



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *D. R. v. Canada Employment Insurance Commission*, 2017 SSTGDEI 26

Tribunal File Number: GE-16-3430

BETWEEN:

**D. R.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

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

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DECISION BY: Christopher Pike

HEARD ON: February 6, 2017

DATE OF DECISION: February 23, 2017

## **REASONS AND DECISION**

### **PERSONS IN ATTENDANCE**

[1] The Appellant attended the hearing by teleconference. The Canada Employment Insurance Commission (Commission) received notice of the hearing electronically on December 12, 2016 but did not attend. The Tribunal is satisfied that the Commission received notice of the hearing and proceeded in their absence pursuant to subsection 12(1) of the *Social Security Tribunal Regulations*.

### **INTRODUCTION**

[2] The Appellant resides in Nova Scotia and made an initial claim for benefits on May 8, 2016.

[3] On Thursday, June 30, 2016 the Appellant accompanied her spouse on a driving trip to Ontario via the United States. She left Canada at 4:00 P.M. that day and returned to Canada during the afternoon of Sunday, July 3, 2016.

[4] On July 15, 2016 the Appellant filed her weekly reports for the period June 26, 2016 to July 9, 2016. When doing so, she disclosed her 3 day absence from Canada and stated she was available for work during the entire two week period.

[5] On July 15, 2016 the Commission determined the Appellant was not entitled to benefits from June 30 to July 1, 2016. The Appellant requested reconsideration of the Commission's decision. On August 12, the Commission maintained their original decision. The Tribunal accepted the Appellant's appeal on September 13, 2016.

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

- a) The complexity of the issues under appeal.
- b) The fact that credibility is not anticipated to be a prevailing issue.
- c) The fact that the appellant will be the only party in attendance.

- d) 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**

[7] The Appellant is appealing the Commission's decision disentitling her from receiving benefits because she was absent from Canada.

## **EVIDENCE**

[8] On Thursday, June 30, 2016 the Appellant left Canada as part of a driving trip from Nova Scotia to Ontario and back. She left Canada at 4:00 P.M. on June 30, 2016 and returned to Canada via an Ontario border crossing during the afternoon of Sunday, July 3, 2016. She was not clear on the precise hour of her return, but noted that she and her spouse encountered delays because of the Canadian and American holidays on July 1 and July 4 respectively.

[9] The Appellant testified that her travel in the United States took her through the states of Maine, New Hampshire, and New York before she returned to Canada. She testified that her spouse selected this route because it was more economical than travelling through Canada to reach their destination in Ontario. The Appellant and her spouse drove through Ontario, Québec, and New Brunswick on their return trip to Nova Scotia.

[10] The Appellant had her laptop computer with her during her trip and stayed in touch with her family in Nova Scotia to ensure that she could continue her job search and be available to prospective employers during her time away from her home in Nova Scotia.

[11] The Appellant testified that after she filed her weekly claims disclosing that she was outside of Canada, the Commission determined she was disentitled to benefits for June 30 and July 1, 2016.

## **SUBMISSIONS**

[12] The Appellant noted that section 37 of the *Employment Insurance Act* (Act) provides for disentitling a claimant who is absent from Canada and submitted that subsection 55(6) of the

*Employment Insurance Regulations* (Regulations) creates an exception applicable to her circumstances because she was in states of the United States contiguous with Canada throughout her journey, she was available for work and she was able to report personally at an office of the Commission throughout that time.

[13] The Appellant also submitted that she was not out of Canada for the whole day on June 30, 2016 and asserted that the Commission should not have disentitled her for that day based on the Federal Court of Appeal's decision in *Canada (Attorney General) v. Picard*, (2014 FCA 46).

[14] The Appellant also submitted that to disentitle her to benefits for July 1, which is both a Nova Scotia provincial statutory holiday and a federal statutory holiday, is punitive and unfair.

[15] The Commission submitted that except as otherwise prescribed by the Regulations, a claimant is not entitled to receive employment insurance benefits for any period during which he or she is not in Canada. They assert that none of the exceptions set out in the Regulations apply to the Appellant's circumstances.

## **ANALYSIS**

[16] The relevant legislative provisions are reproduced in the Annex to this decision.

[17] Paragraph 37(b) of the Act provides that a claimant is not entitled to benefits for any period during which they are not in Canada unless the reason for being outside of Canada falls within those listed within section 55 of the Regulations (*Canada (Attorney General) v. Elyoumni*, 2013 FCA 151). These circumstances include medical treatment, funerals and other family obligations, job interviews and job searches and are fully reproduced in the Annex to this decision.

[18] The Court has also found the claimant has the burden to prove that he or she meets the requirements set out in section 55 to be entitled to receive benefits (*Peterson*, (A-370-95)).

[19] It is uncontested that the Appellant does not meet any of the exceptions set out in subsection 55(1) of the Regulations. Rather, the Appellant argued that her circumstances are within the exception set out in paragraph 55(6)(a) of the Regulations. It reads:

(6) Subject to subsection (7), a claimant who is not a self-employed person and who resides outside Canada, other than a major attachment claimant referred to in subsection (5), is not disentitled from receiving benefits for the sole reason of their residence outside Canada if

(a) the claimant resides temporarily or permanently in a state of the United States that is contiguous to Canada and

(i) is available for work in Canada, and

(ii) is able to report personally at an office of the Commission in Canada and does so when requested by the Commission; ...

(emphasis added)

[20] This paragraph of the Regulations thus sets four conditions, all of which must be present in order to claim the benefit of the exception and establish entitlement to benefits:

- a) The claimant must reside temporarily in a state of the United States;
- b) That state must be contiguous to Canada;
- c) The claimant must be available for work in Canada; and
- d) The claimant must be able to report personally at an office of the Commission in Canada.

[21] Subparagraph 55(6)(a) does not require that the contiguous state be contiguous to the claimant's area of residence in Canada. In support of its submissions, the Commission cited the decision in *Canada (Attorney General) v. Bendahan*, 2012 FCA 237 which dealt with a claimant who went to Florida for 10 days in order to work there. The Court determined that Florida was not a state contiguous to Canada and that spending 10 days in Florida did not constitute "residence." However, the Court defined neither "contiguous state" nor "residence".

[22] In the absence of a definition of "residence" in the Regulations and without jurisprudence on subsection 55(6) to provide guidance, the Tribunal must consider other sources to establish what is meant by the use of the words "resides temporarily".

[23] In *Thomson v. The Minister of National Revenue*, [1946] S.C.R. 209, the Supreme Court of Canada considered the concept "ordinarily resident" was discussed for tax purposes, and held as follows:

For the purposes of income tax legislation, it must be assumed that every person has at all times a residence.

It is not necessary to this that he should have a home or a particular place of abode or even a shelter. He may sleep in the open. It is important only to ascertain the spatial bounds within which he spends his life or to which his ordered or customary living is related. Ordinary residence can best be appreciated by considering its antithesis, occasional or casual or deviatory residence. The latter would seem clearly to be not only temporary in time and exceptional in circumstance, but also accompanied by a sense of transitoriness and of return.

But in the different situations of so-called “permanent residence”, “temporary residence”, “ordinary residence”, “principal residence” and the like, the adjectives do not affect the fact that there is in all cases residence; and that quality is chiefly a matter of the degree to which a person in mind and fact settles into or maintains or centralizes his ordinary mode of living with its accessories in social relations, interests and conveniences at or in the place in question. It may be limited in time from the outset, or it may be indefinite, or so far as it is thought of, unlimited. On the lower level, the expressions involving residence should be distinguished, as I think they are in ordinary speech, from the field of “stay” or “visit”.

It is held to mean residence in the course of the customary mode of life of the person concerned, and it is contrasted with special or occasional or casual residence. The general mode of life is, therefore, relevant to a question of its application.

[24] When considered in this context, it is apparent that paragraph 55(6)(a) of the Regulations requires that a claimant “settles into or maintains or centralizes ... an ordinary mode of living”, in a contiguous state of the United States, rather than making a “stay or visit” in order to satisfy the Tribunal that he or she “resides temporarily” there.

[25] The Appellant was in the United States for roughly 72 hours between 4:00 P.M. on Thursday, June 30 and the afternoon of Sunday, July 3, 2016. She testified that she passed through three states during her journey. Her evidence does not establish an intention to settle in an ordinary mode of living in any of them or elsewhere in the United States temporarily or permanently; rather the evidence establishes that she was visiting transiently for a brief period. The Tribunal finds that the Appellant has not met her burden under Section 55(6) of the Regulations to prove that she had established temporary or permanent residence in a contiguous state of the United States.

[26] The Appellant also argued that the Federal Court of Appeal's decision in *Canada (Attorney General) v. Picard* (2014 FCA 46) ought to apply to the Commission's decision disentitling her to benefits for June 30 and July 1, 2016.

[27] The Appeal Division of the Social Security Tribunal has rendered several decisions on the application of *Picard*. In one of them, *F. S. v Canada Employment Insurance Commission* (2016 SSTADEI 63 (CanLII)), the following finding was made:

... when determining the length of the disentitlement for being out of Canada. *Picard* establishes that the correct length in days of the disentitlement (subject to any exceptions as found in the Regulations) is determined by establishing how many hours during each absence the claimant has been out of Canada, dividing by 24 and dropping the remaining hours.

[28] The Appellant testified that left Canada at 4:00 P.M. on June 30, 2016 and returned to Canada via an Ontario border crossing during the afternoon of Sunday, July 3, 2016. She was not clear on the precise hour of her return, but noted that she and her spouse encountered delay because of the Canadian and American holidays on July 1 and July 4 respectively. The Tribunal finds that the Appellant's period of absence from Canada was 72 hours.

[29] The formula mandated by *F. S. v Canada Employment Insurance Commission* produces the following result:

$$\text{Hours outside Canada} / 24 = \text{Period of Disentitlement in Days}$$

or

$$72 \text{ Hours} / 24 = 3 \text{ Days}$$

[30] These 72 hours occurred between 4:00 P.M. on Thursday and 4:00 P.M. on Sunday; essentially three 24 hour periods ending at 4:00 P.M. on Friday, Saturday and Sunday or July 1, 2 and 3, 2016 respectively. The Act, the Regulations, and jurisprudence are all silent on the treatment of Saturdays and Sundays for the purpose of this calculation.

[31] Section 55 of the Regulations engages the matter of availability for work. This concept is addressed in sections 18 and 20 of the Act and section 32 of the Regulations. Subsection 20(2) of the Act states

If a claimant is disentitled from receiving benefits for a *working day* in a week of unemployment that is not in their waiting period, an amount equal to 1/5 of their weekly rate of benefits for each such working day shall be deducted from the benefits payable for that week.”

[32] In section 32 of the Regulations Saturday and Sunday are not considered “working days”. It is illogical that a claimant’s benefit payment would be reduced as a result of her being disentitled for a day which is not a “working day” and therefore not expected to be available for work.

[33] The Tribunal is therefore satisfied that Saturday and Sunday should not be counted in calculating the Appellant’s period of disentitlement. This requires the result of the calculation to be reduced by 1 ‘day’ leaving the Appellant’s disqualification to be 1 ‘day’ and not the 2 ‘days’ which were imposed.

[34] The Appellant also submitted that it is punitive and unfair to disentitle her to benefits for July 1, which is both a Nova Scotia provincial statutory holiday and a federal statutory holiday.

[35] While the Tribunal is sympathetic to the Appellant’s argument on this point, the Tribunal is bound by the provisions of the Act and Regulations respecting the consequences of a claimant’s absence from Canada and cannot disregard them. The Act and the Regulations are clear in establishing that a claimant is not entitled to benefits while out of Canada subject to a limited number of exceptions. The Appellant being absent from Canada on Canada Day or any other statutory holiday is not one of the exceptions created by the Act and Regulations.

[36] Therefore, the Commission’s decision to impose a disentitlement on the Appellant under section 37 of the Act and section 55 of the Regulations is warranted under the circumstances.



## **CONCLUSION**

[37] The appeal is allowed in part with the modification that the Appellant's disentitlement is reduced from two days to one.

Christopher Pike  
Member, General Division - Employment Insurance Section

## ANNEX

### THE LAW

#### Employment Insurance Act

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

- (a) is an inmate of a prison or similar institution; or
- (b) is not in Canada.

#### Employment Insurance Regulations (Regulations)

**55 (1)** Subject to section 18 of the Act, a claimant who is not a self-employed person 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.

**(1.1)** Only the periods set out in paragraphs (1)(b) and (d) may be cumulated during a single trip outside Canada, and only if the member of the claimant's immediate family whom the claimant visits under paragraph (1)(d) is the person whose funeral the claimant attends under paragraph (1)(b).

**(2)** For the purposes of subsections (1) and (1.1), the following persons are considered to be members of the claimant's immediate family:

(a) the father and mother of the claimant or of the claimant's spouse or common-law partner;

(b) the spouse or common-law partner of the father or mother of the claimant or of the claimant's spouse or common-law partner;

(c) the foster parent of the claimant or of the claimant's spouse or common-law partner;

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

(e) the claimant's spouse or common-law partner;

(f) a child of the claimant or of the claimant's spouse or common-law partner;

(g) a ward of the claimant or of the claimant's spouse or common-law partner; and

(h) a dependant or relative residing in the claimant's household or a relative with whom the claimant permanently resides.

**(3)** [Repealed, SOR/2001-290, s. 3]

**(4)** A claimant who is not a self-employed person is not disentitled from receiving benefits in respect of pregnancy, the care of a child or children referred to in subsection 23(1) of the Act,

the care or support of a family member referred to in subsection 23.1(2) of the Act or of a critically ill child or while attending a course or program of instruction or training referred to in paragraph 25(1)(a) of the Act for the sole reason that the claimant is outside Canada, unless their Social Insurance Number Card or the period of validity of their Social Insurance Number has expired.

**(5)** A major attachment claimant who is not a self-employed person and whose most recent interruption of earnings before making a claim for benefits is from insurable employment outside Canada is not disentitled from receiving benefits for the sole reason that the claimant is outside Canada if

**(a)** the benefits are in respect of pregnancy, the care of a child or children referred to in subsection 23(1) of the Act or the care or support of a family member referred to in subsection 23.1(2) of the Act or of a critically ill child;

**(b)** the claimant proves that they are incapable, by reason of illness, injury or quarantine, from performing the duties of their regular or usual employment or of other suitable employment.

**(6)** Subject to subsection (7), a claimant who is not a self-employed person and who resides outside Canada, other than a major attachment claimant referred to in subsection (5), is not disentitled from receiving benefits for the sole reason of their residence outside Canada if

**(a)** the claimant resides temporarily or permanently in a state of the United States that is contiguous to Canada and

**(i)** is available for work in Canada, and

**(ii)** is able to report personally at an office of the Commission in Canada and does so when requested by the Commission; or

**(b)** the claimant is qualified to receive benefits under Article VI of the *Agreement between Canada and the United States respecting Unemployment Insurance*, signed on March 6 and 12, 1942, and resides temporarily or permanently in one of the following places in respect of which the Commission has not, pursuant to section 16 of the *Employment and Immigration Department and Commission Act*, suspended the application of that Agreement, namely,

**(i)** the District of Columbia,

**(ii)** Puerto Rico,

**(iii)** the Virgin Islands, or

**(iv)** any state of the United States.

(7) Subject to subsection (10), the maximum number of weeks for which benefits may be paid in a benefit period, in respect of a claimant referred to in subsections (5) and (6) who is not disentitled from receiving benefits, is

(a) in the case of benefits that are paid for a reason referred to in subsection 12(3) of the Act, the applicable number of weeks referred to in subsections 12(3) to (6) of the Act; and

(b) in any other case, in respect of the number of hours of insurable employment in the claimant's qualifying period set out in column I of the table to this subsection, the corresponding number of weeks set out in column II of that table.

**TABLE**

Item	Column I Number of Hours of Insurable Employment	Column II Number of Weeks of Benefits
1	420 - 454	10
2	455 - 489	10
3	490 - 524	11
4	525 - 559	11
5	560 - 594	12
6	595 - 629	12
7	630 - 664	13
8	665 - 699	13
9	700 - 734	14
10	735 - 769	14
11	770 - 804	15
12	805 - 839	15
13	840 - 874	16
14	875 - 909	16
15	910 - 944	17
16	945 - 979	17
17	980 - 1,014	18
18	1,015 - 1,049	18
19	1,050 - 1,084	19
20	1,085 - 1,119	19
21	1,120 - 1,154	20
22	1,155 - 1,189	20
23	1,190 - 1,224	21
24	1,225 - 1,259	21
25	1,260 - 1,294	22
26	1,295 - 1,329	22
27	1,330 - 1,364	23
28	1,365 - 1,399	23
29	1,400 - 1,434	24
30	1,435 - 1,469	25
31	1,470 - 1,504	26
32	1,505 - 1,539	27
33	1,540 - 1,574	28
34	1,575 - 1,609	29
35	1,610 - 1,644	30

36	1,645 - 1,679	31
37	1,680 - 1,714	32
38	1,715 - 1,749	33
39	1,750 - 1,784	34
40	1,785 - 1,819	35
41	1,820 or more	36

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**(8)** Subject to subsection (10), a claimant referred to in subsections (5) and (6), for whom a benefit period has been established and who subsequently becomes resident in Canada, continues to be entitled to receive benefits for not more than the maximum number of weeks referred to in subsection (7).

**(9)** Subject to subsection (10), the maximum number of weeks for which benefits may be paid in the benefit period, in respect of a claimant for whom a benefit period has been established in Canada and who subsequently becomes a claimant referred to in subsection (6), is the greater of

**(a)** the number of weeks for which the claimant has already received benefits in Canada; and

**(b)** the number of weeks to which the claimant would have been entitled under subsection

(7) if the claimant had been temporarily or permanently resident in a place referred to in subsection (6) when the benefit period was established.

**(10)** In a claimant's benefit period, a claimant who is not in Canada or a claimant referred to in subsection (8) may, subject to the applicable maximums set out in paragraphs (7)(a) and (b), combine weeks of benefits to which they are entitled, but the maximum number of combined weeks is 50. If the benefit period is extended under subsection 10(13) of the Act, the maximum number of combined weeks equals the maximum number of weeks calculated under subsection 10(15) of the Act less two weeks.

**(11)** A claimant who is not a self-employed person is not disentitled from receiving benefits for the sole reason that the claimant is outside Canada if the claimant is outside Canada, with the approval of the Commission, in the course of the claimant's employment under the Self-employment employment benefit established by the Commission under section 59 of the Act or under a similar benefit that is provided by a provincial government or other organization and is the subject of an agreement under section 63 of the Act.

**(12)** Subject to subsection (13), where a claimant makes a claim for the purposes of this section, the claim shall be sent in an envelope or package addressed to the Commission, by mail or by means of a confirmed delivery service.

**(13)** Where a claim is sent by the claimant to the Commission in a manner other than the manner required by subsection (12), the claim shall be reviewed by an employee of the Commission at the time of importation.