



Citation: *AC v Canada Employment Insurance Commission*, 2021 SST 821

Social Security Tribunal of Canada General Division – Employment Insurance Section

Decision

Appellant: A. C.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (427537) dated July 12, 2021 (issued by Service Canada)

Tribunal member: Raelene R. Thomas

Type of hearing: Teleconference

Hearing date: September 8, 2021

Hearing participant: Appellant

Decision date: September 24, 2021

File number: GE-21-1380

Decision

[1] The appeal is allowed.

[2] The Claimant has met an exception that entitles her to Employment Insurance (EI) benefits while she is out of Canada.

Overview

[3] The Claimant was living in the United States of America (US) and working for a Canadian firm when she was dismissed from her job. She applied for EI benefits. The Commission said that it accepted the reason that she stopped working. But, it said she was not entitled to EI benefits because she was out of Canada.

[4] The Claimant disagrees. She says that she lives in a US state that borders Canada, she is available for work in both countries and is able to report to a Commission office within one hour of being asked to do so.

Matter I have to consider first

I am accepting documents sent in after the hearing

[5] At the hearing, the Claimant explained that she had applied for permanent resident status in the US. After the hearing, she submitted proof of her US visa and her permanent resident status. The Claimant's permanent resident status in the US shows she became a resident April 24, 2021.¹ The Claimant also submitted a US Visa which is an immigrant visa that allowed her to enter the US and live with her spouse. The US visa expires on October 5, 2021 but is replaced by the permanent resident card.

[6] I have admitted the permanent residence card, the US visa and the Claimant's explanation of both documents into evidence because the information is relevant to the issue of whether the Claimant is entitled to EI benefits while she is outside of Canada.

¹ A US permanent resident card is often called a green card because of its color

[7] The Commission was sent a copy of the Claimant's submission and was given an opportunity to respond by September 15, 2021. As of date of writing, the Commission has not provided a submission on these documents.

Issue

[8] Is the Claimant entitled to benefits while she is outside of Canada?

Analysis

[9] A claimant is not entitled to receive EI benefits for any period while she is out of Canada.²

[10] There a number of exceptions to this rule. A claimant could receive EI benefits if the reason she is outside Canada is because she or an immediate family member she is accompanying, are undergoing medical treatment that is not readily or immediately available in their area of residence in Canada. A claimant may also receive EI benefits if she is attending the funeral of an immediate family member or she is visiting an immediate family member who is gravely ill. And, a claimant may receive benefits if she is attending a *bona fide* job interview; or, she is conducting a *bona fide* job search.³

[11] Another exception says a claimant can receive EI benefits if they temporarily or permanently live in a US state that borders Canada if they meet certain conditions. A claimant may also receive benefits if there is an agreement between the government of the US state where they are working and the government of Canada regarding the payment of EI benefits.

[12] It is the responsibility of claimants to prove they meet the exceptions including the availability requirements prescribed in the *Employment Insurance Act*.⁴

² Employment Insurance Act (EI Act), section 37(b). This is how I refer to the legislation that applies to this appeal.

³ Employment Insurance Regulations (EI Regulations), section 55

⁴ *Canada (Attorney General) v. Peterson*, A-370-95; *Attorney General (Canada) v. Gibson*, 2012 FCA 166. This is how I refer to court decisions that apply to the circumstances of this appeal.

[13] The Claimant is a Canadian citizen who was employed by a firm that has its physical offices in Canada. She told the Commission that she would work in Canada during the day and return to the US every evening and for the weekends.

[14] The Claimant testified that prior to the COVID-19 pandemic her employer allowed her to work from home one day a week. When the COVID-19 pandemic started in March 2020, she was working from home full time and living in Canada. She was engaged to be married to a United States citizen. They got married and both returned to the US after a vacation in September 2020.

[15] The Claimant testified that she lives with her husband in a US city that borders Canada. It is a 20-minute drive from her US residence to the Canada – US border. She worked remotely from her US residence from August 2020 until May 7, 2021. The Claimant said that her employer was aware that she was working remotely from a location in the US. It decided that it wanted employees to come into the office once a week to check on the mail. The Claimant arranged with co-workers to cover her on this duty while she was in the US.

[16] The Claimant says that when the border closed in March 2020 she could only drive from the US into Canada to work if she had a letter from her employer saying that she was an essential employee. Her employer refused to give her that letter. In May 2021, the employer dismissed the Claimant because she was not working in Canada, it was concerned with the tax implications and the impact on her provincial medical insurance.

[17] The Claimant says that she should receive her EI benefits because she paid into the EI plan while working. Her employer was aware she was working remotely from the US. She has been looking for work both in Canada and the US. She is eligible to work in Canada because she is a Canadian citizen and she is eligible to work in the US because she is a permanent resident.

[18] The Commission says the Claimant is not entitled to receive EI benefits while she is out of Canada because she has not met any of the exceptions that would allow the

payment of benefits. It says the Claimant is a Canadian citizen who is temporarily residing in the US with her spouse and that she had not taken any steps to apply for authorization to allow her to legally work in the US. As such, she is not considered available in the US. The Commission says the Claimant is not a worker regularly commuting across the Canada US border and that, because she did not provide her address for her residence in the US, she has not proven that she is residing in a contiguous state.

[19] The Claimant testified she did not meet any of the conditions I outlined in paragraph 10 above.

[20] The law says that a Claimant is not disentitled from receiving EI benefits because the Claimant lives outside of Canada provided that:

- (a) the Claimant lives temporarily or permanently in a US state that is contiguous to Canada;
- (b) is available for work in Canada; and,
- (c) is able to report personally at an office of the Commission and does so when asked by the Commission.⁵

[21] The Federal Court of Appeal has said that for a state to be “contiguous” to Canada it must border Canada. The Court specifically rejected an argument that “contiguous” referred to a neighbour state as opposed to a border state in finding that Florida was not “contiguous” with Canada.⁶ I am bound by the Federal Court of Appeal’s interpretation that a state “contiguous” to Canada must border Canada.

[22] The Claimant’s application for EI benefits lists an address in a Canadian city that is contiguous to the US. She said on her application that she left Canada on April 24, 2021. The Claimant’s US permanent resident card, states she has been resident since April 24, 2021. The Claimant testified that she is living in Michigan. The documents

⁵ EI Regulations, Section 55(6)

⁶ *Attorney General v. Bendahan*, 2012 FCA 237

provided after the hearing show that the Claimant's US permanent resident card was mailed to an address in Michigan.

[23] She said that it is a 20 minute drive to the Canada US border from her US residence and it was a further 10 minutes for her to drive from the border to her former place of work in Canada. The Claimant testified that she would be able to report personally at a Service Canada office within an hour of being asked to do so.

[24] The state of Michigan does not share a land border with Canada. It is, however, connected to Canada by a number of bridges. Given the Claimant's testimony that she is able to reach the border within 20 minutes from her US residence and her US permanent resident status, I find that Claimant is permanently residing in a state that is contiguous to Canada.

[25] The Claimant testified that she could report to a Commission office within one hour of being asked to do so. As a result, although she has yet to be asked, I find that the Claimant is able to report to a Commission office when asked.

[26] The fact that a Claimant may or may not have been available for work while outside Canada is irrelevant unless the Claimant meets one of the exceptions in section 55 of the EI Regulations for all or a part of their period of absence. If a Claimant has shown they meet an exception in section 55 of the EI Regulations for their absence from Canada, then the claimant must also prove they were available for work for that period.

[27] 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:⁷

- (a) She wanted to go back to work as soon as a suitable job was available.
- (b) She has made efforts to find a suitable job.

⁷ 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.

- (c) She hasn't set personal conditions that might have unduly (in other words, overly) limited her chances of going back to work.

[28] When I consider each of these factors, I have to look at the Claimant's attitude and conduct.⁸

- **Wanting to go back to work**

[29] The Claimant has shown that she wanted to go back to work as soon as a suitable job was available.

[30] The Claimant worked for her former employer for just under two and one-half years. She needs to work to pay for her expenses. Her spouse works at night and she likes to be working during the day. She is willing to work from her home or outside her home. She has been applying for work in Canada and in the US. This evidence tells me the Claimant has shown a desire to return to work.

- **Making efforts to find a suitable job**

[31] The Claimant has made enough effort to find a suitable job.

[32] There is a list of job search activities to look at when deciding availability under a different section of the law.⁹ This other section does not apply in the Claimant's appeal. But, I am choosing look at that list for guidance to help me decide whether the Claimant made efforts to find a suitable job.¹⁰

[33] There are nine job search activities in the list of job search activities: assessing employment opportunities, preparing a resume or cover letter, registering for job search tools or with online job banks or employment agencies, attending job search workshops

⁸ 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.

⁹ Section 9.001 of the EI Regulations, which is for the purposes of subsection 50(8) of the EI Act.

¹⁰ I am not bound by the list of job-search activities in deciding this second factor. Here, I can use the list for guidance only.

or job fairs, networking, contacting employers who may be hiring, submitting job applications, attending interviews and undergoing evaluations of competencies.¹¹

[34] The Claimant testified that she was working remotely from home when she was dismissed. She has looked for work outside the home and is also able to work from home because she has a home office. The Claimant has a resume. She has posted her resume publicly. She regularly searches for jobs on career websites such as Indeed and Workopolis. She has signed up with the Job Bank for job alerts. The Claimant testified that she has applied for work in Canada and the US. The Claimant has been interviewed for jobs and is currently undergoing a recruitment / interview process for a job with a US firm. In my opinion, the Claimant's job search efforts demonstrate that she made efforts to find a suitable job.

- **Unduly limiting chances of going back to work**

[35] The Claimant did not set personal conditions that might have unduly limited her chances of going back to work.

[36] The Claimant has a permanent residence card that entitles her to work in the US. As Canadian citizen, the Claimant is also entitled to work in Canada. The Claimant testified that she has access to transportation to go to work and has a driver's license. She has looked for and continues to look for work in both countries that is consistent with her qualifications in her former employer's industry and in customer service. She has also applied for jobs that are outside of her former employment. She is willing to accept a job that might require on the job training. There are no jobs that the Claimant could not do due to her moral convictions or religious beliefs. She is willing to commute to Canada should a job require that she be physically present. This evidence tells me that the Claimant has not set any personal conditions that would limit her chances of going back to work.

¹¹ Section 9.001 of the EI Regulations.

[37] Based on my findings of the three factors the Claimant has shown that she is available for work in Canada.

Conclusion

[38] The Claimant has shown that she meets an exception to allow her to be paid EI benefits while she is out of Canada. She is residing permanently in a state that is contiguous to Canada, she is available for work in Canada, and, she is able to personally report to a Commission office when asked to do so.

[39] The appeal is allowed.

Raelene R. Thomas
Member, General Division – Employment Insurance Section