



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *V. A. v. Canada Employment Insurance Commission*, 2017 SSTGDEI 117

Tribunal File Number: GE-17-173

BETWEEN:

V. A.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Charlotte McQuade

HEARD ON: July 6, 2017

DATE OF DECISION: July 20, 2017

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Appellant, V. A., attended the hearing by telephone.

INTRODUCTION

[1] The Appellant applied for regular Employment Insurance (“EI”) benefits on February 5, 2016 and established a benefit period as of January 31, 2016. The Appellant was out of Canada from September 23, 2016 to September 27, 2016 to visit her terminally ill cousin. She advised the Respondent of this absence. The Respondent determined the Appellant was not entitled to EI benefits for the period September 23, 2016 to September 27, 2016 and imposed two separate disentitlements: (i) non-availability and (ii) being outside of Canada for the specified period. The Respondent verbally advised the Appellant of the decision and the right to request a reconsideration but did not send the Appellant a written notice of decision pertaining to the disentitlements. The Appellant requested a reconsideration of these decisions on November 1, 2016. After conducting a reconsideration, in a decision dated November 21, 2016, the Respondent maintained both disentitlements, finding the Appellant had failed to establish she met the conditions to relieve her from disentitlement for the period outside of Canada, or that she was available for work while outside of the country. The Appellant appealed this decision to the Social Security Tribunal on December 29, 2016.

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

- a) The information in the file, including the need for additional information.
- b) 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.

ISSUES

[3] Whether the Appellant should have been disentitled from benefits for the period she was out of Canada, being September 23, 2017 to September 27, 2017 pursuant to section 37 of the *Employment Insurance Act* (“EI Act”) and section 55 of the *Employment Insurance Regulations* (“EI Regulations”).

[4] Whether the Appellant should have been disentitled from benefits for the period September 23, 2017 to September 27, 2017 pursuant to section 18 of the EI Act for failing to prove she was capable of and available for work and unable to obtain suitable employment.

EVIDENCE

Documentary evidence

[5] The Appellant had been in receipt of regular EI benefits pursuant to a benefit period which started on January 31, 2016.

[6] The Appellant completed a Non-Availability questionnaire on October 7, 2016 indicating her absence from Canada to visit her seriously ill cousin. She noted her absence to be from October 23, 2016 at 4 p.m. to October 27, 2016 at 4:00 p.m. She also indicated that she was able to be contacted without delay if any job opportunity arose and that she was ready to return home within 48 hours if a job opportunity that arose. (GD3-16)

[7] The Appellant called Service Canada on October 27, 2016 to correct the dates of her absence and she had mistakenly provided incorrect dates. The Appellant provided the correct period of absence which was September 23, 2016 to September 27, 2016.

[8] A Supplementary Record of Claim dated October 27, 2016 confirms the conversation the Appellant had with the Service Canada agent on that date:

“The dates were incorrect for the disentitlements. Rescinded the disentitlements for the period of 23/10/2016 to 9999, and input the correct disentitlements for the period of 23/09/2016 to 27/09/2016. The claimant was advised of the decision, of its impact on the

claim, of her right to file a formal request for reconsideration of the decision, of the applicable time frame and that no letter will be sent.” (GD3-20)

[9] The Appellant filed a reconsideration request dated November 1, 2016 in which she refers to the Employment Insurance decision she wishes to have reconsidered as “Sept 23 to 26/27 2016.” She notes the decision she is asking to be reconsidered was verbally communicated to her on October 28, 2016.

[10] In the reconsideration request, the Appellant explained the reasons for her disagreement with the initial decision as being “visit a cousin (who is more like a sister) in the U.S.A. suffering from cancer and died a few days after my return. Due to our closeness she wanted to see me.” (GD3-21) She also provided documentary confirmation of her cousin’s passing on September 30, 2016.

[11] A Supplementary Record of Claim dated November 21, 2016 documents a conversation between the Appellant and a Service Canada agent concerning her reconsideration request. The notes indicate that the Service Canada agent advised the Appellant that the agent was performing a complete review of the information in the file and the initial decision. The notes also indicate that the Appellant explained that she travelled to New York to visit her terminally ill cousin before she passed away. She advised that her cousin was very close to her and she considers them to be sisters. The Appellant further advised that she was easily contactable during this absence and could have returned in 48 hours if offered a job. (GD3-24);

[12] The Reconsideration decision issued on November 21, 2016 confirmed that the Appellant was disentitled for the period from September 23, 2016 to September 27, 2016 because she was out of Canada and also that she was away from her home area during this period and, therefore, could not be considered available for work.

Oral evidence

[13] The Appellant confirmed that her legal name was V. A. even though her EI application and Notice of Debt referred to her as V. S..

[14] The Appellant testified that she went to New York to visit her cousin. They grew up in Guyana together. The Appellant lived with her cousin from time to time when she was young and spent a lot of time with her. When her cousin left Guyana in the 1970's she moved to New York. The Appellant's cousin was in a hospice in New York due to her illness, at the time of the Appellant's trip. Although the Appellant lived in Canada and her cousin in the United States, they kept in touch over the years and remained close. The Appellant noted that in her cultural background, her cousin would have been considered like a sister to her, although technically they were cousins. The Appellant felt she had to go to see her cousin, given her terminal situation and the fact the Appellant's cousin had requested that the Appellant come to see her.

[15] The Appellant's flight left Canada at 6 p.m. on Friday, September 23, 2016. She believed she was available for work up until 4 p.m. that day.

[16] The Appellant returned to Canada on September 27, 2016. She left New York at 11:00 a.m. and estimated it was between 3 p.m. and 4 p.m. by the time she had cleared immigration and gotten home from the airport.

[17] The Appellant advised this is why she noted 4 p.m. on her questionnaire as she was available up until 4 p.m. on September 23, 2016 and was available by 4 p.m. on her return date of September 27, 2016.

[18] The Appellant advised that if she had been called for a job opportunity while away, she could have come back home. She had access to her phone and email and was constantly checking her email to see if anything came up. She had applied for many jobs before she left.

[19] She further explained that she had no control over the travelling situation. Her cousin's situation was imminent and she had requested to see her.

SUBMISSIONS

[20] The Appellant submitted that:

- a) The Respondent was inhumane in not considering her reason for leaving the country for 3 days, one of those days being after 6 pm;

- b) She had access to her email and phone;
- c) Her visit was to see a dying relative who was in a hospice and who had requested to see her. This relative was close to her like a big sister and passed away a few days after the Appellant's visit;

[21] The Respondent submitted that:

- a) A clerical error was made and the Commission failed to send the claimant the notice of decision pertaining to the allocation of earnings. Regardless, the Federal Court of Appeal confirmed the principle established by Justice Pinard in CUB 16233 that an error which does not cause prejudice is not fatal to the decision under appeal, and therefore the Tribunal can and should maintain the decision. (*Desrosiers v. Canada (AG)*, A-128-89);
- b) Except as otherwise prescribed by the legislation, a claimant is not entitled to receive EI benefits for any period during which the claimant is not in Canada;
- c) In the case of death in the family the claimant may be considered to be available during an absence of up to seven days, if arrangements have been made to be reached without delay and if the claimant would be able to return within 48 hours should an employment opportunity be offered.;
- d) The family member must fit the criteria outlined within section 55 of the Regulations. A cousin does not fall within the category of "immediate family" that can be considered for such an exception. As such, the claimant is not permitted to be in receipt of benefits during the period she has designated she was outside of Canada;
- e) The Commission is extremely empathetic to the situation that the Appellant was facing, but there are no exceptions to the categories provided within section 55 of the Regulations when considering the provision of benefits during a period outside of Canada;
- f) The jurisprudence supports the Commission's 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. (*Canada (AG) v. Gibson*, 2012 FCA 166) (*Canada(AG) v. Bendahan*, 2012 FCA 237);

- g) For the purpose of proving availability under paragraph 18(1)(a) of the EI Act, subsection 50(8) of the Act states that the Commission may require the claimant to prove that she is making reasonable and customary efforts to obtain suitable employment;
- h) Absence from Canada automatically disentitles a claimant from benefits unless the absence and length of that absence is otherwise prescribed by section 55. In this case, the claimant left Canada to visit her cousin who was terminally ill. Since a cousin is not considered immediate family under section 55, this absence cannot be considered for relief from disqualification for the period the Appellant was outside of the country.

ANALYSIS

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

Absence from Canada

[23] Subsection 37(b) of the EI Act provides that, except as may otherwise be prescribed, a claimant is not entitled to receive benefits for any period during which the claimant is not in Canada.

[24] The Appellant was outside of Canada from September 23 to September 27, 2017 to visit her terminally ill cousin.

[25] Paragraph 55(1)(d) of the EI Regulations provides that, subject to section 18 of the EI Act, a claimant is not disqualified from receiving benefits for the reason that the claimant is outside Canada, 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.

[26] Subsection 55(2) defines who are considered to be members of the claimant's "immediate family" for the purpose of subsection 55(1) and 55(1.1).

[27] The Appellant went outside Canada to visit her ill cousin. A cousin does not come within the defined persons who are considered to be members of the claimant's "immediate family" for the purpose of the paragraph 55(1)(d) exception. The Tribunal has considered the Appellant's argument that, even though the person she was visiting was her cousin, that the relationship was more akin to that of sisters. While the Tribunal acknowledges the closeness of the relationship between the Appellant and her cousin, a "cousin" does not come within the category of persons defined in the legislation to be members of the claimant's "immediate family". The Tribunal has sympathy for the Appellant in this situation, and understands her pressing need to travel out of Canada. However, the Tribunal cannot step outside the bounds of the legislation to create new categories of individuals who may be subject to exception.

[28] The Tribunal finds that the Respondent correctly disentitled the Appellant, pursuant to subsection 37(b) of the EI Act, for being out of Canada as her reason for absence did not fit within any of the prescribed exceptions in section 55 of the EI Regulations.

Length of Disentitlement

[29] Although a disentitlement was appropriate, the length of the disentitlement must be considered. The Respondent imposed a disentitlement of 5 days from September 23, 2017 to September 27, 2017.

[30] Subsection 37(b) of the EI Act provides that a claimant is not entitled to receive benefits for "any period" during which the claimant was not in Canada.

[31] In *(Canada (Attorney General) v. Picard)*, 2014 FCA 46, the Federal Court of Appeal determined how "any period" is to be calculated. In that regard, the Court stated:

"In my view, the answer is no. The absence on each calendar day should not be disregarded. The text of paragraph 37(b) speaks of "any period" outside of Canada, not "any period" of each calendar day. Further, the purpose of the provision is to ensure that a person is available and looking for work in Canada. A situation could be envisaged where a claimant is outside of Canada for almost two entire days – in substance, not available and looking for work in Canada on those days – and yet, because the claimant

was never away for an entire calendar day, no benefits are withheld. This is contrary to the purpose of paragraph 37(b).

In light of the foregoing, I conclude that the “period” in paragraph 37(b) of the Act is the period, expressed in complete, whole days, during which the claimant was outside of Canada. For this purpose, a complete, whole day does not necessarily mean a calendar day. Rather, it can include a continuous 24 hour period that straddles two calendar days.”

[32] Thus, the Court determined that a complete, whole day does not necessarily mean a calendar day. Rather, it can include a continuous 24 hour period that straddles two calendar days.

[33] As such, following the reasoning of the Federal Court of Appeal, when determining the length of the disentitlement for being out of Canada, the correct length in days of the disentitlement 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.

[34] The Appellant advised her flight left Canada at 6:00 p.m. on September 23. Her flight left New York around 11:00 a.m. on September 27. She advised she returned home about 3 to 4 p.m. in the afternoon. As such, she would have re-entered Canada sometime between 11:00 a.m. and 3 to 4 p.m. on September 27, 2016. The period outside of Canada, then, beginning counting 24 hour periods from September 23 at 6 p.m. would amount to 3 full 24 hour periods with the remaining hours from 6 p.m. on Sept. 26, 2016 dropped.

[35] The Tribunal finds the Respondent has improperly imposed 5 days of disentitlement rather than 3 days of disentitlement. As such, the Tribunal finds the period of disentitlement should be reduced to 3 days.

Availability

[36] Given the Tribunal’s finding that the Appellant was out of Canada for a 3 day period as calculated above, and given the reason for the absence does not fit within any of the exceptions in subsection 55 of the EI Regulations, the Tribunal finds it unnecessary to decide whether the Appellant remained otherwise available pursuant to section 18 of the EI Act for these days. The Appellant was categorically disentitled to benefits for this period pursuant to subsection 37(b) of

the EI Act. The fact that the Appellant may or may not have been otherwise available for work is irrelevant unless the Appellant met one of the exceptions in section 55 of the EI Regulations for this period of absence.

[37] With respect to the two 24 hour periods for which the Tribunal has found the Appellant is not disentitled for being outside of Canada, the Tribunal must consider whether she was available for work pursuant to section 18 of the EI Act. In this regard, the Tribunal has considered September 23, the day the Appellant left, and the day of return on September 27 as the calendar days that were not counted as days out of Canada, according to the *Picard* analysis as set out above.

[38] For these days, the Tribunal finds the Appellant has proven she was capable of and available for work and unable to obtain suitable employment. The Appellant provided oral evidence that she had been applying for jobs before she left Canada. Her flight left Canada at 6 p.m. on Friday, September 23, 2016 and she was available for work up until 4 p.m. that day. She also provided oral evidence that on September 27, 2016, she left New York at 11:00 a.m. and estimated it was between 3 p.m. and 4 p.m. by the time she was home. The Appellant testified that if she had been called for a job opportunity while away, she could have come back home. She had access to her phone and email and was constantly checking her email to see if anything had come up. The Tribunal is satisfied that, had any job opportunity arisen that required the Appellant to return home earlier in the day on September 27, she would have been able to do so.

[39] Accordingly, the Tribunal finds the Appellant has proven she was capable of and available for work and unable to obtain suitable employment on September 23 and September, 27, 2016.

CONCLUSION

[40] The appeal is allowed in part. The Tribunal finds the period of disentitlement should be amended to be from the 5 day period from September 23, 2017 to September 27, 2017 to a 3 day period of disentitlement.

Charlotte McQuade
Member, General Division - Employment Insurance Section

ANNEX

THE LAW

Employment Insurance Act

18 (1) 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;
- (b) unable to work because of a prescribed illness, injury or quarantine, and that the claimant would otherwise be available for work; or
- (c) engaged in jury service.

(2) A claimant to whom benefits are payable under any of sections 23 to 23.2 is not disentitled under paragraph (1)(b) for failing to prove that he or she would have been available for work were it not for the illness, injury or quarantine.

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

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

(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 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.