



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *H. S. v Canada Employment Insurance Commission*, 2018 SST 1175

Tribunal File Number: GE-18-1571

BETWEEN:

H. S.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Takis Pappas

HEARD ON: September 20, 2018

DATE OF DECISION: October 11, 2018

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] A benefit period was established effective December 10, 2017.¹ On February 5, 2018 the Appellant contacted the Respondent to advise he had been outside of Canada from January 9-23, 2018 on vacation.

[3] The Respondent concluded that the Appellant was not able to establish that, if it were not for his illness, he would have been available for work and imposed a definite disentitlement from January 9, 2018 to January 23, 2018. The Respondent also concluded that the Appellant was not entitled to benefits for this period because he was absent from Canada and imposed a definite disentitlement for the same dates. These decisions resulted in an overpayment of \$835.²

[4] The Appellant argued that he was not available for work because of his disability so what is the difference if he was outside of Canada or not while collecting sickness benefits. The Appellant said the reason for his absence was his daughter's wedding.³ The Appellant also argued the warm and dry climate in Cuba was the best therapy for his shoulders.

ISSUES

[5] Issue #1: Should a disentitlement be imposed according to section 37 of the *Employment Insurance Act* (the Act) and section 55 of the *Employment Insurance Regulations* (the Regulations) because the Appellant was absent from Canada?

[6] Issue #1: Should a disentitlement be imposed according to subsection 18(1) (b) of the Act for failing to prove that if it were not for the illness, he would have been available for work?

¹ (GD3-3 to GD3-13)

² (GD3-16)

³ (GD3-17 to GD3-18)

ANALYSIS⁴

Issue #1: Should a disentitlement be imposed according to section 37 of the Act and section 55 of the Regulations because the Appellant was absent from Canada?

[7] Except as otherwise prescribed by the legislation, a claimant is not entitled to receive Employment Insurance benefits for any period during which the claimant is not in Canada. Parliament decided upon a very strict approach to the question of entitlement to Employment Insurance benefits for persons outside of Canada, presumably with a view to avoiding abuse of the Employment Insurance system. In Section 37(b) it enacted a clear and unequivocal restriction of Employment Insurance benefits for persons not in Canada. The governing principle is described by Section 37(b) of the Act and it states:

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

- a) is not in Canada

[8] Regulation 55 goes further to add certain exemptions to that may provide benefits for up to seven days for scenarios that include:

- a) attending medical treatment not available in the claimant's area of residence.
- b) attending the funeral of an immediate family member or close relative.
- c) to accompany family member undergoing medical treatment.
- d) to visit an immediate family member who is seriously ill or injured.
- e) to conduct a bona fide job search or interview.

[9] Yes, a disentitlement should be imposed on the Appellant because he was out of Canada.

[10] The uncontested evidence in this case established that the Appellant was out of Canada during the periods in question.

⁴ The relevant legislative provisions are reproduced in the Annex to this decision

[11] The Appellant submitted that the purpose of his trip was to attend his daughter's wedding in Cuba. The Respondent submitted that the purpose of the Appellant's absence did not meet the conditions under Regulation 55 and as a result he was disentitled for the period of January 9, 2018 to January 23, 2018 because he was out of Canada.

[12] The Appellant also submitted that he was seeking medical treatment for his shoulder pain, and that being in a warm and dry climate was the best therapy for his condition.

[13] I did not give any weight to the above submission of the Appellant. The Appellant has not provided any evidence to suggest that he was actively seeking medical treatment while in Cuba, and that such treatment was unavailable to him in Canada. I find that the warm and dry climate of a tropical destination cannot be accepted as a treatment. Furthermore, the Appellant provided the above explanation of his absence from Canada after he became aware that his initial reason for his trip to Cuba did not satisfy the requirements to allow payment of sickness benefits during his absence from Canada.

[14] I find that the Appellant is not entitled to benefits for the period of January 9, 2018 to January 23, 2018 because he was out of Canada.

[15] The Court stated that "Section 37(b) of the Employment Insurance Act, S.C. 1996, c, 23, provides that "except as may otherwise be prescribed", a claimant is not entitled to receive benefits while outside Canada".⁵

Issue #2: Should a disentitlement imposed according to subsection 18(1) (a) (b) of the Act?

[16] The Federal Court of Appeal confirmed the principle that sickness benefits are only payable to a claimant when the claimant's own illness makes them unable to work during a period when they were available for work.⁶

[17] The Court established that the following three factors should be considered to determine whether a claimant proved that they were available for work:⁷

⁵ (Canada (AG) v. Gibson, 2012 FCA 166)

⁶ (Canada (AG) v. X, A-479- 94)

⁷ (Faucher (A-56-96))

“There being no precise definition in the Act, this Court has held on many occasions that availability must be determined by analyzing three factors "the desire to return to the labour market 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 the labour market" and that the three factors must be considered in reaching a conclusion”.

Did the Appellant establish that, if it were not for the illness, he would have been available for work?

[18] Subsection 18(1) (a) (b) of the Act stipulates that to be entitled to sickness benefits, the Appellant must establish that she is unable to work and if it were not for his illness, he would have been available for work.

[19] I find that from January 9, 2018 to January 23, 2018, the Appellant would not have been available for work if it were not for his illness because he was outside of Canada on vacation.

[20] The Respondent submitted that leaving one’s home area to take a vacation is in direct opposition to the concept of availability. Regardless of the area visited or the duration of the trip, a claimant on vacation fails to prove availability for work.

[21] The Respondent also submitted that it does not dispute the Appellant was incapable of work, but contends during the period of time when he was on vacation he was not otherwise available for work and therefore not entitled to employment insurance benefits.

[22] I have considered the submissions from both parties and I accept and assign more weight to the Respondent’s submissions. Therefore I find that the Appellant failed to prove that he would have been available to work if it were not for his illness while out of Canada. It is possible that the Appellant made a good personal decision to attend his daughter’s wedding. It is unfortunate that the reasons for his absence fail to meet the criteria outlined within subsection 18 of the Act.

CONCLUSION

[23] The appeal is dismissed.

Takis Pappas

Member, General Division - Employment Insurance Section

| | |
|-----------------------|--------------------|
| HEARD ON: | September 20, 2018 |
| METHOD OF PROCEEDING: | Teleconference |
| APPEARANCES: | H. S., Appellant |

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.