



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *SP v Canada Employment Insurance Commission*, 2021 SST 192

Tribunal File Number: GE-21-89

BETWEEN:

S. P.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Mark Leonard

HEARD ON: February 2, 2021

DATE OF DECISION: February 4, 2021

DECISION

[1] The appeal is allowed in part.

[2] The Claimant is entitled to receive 1 week's worth of benefits. She is disentitled from receiving EI benefits for the remaining 7 weeks of the period she was outside of Canada.

OVERVIEW

[3] The Canada Employment Insurance Commission (Commission) decided to issue a disentitlement to the Claimant. This meant that she would not receive Employment Insurance (EI) regular benefits from October 4, 2020, to November 27, 2020, because she was outside Canada and unavailable for work. A claimant has to be available for work to get EI regular benefits.

[4] The Commission says that the Claimant wasn't available because she was out of the country visiting her sick father. It says that the *Employment Insurance Act* (Act) specifically provides that where claimants are out of Canada and unavailable for work, benefits will not be paid.

[5] The Claimant says that she was receiving the Canada Emergency Response Benefit (CERB) and was told she would not lose it if she travelled outside of Canada. She says that she travelled to Brazil to visit her ailing father. While she was away, the CERB transitioned to EI benefits and then told her that she was not entitled to benefits while she was outside Canada. The Claimant is seeking to reverse the Commission's decision and receive the 8 weeks benefits for which she was disentitled.

[6] I must decide whether the Claimant was outside of Canada and therefore disentitled to benefits, as well as whether she was unavailable for work.

ISSUES

- [7] Has the Claimant shown that she is entitled to EI benefits while she was outside Canada?
- [8] Does the Claimant meet the availability requirements to receive EI benefits?

ANALYSIS

[9] The Commission disentitled the Claimant from receiving benefits for two reasons. First, it says that she was outside Canada and therefore cannot receive benefits. They also claim that she failed to prove her availability for work.

Outside Canada

[10] A claimant is not entitled to EI benefits for any period that they are not in Canada¹. There are exceptions that can allow benefits to be paid, but it depends on the reason they are outside Canada².

[11] The Claimant does not dispute that she was outside of Canada during the period in question. She testified that she was laid off in March 2020. She made an initial claim for EI benefits but was instead approved to receive the Canada Emergency Relief Benefit (CERB) implemented in response to COVID-19 restrictions.

[12] The Claimant testified that she could not return to work because of the virus and was not asked to be available for or seek employment during the period she was receiving the CERB. The Claimant left Canada on September 2, 2020, to visit her ailing father in Brazil. While she was away, the CERB ended. The Commission automatically transitioned her to EI benefits.

[13] The Claimant completed an online questionnaire regarding her absence from Canada. She confirmed that she was outside of Canada. In an interview with the Commission, she acknowledged that she had not made arrangements to be contacted by employers nor was she willing to return because of the cost of changing airline tickets.

¹ See Section 37(b) of the *Employment Insurance Act* (Act).

² See Section 55(1) of the *Employment Insurance Regulations* (Regulations).

[14] The Commission does not dispute that the Claimant was outside Canada to visit her ailing father. It says that she left Canada on September 2, 2020, and did not return until November 30, 2020. They submit that they automatically established a new claim for benefits effective October 4, 2020. This is consistent with the CERB to EI transition measures.

[15] The Commission then issued a disentitlement for the period from October 4, 2020, to November 27, 2020 (an 8-week period) because the claimant was outside of Canada. The Act³ specifically details that a claimant who is outside of Canada is disentitled to receive benefits unless the claimant can demonstrate that they left Canada for one or more listed reasons in the Regulations.

[16] The Regulations provide for several reasons⁴ that a Claimant may be outside Canada and still not be disentitled to benefits. One reason⁵ allows for a period of 7 consecutive days to visit an ailing immediate family member. The Claimant's father qualifies as an immediate family member.

[17] The Commission agrees that the Claimant's reason for absence would qualify her to receive benefits under the provisions of the Regulations. However, it asserts that since her claim began beyond the "first 7 days" of her absence, she is disentitled for the entire 8-week period of her absence.

[18] I have examined the relevant sections of the Act and Regulations and can find no instance of the phrase "first 7 days." The Regulations only provide for a period of 7 consecutive days' absence. The notion of "first 7 days" appears to be a construct of the Commission and not well founded in the law.

[19] The novel (new) corona virus pandemic certainly interrupted the usual processes for many programs. The Canadian Governments had to implement novel programs to address managing the pandemic. The CERB and its transition back to EI is also a novel situation. Ordinarily, had CERB not been implemented, the Claimant would have been on EI in March 2020. She would have been disentitled to benefits for any period of absence from Canada except

³ See section 37(b) of the *Employment Insurance Act (Act)*.

⁴ See section 55(1) of the *Employment Insurance Regulations (Regulations)*.

⁵ See section 55(1)(d) of the *Employment Insurance Regulations (Regulations)*.

for 7 consecutive days to visit an ailing relative. One can expect that the exception period would apply at the start of her journey characterized as the “first 7 days”; however, nowhere in the Act or Regulations does it stipulate this. Also, the Claimant’s situation is unique.

[20] The Claimant left Canada while receiving CERB. She became eligible for EI benefits while she was away. She was disentitled to EI benefits for the entire period of her absence that corresponded with her eligibility. The Commission confirmed that it did not allow the 7 consecutive day absence because she completed the “first 7 days” of her journey before she was approved for benefits. The Commission admits that she would otherwise be entitled to the 7 consecutive days of benefits.

[21] I am concerned with when the Claimant became eligible for EI benefits. This occurred immediately after the CERB ended and she transitioned to EI benefits. The Claimant did not establish this new initial claim for benefits. The Commission did it in keeping with the transition provisions. Her first date of eligibility for benefits was October 4, 2020. She was already out of Canada at that point. Therefore, her first 7 consecutive days for which she would have been entitled to the provisions found in the Regulations was also her first 7 days of eligibility for EI.

[22] I am satisfied that the Claimant meets the criteria to be eligible to receive benefits for a 7-consecutive day period that fell within the time she was away from Canada. The 7-consecutive day period was the “first 7 days” of her eligibility to receive EI benefits after CERB ended.

[23] Therefore, I find that the Claimant is entitled to 1 week’s EI benefits as provided for under the Regulations, but is disentitled from the remaining 7 weeks of her journey because she was outside of Canada.

Availability for Work

[24] Two different sections of the law require claimants to show that they are available for work. The Commission decided that the Claimant was disentitled under both of these sections. Therefore, she has to meet the criteria of both sections to get benefits.

[25] First, the *Employment Insurance Act* (Act) says that a claimant has to prove that they are making “reasonable and customary efforts” to find a suitable job.⁶ The *Employment Insurance Regulations* (Regulations) give criteria that help explain what “reasonable and customary efforts” mean.⁷ I will look at those criteria below.

[26] Second, the Act says that a claimant has to prove that they are “capable of and available for work” but aren’t able to find a suitable job.⁸ Case law gives three things a claimant has to prove to show that they are “available” in this sense.⁹ I will look at those factors below.

[27] I will now consider these two sections to determine whether the Claimant was available for work.

Reasonable and Customary Efforts to find a Job

[28] The Commission decided that the Claimant was disentitled from receiving benefits because she was not available for work during the period she was outside of Canada and because she had not made arrangements to be contacted for employment. It further added that the Claimant was unwilling to change her flight tickets to return to Canada within a reasonable period to accept employment.

[29] The law sets out criteria for me to consider when deciding whether the Claimant’s efforts were reasonable and customary.¹⁰ I have to look at whether her efforts were sustained and whether they were directed toward finding a suitable job. In other words, the Claimant has to have kept trying to find a suitable job. I have to consider the Claimant’s efforts to find a job. The Regulations list nine job-search activities I have to consider. Some examples of those activities are the following:¹¹

- registering for job-search tools or with online job banks or employment agencies.
- contacting employers who may be hiring.
- applying for jobs.

⁶ See section 50(8) of the *Employment Insurance Act* (Act).

⁷ See section 9.001 of the *Employment Insurance Regulations* (Regulations).

⁸ See section 18(1)(a) of the Act.

⁹ See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

¹⁰ See section 9.001 of the Regulations.

¹¹ See section 9.001 of the Regulations.

[30] The Claimant testified that she did not endeavour to find employment while she was outside of Canada. She did not attempt any of the above listed activities to find suitable employment.

[31] Clearly, from the submissions of the Commission and the admission of the Claimant, she was not engaged in a sustained effort seeking employment after she transitioned from CERB to EI benefits while she was away from Canada. Essentially, she was not trying to find a job during the period of her absence.

[32] I find that the Claimant did not make reasonable and customary efforts to find work.

Capable of and Available for Work

[33] Case law sets out three factors for me to consider when deciding whether the Claimant was capable of and available for work but unable to find a suitable job. The Claimant has to prove the following three things:¹²

- She wants to go back to work as soon as a suitable job is available.
- She has made efforts to find a suitable job.
- She didn't set personal conditions that might unduly limit her chances of going back to work.

[34] When I consider each of these factors, I have to look at the Claimant's attitude and conduct.¹³

Wanting to go back to work

[35] Am satisfied that the Claimant has shown that she wants to go back to work as soon as a suitable job is available. She told me that she needs to find work as soon as possible but that the pandemic has made that difficult. She said she wants to find work in her field and start rebuilding her career. I believe her.

¹² These three factors appear in *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A- 57-96. This decision paraphrases those three factors for plain language.

¹³ Two decisions from case law set out this requirement. Those decisions are *Canada (Attorney General) v Whiffen*, A-1472-92; and *Carpentier v Canada (Attorney General)*, A-474-97.

Making efforts to find a suitable job

[36] The Claimant did not make any efforts to find a suitable job during the period she was outside Canada. She admitted this. She said that she did not have a phone because her cell phone would not work in Brazil. She further added that the only way someone could reach her from Canada was by e-mail. She did not attempt to correct this situation in order to make the requisite enquiries to find employment. She did offer that she believes that because she was on CERB when she left Canada, she was not required to do so.

[37] I find that the Claimant did not make efforts sufficient to meet the requirements of this second factor.

Unduly limiting chances of going back to work

[38] The Claimant did set personal conditions that unduly limited her chances of going back to work.

[39] She travelled outside of Canada and when asked by the Commission, she stated that she was not willing to return earlier than her scheduled flight or within 48 hours of notice because she could not afford the cost of changing her flights.

[40] I find that the Claimant's admitted unwillingness to return to Canada by changing her flights was a personal condition that limited her chances of gaining suitable employment.

So was the Claimant Capable of and Available for Work?

[41] I am empathetic to the Claimant's situation. She found herself outside of Canada when her CERB transitioned to EI. This change imposed differing requirements for her in order to continue receiving support benefits. She did not know at the time she left Canada that she would need to be available or to have made arrangements to be contacted in the event of a possible employment.

[42] However, once she was made aware of these requirements, it was incumbent on the Claimant to seek ways to mitigate her situation. She could not simply decide that she would not seek to change her tickets nor at least try to identify ways to job seek. In making that decision,

the Claimant elected to place the cost of her unemployment on the other contributors to the plan with no possibility of those costs being mitigated by her finding employment.

[43] Based on my findings on the three factors, I find that the Claimant has not shown that she was capable of and available for work but unable to find a suitable job during the period of absence.

CONCLUSION

[44] The Claimant was outside of Canada for the period from October 4, 2020, to November 27, 2020. She has not demonstrated that she would be entitled to benefits for any portion of that period beyond those detailed in Section 55 (1) (d) of the Regulations. Further, she hasn't shown that she was available for work within the meaning of the law for a period of 7 weeks. Because of this, I find that the Claimant is entitled to only 1 weeks worth of EI benefits and is disentitled from receiving benefits for the remaining 7 weeks of her absence from Canada.

[45] This means that the appeal is allowed but only in part.

Mark Leonard

Member, General Division - Employment Insurance Section

HEARD ON:	February 2, 2021
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	S. P., Appellant