Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

[TRANSLATION]

Citation: *JP v Canada Employment Insurance Commission*, 2021 SST 118

Tribunal File Number: AD-20-769

BETWEEN:

J. P.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Pierre Lafontaine

DATE OF DECISION: March 31, 2021

Canada

DECISION AND REASONS

DECISION

[1] The Tribunal dismisses the appeal.

OVERVIEW

[2] The Appellant (Claimant) applied for regular benefits on August 11, 2017. The Claimant's qualifying period was established from August 7, 2016, to August 5, 2017.

[3] Since the Claimant had only 441 hours of insurable employment in his qualifying period, and he needed 700 to establish a benefit period, the Respondent, the Canada Employment Insurance Commission (Commission), denied him Employment Insurance benefits.

[4] The Claimant challenged that decision, and he also filed a notice of constitutional challenge before the General Division.

[5] The General Division found that the Claimant had not shown that section 8(7) of the *Employment Insurance Act* (EI Act) treats him differently based on mental disability and that it discriminates against him within the meaning of section 15(1) of the *Canadian Charter of Rights and Freedoms* (Charter).

[6] The Claimant was granted leave to appeal to the Appeal Division. He submits that the videoconference hearing format did not give him the opportunity to properly argue his position. In addition, he submits that the General Division overlooked some of the evidence and made an error of law in its interpretation of section 15(1) of the Charter.

[7] I have to decide whether the General Division failed to observe a principle of natural justice, whether it overlooked some of the evidence, and, lastly, whether it made an error in its interpretation of section 15(1) of the Charter.

[8] For the reasons that follow, I am dismissing the Claimant's appeal.

ISSUES

[9] Did the General Division's decision to proceed by videoconference have the effect of preventing the Claimant from properly arguing his position?

[10] Did the General Division overlook some of the evidence and make an error in its interpretation of section 15(1) of the Charter?

ANALYSIS

Appeal Division's Mandate

[11] The Federal Court of Appeal has established that the Appeal Division's mandate is conferred to it by sections 55 to 69 of the *Department of Employment and Social Development Act* (DESD Act).[1]

[12] The Appeal Division acts as an administrative appeal tribunal for decisions made by the General Division and does not exercise a superintending power similar to that exercised by a higher court.

[13] Therefore, unless the General Division failed to observe a principle of natural justice, made an error of law, or based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it, the Tribunal must dismiss the appeal.

Preliminary Remarks

[14] The Claimant asked that the Appeal Division proceed by way of a question and answer hearing.

[15] Since my powers are limited by section 58(1) of the DESD Act, and since this is not a new hearing, my decision takes into account only the evidence that was before the General Division. No exceptions to this rule apply in this case.

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[1] *Canada (Attorney General) v Jean*, 2015 FCA 242; *Maunder v Canada (Attorney General)*, 2015 FCA 274.

[16] I therefore invited the parties to explain in detail, in their written submissions, why the General Division decision should be rescinded, amended, or upheld, and the remedy sought, which they did. Each party also had the opportunity to respond to the other party's submissions.

[17] Now that the deadline given to the parties for filing their submissions has passed, and in accordance with my decision to grant leave to appeal, I will make my final decision on the record.[2]

Facts and Proceedings

[18] The Claimant started working for his employer in September 1984.

[19] On July X, 2013, the Claimant was on site when the X tragedy occurred. The incident happened a few metres from him. He escaped death, but this was not the case for a few close friends. This tragedy left the Claimant with post-traumatic stress disorder. He was absent from work until November 2013.

[20] When he returned to work, the Claimant was faced with new requirements from his employer. He filed a grievance, arguing, among other things, that his employer was ignoring his health problems and was unwilling to accommodate him in his duties. The arbitrator ruled in the Claimant's favour in a decision made on August 22, 2016.

[21] Meanwhile, the Claimant received 15 weeks of sickness benefits from August 30 to December 12, 2015. He did not work in any position between April 2, 2014, and September 1, 2016.

[22] The Claimant then gradually returned to work for his employer. He accumulated 441 hours of insurable employment from September 1, 2016, to January 7, 2017. However, he left his job permanently on January 9, 2017.

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[2] *Robbins v Canada (Attorney General)*, 2017 FCA 24.

[23] An agreement was reached between the Claimant and his employer that confirms his leaving for health reasons. The Claimant was tired of the employer's attitude. The agreement indicated, among other things, that the Claimant would be on leave without pay from January 8, 2017, to March 31, 2018, when the employer-employee relationship would end, and that he agreed to retire at the end of his leave.

[24] The Claimant filed an initial claim for Employment Insurance benefits on August 11, 2017. His qualifying period to establish his claim for benefits is from August 7, 2016, to August 5, 2017. He has 441 hours of insurable employment in his qualifying period.

[25] The Commission informed the Claimant that he did not qualify for Employment Insurance benefits, since he had 441 hours of insurable employment in the period from August 7, 2016, to August 5, 2017, when he needed 700.

[26] The Claimant appealed the Commission's decision to deny his claim for regular benefits to the General Division. In support of his appeal, he filed numerous documents (grievances, arbitration decisions, expert reports, second opinions, etc.) showing the work environment that led to his leaving for health reasons.

[27] The Claimant also raised a constitutional issue before the General Division. He argued that section 8(7) of the EI Act, which limits the extension of the qualifying period to 104 weeks, is discriminatory under section 15(1) of the Charter. He submitted that the 104-week limit imposed by the EI Act puts people who suffer from mental illness for an extended period at a disadvantage because they are systematically denied access to Employment Insurance benefits.

[28] The Commission initially asked the General Division to dismiss the Claimant's constitutional challenge and that the case be heard as a regular appeal. It argued that the issue does not affect the Claimant directly because the limit set out in section 8(7) of the EI Act does not affect him and that the Claimant does not have the legitimacy to act in the public interest.

[29] The Commission argued that, since the Claimant had received sickness benefits until December 12, 2015, an additional extension of his qualifying period would not give him access to any more hours of insurable employment than the 441 hours already considered.

[30] The General Division denied the Commission's request. It found the request premature given that no decision had been made as to the constitutional validity of the impugned provisions. The General Division found that the constitutional challenge was not purely theoretical.

[31] On August 3, 2020, the General Division conducted the hearing by videoconference.

[32] The General Division found that the Claimant did not have enough hours in his qualifying period to qualify for regular benefits. It also found that the Claimant had not shown that section 8(7) of the EI Act, which limits the extension of the qualifying period to 104 weeks, treats him differently based on mental disability and that, as a result, he is being discriminated against within the meaning of section 15(1) of the Charter.

[33] The Claimant was granted leave to appeal to the Appeal Division.

Did the General Division's decision to proceed by videoconference have the effect of preventing the Claimant from properly arguing his position?

[34] The Claimant criticizes the General Division for proceeding with a videoconference hearing when he had demanded an in-person hearing. He argues that, as a result, he was prevented from properly explaining his position. He submits that the General Division glossed over important points in his submissions at the videoconference hearing.

[35] After listening to the recording of the General Division hearing, I am of the view that the General Division's choice of hearing type did not adversely affect the Claimant's appeal.

[36] The Claimant had the opportunity to present all of his grounds of appeal to the Appeal Division. He provided numerous written submissions before the General Division hearing. In addition, he submitted a summary of his arguments a week before the General Division hearing.

[37] Before withdrawing from the record, the Claimant's representative also submitted detailed arguments related to the Charter.[3]

[38] The General Division sent a letter to the Claimant explaining that the member who would hear the case would have reviewed the entire file before the hearing and that the focus would be on the arguments on the impugned provision.

[39] The Claimant did not raise any procedural fairness objections at the General Division hearing. He did not object to the General Division's choice of hearing type after receiving the notice of hearing, either.

[40] In my view, the Claimant has failed to show that the type of hearing the General Division had chosen had the effect of preventing him from properly arguing his position or that the General Division improperly exercised its discretion by proceeding with a videoconference hearing.[4]

[41] This ground of appeal fails.

Did the General Division overlook some of the evidence and make an error in its interpretation of section 15(1) of the Charter?

[42] I must now decide whether the General Division overlooked some of the Claimant's evidence and whether it made an error in its interpretation of section 15(1) of the Charter.

[3] GD10.
[4] *Parchment v Canada (Attorney General)*, 2017 FC 354.

The General Division Decision

[43] The General Division found that the Claimant had not shown that section 8(7) of the EI Act, which allows the qualifying period to be extended to a maximum of 104 weeks, treats him differently based on mental disability and that, as a result, he is being discriminated against within the meaning of section 15(1) of the Charter.

Position of the Parties

[44] The Claimant argues that, while section 8(7) of the EI Act does not specifically mention the notion of physical or mental disability, limiting the qualifying period to 104 weeks denies Employment Insurance benefits to people who have suffered from serious illness.

[45] The Claimant submits that section 8(2)(a) of the EI Act is meant to allow a person who has suffered from an illness to extend their qualifying period by the length of their period of absence. However, under section 8(7) of the EI Act, the period cannot be extended beyond 104 weeks. This has the effect of denying Employment Insurance to some people who are on extended sick leave for reasons beyond their control.

[46] The Claimant submits that section 8(7) of the EI Act creates a distinction based on a person's physical or mental disability when that disability is major and long-term. He argues that Employment Insurance does not cover people who have to be off work because of illness for a period of more than 104 weeks.

[47] For these reasons, he submits that he is at a disadvantage as a result of the EI Act because of his mental disability and that the conditions of the applicable test in section 15(1) of the Charter are met.

[48] The Commission is of the view that the Claimant has not established discrimination, for lack of evidence and of a demonstration grounded in law. It argues that the Claimant has not demonstrated that this provision creates a distinction that has the effect of perpetuating arbitrary disadvantage.

[49] The Commission also submits that the impugned provision does not infringe on the Claimant's right to equality that is guaranteed him in section 15(1) of the Charter and, alternatively, is justified under section 1 of the Charter.

The Legal Test in Section 15(1) of the Charter

[50] The jurisprudence establishes a two-part test for assessing a section 15(1) Charter claim:

(1) Does the law create a distinction based on an enumerated or analogous ground?

(2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?[5]

[51] The first step in the section 15(1) analysis ensures that the courts address only those distinctions that the Charter seeks to prohibit. Section 15(1) of the Charter protects only against distinctions made on the basis of the enumerated grounds or grounds analogous to them.

[52] An analogous ground is one based on "a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity."[6]

[53] However, a distinction based on an enumerated or analogous ground is not by itself enough to establish a section 15(1) Charter violation. At the second step, it must be shown that the law has a discriminatory impact in terms of prejudicing or stereotyping.[7]

[54] The analysis of Charter rights is to be undertaken in a purposive and contextualized manner, where the central concern of section 15(1) of the Charter is combatting discrimination defined in terms of perpetuating disadvantage and stereotyping.

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[5] *Withler v Canada (Attorney General)*, 2011 SCC 12.
[6] *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at para 13.
[7] *Withler v Canada (Attorney General)*, 2011 SCC 12.

[55] In my final analysis, I must ask whether, having regard to all relevant contextual factors, including the nature and purpose of the impugned legislation in relation to the Claimant's situation, the impugned distinction discriminates by perpetuating the group's disadvantage or by stereotyping the group.

The Statutory Scheme

[56] The Employment Insurance system is a contributory scheme that provides social insurance for Canadians who suffer a loss of income as a result of a loss of their employment or who are unable to work by reason of illness, pregnancy, and childbirth or parental responsibilities for a newborn or newly adopted child.

[57] The Employment Insurance system is based on recent labour market participation.[8] The purpose is to compensate unemployed workers for their loss of employment income and to ensure their economic and social security for a time, thus assisting them in returning to the labour market.

[58] An insured person who wishes to receive benefits has to make a claim and show that they meet the necessary conditions to establish a benefit period and the criteria to qualify for the applicable type of benefit.

[59] Section 7(2) of the EI Act establishes a threshold for qualifying for Employment Insurance benefits based on hours worked in insurable employment (between 420 and 700 hours) and the regional rate of unemployment. All the insurable hours of employment need to have been accumulated in the qualifying period, which is defined as the 52 weeks immediately before the start of the benefit period.

[60] In some situations, the qualifying period can be extended to provide the claimant with enough hours of insurable employment to establish a claim for benefits.

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[8] [translation] Backgrounder on Employment Insurance policy and legislation – Regular benefits and extension of qualifying period (Report), May 21, 2020, paragraphs 9, 19, 26 to 30, and 45 to 48, Annex C, Tab 1.

[61] Section 8(2) of the EI Act states that a qualifying period of 52 weeks mentioned in section 8(1)(a) of the EI Act is extended by the aggregate of any weeks during the qualifying period for which the person proves that throughout the week the person was not employed in insurable employment because the person was:

> **(a)** incapable of work because of a prescribed illness, injury, quarantine or pregnancy;
>
> **(b)** confined in a jail, penitentiary or other similar institution and was not found guilty of the offence for which the person was being held or any other offence arising out of the same transaction;
>
> **(c)** receiving assistance under employment benefits; or
>
> **(d)** receiving payments under a provincial law on the basis of having ceased to work because continuing to work would have resulted in danger to the person, her unborn child or a child whom she was breast-feeding.

[62] These circumstances share the common characteristic of relating to situations where a claimant is not available for work because of external circumstances beyond their control.

[63] However, section 8(7) of the EI Act limits the extension of the qualifying period to a total of 104 weeks.

Whether the Claimant Suffered a Differential Treatment

[64] In Charter jurisprudence prior to *Withler*, the initial step of showing that the law in question has resulted in adverse distinction has included a comparison with the law's impact on a "comparator group" which lacks the discriminatory characteristic.

[65] The Claimant submits that section 8(2)(a) of the EI Act is meant to allow a person who has suffered from an illness to extend their qualifying period because they are incapable of work because of illness. However, under section 8(7) of the EI Act, the period cannot be extended beyond 104 weeks. This has the effect of denying Employment Insurance to some people who are on extended sick leave.

[66] The Claimant essentially argues that the comparator group by which to gauge the adverse distinction he experienced would be claimants whose qualifying period is extended because they are incapable of work due to illness under section 8(2)(a) of the EI Act.

[67] The Claimant relies on his non-contradicted evidence that he was unable to return to the labour market for an extended period because of his mental disability. He submits that, because of his lengthy, involuntary illness, he was denied benefits.

[68] In the Claimant's view, the limit imposed by section 8(7) of the EI Act for extending the qualifying period and the fact that he had to be off work for an extended period as a result of the post-traumatic stress he experienced have resulted in an adverse distinction based on his mental disability.

[69] The Supreme Court of Canada has indicated that, in circumstances where there is not simply a straightforward, facial distinction on the basis of an enumerated or analogous ground, establishing a distinction will be more difficult. The Court has also stated that, for indirect discrimination cases, as is the present case, "the claimant will have more work to do at the first step."[9]

[70] As the General Division rightly pointed out, it is true that the Claimant has not presented some of the evidence that usually supports a Charter challenge. Without adequate statistical data, I cannot presume that the Claimant has been denied a benefit that was granted to others or carries a burden not carried by others, by reason of a personal characteristic that falls within the enumerated or analogous grounds of section 15(1) of the Charter.

[71] However, an infringement of section 15(1) of the Charter may be established by other means and may exist even if there is no one similar to the claimant who is

[9] See *Whitler*, *supra*.

experiencing the same unfair treatment.[10] In addition, statistical evidence is not always required to establish that a law infringes section 15(1) of the Charter.[11]

[72] In my view, the General Division made its decision without considering the other evidence that the Claimant had presented. Therefore, in accordance with my authority under section 59(1) of the DESD Act, I will give the decision that the General Division should have given.

[73] Section 8(2)(a) of the EI Act allows for an extension of the qualifying period where a person is incapable of work because of illness, since it is an external circumstance beyond their control.

[74] The Claimant's unchallenged documentary evidence and testimony show that, following the tragic X incident, he developed a mental disability that caused him to be absent from the workplace for more than 104 weeks. This is clearly an external circumstance beyond his control. However, the limit imposed by section 8(7) of the EI Act would have had the effect of disqualifying the Claimant from receiving Employment Insurance benefits if he had not received sickness benefits until December 12, 2015.

[75] In my view, section 8(7) of the EI Act creates an adverse distinction between a claimant who has developed a severe mental disability that causes them to be absent from the workplace for more than 104 weeks and those whose qualifying period is extended because of illness by the length of their absence from the labour market.

[76] As stated by the Federal Court of Appeal, by definition, laws granting social benefits entail a differential treatment. In determining categories of beneficiaries and eligibility requirements, they treat differently the persons who are excluded from their scope of application and, as a result, are denied benefits.[12]

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[10] *Law v Canada (Minister of Employment and Immigration)*, 1999 CanLII 675 (SCC), [1999] 1 SCR 497.
[11] *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30.
[12] *Canada (Attorney General) v Lesiuk*, 2003 FCA 3.

[77] Taking into account the Federal Court of Appeal's teachings, and considering the other evidence presented by the Claimant, I am willing to recognize that the Claimant experienced differential treatment on account of his mental disability, which kept him out of the labour market for an extended period, even though I have doubts that there exists a causal relationship between the denial of benefits and the Claimant's characteristics.[13]

Enumerated or Analogous Grounds

[78] In this case, the Charter ground in question is mental or physical disability. There can be no question that a distinction based on mental or physical disability can form the basis for a section 15 Charter challenge.

[79] This brings me to the next stage of the section 15(1) Charter analysis, namely whether the differential treatment amounts to discrimination under section 15(1) of the Charter.

Whether the Differential Treatment Amounts to Discrimination under Section 15(1) of the Charter

[80] Given my findings on the issue of differential treatment, I am of the view that the General Division also made an error of law in its interpretation of section 15(1) of the Charter by failing to determine whether the differential treatment amounts to discrimination under section 15(1) of the Charter.

[81] The purpose of section 15 of the Charter is:

> to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.[14]

[13] *Idem* at para 33.
[14] See *Law*, *supra*.

[82] It is the second stage of the section 15(1) analysis that is most directly involved with the concept of human dignity.

[83] The Supreme Court of Canada identified four contextual factors relevant to the third stage of the discrimination analysis:

(i) Pre-existing disadvantage, stereotyping, prejudice, or vulnerability

(ii) The correspondence, or lack thereof, between the ground(s) on which the claim is based and the actual needs, capacity, or circumstances of the claimant or others

(iii) The ameliorative purpose or effects of the impugned law, program, or activity upon a more disadvantaged person or group in society

(iv) The nature and scope of the interest affected by the impugned government activity[15]

[84] The Claimant submits that exempting a claimant from the limit imposed by section 8(7) of the EI Act, by considering their mental health problems and their extended absence from work, would only mean that they could be eligible to receive the same amount and length of benefits on the same terms as other claimants in their region who worked the same number of hours and received the same earnings.

[85] The Commission submits that, while it is harder for individuals with mental disabilities to meet the number of hours of insurable employment in the qualifying period, this does not mean that neutral provisions are discriminatory based on mental disabilities.

[86] The Commission also argues that changing an eligibility requirement to meet the needs of some groups of claimants could theoretically lead to further changes for other

[15] See *Law*, *supra*.

groups, and eventually to a situation in which Employment Insurance benefits would become a form of social assistance available to anyone who needs them.

[87] Lastly, the Commission submits that the Claimant wants the limit to be removed so that a claimant can meet the eligibility requirements of the EI Act in a manner that it does not provide for. The Commission argues that it is up to Parliament, not the Tribunal, to amend the provisions of the EI Act.

[88] The first of the contextual factors asks me to consider the pre-existing disadvantage, stereotyping, prejudice, or vulnerability experienced by the individual or group.

[89] It is surely true that persons with mental disabilities have historically faced barriers to entering and remaining in the work force and that these barriers are rooted in stereotypes and prejudices.

[90] However, it has not been demonstrated that, in the context of Employment Insurance, there was a past and long history of disadvantages, stereotyping, vulnerability and prejudice due to the obligation imposed on a claimant to meet the requisite number of hours of insurable employment in a given qualifying period to qualify for benefits.

[91] The requirement to work the requisite number of hours in the 52-week qualifying period, or the extended period of 104 weeks, does not create or reinforce a stereotype that persons with mental disabilities are not valuable assets to the labour force. Nor does this requirement affect the dignity of these people by suggesting that their work is less worthy of recognition.

[92] Anyone who works the requisite number of insurable hours in the applicable qualifying period will qualify.

[93] In an adverse effects analysis like this one, I must distinguish between effects which are wholly caused or contributed to by an impugned provision and those social circumstances which exist independently of the provision.[16]

[94] In this context, I find that the Employment Insurance system does not have the effect of perpetuating a historic disadvantage that exacerbates or stereotypes the situation for persons with mental disabilities.

[95] The second of the contextual factors asks me to look at the correspondence between the ground(s) and the actual needs, capacity, or circumstances of the Claimant and others.

[96] In my view, the impugned conditions do not correspond to the actual needs of the Claimant and of people in his situation. In fact, the evidence supports the opposite position.

[97] Parliament increased from 52 to 104 weeks the period in which insurable earnings can be counted to determine whether certain groups of claimants who have left the labour force for reasons beyond their control qualify for benefits. It can therefore be said that the EI Act considers the traits and circumstances of persons with mental disabilities.

[98] The impugned provision improves the correspondence between the EI Act and the needs of those with mental health problems by including hours of insurable employment despite the fact that they have recently been unable to work.

[99] It is clear that the qualifying period cannot be extended indefinitely. This would ultimately lead to the termination of the qualifying period set out in the EI Act and would not comply with the principle of proximity of the Employment Insurance system between, on the one hand, recent labour market participation and the payment of premiums and, on the other hand, the payment of benefits.

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[16] *Symes v Canada*, 1993 CanLII 55 (SCC), [1993] 4 SCR 695, [1993] ACS no 131 (QL) (SCC).

[100] The third contextual factor involves the consideration of the ameliorative nature of the legislation and is essentially relevant only in respect of situations of so-called reverse discrimination. The present case does not involve a claim of discrimination by an "advantaged" person.

[101] The fourth contextual factor asks me to consider the nature and scope of the interest affected by the impugned law. The more severe and localized the consequences of the legislation for the affected group, the more likely that discrimination will be founded.

[102] In the present case, the consequences are neither severe nor overly localized for persons with mental disabilities. In fact, there is no evidence to support localization. The differential treatment is between those who do not work the requisite number of hours in a given qualifying period and those who meet this threshold. It is not localized on persons with mental disabilities in any significant manner.

[103] The Claimant is not excluded from participation in the Employment Insurance program although he has a mental disability due the post-traumatic stress he unfortunately experienced on July X, 2013.

[104] Moreover, the Claimant received sickness benefits after his return to work in November 2013. This confirms that the Claimant, like all Canadians, qualifies for Employment Insurance benefits if he has an interruption of earnings and meets the requirements of the EI Act.

[105] As the Federal Court of Appeal noted, "[t]he eligibility requirements are not a manifestation of a lack of respect or loss of dignity. They are an administratively necessary tool tailored to correspond to the requirements of a viable contributory insurance scheme."[17]

[17] See *Lesiuk, supra*.

[106] In view of the above, I find that the Claimant has not discharged his onus of establishing, on a balance of probabilities, that his right under section 15(1) of the Charter has been infringed.[18]

CONCLUSION

[107] The Tribunal dismisses the appeal.

Pierre Lafontaine
Member, Appeal Division

METHOD OF PROCEEDING:	On the record
APPEARANCES:	J. P., Appellant Suzette Bernard, Representative for the Respondent

[18] See *Lesiuk, supra*.