



Citation: *ML v Canada Employment Insurance Commission*, 2024 SST 1070

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant: M. L.
Representative: N. O.

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: Suzanne Graves

Type of hearing: In writing

Decision date: September 4, 2024

File number: GE-23-2736

Decision

[1] The appeal is allowed in part.

[2] The Commission hasn't proved that the Appellant knowingly provided false or misleading information. So, the Appellant isn't subject to a penalty.

[3] The Appellant hasn't proved he was available for work from March 30, 2018, to April 2, 2018. He has shown that he was available for work on March 29, 2018, and on April 3, 2018.

Overview

The appeal was returned to the General Division for a new hearing

[4] On January 8, 2022, the Tribunal's General Division (GD) decided that the Appellant couldn't receive employment insurance (EI) benefits from March 30, 2018, to April 2, 2018, because he was outside Canada. It also decided that he hadn't shown he was available for work from March 29, 2018, to April 3, 2018, and that he had knowingly provided false information on his biweekly reports.

[5] The Appellant appealed the GD's decision to the Tribunal's Appeal Division (AD). On September 20, 2023, the AD allowed the appeal in part and returned the matter to the GD for another hearing on: whether the Appellant was available for work, whether he made a false statement, and how the Commission decided the appropriate penalty.

[6] I scheduled a hearing for December 21, 2023. The Appellant told the Tribunal he wouldn't be able to attend a hearing because of his ongoing medical issues. Following two case conferences on July 8, 2024, and July 29, 2024, I decided to hold a hearing in writing and allowed the Appellant until August 30, 2024, to send in any new documents.

[7] The Appellant wrote to the Tribunal on August 29, 2024, stating that he had no new documents to send in, and asking me to make the decision based on documents already on file.

Issue #1: Penalty

[8] To be paid EI benefits, claimants complete online reports. The reports ask a series of questions. The Commission makes its decision about entitlement to benefits based on the claimant's answers to those questions.

[9] The Commission reviewed the Appellant's answers on his biweekly reports about whether he had been out of Canada from March 29, 2018, to April 3, 2018. It decided that he had knowingly provided false or misleading information on his reports, because he stated that he hadn't been outside Canada. It imposed a non-monetary penalty.

[10] The Appellant argues that he didn't knowingly report false information. He says that he was only out of Canada on the long Easter weekend for a sports event. He didn't know he had to report his absence from Canada on statutory holidays.

Issue #2: Availability for work

[11] The Commission also decided that the Appellant can't receive benefits from March 29, 2018, to April 3, 2018, because he didn't show that he was available for work.

[12] A claimant has to be available for work to get EI regular benefits. Availability is an ongoing requirement. This means that a claimant has to be searching for a job.

[13] The Commission says the Appellant hasn't shown he was available for work because he was away on vacation from March 29, 2018, to April 3, 2018. The Appellant argues he wasn't aware that he had to be available for work on dates that fell on long holiday weekends.

Issues

[14] Has the Commission proved that the Appellant knowingly provided false or misleading information on his claim reports? If he did, then I must also decide whether the Commission properly decided to impose a non-monetary penalty.

[15] Was the Appellant available for work from March 29, 2018, to April 3, 2018?

Analysis

Issue #1: Penalty

Did the Appellant knowingly provide false or misleading information?

[16] To impose a penalty, the Commission has to prove that the Appellant knowingly provided false or misleading information.¹ It is not enough that the information is false or misleading. To be subject to a penalty, the Commission has to show that it is more likely than not that the Appellant knowingly provided it, knowing that it was false or misleading.²

[17] If it is clear from the evidence that the questions were simple and the Appellant answered incorrectly, then I can infer that he 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.³ The Commission may impose a penalty for each false or misleading statement knowingly made by the Appellant.

[18] I don't need to consider whether the Appellant intended to defraud or deceive the Commission when deciding whether he is subject to a penalty.⁴

[19] Each of the Appellant's claim reports asked the question: "Were you outside Canada between Monday and Friday during the period of this report?" The Appellant responded: "No" on two reports for the weeks of March 25, 2018, and April 1, 2018.⁵

[20] The Commission decided that the Appellant knowingly made false or misleading statements because he was out of Canada and didn't report it on his biweekly reports. It says that if he had made an error, he could have later amended his reports to correctly report his absence from Canada.

¹ Section 38 of the *Employment Insurance Act* (EI Act).

² *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.

³ *Nangle v Canada (Attorney General)*, 2003 FCA 210.

⁴ *Canada (Attorney General) v Miller*, 2002 FCA 24.

⁵ The Commission filed copies of the Appellant's biweekly reports for the relevant weeks at GD3-18 to 29.

[21] The Appellant testified that he didn't report that he was out of Canada, because he was only away for the long Easter weekend and had made his reports before leaving. He didn't think he had to let the Commission know about his absence on statutory holidays. He told the Commission that he had been invited on short notice to a sports tournament, leaving Canada in the evening of Thursday, March 29, 2018.⁶

[22] I first reviewed the questions on the form that the Appellant answered. The Appellant answered "no" to the straightforward question: "Were you outside Canada between Monday and Friday during the period of this report?"

[23] I next considered the Appellant's argument that he was invited to a sports tournament in the United States and didn't realize that he had to report his absence from Canada on a long weekend. It is not disputed that he left Canada in the evening of March 29, 2018, and was away on Good Friday until the night after Easter Monday.

[24] The Appellant also told the Commission that he recalled completing his reports before he left Canada. But the evidence shows that he completed his report for the week of April 1, 2018, on April 11, 2018.

[25] I have already decided that the Appellant didn't correctly report his absence from Canada. I haven't put any weight on the Appellant's statement to the Commission that he completed his reports before he left Canada, since he made this statement based on a recollection three years after filing his reports.

[26] I have put most weight on the Appellant's stated explanation to the Commission that he believed it wasn't necessary to report an absence from Canada on a long holiday weekend. He assumed that both Good Friday and Easter Monday were statutory holidays as he had those days off in his previous jobs. He readily acknowledged his reporting error when the Commission followed up with him in 2021.

[27] The Appellant's explanation for not reporting his absence is consistent with other statements he made to the Commission. The fact that he didn't later amend his reports

⁶ The relevant part of the Appellant's response to the Commission's enquiry is at GD3-38.

isn't relevant to the issue of whether he knowingly made a false report. I find that it is more likely than not that the Appellant didn't knowingly give false or misleading information on his biweekly reports.

[28] Since I have decided that the Appellant didn't knowingly make a false or misleading statement, the Commission's decision to impose a non-monetary penalty is rescinded.

Issue #2: Availability for work

[29] Two different sections of the law require claimants to show that they are available for work. The Commission decided that the Appellant was disentitled under both of these sections.

[30] First, the *Employment Insurance Act* (EI Act) says that a claimant has to prove that they are making "reasonable and customary efforts" to find a suitable job.⁷ The *Employment Insurance Regulations* give criteria that help explain what "reasonable and customary efforts" mean.

[31] Second, the EI Act says that a claimant has to prove that they are "capable of and available for work" but aren't able to find a suitable job.⁸ Case law gives three things a claimant has to prove to show that they are "available" in this sense.⁹

[32] The Commission decided that the Appellant couldn't receive regular benefits because he wasn't available for work based on these two sections of the law. I make no findings under section 50(8) of the EI Act as there is no evidence that the Commission made a decision on this issue.

[33] I will consider whether the Appellant has shown he was capable of and available for work and unable to find suitable employment while he was temporarily outside Canada from March 29, 2018, until April 3, 2018.

⁷ See section 50(8) of the EI Act.

⁸ See section 18(1)(a) of the EI Act.

⁹ See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96

[34] 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:¹⁰

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

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

[35] The Appellant has shown that he wanted to work. The Appellant reported that he was already working at a part-time job and showed those earnings on his reports.¹¹ So, I find that the evidence shows that the Appellant had a desire to return to the labour market.

Did the Appellant make efforts to find a suitable job?

[36] On his biweekly report for the week of April 1, 2018, the Appellant reported that he started a new job during the reporting period. He also worked part-time hours during this period. The EI Act doesn't require that a claimant must be looking for a full-time job.

[37] There is no evidence that the Appellant was looking for work during the days he was playing in a sports tournament from March 30, 2018, to April 2, 2018. But there is enough evidence to show that the Appellant was making efforts to find new work on the dates he was in Canada. He left Canada in the evening after working hours on March 29, 2018, and returned in the early morning of April 3, 2018. So, I find that his job search efforts meet this second factor on March 29, 2018, and on April 3, 2018.

¹⁰ 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.

¹¹ See GD3-28.

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

[38] The Appellant's flight itinerary shows that he left Canada at 8:55 p.m. on March 29, 2018, and was scheduled to return at 11:05 p.m. in the evening of April 2, 2018.¹²

[39] The parties agree that the Appellant played in a sports tournament from March 30, 2018, to April 2, 2018. This was a personal condition which unduly limited his chances of returning to work during that period.

[40] The evidence shows that the Appellant left Canada several hours after the end of a working day on March 29, 2018. He arrived home late in the evening of April 2, 2018, or early in the morning of April 3, 2018. So, I find that the Appellant didn't set any personal conditions that might have unduly limited his chances of returning to the job market on the two days of April 29, 2018, and April 3, 2018.

So, was the Appellant available for work from March 29, 2018, to April 3, 2018?

[41] After considering my findings on each of the three factors together, I find that the Appellant has shown he was available for work and unable to find suitable employment on the two days of March 29, 2018, and April 3, 2018.

[42] The Appellant hasn't shown that he was available for work while he was attending a sports tournament from March 30, 2018, to April 2, 2018.

The Appellant still has an overpayment of benefits

[43] The Appellant will still have an overpayment of benefits for the period from March 30, 2018, to April 2, 2018. I note that the AD decision upheld the GD's earlier finding that he also can't receive benefits for that period because he was outside Canada.

¹² The Appellant's flight schedule information is shown at GD3-41.

[44] I have no authority to reduce or cancel overpayments. Only the Commission can write off an amount payable under section 43 of the EI Act.¹³

[45] The Appellant still has two options with respect to the overpayment. He can ask the Commission to consider writing off the debt because of undue hardship. If he doesn't agree with the Commission's response, he can file a Notice of Application for Judicial Review with the Federal Court of Canada.¹⁴

[46] The Appellant can also telephone the Debt Management Call Centre at Canada Revenue Agency (CRA) at 1-866-864-5823 and ask about debt relief due to financial hardship.¹⁵ He would need to present information about his financial circumstances for consideration.

Conclusion

[47] The Appellant didn't knowingly make false misrepresentations, so he isn't subject to a penalty.

[48] The Appellant has not shown that he was available for work from March 30, 2018, to April 2, 2018, so he is disentitled from receiving benefits for that period.

[49] The Appellant has shown he was available for work on March 29, 2018, and on April 3, 2018, so he is not disentitled from receiving benefits on those two dates.

[50] This means that the appeal is allowed in part.

Suzanne Graves

Member, General Division – Employment Insurance Section

¹³ See section 56 of the Regulations.

¹⁴ It is up to the Appellant to investigate the process and take the required steps to appeal to the Federal Court. Application forms are usually available by calling the Courts Administration Service (1-613-992-4238) or by going to a local office of the Courts Administration Service.

¹⁵ The Debt Management Call Centre telephone number is also shown on the Notice of Debt and account statements sent to the Appellant for the overpayment.