



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *V. M. v. Canada Employment Insurance Commission*, 2016 SSTGDEI 44

Tribunal File Number: GE-16-107

BETWEEN:

**V. M.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

---

**SOCIAL SECURITY TRIBUNAL DECISION**  
**General Division – Employment Insurance Section**

---

DECISION BY: Me Dominique Bellemare, Vice-Chair, General  
Division- Employment Insurance Section

HEARD ON: March 17, 2016

DATE OF DECISION: March 23, 2016

## **REASONS AND DECISION**

### **PERSONS IN ATTENDANCE**

The Appellant was not present at the hearing, but his Representative, M. M., was present. The Respondent, the Employment Insurance Commission (Commission) did not attend the hearing.

### **INTRODUCTION**

[1] The Appellant is appealing a reconsideration decision issued by the Commission on December 2, 2015, disentitling him from receiving Employment Insurance benefits from October 9 to 30, 2015, because he was not out of Canada on those dates and because he was not available on those dates. However, on the question of availability, the Commission allowed the day of October 9, 2015. As the Appellant is only asking benefits for the day of October 9, 2015, the issue of availability is therefore not before the Tribunal.

[2] The hearing was held by Teleconference for the following reasons:

- a) The Appellant's credibility is not anticipated to be a prevailing issue; and
- b) The form of hearing respects the requirements under the Social Security Tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

### **ISSUE(S)**

[3] Was the Appellant considered to be out of Canada on October 9, 2015?

### **THE LAW**

[4] **Subsection 37(b) of the Act:**

Except as may otherwise be prescribed, a claimant is not entitled to receive benefits for any period during which the claimant

(b) is not in Canada

**[5] Convention on International Civil Aviation**

Signed at Chicago, on 7 December 1944 Article 1- Sovereignty

The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory.

Article 2- Territory

For the purposes of this Convention the territory of a State shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State.

Article 3- Civil and state aircraft

a) This Convention shall be applicable only to civil aircraft, and shall not be applicable to state aircraft.

[...]

**EVIDENCE**

**Documentary evidence**

[6] We find in the file the usual documents, such as the initial application for benefits, the Commission notes, the availability questionnaire, the initial decision and the reconsideration decision.

[7] In the Notice of Hearing filed by the Appellant's representative, we find an Affidavit sworn in on December 31st, 2015, in which the Appellant states that on October 9, 2015, he boarded flight X from Vancouver to London, UK. He also added some exhibits. Exhibits A and B are copies of the flight path of the same flight for December 25 and 26, 2015, as it would have costs \$250 to obtain the flight paths of October 9, 2015. Exhibit C is the length of time, four hours and 30 minutes that a flight would take from Vancouver to Toronto.

[8] In his availability questionnaire filed to inform the Commission that he was out of Canada, the Appellant stated his scheduled time of departure (8:40 pm) and his arrival time on December 31 was at 9:45 pm. In interview notes found on page GD3-16, the Appellant stated that his flight was delayed and the plane only left at 10 pm on October 9, 2015.

[9] At the hearing, the Appellant also filed the Convention on International Civil Aviation, ninth edition, as amended in 2006. It is also know at the “Chicago Convention” of 1944, ratified by Canada in 1946.

### **Oral evidence**

[10] As the Appellant was not present at the hearing, no testimonies were made at the hearing.

### **SUBMISSIONS**

[11] The Appellant submitted that:

- a) The Appellant has filed an affidavit in which he clearly states that he was indeed in Canada during the entire day on October 9, 2015. V. M.'s evidence is well supported by independent corroborating evidence, is consistent with his prior statements, and is not contradicted. As a result, the SST should find it highly reliable and credible.
- b) The Appellant’s flight left Vancouver International Airport ("YVR") at approximately 8:40 PM. V. M. was traveling on British Airways Flight X which departs from YVR and proceeds directly to London Heathrow Airport ("LHR") in London, England (the "Flight"). The Flight remains in Canadian airspace for well over four hours. As a result, when this information is combined with the departure time for the Flight, then regardless of which of Canada's time zones is used (i.e. from Pacific Standard Time, to Newfoundland Time Zone), The Appellant was in Canada for the entire day on October 9, 2015.
- c) The Appellant respectfully requests that the SST allow the appeal and modify the Commission’s decision and to remove the disentitlement for October 9, 2015.

[12] The Respondent submitted that:

- a) Except as otherwise prescribed by the legislation, a claimant is not entitled to receive employment insurance benefits for any period during which the claimant is not in Canada. The facts of the case are clear; the claimant travelled outside Canada, for the purpose of vacation, departing at 8:40PM Friday October 9, 2015 and returned on October 31, 2015. The claimant has argued he is unable to locate any reference in the Employment Insurance Act or Regulation that refers to a part-day of disentitlement for being outside Canada. Subsection 37(b) of the Act directs a claimant is not entitled to receive benefits for any period during which the claimant is not in Canada. The Act does not refer to part days, rather for any period. On this issue the Commission relies on the Federal Court of Appeal decision in *Canada (A.G.) v. Picard* 2014 FCA 46 in which the Court provides the interpretation of this provision: "... the express words, design and architecture of the Act and regulations all support the view that the "period" in paragraph 37(b) is to be expressed only in whole days, not fractions of days. The Act and the regulations speak to units of time graduated in periods of whole days, not fractions of days. It would take express wording in the Act to justify periods in paragraph 37(b) to be expressed in fractions of days, as opposed to whole days."
- b) The Commission submits that the claimant is subject to a disentitlement under subsection 37(b) of the Act because despite his departure time on October 9, 2015, it remains that the claimant departed on an international flight for a destination beyond the Canadian borders, as such is considered outside of Canada. To accept his argument that he was still in Canadian airspace on October 9, 2015 therefore should not be considered outside Canada would be contrary to the intent of this piece of legislation.
- c) The Commission submits that the jurisprudence supports its decision. The Federal Court of Appeal confirmed the principle that employment insurance benefits are not payable to those persons not in Canada except as specifically prescribed by the Regulations, see *Canada (AG) v. Gibson*, 2012 FCA 166 and *Canada(AG) v. Bendahan*, 2012 FCA 237. The Court further confirmed that the onus is on the claimant to prove that his absence outside Canada met the exceptions prescribed by the Regulations. In this case

the claimant has advised he was outside Canada for the purpose of a vacation therefore does not have relief under Regulation 55, see *Canada (AG) v. Peterson, A-370-95*.

- d) he Commission accepted the claimant's availability on October 9, 2015 since he advised he could have and would have worked that day since his flight was leaving late in the evening, however in holding with the Federal Court's interpretation of subsection 37(b) of the Act and despite still being in Canadian airspace the Commission maintains a disentitlement is warranted starting October 9, 2015 as this is first day of the period he was travelling beyond the borders of Canada, thus considered outside Canada.

## ANALYSIS

[13] As the Appellant only wishes to appeal the disentitlement for the day of October 9, 2015 and that the Commission had conceded in the reconsideration decision that the Appellant was available for work on that day, the only issue left is whether or not the Appellant was considered to be out of Canada on October 9, 2015.

[14] The Tribunal is also pleased that the Commission is finally taking into consideration the Federal Court of Appeal's decision in *Picard*, supra, but the Commission erred in its interpretation of the decision. While rightfully the Commission considers that the principle established in *Picard*, supra, is the fact that absence from Canada are computed in periods, but more precisely in full period of 24 hours.

[15] The Commission also failed to consider that since the Appellant's plane was delayed and only left Vancouver airport at 10:00 pm and returned at 9:45 pm, the full 24 hour period as per the principles established in *Picard*, supra mean that the Appellant was deemed to have been in Canada on that day. That argument alone is necessary to allow the appeal.

[16] However, the Appellant, being represented by counsel who is also the Appellant's son had presented a very interesting argument on the issue of plane travels and it is warranted that the Tribunal looks into that argument, as is it rare that an appeal on a single day of benefit would rarely happen with the assistance of a lawyer.

[17] The Commission has dismissed the Appellant's argument stating that once the plane leaves the airport, as it is destined to be leaving "beyond the borders of Canada" at some time it is considered as being out of Canada.

[18] The Appellant filed the Convention on International Civil Aviation. The Tribunal is quite familiar with this international convention, commonly called "The Chicago Convention". Canada became a party to this international convention in 1946. The Appellant relies on the first three articles on this convention that state that it applies only to civilian aircrafts, and that Canada has jurisdiction over these aircraft while they are flying within the borders of Canada, which the convention describes as Canada's land mass and its territorial waters.

[19] The Appellant is arguing that as the aircraft on which he was a passenger was flying over Canadian territory for several hours, he was still in Canada passed midnight. The Appellant did file the normal flight path for Flight X as well as the evidence as to how long it took to reach Toronto, which is over 4 hours of time.

[20] When a claimant leaves Canada by land, the Commission applies the principle that a claimant leaves the country when he or she crosses the border. It is only logical to apply the same principle for air travel. While the certainty is better when someone crosses a border by car, it is still possible to do an approximation. As the projected departure from Vancouver was supposed to occur at 8:40 pm and that it takes more than 4 hours to even reach Toronto while travelling to Europe, all that the Appellant had to prove was that he was still in Canadian airspace passed 9:45 pm on October 9, 2015. There is enough evidence filed by the Appellant to support that argument, especially in relation to the principles established in *Picard*, supra.

[21] Therefore the Tribunal agrees with the Appellant's argument regarding the fact that a claimant only leaves Canada once he leaves the Canadian territory, being by land, air or sea. Has the plane left Vancouver airport at 8:40, the claimant would still have been in Canada passed midnight.

[22] Of course, in this case, a flight from Vancouver to Europe would make the Tribunal's decision even easier to apply to other cases. The same would far more restricted to flights leaving Canada to go south where the aircraft would be in Canadian territory for much shorter periods, or to West Coast flight going West and East Coasts flights going East.

[23] The Tribunal therefore rejects the Commission's argument that once a plane takes off it immediately renders its occupants out of Canada. Canada still has jurisdiction, and if they commits a crime subject to the Criminal Code of Canada they can be charged in Canada for such action. There is nothing to support the Commission's position, either pursuant to the Employment Insurance Act and regulations, or any other laws of Canada or international convention or treaties.

## **CONCLUSION**

[24] The appeal is allowed and the Appellant is entitled to receive Employment Insurance benefits for the day of October 9, 2015.

Me Dominique Bellemare  
Vice-Chair, General Division - Employment Insurance Section