



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *AH v Canada Employment Insurance Commission*, 2021 SST 97

Tribunal File Number: GE-21-45

BETWEEN:

A. H.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Teresa M. Day

HEARD ON: January 22, 2021

DATE OF DECISION: January 22, 2021

DECISION

[1] The appeal is dismissed. The Appellant is disentitled to employment insurance benefits (EI benefits) from October 5, 2020 because he was - and continues to be - outside of Canada. He is also disentitled from October 5, 2020 for failing to prove his availability for work.

OVERVIEW

[2] The Appellant left Canada on February 22, 2020 and travelled to India. He applied for employment insurance sickness benefits on March 30, 2020. From March 29, 2020 to October 4, 2020, he received Canada Emergency Response Benefits (CERB) while remaining outside of Canada. When his CERB ended, he was automatically enrolled in the regular employment insurance plan, as per his original application. The Appellant was able to establish a claim for benefits effective October 5, 2020, but the Canada Employment Insurance Commission (Commission) imposed an immediate and indefinite disentitlement on his claim because he was not in Canada and was unavailable for work.

[3] The Appellant asked the Commission to reconsider its decision. He advised that he went to India to visit family there and expected to return to Canada approximately one month later. However, his return flight was cancelled due to the global Covid-19 pandemic and he remains unable to return to Canada because of a travel ban in India. The Commission maintained the disentitlement on his claim. The Appellant appealed to the Social Security Tribunal (Tribunal).

ISSUES

[4] Is the Appellant disentitled to EI benefits as of October 5, 2020 because he was, and continues to be, outside of Canada?

[5] Is the Appellant disentitled to EI benefits as of October 5, 2020 because he has not proven he is available for work?

ANALYSIS

Outside of Canada

[6] EI benefits are not payable to claimants while they are outside of Canada¹ except as specifically prescribed in the *Employment Insurance Regulations*² (EI Regulations).

[7] The onus is on the Appellant to prove he meets the requirements of one or more of the exceptions in the EI Regulations in order to overcome the general prohibition on payment to claimants outside of Canada³.

Availability

[8] In order to receive EI benefits, the Appellant must prove he was capable of and available for work and unable to obtain suitable employment⁴.

[9] The Appellant must demonstrate three (3) things to show he was available:

- a) a 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) no personal conditions that might unduly limit his chances of returning to the labour market⁵.

Issue 1: Outside of Canada

Does the Appellant come within any of the exceptions provided for claimants who are outside of Canada during their benefit period?

[10] Subsection 55(1) of the EI Regulations allows a claimant to receive EI benefits while outside of Canada ***if*** the travel is for one of the following specific purposes, namely:

¹ Section 37 of the *Employment Insurance Act*

² Section 55 of the *Employment Insurance Regulations*, and *Attorney General of Canada v. Bendahan*, 2012 FCA 237

³ *Attorney General of Canada v. Peterson*, A-370-95.

⁴ Section 18 of the *Employment Insurance Act*, and *Attorney General of Canada v. Bois*, 2001 FCA 175

⁵ *Faucher v. Canada Employment Insurance Commission*, A-56-96 and A-57-97.

- to undergo medical treatment that is not readily available in Canada
- to attend the funeral of an immediate family member (7 days),
- to accompany an immediate family member to a hospital for medical treatment that is not available in Canada (7 days),
- to visit a family member who is seriously ill or injured (7 days)
- to conduct a bona fide job search (14 days) or attend a bona fide job interview (7 days)

[11] The Appellant testified that he traveled to India on February 22, 2020 for the purpose of visiting his parents and other family living there. He intended to come back to Canada “at the end of March”. However, his return flight was cancelled when India went into a lockdown and suspended all international flights due to the global Covid-19 pandemic. He has since made a number of attempts to book a return flight to Canada, but these flights have also been cancelled due to India’s on-going travel ban (see GD5). He has heard news that India may lift the travel ban at the end of January 2021, and that international flights “will operate normally” after that. He has booked another return flight and hopes to reach Canada “by February 19, 2021”. But there is “no guarantee” the flight he has booked will go ahead.

[12] The Appellant submitted that wanted to return to Canada at the end of March 2020 and should not be prevented from receiving EI benefits because of circumstances that are beyond his control. He planned his trip and had a return ticket booked for March 26, 2020, but then “Covid happened”, and “the entire nation of India went into lockdown” and there was a ban on all flights from his location. His only option was – and continues to be – to keep extending his return ticket with the airline until the travel ban is lifted. But the ban is still in effect and there’s no certainty about when India will allow international flights to resume.

[13] A claimant can only receive EI benefits while outside of Canada if they prove that one of the exceptions listed in subsection 55(1) of the EI Regulations (see paragraph 10 above) applies to their situation.

[14] I find that none of the Appellant’s reasons for being outside of Canada come within any of the exceptions provided for in the EI Regulations.

[15] I am extremely sympathetic to the difficult situation the Appellant finds himself in, and I acknowledge the toll it has taken on his physical and mental health, as well as his financial well-being. I agree that the imposition of a travel ban due to the global Covid-19 pandemic was entirely beyond his control.

[16] However, being stranded outside of Canada due to the global Covid-19 pandemic is not one of the exceptions listed in the law. And although the Appellant received the Canada Emergency Response Benefit (CERB) while he was outside of Canada, there have been no emergency provisions enacted that would permit conventional EI benefits to be paid to a claimant who is outside of Canada due to the Covid-19 pandemic. The only permissible exceptions are those specific exemptions listed in subsection 55(1) of the EI Regulations.

[17] The Appellant was hoping I would be able to help him and asked me to consider everything he has gone through while waiting for India to lift the travel ban, including:

- the loss of his job due to the pandemic;
- the diagnosis and treatment of his gastro-intestinal health problems;
- the anxiety he is experiencing about having to travel with compromised immunity; and
- the financial stress he is under.

[18] Unfortunately, I do not have discretion to add these – or any other – circumstances to the list of exceptions, or to interpret the law in any way other than its plain meaning. I must be guided by the Supreme Court of Canada’s direction that an adjudicator is bound by the law and cannot refuse to apply it, even on grounds of equity⁶.

[19] The Appellant has failed to bring the purpose of his travel within any of the exceptions listed in subsection 55(1) of the EI Regulations. I therefore find that section 37 of the *Employment Insurance Act* (EI Act) applies to his claim and he is disentitled to EI benefits from October 5, 2020 because he was – and continues to be – outside of Canada.

⁶ *Granger v. Canada (CEIC)*, [1989] 1 S.C.R. 141

Issue 2: Availability

Has the Appellant satisfied the three factors to prove availability⁷?

[20] As the Appellant cannot receive EI benefits as long as he remains outside of Canada, it is not strictly necessary for me to also consider whether he should be “double-disentitled” for the additional reason of failing to prove his availability. However, I will do so because this second ground for disqualification was reconsidered (see decision letter at GD03-23) and because the Appellant addressed it in his appeal.

[21] I only need to decide if the Appellant was available for work under paragraph 18(1)(a) of the EI Act⁸. The *Faucher* test sets out the three factors that I must consider before deciding if the Appellant is available under this section (see paragraph 10 above).

[22] On the first factor, I accept that the Appellant had a desire to return to work from October 5, 2020 (the effective date of the disqualification). I base this on his various statements that he was looking for work and on the on-line job applications included in his appeal materials.

[23] On the second factor, it is up to the Appellant to prove he has made reasonable efforts to find work in order to establish his availability for work⁹. He told the Commission that he was looking for work while in India (see Supplementary Record of Claim from reconsideration interview on December 8, 2020 – GD03-22). But mere statements and assertions are not enough. Fortunately for the Appellant, he has provided a record of the jobs he applied for between November 20, 2020 and January 18, 2021 (GD06). On the basis of this record, I find that the Appellant has satisfied the second *Faucher* factor – but only as of November 20, 2020. This is because there is no verifiable evidence of his job search efforts prior to that.

⁷ See *Faucher, supra*

⁸ Although the Commission referred to a disqualification as having been imposed pursuant to sections 6, 18 and 50 of the EI Act and sections 9.001 and 9.002 of the *Employment Insurance Regulations* (see GD4-1), I see no evidence that the Commission ever required the Appellant to prove his job search activities under section 50 according to the “reasonable and customary” criteria described in section 9.001. I therefore do not need to decide that the Appellant’s job search activities satisfy the section 9.001 in order to find him to be available and entitled to benefits: AD-20-575.

⁹ *Ricard v. Canada (Attorney General)*, A-298-74.

[24] However, I find that the Appellant has not satisfied the third *Faucher* factor because he is subject to conditions that unduly limit his chances of returning to the labour market. The Appellant is subject to a travel ban in effect in India and all international flights have been suspended. While these are not conditions that have been set by the Appellant, they are nonetheless conditions which apply to him personally and which unduly limit his chances of returning to the labour market.

[25] Appellant testified that he knows he has to get back to Canada and resume his life. He said that he is “very much ready to return”, but international flights are not operating from his city in India and there is nothing he can do until the travel ban is lifted. He has been – and continues to be – unable to return to Canada because there have been – and still are – no flights available due to the travel ban India imposed back in March 2020 due to the global Covid-19 pandemic. He is “keeping his fingers crossed” that the travel ban will be lifted next month.

[26] I find the fact that the Appellant is unable to return to Canada due to the travel ban to be a condition that unduly limits his chances of returning to the labour market. This is because the travel ban prevents him from attending job interviews in Canada and accepting jobs in Canada. He cannot return to Canada within 48 hours if offered a job that required him to be in Canada. And while he testified that he has tried to look for on-line jobs that would allow him to work remotely from India, I note that this is, in and of itself, a restriction on his job search efforts that might unduly limit his chances of returning to the labour market.

[27] Having failed to satisfy all three of the factors in *Faucher*, the Appellant has not met the availability requirements to receive EI benefits from October 5, 2020 to present.

CONCLUSION

[28] The Appellant is disentitled to EI benefits from October 5, 2020 because he was – and continues to be – outside of Canada and has failed to prove he qualifies for any of the statutory exemptions provided for in subsection 55 of the EI Regulations.

[29] The Appellant has also failed to meet the requirements to support a claim for EI benefits from October 5, 2020 because he has not proven he was available for work from that point of time to present. He is, therefore, also subject to a disentitlement to EI benefits from October 5, 2020 pursuant to section 18 of the *Employment Insurance Act*.

[30] The appeal is dismissed.

Teresa M. Day
Member, General Division - Employment Insurance Section

HEARD ON:	January 22, 2021
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	A. H., Appellant