Citation: *J. B. v. Canada Employment Insurance Commission*, 2013 SSTGDEI 1

Appeal #: GE-13-97

BETWEEN:

J. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance

SOCIAL SECURITY TRIBUNAL MEMBER:	Eleni Palantzas
HEARING DATE:	15 August 2013
TYPE OF HEARING:	Teleconference
DECISION:	Appeal dismissed

PERSONS IN ATTENDANCE

Ms. J. B., the Claimant, participated by telephone.

DECISION

[1] The Member finds that the Claimant was not in Canada from April 1, 2013 to April 5, 2013 and again, from April 18, 2013 to April 23, 2013 and is therefore, disentitled to benefits for both periods.

INTRODUCTION

[2] On April 10, 2013, the Claimant applied for regular benefits which became effective March 31, 2013.

[3] On April 15, 2013 the Canada Employment Insurance Commission (Commission) imposed a disentitlement to benefits for the periods April 1, 2013 to April 5, 2013 and again, from April 18, 2013 to April 23, 2013.

[4] On April 26, 2013 the Claimant requested a reconsideration of the Commission's decision. On May 29, 2013, the Commission verbally advised the Claimant that while outside the country on vacation, she is not payable and therefore, maintained its decision.

[5] On June 6, 2013, the Claimant appealed to the General Division of the Social Security Tribunal.

[6] On June 20, 2013 the Member, advised the Claimant of the intent to summarily dismiss the appeal. The Claimant was invited to provide written submissions no later than July 19, 2013.

[7] On July 11, 2013 the Claimant made further submissions and on July 31, 2013 the Claimant was advised that her appeal would proceed to a hearing.

FORM OF HEARING

[8] After reviewing the evidence and submissions of the parties to the appeal, the Member decided to hold the hearing by way of telephone conference for reasons provided in the Notice of Hearing dated July 31, 2013.

ISSUE

[9] Whether the Claimant is disentitled to benefits, pursuant to section 37 of the *Employment Insurance Act* (EI Act) and section 55 of the *Employment Insurance Regulations* (Regulations), because she was not in Canada.

THE LAW

[10] Paragraph 37(b) of the EI Act stipulates that a claimant is not entitled to receive benefits for any period during which a claimant is not in Canada.

[11] Section 50 of the EI Act stipulates that a claimant, who fails to fulfil or comply with a condition or requirement of this section, is not entitled to receive benefits for as long as the condition or requirement is not fulfilled or complied with.

[12] Subsection 50(10) of the EI Act stipulates that the Commission may waive or vary any of the conditions or requirements of section 50 whenever in its opinion the circumstances warrant the waiver or variation for the benefit of the claimant.

[13] Section 55 of the Regulations stipulates that, subject to section 18 of the Act, a claimant is not disentitled from receiving benefits for the reasons that the claimant is outside Canada:

> (a) for the purpose of undergoing, at a hospital, medical clinic or similar facility outside Canada, medical treatment that is not readily or immediately available in the claimant's area of residence in Canada, if the hospital, clinic or facility is accredited to provide the medical treatment by the appropriate governmental authority outside Canada;

(*b*) for a period of not more than seven consecutive days to attend the funeral of a member of the claimant's immediate family or of one of the following persons, namely,

(i) a grandparent of the claimant or of the claimant's spouse or common-law partner,

(ii) a grandchild of the claimant or of the claimant's spouse or common-law partner,

(iii) the spouse or common-law partner of the claimant's son or daughter or of the son or daughter of the claimant's spouse or common-law partner,

(iv) the spouse or common-law partner of a child of the claimant's father or mother or of a child of the spouse or common-law partner of the claimant's father or mother,

(v) a child of the father or mother of the claimant's spouse or common-law partner or a child of the spouse or common-law partner of the father or mother of the claimant's spouse or common-law partner,

(vi) an uncle or aunt of the claimant or of the claimant's spouse or common-law partner, and

(vii) a nephew or niece of the claimant or of the claimant's spouse or common-law partner;

(c) for a period of not more than seven consecutive days to accompany a member of the claimant's immediate family to a hospital, medical clinic or similar facility outside Canada for medical treatment that is not readily or immediately available in the family member's area of residence in Canada, if the hospital, clinic or facility is accredited to provide the medical treatment by the appropriate governmental authority outside Canada;

(d) for a period of not more than seven consecutive days to visit a member of the claimant's immediate family who is seriously ill or injured;

(e) for a period of not more than seven consecutive days to attend a bona fide job interview; or

(f) for a period of not more than 14 consecutive days to conduct a bona fide job search.

EVIDENCE

[14] The Claimant applied for and received regular benefits effective March 31, 2013.

[15] The Commission imposed a disentitlement to benefits for the periods April 1, 2013 to April 5, 2013 and again, from April 18, 2013 to April 23, 2013.

[16] It is undisputed evidence that the Claimant was on a preplanned vacation in Florida from April 1, 2013 to April 5, 2013 and on the occasion of her grandmother's 95th birthday, the Claimant was again in Florida from April 18, 2013 to April 23, 2013.

[17] At the hearing, the Claimant stated that the first vacation was booked a year in advance not foreseeing her eventual unemployment as her contract was to be in renewed in November 2013. Her second vacation was planned in short notice given her unemployment, flexibility in her schedule and timing of the occasion.

[18] The Claimant testified that she was available for employment in Canada through her continued efforts to job search, email contacts and applied for jobs while in Florida. She stated that she was ready, willing and able to return to work.

[19] The Claimant stated that she understands that the disentitlements were imposed pursuant to paragraph 37(b) and that the exceptions in section 55 of the Regulations do not apply in her case. She however argues that paragraph 37(b) was applied by the Commission in its strict meaning that she was 'not physically in Canada'. The Claimant however, stated that she was 'present and in Canada by all intents and purposes" and meets the requirements of the EI Act.

SUBMISSIONS

[20] The Claimant submitted that:

a. The Commission, in its decision of June 13, 2013, has applied a strict reading of section 37 of the EI Act and cites case law that is not applicable to her case because she has not put forward the argument that she qualifies for any of the exceptions in section 55 of the Regulations. On the contrary, she does not need to qualify for an exception pursuant to section 55 of the Regulation because for all intents and purposes she has satisfied the true requirements of subsection 37(b) of the EI Act.

b. She meets the requirement of paragraph 37(b) of the EI Act and was "in Canada" because:

   i. the purpose of the Act is to provide temporary financial assistance to claimants while they look for work or are upgrading their skills and therefore, is a public welfare statute designed to protect those who are vulnerable balanced against those who attempt to abuse it. She therefore submits that the EI Act has to be read with this purpose in mind.

   ii. as in a recent case of the Ontario Court of Appeal, *Blue Mountain Resorts Limited v. Ontario (Labour),* (2013 ONCA 75) at paragraph 43 it references a Supreme Court of Canada decision (*Rizzo & Rizzo Shoes Ltd.*, (1998)1 S.C.R. 27, at para. 27) states that "… statute should be read in such a way as to avoid absurd results" and goes on to say that the "… the legislation did not intend to produce absurd results".

   iii. the Commission's interpretation of paragraph 37(b), in her case, produces an absurd results for the following reasons (i) it insinuates that a physical presence is required notwithstanding that this is not specified in the EI Act; (ii) it insinuates that a claimant that is physically in Canada is less likely to take advantage/abuse the system, than somebody that is not; (iii) it does not take into consideration the actual search activity of a claimant. The latter should be the measure of whether a claimant is outside Canada. The Claimant submits that in her case, she job searched, applied for jobs and networked, in the same time zone as other Canadians and yet is considered

to be 'less in Canada' than a claimant away in a 3 hour time zone difference within Canada.

She argues that she was "very much present in Canada" by being on-line, in constant communication with contacts, researched job postings, worked on her resume and made an application electronically. She was present, willing and able to return to work during the periods in question pursuant to section 18 of the EI Act. She submits that to interpret paragraph 37(b) of the EI Act in a way that would disentitle her to benefits but would allow benefits to somebody who is on vacation inside Canada, perhaps not conducting the same level of job search activity, is in 2013, an absurd interpretation of the EI Act.

iv. Other statutes are specific and prescribe an applicant's presence in Canada, whereas the EI Act does not, and yet, case law has shown that even with those statutes a more relaxed interpretation has been applied. For example, the *Immigration and Refugee Protection Act* at subparagraph 28(2)(a)(i) specifies that a resident must be physically present in Canada for a specified number of days/year. And, the *Citizenship Act* in paragraph 5(1)(c) requires an applicants for citizenship to physically reside in Canada for a prescribed number of days over 5 years. However, even though these statutes prescribe an actual physical presence in Canada, they have been interpreted more broadly by the Courts. For example, in *Hsu (Re),* 1998 (T-2044-97) at paragraph 20 a more liberal interpretation of the days required to be in Canada was taken by the Federal Court and in *Canada (Minister of Citizenship and Immigration) v. Wang*, 1999 (T-1068-98) at paragraph 3, the Federal Court says that an applicant does not have to be physically present in Canada for the prescribed number of days set out in that Act. The Claimant submits that in 1998 and 1999 when these decisions were rendered, smartphones did not exist and the internet was in its infancy. Further, she submits that, in 2013, even the Commission encourages on-line application and reporting, emails job alerts, telephone communication and teleconferencing (as with the present hearing).

c. As an alternative argument, should the Member find that paragraph 37(b) is to be interpreted to mean that a claimant must be physically in Canada, then she submits that paragraph 37(b) of the EI Act is simply a procedural requirement. Therefore, section 50 of the EI Act applies and requests consideration under subsection 50(10) which provides the authority to impose a more relaxed interpretation of that section.
d. In conclusion, the Claimant notes that the EI Act does not say "not physically in Canada" but just simply "not in Canada". And therefore, submits that the fact that she was available pursuant to section 18 of the EI Act for the periods in question, can be interpreted to mean that she was 'in Canada' for all intents and purposes of the EI Act. Further, if paragraph 37(b) was intended to balance the purpose of the EI Act against those who attempt to take advantage of the system, then in 2013, this subsection may not be serving the purpose it once was implemented to provide. Today, one's level of job search activity should be the measure on one's presence inside of Canada.

[21] The Respondent submitted that:

a. The Claimant is not entitled to employment insurance benefits for the periods that she was outside the country from April 1, 2013 to April 5, 2013 and again, from April 18, 2013 to April 23, 2013 pursuant to paragraph 37(b) of the EI Act.
b. The Claimant's reasons for her absences are not ones prescribed in section 55 of the Regulations.

ANALYSIS

[22] It is undisputed that the Claimant was on a vacation in Florida from April 1, 2013 to April 5, 2013 and again, from April 18, 2013 to April 23, 2013.

[23] The Member therefore, finds that the facts and evidence are not in dispute in this appeal but it is the interpretation and resulting application of paragraph 37(b) of the EI Act that forms the basis of the Claimant's appeal.

[24] Section 37 of the EI Act is clear that benefits are not payable to claimants while they are not in Canada except as specifically prescribed in section 55 of the Regulations (*Attorney General of Canada v. Bendahan* 2012 FCA 237). Further, the onus is on claimants to prove that they meet the requirements of the Regulations (*Peterson* A-370- 95).

[25] The Member notes that the Claimant was clear in her submissions that she is not attempting to argue that section 55 of the Regulations applies to her case. In fact, the Member agrees and finds that the Claimant's reasons for not being in Canada during the periods in question do not satisfy any of the exceptions prescribed in section 55 of the Regulations.

[26] The Member considered that the Claimant is instead, putting forward the argument that she has satisfied the true requirements of paragraph 37(b) of the EI Act by being, by all intents and purposes "in Canada" while physically in Florida. In support of her position, the Claimant argued that paragraph 37(b) should be applied in the context of the EI Act's purpose and not read in a way that would lead to an absurd result and refers to *Rizzo & Rizzo Shoes Ltd*., (1998)1 S.C.R. 27, at paragraph 27. Essentially, the Claimant has put forth arguments as to how she believes paragraph 37(b) should be interpreted.

[27] The Member therefore considered what the courts have long held with respect to statutory interpretation. The Supreme Court of Canada has often referred to Driedger's 'Modern Principle' which states that statutory interpretation cannot be founded on the wording of the legislation alone. This principle provides that "Today there is only one principle or approach; namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." (*Rizzo & Rizzo Shoes Ltd*., (1998)1 S.C.R. 27, at paragraph 21)

[28] Given this approach of statutory interpretation, the same as that suggested by the Claimant, the Member considered that Claimant's submissions regarding paragraph 37(b) as she put them forth. Namely, (i) paragraph 37(b) in relation to section 18, (ii) interpretation of paragraph 37(b) to not mean 'physically in Canada' and (iii) paragraph 37(b) in relation to the intent of the EI Act.

[29] The Member first considered the Claimant's argument that the Commission's interpretation of paragraph 37(b) produced the absurd result of her disentitlement to benefits for the periods she was physically not in Canada when for the same periods she was considered available for work pursuant to section 18 of the EI Act. She submits that to interpret paragraph 37(b) of the EI Act in a way that would disentitle her to benefits but would allow benefits to somebody who is on vacation (and physically) inside Canada, perhaps not conducting the same level of job search activity, is an absurd interpretation of the EI Act. She argues that in her case, she was considered to be 'less in Canada' than a claimant in another part of Canada with a 3 hour time zone difference who may not be conducting the same level of job search activity. It also implies that a claimant physically in Canada is less likely to take advantage or abuse the system. The Claimant argues that given present day technologies, a claimant's availability should be a consideration, along with other factors, when one is not physically in Canada and that paragraph 37(b) of the EI Act should be considered in this context. The Claimant submits that paragraph 37(b) does not take into consideration the job search activity of a claimant and suggests that a claimant's availability should be the measure of whether a claimant is outside Canada.

[30] The Member notes that what the Claimant is suggesting is that paragraph 37(b) is or should be subject to section 18 of the EI Act. However, section 18 and paragraph 37(b) of the EI Act are two separate disentitlement provisions and should not be confused. Paragraph 37(b) of the EI Act is not subject to section 18 of the EI Act because it is a disentitlement provision and so is section 18 of the EI Act. Each provision has its own separate requirements that must be met in order to be entitled to benefits.

[31] Section 55 of the Regulations, on the other hand, provides an exhaustive list of exceptions to paragraph 37(b), is subject to section 18 of the EI Act. That is, a claimant may be outside Canada for a prescribed period and reason pursuant to section 55 of the Regulations however, in order to qualify for benefits, the claimant must also demonstrate his/her availability pursuant to section 18 of the EI Act (*Attorney General of Canada v. Elyoumni* 2013 CAF 151; CUB 78175).

[32] The Member notes that it is not within the Member's jurisdiction or discretion to ignore or change the legislation as it is presently written. As a disentitlement under section 18 of the Act and a disentitlement under paragraph 37(b) of the EI Act are two separate disentitlement provisions, the Member finds that to interpret paragraph 37(b) of the EI Act in the absence of the requirements (such as job search activity) for section 18 of the EI Act, is not absurd. To conclude that a disentitlement to benefits applies if the requirement of paragraph 37(b) is not met is also not an absurd result. It is the interpretation of the requirement of paragraph 37(b) that is under consideration.

[33] The Member therefore, next considered Claimant's position regarding the interpretation of the requirement of paragraph 37(b) of the EI Act. She submits that the Commission's decision requires a physical presence in Canada when in fact that is not specified/prescribed in paragraph 37(b) of the EI Act. The Claimant further cited case law from the *Citizenship Act* and the *Immigration and Refugee Protection Act*, and argued that despite their more prescriptive language, the courts have applied a more relaxed interpretation of these statutory requirements regarding a physical presence in Canada.

[34] The Member reviewed the statutes and case law that the Claimant cited in support of her position. The Member however, finds that such consideration was of little value in the interpretation of paragraph 37(b) of the EI Act. First, the Member noted that the Tribunal is not bound by how the courts have interpreted provisions contained in other legislation. Second, the language contained in those statutes and the purpose of those

provisions is very different from those chosen by Parliament in the EI Act. Third, the Claimant's interpretation of how 'prescriptive' the cited statutes are is debatable. Finally, the Member notes that even in the cases cited in support of a more 'relaxed interpretation' by the courts regarding a physical presence in Canada, the importance of a physical presence in Canada was stressed by the courts, as was the necessity of those provisions in those statutes (*Hsu (Re)*, 1998 (T-2044-97) and *Minister of Citizenship and Immigration v. Wang*, 1999 (T-1068-98)).

[35] Of more relevance however, is that the case law specific to the EI Act supports an interpretation of the simple words "not in Canada" to mean clearly a physical absence of the claimant from Canada. It consistently supports a strict interpretation that is not intended nor applied in a broad and generous manner (CUBs 73316 and 27413).

[36] Further, the Member also considered that even after Parliament set out a list of exceptions to subsection 37(b) of the EI Act in section 55 of the Regulations, it was clearly stipulated in subsection 55(1) that a claimant is not disentitled from receiving benefits for the prescribed reasons that the claimant is "outside Canada". This reinforces the position that 'not in Canada' implies a physical absence from Canada. If Parliament had intended to provide benefits to claimants who were physically outside Canada but "for all intents and purposes" in Canada, they would have included an exception in the Regulations. In CUB 27413, Justice Rothstein goes further to say that "…even if it were possible to adopt a liberal approach to the words "not in Canada" in paragraph 32(b) [now paragraph 37(b)] of the EI Act, this is precluded by the opening words of the paragraph ("Except as may otherwise be prescribed") and section 54 [now 55] of the Regulations".

[37] The Member next considered the Claimant's submission that paragraph 37(b) of the EI Act should be read with the purpose of the EI Act in mind and that paragraph 37(b) was intended to balance the purpose of the EI Act against those who attempt to take advantage of the system and that this subsection may not be serving the purpose it once was implemented to provide.

[38] The Member however, notes that to interpret the words 'not in Canada' to mean 'not physically in Canada' does not necessarily mean that the purpose of the EI Act is not being met. The Claimant argues that to interpret paragraph 37(b) in this way, insinuates that a claimant that is physically in Canada is less likely to take advantage/abuse the system than somebody that is not. The Member notes that paragraph 37(b) may have been included in the EI Act presumably in an attempt to avoid abuse of the system and to discourage travelling unduly at the expense of taxpayers. However, the Member also notes that similarly, all claimants, while in Canada, are subject to all other sections of the EI Act and the Regulations, including section 18 which stipulates the requirement to prove one's availability. Paragraph 37(b) is a disentitlement provision, one of many, that constitutes the EI Act.

[39] In a very similar case (CUB 70090B), a claimant put forth similar arguments as the Claimant. The Member's position is supported by Umpire Shore, in his decision to dismiss that case for the following reasons:

> "Section 37(*b*) of the EIA states that, except in the cases stipulated in the Regulations, the claimant is not entitled to benefits for any period while outside the country. The purpose of section 37(*b*) of the EIA is to avoid dishonest claimants abusing the system and travelling unduly at the expense of taxpayers.
>
> Section 55(1) of the Regulations tempers the obligation to remain in Canada, as stipulated in section 37(*b*), and expresses the recognition of the legislator that, under certain circumstances, a claimant can legitimately be outside Canada without losing benefits.
>
> The fact that a claimant is available for work in Canada, by means of the ability to return to Canada immediately or by the Internet, is irrelevant (CUB 54131; CUB 16871; CUB 5940, conf. by *Canada (A.G.)* (October 20, 1980) No. A-442-80 (F.C.A.)). That means that even if the claimant provides

> evidence that he is available and actively looking for employment, the Court cannot consider factors that do not appear in the provisions of the Act or Regulations: 'The Umpire cannot correct what are regarded by some as weaknesses or errors or injustices in the legislation adopted by Parliament or the Regulations adopted by the Governor in Council" (CUB 11077). The claimant believes that the Act is unfair to him but it is the duty of the Umpire to apply the law as written. The legislative branch and those who delegate that authority are responsible for establishing Regulations under the Act.
>
> Moreover, the modern method of interpretation applies in this case: "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (File No. 31476, *Canada (Revenue Agency)*, 2007 SCC 42 at paragraph 16; E.A. Dreidger, *Construction of Statutes* (second ed. 1983), p. 87). In the absence of ambiguity, there is no need to interpret the wording of the Act otherwise.
>
> In CUB 27413, above, Rothstein J. finds that the same provisions that are at issue in this case are not ambiguous. The analysis by Rothstein J. is as valid today as when he gave his decision in 1995. Therefore, in this case, there is no requirement to refer to the rules of legislative interpretation, because no concept or term used in the EIA or Regulations requires interpretation."

[40] Both Umpire Rothstein and Shore (CUBs 27413 and 70090B), have found that the requirement of paragraph 37(b) is not ambiguous and therefore does not require interpretation and so to refer to the rules of legislative interpretation is unnecessary. However, given the Claimant's position on how paragraph 37(b) should be interpreted, the Member considered the 'Modern Principle' of legislative interpretation in this case.

The Member finds that to interpret the requirement of paragraph 37(b) to mean a claimant is disentitled to benefits because they are not physically in Canada, is to read the

words of the EI Act in their simple, grammatical and ordinary sense that is consistent with both the intent of the EI Act and that of Parliament. To interpret paragraph 37(b) to mean that a claimant is disentitled to benefits when they are physically not in Canada, is also consistent with the 'Modern Principle' of legislative interpretation. The Member finds that such an interpretation does not lead to an absurd result, but to the intended consequence of disentitlement while a claimant is physically outside Canada. The Member therefore, finds that the words 'not in Canada' are plain and clear and have consistently been interpreted to mean 'not physically in Canada'.

[41] Finally, the Member considered the Claimant's alternative argument that should the Member find paragraph 37(b) is to be interpreted to mean that a claimant must be physically in Canada, then she submits that paragraph 37(b) of the EI Act is simply a procedural requirement and therefore, subsection 50(10) of the EI Act applies to her case. The Member however disagrees with the Claimant's position and finds that the requirement to be physically in Canada pursuant to paragraph 37(b) is not one of simple procedure. Subsection 50(10) stipulates that the Commission can waive or vary the requirements of this section, namely section 50 of the EI Act, or the Regulations. The requirement to be in Canada is in section 37 of the EI Act and therefore, subsection 50 (10) cannot be interpreted to allow for the waiver of that requirement. Further, subsection 50 (10) is a discretionary power of the Commission and is not in the jurisdiction of the Tribunal.

[42] The Member finds that the Claimant failed to meet the onus placed upon her to demonstrate that she was not in Canada for reasons prescribed in section 55 of the Regulations.

[43] The Member therefore finds that the Claimant is disentitled to benefits for the two periods that she was not in Canada from April 1, 2013 to April 5, 2013 and again, from April 18, 2013 to April 23, 2013.

CONCLUSION

[44] The appeal is dismissed.

Eleni Palantzas
Member, General Division

DATED: September 10, 2013