on a personal trip.

[22] I find that the Appellant has set personal conditions which unduly limited his chances of finding and accepting full time employment, a requirement of being eligible to receive benefits.

[23] By itself, a mere statement of availability by the claimant is not enough to discharge the burden of proof**. CUBs 18828 and 33717**

[24] I find the Appellant, by his submissions and actions, has not met the burden of proof required to show he was in fact available for work during the period in question.

Issue 4: Is the Appellant disentitled to EI benefits because he was outside of Canada? If so, for what period? Does the Appellant come within the exception to section 37(b) of the Act provided for claimants travelling outside of Canada as per section 55 of the Regulation?

[25] Yes.

[26] By the Appellant's admission, he was, in fact, outside Canada for the period in question.

[27] He failed to report same on his bi-weekly reports upon his return to Canada. He testified that he was unaware of any mechanism available to him to allow him to amend his response to the questions posed but agreed he made no effort to contact Service Canada to inquire if changes were possible.

[28] The Appellant confirmed he left Canada for the period March 29, 2018 to April 3, 2018.

[29] The Appellant has not proven that his reason for being outside of Canada while on claim comes within the exceptions listed in paragraph 55 of the EI Regulations.

[30] The Appellant has not put forward any evidence that he qualifies for any other exceptions provided for in subsection 55 of the EI Regulations that might assist him with the disentitlement

[31] Having failed to show the total of his travel period fall within any of the other exceptions provided for in subsection 55 of the EI Regulations, the Tribunal finds that section 37 of the EI Act applies to those days. The Tribunal therefore finds that the Appellant is not entitled to EI benefits for the period March 30, 2018 to April 2, 2018.because he was outside of Canada while on claim.

[32] According to the Federal Court of Appeal decision in Picard, 2014 FCA 46, a disentitlement is not imposed for a departure or return day when the claimant is outside of Canada for a partial day. The Appellant was outside of Canada for a partial day on the date of departure and return and is therefore not disentitled from benefits for being outside of Canada on these days. The disentitlement is therefore imposed from March 30, 2018 to April 2, 2018.

[33] While I understand the Appellant's frustration regarding his not being able to collect benefits while Outside Canada on statutory holidays I must consider the facts and apply the statutory requirements and cannot ignore, refashion, circumvent or rewrite the Act, even in the interest of compassion **(Canada (Attorney General) v. Knee, 2011 FCA 301).**

[34] The Tribunal finds that the Appellant is not entitled to EI benefits the period March 30, 2018 to April 2, 2018. because he was outside of Canada.

Issue 5: Were there any misrepresentations made by the Appellant, either by knowingly providing false or misleading information to the Commission or by withholding correct information which should result in a penalty pursuant to section 38 and an overpayment being assessed on this claim? If so should the notice of violation issued pursuant to the Act stand?

[35] By the Appellant's admission, he was, in fact, outside Canada for the period in question.

[36] Again, he failed to report same on his bi-weekly reports upon his return to Canada. He testified that he was unaware of any mechanism available to him to allow him to amend his response to the questions posed but agreed he made no effort to contact Service Canada to inquire if changes were possible. This confirms he was aware of the misinformation supplied to the Commission resulting in benefits being paid.

[37] The Appellant here read and indicated he understood his rights and obligations regarding his claim for benefits. One of these obligations was to report any absence from Canada.. He failed to do so. As the Appellant testified at his hearing that he was aware he was making misrepresentations because he testified that he was unaware of any procedures that would allow him to change his answers. Therefore I find that the Appellant did knowingly make false representations to the Commission by failing to report his absence from Canada resulting in him obtaining benefits to which he was not entitled, the overpayment. Mootoo v. Canada (AG), 2003 FCA 206; Canada (AG) v. Gates, A-600-94

[38] I find that the Commission rendered its decision in this case in a judicial manner, as all the pertinent circumstances were considered when assessing the non monetary penalty.

[39] The Federal Court of Appeal confirmed the principle that the Commission has sole discretion to impose a penalty under section 38 of the Act. The Court further reiterated that no Court, Umpire or Tribunal is entitled to interfere with a Commission's

ruling with respect to the penalty, so long as the Commission can prove that it exercised its discretion “in a judicial manner”. In other words, the Commission must demonstrate that it acted in good faith, taking into account all relevant factors and ignoring any irrelevant factors. Canada (AG) v. Uppal, 2008 FCA 388; Canada (AG) v. Tong, 2003 FCA 281

[40] I have found that the Appellant has failed to show that there could be an innocent interpretation of his actions when he failed to disclose the correct information relating to his being outside Canada while in receipt of benefits therefore the violation must remain in effect.

[41] Regarding the Appellant’s expectation that the Tribunal could cause the overpayment to be waived, this is a decision that can only be made by the Commission, the Tribunal has no jurisdiction in this matter. The Commissions decision regarding same is not appealable to the Tribunal. Only the Commission decision that caused the overpayment is subject to the reconsideration under section 112 of the Employment Insurance Act (the Act). The claimant’s responsibility to repay an overpayment and the interest charged on an overpayment is not subject to reconsideration because these are not decisions of the Commission, and the claimant’s liability is as a “debtor” as opposed to a “claimant”. The claimant’s recourse regarding these issues is to seek judicial review with the Federal Court of Canada.

[42] I do not have the authority to reduce or write off the overpayment. The Tribunal does not have the jurisdiction to decide on matters relating to debt reduction or write off. It is the Commission who holds the authority to reduce or write-off an overpayment.

[43] The Appellant requests that the overpayment be erased. I agree with the stated position of the Commission and I note that the law states that their decision regarding writing off an amount owed can’t be appealed to the Social Security Tribunal. This means that I cannot determine matters relating to a request for a write-off or reduction of an overpayment.

[44] The Federal Court of Canada has the jurisdiction to hear an appeal relating to a write-off issue. This means that if the Claimant wishes to pursue an appeal regarding her request to write off the overpayment, she needs to do so through the Federal Court of Canada.

[45] As a final matter, I cannot see any evidence in the file that the Commission advised the Appellant about the debt forgiveness program through Canada Revenue Agency (CRA). If immediate repayment of the overpayment pursuant to section 44 of the EI Act will cause her financial hardship, she can call the Debt Management Call Centre of CRA at 1-866-864-5823. She may be able to make alternative repayment arrangements based on her individual financial circumstances

Conclusion

[46] I find that, having given due consideration to all of the circumstances, the appeal is dismissed on all issues.

John Noonan

Member, General Division – Employment Insurance Section