



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *N. C. v Canada Employment Insurance Commission*, 2019 SST 847

Tribunal File Number: GE-19-780

BETWEEN:

N. C.

Appellant / Claimant

and

Canada Employment Insurance Commission

Respondent / Commission

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Raelene R. Thomas

HEARD ON: March 6, 2019

DATE OF DECISION: March 27, 2019

DECISION

[1] The appeal is dismissed. I find the Claimant has not proven he is entitled to benefits for the period he was outside Canada while in Europe and while in the United States. I further find the Claimant has not proven that he was available for work during the period while he was in Canada but away from his residence.

OVERVIEW

[2] The Appellant (Claimant) was laid off from his employment and established a claim for employment insurance (EI) benefits. He is an avid cyclist who has participated in provincial, national and international races, and has been on the podium on number of occasions. He continues to race and to coach with great success. The Claimant decided to pursue self-employment in the cycling tourism industry, and in exploring that opportunity visited Spain, Belgium, and the United States. The latter trip included some time in Canada away from his residence. The Respondent, the Canada Employment Insurance Commission (Commission), became aware of the Claimant's absence while in Europe as part of the sharing of information between itself and the Canada Border Services Agency. The Claimant advised the Commission of his second absence. The Commission disentitled the Claimant from EI benefits for each of the periods he was away from his residence because he was out of Canada or on vacation. The Commission also disentitled the Claimant because he was not available for work during these periods. This created an overpayment. The Claimant requested reconsideration of the Commission's decisions and the Commission maintained its initial decisions. The Claimant appeals the decisions to the Social Security Tribunal (Tribunal) arguing that he was available for work as he was exploring self-employment at all times.

ISSUES

Issue 1: Is the Claimant entitled to benefits while he was outside Canada from April 11, 2016, to April 22, 2016?

Issue 2: Was the Claimant available for work for the period April 11, 2016, to April 24, 2016?

Issue 3: Is the Claimant entitled to benefits while he was outside Canada from July 18, 2016, to July 19, 2016?

Issue 4: Was the Claimant available for work on April 25, 2016, July 14, 2016, July 15, 2016 and from July 20, 2016 to July 26, 2016?

Issue 5: Has the Claimant proven that he was making reasonable and customary efforts to find work on April 25, 2016, July 14, 2016, July 15, 2016, and from July 20, 2016, to July 26, 2016?

ANALYSIS

[3] The *Employment Insurance Act* (Act) is clear that claimants are not entitled to EI benefits while they are outside Canada.¹

[4] The *Employment Insurance Regulations* (Regulations) provide the only exceptions to the general disqualification. A claimant is not disqualified from receiving EI benefits while outside Canada if: the claimant, or an immediate family member they are accompanying, are undergoing medical treatment that is not readily or immediately available in their area of residence in Canada; the claimant is attending the funeral of an immediate family member; the claimant is visiting an immediate family member who is gravely ill; the claimant is attending a *bona fide* job interview; or, the claimant is conducting a *bona fide* job search.²

[5] It is the responsibility of claimants to prove they meet the exceptions including the availability requirements prescribed in the Act.³ Further, where a claimant falls within one of the exceptions to the disqualification for being outside of Canada, he or she must still show availability.⁴

[6] To be entitled to receive regular EI benefits, claimants have to prove that, for each working day, they are capable of and available for work and unable to obtain suitable employment.⁵ A working day is any day of the week except Saturday and Sunday.⁶ Claimants

¹ *Employment Insurance Act* (Act), section 37

² *Employment Insurance Regulations* (Regulations), section 55

³ *Canada (Attorney General) v. Peterson*, A-370-95; *Attorney General (Canada) v. Gibson*, 2012 FCA 166

⁴ Regulations, section 55(1)

⁵ Act, paragraph 18(1)(a)

⁶ Act, section 32

also have to prove that it is more likely than not they are making reasonable and customary efforts to obtain suitable employment.⁷ To determine whether a claimant's efforts are reasonable and customary I must compare those activities to the criteria listed in the Regulations.⁸ The Regulations also provide criteria for determining whether an employment is suitable employment.⁹

Issue 1: Is the Claimant entitled to benefits while outside Canada from April 11, 2016, to April 22, 2016?

[7] No, the Claimant has not proven that he was outside of Canada for any of the exceptions listed in the Regulations.

[8] The Claimant testified that he has spent his whole life involved in competitive cycling. He has raced provincially, nationally and internationally. He was active in the European racing circuit. He stated that after his layoff he received employment counselling from a private firm supplied by his former employer. He explored his career options and determined that he would like to find employment in the cycling tourism industry. The Claimant testified he contacted fellow cyclists in Spain and Belgium. He stated he went to Spain to explore the cycling tourism industry and to see how they conducted their operations. He led a group of cyclists for one ride. He was not paid for that ride. The Claimant testified the purpose of his trip was to determine if he could become self-employed by setting up his own cycling tourism company to broker and guide cycling tours. He did not have any job interviews arranged for the time he was in Spain nor did he look for any paid employment while in Spain. When asked, the Claimant stated that he did not have any expectation of meeting the requirements for employment in Spain. The Claimant testified that the time he spent in Belgium was to attend a race in which a friend was competing.

[9] The Claimant submitted that because he was looking for self-employment in the cycling tourism industry, he was engaged in a *bona fide* job search while outside Canada. He testified that he has a lifelong involvement in competitive cycling and was exploring how to make that

⁷ Act, subsection 50(8); *Canada (Attorney General) v. Renaud*, 2007 FCA 328

⁸ Regulations, section 9.001

⁹ Regulations, sections 9.002

passion his source of income. He testified he contacted the Commission prior to leaving on this trip and was told that it would be acceptable for him to be outside Canada for two weeks while he was receiving EI.

[10] The Commission submitted that the purpose of the Claimant's trip to engage in cycling tourism and assess the possibility of potentially starting his own business are activities that are not included in the Regulations. The Commission submitted that the Claimant may very well have been told that it was acceptable to be outside of Canada for 14 days for a *bona fide* job search, but stated the Claimant's activities and his reasons for being outside of Canada do not amount to a *bona fide* job search.

[11] I find the Claimant has not met any of the exceptions to entitle him to EI benefits while outside Canada. I recognize the Claimant's extensive experience in competitive cycling and his desire to transform that experience into self-employment. However, a *bona fide* job search in the context of the Act and Regulations requires that a Claimant seek a job, which necessarily would require that the Claimant contact prospective employers either before or during the period he was out of Canada. As the Claimant has readily testified that he was not seeking a job I cannot find that he met this, or any other, exception to disentitlement while outside of Canada.

[12] Regarding the period of disentitlement, the Federal Court of Appeal found that the word "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. The time, therefore, that a claimant is outside Canada for a fraction of a complete day, is not counted as a "period" outside of Canada.¹⁰

[13] The Claimant left Canada for Spain on Sunday, April 10, 2016. He returned to Canada at 2:55 p.m. on Monday, April 25, 2016. Included in the file is the Commission's breakdown of the overpayment. The Commission disentitled the Claimant from benefits for the full weeks beginning April 10, 2016, and April 17, 2016. I find this assessment is correct. However, in the breakdown of overpayment for the week of April 24, 2016, the Claimant is shown as having an

¹⁰ *Canada (Attorney General v. Picard*, 2014 FCA 46

overpayment of 1 day. This is incorrect given the Claimant returned to Canada at 2:55 p.m. on Monday, April 25, 2016, as demonstrated by the flight information in the file. As a result, I find the Claimant was incorrectly disentitled from benefits because he was outside Canada for Monday, April 25, 2016. I note that this finding does not establish entitlement as the Claimant must also prove that he was capable of and available for work for that day.

Issue 2: Was the Claimant available for work for the period April 11, 2106, to April 24, 2016?

[14] Having determined the Claimant is disentitled from benefits because he was outside of Canada for this time period, I do not need to consider whether the Claimant has proven he was available for work while he was outside Canada from April 11, 2016 to April 24, 2016.

Issue 3: Is the Claimant entitled to benefits while he was outside Canada from July 15, 2016, to July 20, 2016?

[15] No, the Claimant has not proven that he was outside of Canada for any of the exceptions listed in the Regulations.

[16] The Claimant testified that he flew from his residence to Vancouver on Thursday, July 14, 2016. He stayed overnight and on Friday, July 15, 2016, he drove to Oregon, USA, to meet with a friend and to explore the cycling tourism opportunities in that region. He stated that there were opportunities given the wine making industry in the area and the nature of the road system. The Claimant testified that during this time he did not apply for any jobs. He did not have any interviews arranged for the time while he was in Oregon nor did he look for any paid employment while in Oregon. When asked, the Claimant stated that he did not have any expectation of meeting the requirements for employment in the USA. On July 20, 2016, the Claimant returned to Canada. He remained in Victoria, BC, until returning to his residence on July 26, 2016.

[17] The Claimant submitted that because he was looking for self-employment in the cycling tourism industry he was engaged in a *bona fide* job search while outside Canada. He testified that he was relying on the information he received from the Commission prior to his trip to

Europe and assumed it would be acceptable for him to be outside Canada for two weeks while in the USA as well.

[18] The Commission's submission regarding the Claimant's absences from Canada is set out above in paragraph 10.

[19] I find the Claimant has not met any of the exceptions to entitle him to EI benefits while outside Canada. He was not engaged in a *bona fide* job search as the Claimant has readily testified that he was not seeking a job. As a result, I cannot find that he met this, or any other, exception to disentitlement while outside of Canada.

[20] I have already set out the case law regarding the period of disentitlement, in paragraph 12 above.

[21] The Claimant left Canada for Oregon on Friday, July 15, 2016. He returned to Canada on Wednesday, July 20, 2016. As he was driving, exact times of departure and arrival are not available. The Commission determined the Claimant was disentitled from benefits for the two whole normal work days that he was outside Canada, being July 18, 2016, and July 19, 2016. I find this assessment is correct. The Claimant was present in Canada for a fraction of July 15, 2016, as did he not depart for Oregon until the morning of that day. He was also present in Canada for a fraction of July 20, 2016, as he returned to Canada on that day. As a result, I find the Claimant is not disentitled to EI benefits for being outside Canada on these 2 days. This finding does not establish an entitlement to benefits as the Claimant must prove that he was capable of and available for work for those two days, in addition to the other days he was away from his residence as discussed below.

Issue 4: Was the Claimant available for work on April 25, 2016, July 14, 2016, July 15, 2016 and from July 20, 2016 to July 26, 2016?

[22] No, the Claimant was not available for work on April 25, 2016, July 14, 2016, July 15, 2016, and from July 20, 2016, to July 26, 2016, because he has not satisfied all three factors required to prove his availability.

[23] Availability is not defined in the legislation. A claimant can establish his availability by proving his desire to return to the labour market as soon as a suitable job is offered, through demonstrating efforts to find a suitable job, and by not setting personal conditions that might limit his chances of returning to the labour market. These three factors are known as the *Faucher*¹¹ factors.

[24] I must apply all three of the *Faucher* factors to the Claimant's circumstances; the failure to apply one of the factors is an error of law.¹²

[25] The desire to return to work must be sincere, demonstrated by the attitude and the conduct of the claimant.¹³

[26] No matter how little chance of success a claimant may feel a job search would have, the Act is designed so that only those who are genuinely unemployed and actively seeking work will receive benefits.¹⁴ It is not enough for the Claimant to say that he was looking for work, he must demonstrate his availability by actively looking for work.¹⁵

[27] The Commission submitted that the Claimant made the clear and unambiguous statement that he was not making efforts to find insurable employment while he was outside Canada. It submitted the Claimant's assessment of employment opportunities while he was outside Canada was intended to assess the feasibility of starting his own business in the field of cycling.

[28] The Claimant submitted that his trips outside of Canada were for the purpose of investigating existing cycle tourism operations. The Claimant stated he wanted to see how the businesses operated and determine if he would be able to start and operate a cycle tourism business. The Claimant testified that he did not seek employment, inside or outside Canada, while he was outside Canada. The Claimant testified that he did not seek employment on the days that he was traveling to and from destinations within Canada and outside Canada. His efforts were devoted solely to the establishment of a cycle tourism business.

¹¹ *Faucher v. Canada (Attorney General)*, A-56-96

¹² *Canada (Attorney General) v. Rideout*, 2004 FCA 304

¹³ *Canada (Attorney General) v. Whiffen*, A-1472-92

¹⁴ *Canada (Attorney General) v. Cornelissen-O'Neill*, A-652-93

¹⁵ *Canada (Attorney General) v. Renaud*, 2007 FCA 328

[29] The Commission submitted that the Claimant was visiting family in Vancouver on July 14, 2016, and was visiting family in Victoria from July 20, 2016 until July 26, 2016. The Commission submitted the Claimant consistently said that he was not actively looking for work during his period away from his residence while he was in Canada.

[30] The Claimant submitted that the periods spent with family were incidental to the main purpose of his trip, which was to investigate the feasibility of a cycle tourism business. He submitted that investigating the cycle tourism industry was a *bona fide* job search. He stated he chose to stay with family on this trip as a means to reduce his costs. The Claimant testified that he did not seek employment inside Canada while he was away from his residence, traveling to Vancouver, Oregon, and Victoria. He stated his efforts throughout that trip were devoted solely to the establishment of a cycle tourism business. He testified that on the days he traveled from his residence to Vancouver, and returned from Victoria to his residence, he did not have the opportunity to look for work as he was travelling.

[31] I find that the Claimant has not demonstrated a sincere desire to return to the labour market as he testified that he had not looked for any employment through any means while he was outside Canada in April 2016, and July 2016, or while he was away from his residence in July 2016. Based on the Claimant's testimony that his efforts were limited to the exploration of the cycling tourism industry I find that the Claimant made no efforts to find suitable employment. Finally, I find that the Claimant's willingness to only seek and undertake self-employment in the cycling tourism industry is a personal condition set by the Claimant that unduly limited his chances of returning to the labour market. As a result, the Claimant has failed to satisfy any of the three *Faucher* factors. Accordingly, the Claimant has not proven that he was available for work on April 25, 2016, July 14, 2016, July 15, 2016, and from July 20, 2016 to July 26, 2016.

Issue 5: Has the Claimant proven that he was making reasonable and customary efforts to find work on April 25, 2016, July 14, 2016, July 15, 2016, and from July 20, 2016, to July 26, 2016?

[32] The Commission has the authority to require a claimant to prove that he is making reasonable and customary efforts to obtain suitable employment.¹⁶ To prove this, the Claimant's efforts must be sustained, directed towards obtaining suitable employment and include activities such as assessing employment opportunities, preparing a resume or cover letter, registering for job search tools or with electronic job banks or employment agencies, attending job search workshops or job fairs, networking, contacting prospective employers, attending interviews, and undergoing evaluations of competencies.

[33] The Commission submitted the Claimant made the clear and unambiguous statement that he was not making efforts to find insurable employment while outside of Canada. The Commission submitted claimants are expected to make reasonable efforts to search for employment and are not exempt from this obligation while away from home. The Commission stated the Claimant consistently stated that he was not actively looking for work during the period he was away from home within Canada.

[34] The Claimant submitted that he was making reasonable and customary efforts to find employment. The Claimant testified that he did have a resume prepared, he had worked with an employment agency to attend job search workshops and he networked with his friends and contacts in the cycling world. The Claimant stated he did not contact employers because his focus was on starting his business and there was no one to contact to hire him as a cycling guide. The Claimant testified he did not submit any applications or attend any job interviews. He stated he was also in touch with Olympic champions to discuss establishing cycling training camps for youth.

[35] Based on the Claimant's testimony, and the evidence on file, I find that the Claimant's efforts to find employment were not reasonable and customary or sustained, given that he was focused on exploring a cycle tourism business.

CONCLUSION

[36] The appeal is dismissed.

¹⁶ Act, subsection 50(8)

Raelene R. Thomas

Member, General Division - Employment Insurance Section

HEARD ON:	March 6, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	N. C., Appellant