



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *K. P. v Canada Employment Insurance Commission*, 2018 SST 1357

Tribunal File Number: GE-18-2326

BETWEEN:

K. P.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Teresa M. Day

HEARD ON: October 2 and October 12, 2018

DATE OF DECISION: October 12, 2018

DECISION

[1] The appeal is allowed in part. The Appellant has proven she qualified for employment insurance benefits (EI benefits) for part of the time she was outside of Canada, namely from September 30, 2017 to October 30, 2017, because she was outside of Canada receiving medical treatment not available in Canada during this period and was available for work. However, the disentitlement will remain in place for the period September 21 to September 29, 2017 because the Appellant was outside of Canada and had not yet started her medical treatment.

OVERVIEW

[2] The Appellant established a claim for EI benefits effective August 27, 2017. She left Canada on September 20, 2017 to travel to Russia to receive a fertility treatment involving a donor egg from the same Russian donor who had provided an egg for the Appellant's child born in 2014. The Appellant returned to Canada on October 30, 2017. The Respondent, the Canada Employment Insurance Commission (Commission), imposed a disentitlement on the Appellant's claim from September 21, 2017 to October 30, 2017 because she was not in Canada. The Appellant argued that she was undergoing a medical treatment that was not available to her in Canada, but the Commission maintained the disentitlement on her claim. The Appellant appealed to the Social Security Tribunal.

PRELIMINARY MATTERS

[3] The hearing in this appeal commenced on October 2, 2018. It was adjourned to allow the Appellant's additional supporting documents to be translated from Russian to English. The translated documents were filed by the Appellant on October 9, 2018 and copies were provided to the Commission, who advised they had no additional representations in response. The hearing then resumed and concluded on October 12, 2018.

ISSUE

[4] Is the Appellant disentitled to EI benefits for the entire period she was outside of Canada while on claim, namely from September 20, 2017 to October 30, 2017?

ANALYSIS

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

[6] Section 37 of the *Employment Insurance Act* (EI Act) is clear that benefits are ***not*** payable to claimants while they are outside of Canada ***except*** as specifically prescribed in section 55 of the *Employment Insurance Regulations* (EI Regulations) (*Attorney General of Canada v. Bendahan 2012 FCA 237*).

[7] The onus is on the Appellant to prove she meets the requirements of one or more of the exceptions in the EI Regulations (*Attorney General of Canada v. Peterson A-370-95*). Additionally, in order to qualify for an exemption in subsection 55(1) of the EI Regulations, the Appellant must still prove her availability for work.

[8] In order to receive EI benefits, the Appellant must prove she was capable of and available for work and unable to obtain suitable employment: section 18 of the EI Act, and *Attorney General of Canada v. Bois 2001 FCA 175*; *Attorney General of Canada v. Cornelissen-O'Neil A-652-93*; *Attorney General of Canada v. Bertrand A-631-81*).

[9] Availability for purposes of establishing the Appellant's entitlement to EI benefits is determined by analyzing the three (3) factors set out by the Federal Court of Appeal in *Faucher, A-56-90*, namely:

- a) the desire to return to the labour market as soon as a suitable job is offered;
- b) the expression of that desire through efforts to find a suitable job; and
- c) not setting personal conditions that might unduly limit the chances of returning to the labour market.

[10] Subsection 50(8) of the EI Act establishes that the onus is on the Appellant to prove availability by demonstrating that she has made reasonable and customary efforts to obtain suitable employment for every working day during her benefit period in accordance with the provisions of sections 9.001 to 9.004 of the EI Regulations.

Issue 1: Does the Appellant come within the exception provided for claimants travelling outside of Canada to receive medical treatment not readily available in Canada?

[11] Paragraph 55(1)(a) of the EI Regulations allows a claimant to receive EI benefits while outside of Canada *if* the travel is for the specific purpose of receiving medical treatment that is not readily or immediately available in Canada. The medical treatment must take place in an accredited medical facility.

[12] The Tribunal finds that a portion of the Appellant's time outside of Canada, namely the period from September 30, 2017 to October 30, 2017, comes within the exception provided for in paragraph 55(1)(a) of the EI Regulations.

[13] The Tribunal agrees with the Commission that during the reconsideration process, the Appellant failed to submit the documentation to prove the facility she attended was accredited and that treatment took place on the dates specified. The Commission therefore, understandably, maintained the disentitlement on her claim. However, the Appellant has provided additional documentary evidence and testimony in support of her appeal.

[14] The Appellant's evidence is as follows:

- She left Canada on September 20, 2017 and travelled via London and other stops to Russia. She arrived at X Medical Clinic in X, Russia on September 30, 2017.
- The X clinic is licensed by the Ministry of Health of Novosibirsk Region to provide various medical services, including obstetrics and gynecology with assisted reproductive technology. This includes implantation using donor eggs.
- The licenses for such clinics are issued annually.
- A copy of the X clinic's current accreditation is at GD12-3 to GD12-4.
- She was unable to obtain a copy of the license for 2017, but the X clinic was properly licenced and accredited when the Appellant was treated there in 2014 and 2017.
- In 2014, she travelled to Russia for a "non-altruistic egg donation" fertility treatment that her doctor in X, Alberta certified was offered there and not offered in X (GD3-21). The Appellant has no eggs of her own and required an egg donor in order to give birth to a child. Her husband would provide the sperm.

- The 2014 treatment was successful and she gave birth to a healthy son on November 19, 2014.
- The egg donor/embryo implantation treatment takes place over a complete menstrual cycle. It requires numerous tests and procedures throughout the cycle, including blood tests to check hormone levels, ultra sound images to measure the thickness of the lining of the uterus, and drug treatments to prepare for implantation of the fertilized donor egg (embryo).
- She arrived in Russia on September 30, 2017, at the start of her period. She found an apartment to rent that was close to the clinic. She checked in at the clinic and was told to come back on the 2nd or 3rd day of her period. She returned to the clinic on October 2, 2017 and had her first meeting with a doctor at that time (see medical notes at GD10-3 to GD10-4). She then attended at the clinic nearly every day after that for various procedures, as set out in her treatment card at GD12-5 to GD12-6.
- She had two embryos implanted on October 27, 2017 (see Discharge Summary at GD6-3 to GD6-5).
- She returned to Canada on October 30, 2017.
- She was required to have a follow-up procedure, namely HCG control on November 9, 2017 (see Discharge Summary at GD6-3 to GD6-5). She completed the HCG control in X on November 9, 2017 (see doctor's notes at GD9-2 and lab results at GD9-4).

[15] The Tribunal acknowledges that the Commission located a donor egg program in X in May 2018 (see research at GD3-24 to GD3-43). The Tribunal nonetheless gives greatest weight to the Appellant's evidence that this program was not available to her in 2014 and that, when she decided to try for a second child in 2017, there were still 8 eggs available from the original donor for her first child - but Russian authorities do not allow donor eggs to be exported. The Appellant and her husband actually looked into the shipping process with an embryologist in December 2016 (see doctor's notes at GD9-2) and found out about the restrictions then.

[16] The Appellant wanted to use an egg from the same donor because she wanted her children to have this biological connection, namely the same genetic mother and father. The Tribunal finds this was a legitimate treatment option for the Appellant and that the medical procedure could not have been accomplished in Canada.

[17] The Tribunal further finds as follows:

- a) the Appellant travelled to the X Medical Clinic in Russia for the sole purpose of obtaining the medical treatment described in paragraphs 14 to 16 above;
- b) this medical treatment was not readily available in Canada;
- c) the X clinic is accredited to provide the medical treatment; and
- d) the portion of the Appellant's travel outside of Canada that was related to her medical treatment was from September 30, 2017 to October 30, 2017.

[18] The Appellant stated that the Service Canada agent she spoke with during the reconsideration process told her that because she was outside of Canada for medical reasons, her claim would be converted to a claim for sickness benefits. The Tribunal is unable to see any notes about this in the reconsideration file at GD3. However, the Tribunal finds that the Appellant has brought herself within the exception provided for in paragraph 55(1)(a) of the EI Regulations and, therefore, is ***not*** disentitled to EI benefits – be they regular benefits or sickness benefits – for the period of September 30, 2017 to October 30, 2017 because she was outside of Canada.

Issue 2: Has the Appellant proven her availability for work between September 30, 2017 and October 30, 2017?

[19] Availability is determined by analyzing three factors: the desire to return to work as soon as a suitable job is offered, the expression of that desire through efforts to find a suitable job, and not setting personal conditions that might unduly limit the chances of returning to work (*Faucher, supra*).

[20] The Tribunal finds the Appellant has satisfied the test in *Faucher, supra*, and has proven her availability for work from September 30, 2017 to October 30, 2017. Therefore, the Appellant is ***not*** disentitled to EI benefits for failing to prove her availability.

[21] The Appellant testified as follows:

- She was laid off from her job as an environmental specialist with X in July 2017 and received severance pay on separation from her employment.
- In her job at X, she was responsible for overseeing the employer's natural gas facilities, pipelines, compression stations and meter stations in Albert and British Columbia.
- She immediately started to apply for jobs through various websites, and she registered with the government of Alberta's job search website. Her job search efforts also included networking with colleagues from X and from her prior employer before that, as well as with contractors she had worked with over the years. She also researched and applied to a number of environmental consulting companies.
- She was not medically incapacitated while she was in Russia undergoing fertility treatment, and she continued with all of her job search efforts during that period.
- She even continued her efforts to gain employment as an X with the X after she travelled to Russia for treatment. She had begun the selection process prior to leaving Canada and, on September 27, 2017, was advised by email that she had met the screening requirements and that the next assessment stage was to complete a 2-hour written test electronically. She completed the electronic testing on October 4, 2017, while she was receiving treatment in Russia (see X correspondence at GD12-7 to GD12-9).

[22] The Tribunal accepts the Appellant's sincere and credible testimony that she wanted to get back to work as soon as possible. The Tribunal also accepts the Appellant's testimony regarding her sustained efforts to find a job, and finds that these efforts were directed toward obtaining suitable employment and consistent with the activities specified in subsection 9.001(b) of the EI Regulations. Finally, based on the Appellant's testimony set out in paragraph 21 above, the Tribunal accepts that there were no personal conditions – including medical incapacity – that would have prevented her from returning to the labour force.

[23] Having satisfied all three (3) factors in *Faucher, supra*, the Tribunal finds the Appellant has proven her availability for work from September 30, 2017 to October 30, 2017 and,

therefore, is ***not*** disentitled to EI benefits for failing to prove her availability for work during this period.

CONCLUSION

[24] The Tribunal finds the Appellant was outside of Canada from September 30, 2017 to October 30, 2017 while on claim, but that she is ***not*** disentitled to EI benefits during this period because she has proven that she qualified for the statutory exemption provided for in paragraph 55(1)(a) of the EI Regulations.

[25] The Tribunal further finds the Appellant has demonstrated that she satisfied all (3) factors set out in *Faucher, supra* between September 30, 2017 and October 30, 2017 and, therefore, has proven her availability for work during this period. As a result, the Appellant is ***not*** disentitled to EI benefits for failing to prove her availability for work during this period.

[26] The appeal is allowed in part. The Appellant has proven her entitlement to EI benefits for part of the time she was outside of Canada, namely from September 30, 2017 to October 30, 2017, because she was outside of Canada receiving medical treatment not available in Canada during this period and available for work. However, the disentitlement on her claim will remain in place for the period September 21 to September 29, 2017 because the Appellant was outside of Canada and had not yet started her medical treatment.

Teresa M. Day

Member, General Division - Employment Insurance Section

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| HEARD ON: | October 2 and October 12, 2018 |
| METHOD OF PROCEEDING: | Teleconference |
| APPEARANCES: | K. P., Appellant |

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

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 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.