Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *R. P. v. Canada Employment Insurance Commission,* 2016 SSTGDEI 82

Tribunal File Number: GE-16-889

BETWEEN:

R. P.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Gerry McCarthy

HEARD ON: June 16, 2016

DATE OF DECISION: June 21, 2016

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

R. P., the Appellant, attended by telephone.

INTRODUCTION

[1] The Appellant established an initial claim for regular Employment Insurance benefits (EI benefits) on January 4, 2015. On November 20, 2015, the Appellant contacted the Canada Employment Insurance Commission (Commission) prior to her departure from Canada and indicated that she would be out of Canada from November 23, 2015, and returning January 5, 2016. The Commission determined that the Appellant was not entitled to EI benefits from November 23, 2015, to January 5, 2016, pursuant to subsection 18 (1) (a) of the *Employment Insurance Act* (EI Act) and section 37 of the EI Act and section 55 of the *Employment Insurance Regulations* (EI Regulations). The Appellant requested a reconsideration of the Commission's decision, which was denied, and the Appellant appealed to the Social Security Tribunal (Tribunal)

[2] The hearing was held by teleconference for the following reasons: The fact that the appellant will be the only party in attendance; and the form of hearing respects the requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

ISSUE

[3] The Appellant appeals two issues:

> 1. The issue is whether a disentitlement should be imposed on the Appellant pursuant to subsection 18 (1) (a) of the EI Act for failing to prove her availability.
>
> 2. The issue is whether a disentitlement should be imposed on the Appellant pursuant to section 37 of the EI Act and section 55 of the EI Regulations, because she was absent from Canada.

THE LAW

Issue 1

[4] Section 18 of the EI Act states that a claimant is not entitled to be paid benefits for a working day in a benefit period for which the claimant fails to prove that on that day the claimant was:

> a) capable of and available for work and unable to obtain suitable employment

[5] The Federal Court of Appeal (*Faucher v. Attorney General of Canada*, A-56-96) has explained the criteria to be analyzed in assessing the evidence of a claimant's availability. Those criteria include:

> 1) A wish to return to the labour market as soon as suitable employment is offered
>
> 2) An indication of this wish by efforts to find such suitable employment
>
> 3) An absence of personal conditions that unduly limit chances of returning to the labour market

Issue 2

[6] Subsection 37(b) of the EI Act states: Except as otherwise prescribed, a claimant is not entitled to receive benefits for any period during which the claimant

> a) is not in Canada.

[7] Section 55 of the EI Regulations states that: (1) Subject to section 18 of the Act, a claimant is not disentitled from receiving benefits for the reason 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

[8] The Appellant applied for regular EI benefits on January 7, 2015, and established an initial claim on January 4, 2015.

[9] The Appellant worked for "Community Life Care" from February 8, 1988, to January 2, 2015.

[10] On November 20, 2015, the Appellant contacted the Commission prior to her departure from Canada and indicated that she would be out of Canada from November 23, 2015, and returning on January 5, 2016. The Appellant further indicated that she would be out of Canada to look after her daughter who was having a baby (Exhibit GD3-12 to GD3-13).

[11] The Commission determined that the Appellant was not entitled to EI benefits for the entire period she was out of Canada and imposed a disentitlement for the period from November 23, 2015, to January 5, 2016 (Exhibit GD3-12 to GD3-13).

[12] In a request for reconsideration (dated January 6, 2016) the Appellant wrote that she was away from home from November 23, 2015, to January 5, 2015, to help her daughter during her delivery and assist her daughter with her newborn grandson and 4-year-old granddaughter.

[13] The Appellant spoke to the Commission on February 4, 2016, and requested a reconsideration of their decision to disentitle her from EI benefits from November 23, 2015, to January 5, 2016. She explained that she travelled to Minnesota (USA) to help her daughter during her delivery and assist her with the care of a new born baby and older granddaughter who was only 4-years-old. She indicated that she could be easily contacted during this absence from Canada, but was not able to return in 48-hours since she had to help her daughter with the grandchildren.

[14] On February 5, 2016, the Commission advised the Appellant that their initial decisions to impose a disentitlement for being outside of Canada and not being available for work were being maintained since the reasons the Appellant was absent from Canada did not fall within a prescribed reason under the legislation.

[15] In a Notice of Appeal (dated stamped by the Tribunal on March 3, 2016) the Appellant wrote that she was away from home to help her daughter during her delivery time and attend to her granddaughter and new grandson who was born on September 29, 2015. She further indicated she had been working for the past 26-years and contributing to EI without any claim. She explained that her daughter was in Minnesota (USA) and she had to extend her stay. She indicated she was not in a financial position to fly back and forth from Canada to Minnesota. She requested that she be allowed benefits while she was outside of Canada on humanitarian grounds.

Oral Evidence at Hearing

[16] The Appellant confirmed that she was in X (Minnesota) from November 23, 2015, to January 5, 2016, when she returned to Canada. She said she was not on vacation from November 23, 2015, to January 5, 2016. She explained that her daughter needed help, because she was expecting a baby. She further indicated that her daughter’s husband was on call at the hospital and her daughter particularly needed her help. She confirmed that her grandson was born on November 29, 2015. She said the birthdate of her grandson provided in the Appeal Docket was incorrect. She further indicated that her granddaughter was 4-years-old.

[17] The Appellant explained she had only planned to stay in Minnesota until two-weeks after her daughter's baby was born. She indicated that she had access to a computer and was continually looking for work. She said she could have returned home in 48-hours.

[18] The Appellant testified that her daughter stayed only one night in the hospital after the birth of her grandson. She said her daughter had no medical complications after her birth. She said her daughter's due date had been October 2015. She said her daughter was not ill prior to the birth of her grandson, but was tired. She further explained that she travelled to Florida with her daughter and husband in December 2015 and returned to Canada from Florida on January 5, 2016. She explained that did not have any interviews while in the United States. She further indicated that she did not require any medically treatment while in the United States.

SUBMISSIONS

[19] The Appellant submitted that:

a) She travelled to X, Minnesota (USA) to help her daughter during her delivery and assist her with the care of a new born baby and her older granddaughter who was only 4-years-old.

b) She could be easily contacted during her absence from Canada.

c) She should be allowed benefits while outside of Canada on humanitarian grounds.

d) She had been working for the past 26-years and contributing to EI without any claim.

e) She had access to a computer and was continually looking for work and could have returned home in 48-hours.

[20] The Respondent submitted that:

a) Although the Appellant requested benefits to be paid for humanitarian reasons, availability must be proven for each day that EI benefits were

requested in accordance with the EI Act. The Appellant's reason for leaving Canada was not related to job search efforts. In fact, although the Appellant could have been contacted by telephone she would not have been able to return to Canada in order to attend an interview or to accept employment within 48-hours.

b) Leaving home to be part of the arrival of her daughter's new baby (and to care for her grandchildren) was in direct opposition to the concept of availability.

c) The Appellant did not meet the exceptions found in EI Regulation 55 to be eligible to receive benefits while out of Canada, because the purpose for her trip was to be part of the arrival of a new grandchild and to assist her daughter.

d) While the Appellant requested consideration on humanitarian grounds, the Commission cannot apply leniency as the EI Act and EI Regulations must be applied as written.

ANALYSIS

Issue 1

[21] The Tribunal must decide whether a disentitlement should be imposed on the Appellant pursuant to sections 18 (a) of the EI Act for failing to prove her availability.

[22] The Tribunal finds the Appellant established an initial claim for EI benefits on January 4, 2015.

[23] The Tribunal finds that on November 20, 2015, the Appellant contacted the Commission prior to her departure from Canada and indicated that she would be out of Canada from November 23, 2015, and returning January 5, 2016. The Appellant explained that she would be out of Canada to look after her daughter who was having a baby.

[24] The Tribunal recognizes the Commission (the Respondent) determined that the Appellant was not entitled to EI benefits for the entire period she was out of Canada and imposed a disentitlement for the period from November 23, 2015, to January 5, 2016.

[25] The Tribunal finds the Appellant was outside Canada from November 23, 2015, to January 5, 2016. The Tribunal does recognize the Appellant submitted numerous arguments about why she should not be disentitled from benefits from November 23, 2015, to January 5, 2016. First: The Appellant explained that she had access to a computer and was continually looking for work. Second: The Appellant indicated she was not on vacation, but travelled to X, Minnesota (USA) to help her daughter during her delivery and assist with the care of a new born baby and her older granddaughter. Third: The Appellant explained that she could be easily contacted during her absence from Canada. Fourth: She should be allowed benefits while outside of Canada on humanitarian grounds.

[26] The Tribunal will address the Appellant's submissions in a moment. However, the Tribunal wishes to emphasize that Section 18 (a) of the EI Act states that a claimant is not entitled to be paid benefits for a working day in a benefit period for which the claimant fails to prove that on that day the claimant was:

> a) capable of and available for work and unable to obtain suitable employment.

[27] The Tribunal further wishes to emphasize that the Federal Court of Appeal (*Faucher v. Attorney General of Canada*, A-56-96) has explained the criteria to be analyzed in assessing the evidence of a claimant's availability. Those criteria include:

> 1) A wish to return to the labour market as soon as suitable employment is offered
>
> 2) An indication of this wish by efforts to find such suitable employment
>
> 3) An absence of personal conditions that unduly limit chances of returning to the labour market

[28] The Tribunal recognizes the Appellant has submitted she had access to a computer while outside of Canada and was continually looking for work. Nevertheless, the Appellant confirmed

during the hearing that she travelled to Minnesota to assist her daughter during her delivery and help with the care of a new born baby and older granddaughter. The Tribunal recognizes the Appellant emphasized during the hearing she was not on vacation while outside of Canada and travelled to Minnesota to care for her daughter and granddaughter. The Tribunal accepts that the Appellant was not on vacation while outside of Canada from November 23, 2015, to January 5, 2016. Nevertheless, the Tribunal finds the Appellant unduly limited her chances of returning to the labour market since her first priority while outside of Canada was the care of her daughter and grandchildren.

[29] The Appellant further submitted that she could be easily contacted while absent from Canada, but she was not in a financial position to fly back and forth from Canada to Minnesota. The Tribunal wishes to emphasize that although the Appellant might have desired to return to the labour from November 23, 2015, to January 5, 2016, she was out of Canada and unduly limited her chances of returning to the labour by indicating she was not in a financial position to fly back and forth from Minnesota to Canada.

[30] The Appellant also submitted she should be allowed benefits while outside of Canada on humanitarian grounds. On this matter, the Tribunal wishes to emphasize that it must apply the EI Act. In short: The Tribunal cannot ignore, re-fashion, or re-write the EI Act even in the interest of compassion (*Knee v. Attorney General of Canada*, 2011 FCA 301).

[31] As cited above, the Tribunal recognizes the Appellant was not on vacation while outside of Canada. The Appellant was certainly forthright that she travelled outside of Canada to assist her expectant daughter and look after her granddaughter. Nevertheless, the Tribunal finds the Appellant has not proven her availability for work while outside of Canada from November 23, 2015, to January 5, 2016, since she unduly limited chances of returning to the labour market for the reasons cited above.

[32] In the last analysis, the Tribunal finds the Appellant was not entitled to EI benefits for the entire period she was out of Canada from November 23, 2015, to January 5, 2016, pursuant to Section 18 (a) of the EI Act.

Issue 2

[33] The Tribunal must decide whether there should be a disentitlement imposed on the Appellant, because she was absent from Canada pursuant to section 37 (b) of the EI Act and section 55 of the EI Regulations.

[34] The Tribunal finds the Appellant established an initial claim for benefits on January 4, 2015.

[35] The Tribunal finds that on November 20, 2015, the Appellant contacted the Commission prior to her departure from Canada and indicated that she would be out of Canada from November 23, 2015, and returning January 5, 2016. The Appellant further explained that she would be out of Canada to look after her daughter who was having a baby.

[36] The Tribunal recognizes the Commission (the Respondent) determined the Appellant was not entitled to EI benefits for the entire period she was out of Canada and imposed a disentitlement for the period from November 23, 2015, to January 5, 2016.

[37] The Tribunal finds the Appellant was outside Canada from November 23, 2015, to January 5, 2016. The Tribunal does realize the Appellant submitted numerous arguments about why she should not be disentitled from benefits while outside of Canada from November 23, 2015, to January 5, 2016. First: The Appellant explained that she had access to a computer and was continually looking for work. Second: The Appellant indicated she was not on vacation, but travelled to X, Minnesota (USA) to help her daughter during her delivery and assist with the care of a new born baby and her older granddaughter. Third: The Appellant explained that she could be easily contacted during her absence from Canada. Fourth: She should be allowed benefits while outside of Canada on humanitarian grounds.

[38] The Tribunal will address the Appellant's submissions in a moment. However, the Tribunal wishes to emphasize that the Federal Court of Appeal has affirmed the principle that the onus is on the claimant to prove that his or her absence outside Canada met the exceptions prescribed by the EI Regulations (*Peterson v. Attorney General of Canada*, A-370-95).

[39] The Tribunal does recognize that during the hearing the Appellant was forthright about the reasons she travelled outside of Canada while on EI benefits. The Appellant explained that she travelled to X, Minnesota (USA) to assist her expectant daughter and look after her 4- year-old granddaughter. The Appellant explained that when her daughter gave birth on November 29, 2015, she was in the hospital for one-night and there were no medical complications. Furthermore: The Appellant confirmed that she was not in the United States for a job interview, a family funeral, or medical treatment.

[40] The Tribunal has carefully examined section 55 of the EI Regulations to see if the Appellant would meet any of the exceptions for not being disentitled from benefits while outside Canada. The Tribunal finds the Appellant has not met any of the exceptions listed in section 55 of the EI Regulations since she travelled to Minnesota to assist her daughter who was preparing to give birth and care for her 4-year-old granddaughter.

[41] The Tribunal does realize the Appellant further submitted that she that had access to a computer in Minnesota and was continually looking for work. Nevertheless, the Tribunal wishes to emphasize that the Appellant did not meet any of the exceptions in section 55 of the EI Regulations for not being disentitled from EI benefits while outside Canada.

[42] The Tribunal further realizes the Appellant submitted that she was not on vacation, but travelled to X, Minnesota (USA) to help her daughter during her delivery and assist with the care of a new born baby and her older granddaughter. The Tribunal accepts that the Appellant was not on vacation while in Minnesota. The Tribunal recognizes the Appellant was forthright about the reasons she traveled outside of Canada. The Tribunal also accepts that the reasons the Appellant travelled outside of Canada were important to her family. Nevertheless, the Tribunal finds the reasons the Appellant travelled to X, Minnesota (USA) do not meet any of the exceptions listed in section 55 of the EI Regulations.

[43] Finally: The Appellant submitted that she should be allowed benefits while outside of Canada on humanitarian grounds. On this point, the Tribunal wishes to emphasize that it must apply the EI Act and EI Regulations. In short: The Tribunal cannot ignore, re-fashion, or re-write the EI Act even in the interest of compassion (*Knee v. Attorney General of Canada*, 2011 FCA 301).

[44] In the final analysis, the Tribunal finds that a disentitlement should be imposed on the Appellant from November 23, 2015, to January 5, 2016 , because she was absent from Canada pursuant to section 37 (b) of the EI Act and section 55 of the EI Regulations.

CONCLUSION

Issue 1

[45] The appeal is dismissed.

Issue 2

[46] The appeal is dismissed.

Gerry McCarthy

Member, General Division - Employment Insurance Section