



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *Canada Employment Insurance Commission v. SP*, 2021 SST 191

Tribunal File Number: AD-21-58

BETWEEN:

**Canada Employment Insurance Commission**

Appellant

and

**S. P.**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**Appeal Division**

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DECISION BY: Stephen Bergen

DATE OF DECISION: May 11, 2021

## DECISION AND REASONS

### DECISION

[1] I am allowing the Commission's appeal.

[2] I have made the decision the General Division should have made. The Claimant is disentitled to benefits during the period that she was outside of Canada. She is not relieved from any part of that disentanglement because she was visiting her father who has Alzheimer's disease.

### OVERVIEW

[3] The Respondent, S. P. (Claimant) was laid off in March 2020. She applied for Employment Insurance benefits but she was approved for the Canada Emergency Response Benefit (CERB) instead. In September 2020, the Claimant left Canada to visit her father who has Alzheimer's disease. While she was outside of Canada, the Appellant, the Canada Employment Insurance Commission (Commission) switched her from the CERB benefit to Employment Insurance benefits (EI benefits). The Commission determined that the Claimant was not entitled to receive Employment Insurance benefits because she was outside of Canada and not available for work. The Claimant asked the Commission to reconsider but it would not change its decision.

[4] The Claimant appealed to the General Division of the Social Security Tribunal. The General Division found that she was outside of Canada to visit a member of her immediate family who was seriously ill. Because of this, the General Division decided that she was entitled to one week of benefits under section 55(1)(d) of the Employment Insurance Regulations (Regulations), even though she was outside of Canada.<sup>1</sup> The Commission is appealing the General Division decision to the Appeal Division.

[5] I am allowing the appeal. The General Division made an error of law in finding that the Claimant was entitled to one week of benefits. I have made the decision the General Division should have made and I find that the Claimant was disentitled to benefits for the period that she was outside of Canada.

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<sup>1</sup> General Division decision, para 22-23.

## WHAT GROUNDS CAN I CONSIDER FOR THE APPEAL

[6] “Grounds of appeal” are the reasons for the appeal. To allow the appeal, I must find that the General Division made one of these types of errors:<sup>2</sup>

- a) The General Division hearing process was not fair in some way.
- b) The General Division did not decide an issue that it should have decided. Or, it decided something it did not have the power to decide.
- c) The General Division based its decision on an important error of fact.
- d) The General Division made an error of law when making its decision.

## ISSUE

[7] Did the General Division make an error of law when it found that the Claimant was entitled to a week of EI benefits because she was visiting her ailing father?

## ANALYSIS

[8] Section 37 of the Employment Insurance Act (EI Act) states that a claimant who is outside of Canada is not entitled to benefits. Section 55(1) of the Employment Insurance Regulations (Regulations) provides some limited exceptions. One of those exceptions applies to claimants who are outside Canada to visit an immediate family member who is seriously ill.<sup>3</sup> A claimant who qualifies under this exception may be entitled to benefits for a period not exceeding 7 days.

[9] The General Division held that the exception applied and that the Claimant should be entitled to seven days of benefits because she was outside of Canada to visit her ailing father. At the same time, the General Division found that the Claimant was not available for work within the meaning of the EI Act during the period that she was absent from Canada.<sup>4</sup>

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<sup>2</sup> This is a plain-language version of the three grounds. The full text is in section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).

<sup>3</sup> Section 55(1)(d) of the Regulations.

<sup>4</sup> General Division decision, para 43.

[10] It was an error of law for the General Division to conclude that the Claimant was still entitled to the 7 days of benefits after it found that she was not available.

[11] The Commission argued to the General Division that the exception should not apply because the Claimant's EI benefit period began more than seven days after she left Canada.<sup>5</sup> The General Division rejected this argument. It did not accept that the exception could only apply in the first seven days after the Claimant left Canada.<sup>6</sup>

[12] Regardless, it does not matter whether the exception is meant to apply only during the Claimant's first week outside of Canada. The Claimant must meet *all* of the requirements to qualify for an exception under section 55(1) of the Regulations.

[13] One of those requirements is availability for work. Section 55(1) states that it is "subject to" section 18 of the EI Act. This means that a claimant cannot receive any benefits under any of the exceptions unless the claimant also meets the requirements of section 18. Section 18(1) of the EI Act says that a claimant is not entitled to benefits for any working day in which the claimant cannot prove that he or she is capable of and available for work.

[14] The Federal Court of Appeal interpreted section 55(1) in a decision called *Elyoumni*.<sup>7</sup> The Court stated that claimants who ask for benefits under one of the exceptions must remain available for work for the purpose of section 18(1) of the EI Act.

[15] The General Division found that the Claimant was not available for work while she was outside of Canada. If that is correct, the Claimant could not qualify for an exception; no matter which period of seven days is the period for which the exception is claimed.

## **Summary**

[16] I have found that the General Division made an error of law. Now I must consider what I should do about the error (remedy).

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<sup>5</sup> GD4-3.

<sup>6</sup> General Division decision, para 19.

<sup>7</sup> *Canada (Attorney General) v Elyoumni*, 2013 FCA 151.

## **REMEDY**

### **Nature of Remedy**

[17] I have the authority to change the General Division decision or make the decision that the General Division should have made. I could also send the matter back to the General Division for it to reconsider its decision.<sup>8</sup>

[18] The Claimant and the Commission agree that I should make the decision.

[19] I accept that the Claimant had a fair opportunity to present her evidence to the General Division and that I have all the evidence I need to make the decision. I will make the decision that the General Division should have made.

### **My Decision**

[20] The law is clear. A claimant is disentitled to regular Employment Insurance benefits while he or she is outside of the Canada, except for the limited benefits that the claimant might receive under one of the exceptions in section 55(1) of the Regulations.

[21] For the exception to apply during any period that the Claimant was outside of Canada and visiting her seriously ill father, she must still show she was available for work.

[22] In a decision called *Faucher*, the Federal Court of Appeal held that availability is determined by looking at three factors. A claimant must have a desire to return to work, have made job search efforts that demonstrate that desire, and the claimant cannot have set person conditions that unduly restricted his or her ability to return to work.<sup>9</sup>

[23] However, *Eloyumni* said that a claimant's availability must be interpreted "in context". The *Eloyumni* decision did not refer to the earlier *Faucher* decision, or consider the three factors described in *Faucher*.

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<sup>8</sup> My authority is set out in sections 59(1) and 64(1) of the DESD Act.

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

[24] The context for the *Elyoumni* decision is similar to the context in this case. The claimant in the *Elyoumni* case was also outside the country and seeking benefits under one of the section 55(1) exceptions. The Federal Court of Appeal stated that a claimant who is outside Canada must at least be able to show that he or she made arrangements to be reached if a job was offered.

[25] The Claimant in this case does not meet the minimal requirement that was identified by the Federal Court of Appeal in *Elyoumni*. She did not arrange to be contacted outside of Canada about job opportunities.

[26] There is some conflicting information on the file about whether the Claimant was available for work while outside Canada. The Claimant completed two versions of the out-of-Canada questionnaire. In the first version that she submitted in September 2020, she said she had made arrangements to be contacted. She also stated that she could return within 48 hours for a job offer.<sup>10</sup> In the October 2020 version, the Claimant said that she had made arrangements to be contacted but said that she could not return within 48 hours.<sup>11</sup> When she spoke to the Commission on December 1, 2020, she confirmed the second questionnaire, saying again that she had made arrangements to be contacted but could not return home within 48 hours because of the cost of changing her return flight.<sup>12</sup>

[27] However, the Claimant spoke to the Commission again about her reconsideration in early January 2021. In that conversation, she said that she had not made any arrangements to be contacted about any job offer.<sup>13</sup>

[28] At her General Division hearing, the Claimant testified that she was not trying to look for work while she was outside Canada.<sup>14</sup> The General Division asked her to clarify what would happen if someone offered her a job while she was out of Canada.<sup>15</sup> It also asked her to explain the different information on her two questionnaires and whether she had made arrangements to

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<sup>10</sup> GD3-15.

<sup>11</sup> GD3-17,18.

<sup>12</sup> GD3-19.

<sup>13</sup> GD3-25, 26.

<sup>14</sup> Audio recording of General Division hearing at timestamp 00:17:40.

<sup>15</sup> Audio recording of General Division hearing at timestamp 00:19:05.

be contacted about a job offer.<sup>16</sup> In response, the Claimant said that she could not be reached by phone, but that she could be reached by email. However, she did not say whether she had actually made arrangements so to be contacted about any job opportunity, by email or otherwise. Instead, she said that she could not have changed her flight even if there had been a job opportunity.<sup>17</sup>

[29] I find that the Claimant did not arrange to be contacted in the event of a job opportunity. She originally said she had made arrangements to be contacted, but she has since backed away from that statement. Furthermore, there is no evidence of any particular arrangements that the Claimant made, or the details of those arrangements.

[30] I do not doubt that it was technically possible to reach her by email while she was outside of Canada, but I do not accept that the Claimant arranged to be contacted by email about job opportunities. The Claimant knew she would not be returning to Canada until the time that she was scheduled to return. This suggests that she would not be accepting the offer of any job that started before she returned, even if she had left instructions for someone to contact her about a possible job.

[31] The Claimant has also argued that the transition to regular benefits affected her unfairly. She said that she *would have made* arrangements to be contacted, if she had known she would have to prove her availability. The Claimant noted that she was not receiving Employment Insurance benefits (EI benefits) when she left Canada. She was on the Canada Employment Relief Benefit (CERB), which did not require her to prove availability.

[32] Before the Claimant left Canada, she had called Service Canada (as an agent of the Commission) to find out whether she would continue to receive the CERB benefit. She says that the agent told her that she could leave the country and remain on the CERB benefit. The agent also said that she would be switched to EI benefits automatically when the CERB benefit ran out. The Claimant understood this to mean that she would continue to receive benefit payments after the switch.

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<sup>16</sup> Audio recording of General Division hearing at timestamp 00:19:25.

<sup>17</sup> Audio recording of General Division hearing at timestamp 00:19:40.

[33] When the Claimant's benefit payments stopped, she contacted Service Canada to find out what had happened. This is when she learned that her CERB had ended and that she could not qualify for EI benefits because she was out of Canada and not available for work.

[34] I understand why the Claimant was surprised to find that her benefits stopped. Before she stopped receiving benefit payments, she had no notice that her CERB was ending or that she was being switched to EI benefits. The Claimant was outside of Canada when she learned that her benefits were affected. She had not known that the transition to regular benefits would require her to prove her availability, or how she might do that.

[35] Unfortunately, I must apply the law. It does not matter that the Claimant might have done things differently if she knew when her CERB benefit would end, or if she knew that she would have to prove her availability for work. Under the law, a claimant is not entitled to regular EI benefits for any of the time that the claimant spends outside of Canada, except for the limited benefits described in section 55(1) of the Regulations.

[36] The Claimant could not qualify for any of those exceptions unless she was also available for work. She could not be available unless she had at least made arrangements to be contacted in the event of a job opportunity.

[37] I find that the Claimant was not available for work within the meaning of section 18(1) of the EI Act during the time that she was outside of Canada. Therefore, the exception that offers a limited benefit to a claimant who is outside of Canada to visit an immediate family member is not available to her.

## **CONCLUSION**

[38] The appeal is allowed.

[39] I have made the decision the General Division should have made. The Claimant is disentitled to benefits during the period that she was outside of Canada under section 37(b) of the EI Act. She is not relieved from any part of that disentitlement by section 55(1)(d) of the Regulations.



Stephen Bergen  
Member, Appeal Division

HEARD ON:	April 22, 2021
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	Isabelle Thiffault, Representative for the Appellant  S. P., Respondent