



Citation: *SS v Canada Employment Insurance Commission*, 2022 SST 313

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant: S. S.
Representative: S. Y.
Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (437733) dated December 6,
2021 (issued by Service Canada)

Tribunal member: Linda Bell
Type of hearing: Teleconference
Hearing date: March 1, 2022
Hearing participants: Appellant
Appellant's representative/witness
Decision date: March 4, 2022
File number: GE-22-43

Decision

[1] I am allowing the appeal, in part.

[2] The Appellant has shown that she was outside Canada to attend her mother's funeral and meets the availability requirements within that context. So she is exempt from disqualification for seven calendar days. This means she is entitled to Employment Insurance (EI) benefits from July 23, 2021, to July 29, 2021.

[3] The Appellant isn't entitled to any other exemptions while outside Canada. This means she is disqualified from EI benefits while outside Canada from July 30, 2021, to October 7, 2021.

[4] The Appellant hasn't shown that she was otherwise available for work while on an approved period of leave, while sick and outside Canada. This means she is disqualified from receiving EI benefits from July 20, 2021, to July 22, 2021, and July 30, 2021, to October 8, 2021, for this reason.

Overview

[5] The Appellant asked her employer for a leave of absence when she learned that her mother was ill. Her employer approved her request for a leave of absence from July 20, 2021, to October 8, 2021. The Appellant initially planned to travel to Egypt to provide care for her mother. However, her mother passed away on July 20, 2021, before she arrived. She left Canada on July 22, 2021, and returned on October 8, 2021.

[6] While the Appellant was in Egypt, she attended her mother's funeral. The Appellant also became ill on July 22, 2021. The Appellant requests sickness EI benefits.

[7] The Commission decided that the Appellant was not entitled to EI benefits. It imposed two disqualifications. The first was an indefinite disqualification for being outside Canada starting from July 30, 2021, allowing seven days for attending her mother's funeral. The second was an indefinite disqualification for not meeting the availability requirements for regular EI benefits starting from July 30, 2021.

[8] Upon reconsideration, the Commission changed its decision and the disentitlements. It changed the disentitlement for being outside Canada to a definite period from July 23, 2021, to October 7, 2021. It refused the seven-day exemption to attend her mother's funeral because the Commission determined the Appellant hadn't proven her availability. It changed the disentitlement for not being available for work to a disentitlement for failing to prove she was otherwise available if not for her illness. The Commission imposed this disentitlement for not being otherwise available from July 25, 2021, to October 8, 2021.

[9] The Appellant appeals to the Social Security Tribunal (Tribunal). She says she should be entitled to the seven days of EI benefits while outside Canada to attend her mother's funeral. She also says that she ought to be entitled to sickness EI benefits while outside Canada, without having to prove her availability because she still had a job.

Matters I must consider first

Jurisdiction

[10] My jurisdiction comes from the reconsideration decision that the Commission made under section 112 of the *Employment Insurance Act* (Act).¹

[11] In this case, the reconsideration decision refers to two disentitlements the Commission imposed. The Commission imposed the first disentitlement because the Appellant was outside Canada from July 22, 2021, to October 8, 2021. The second disentitlement was imposed from July 25, 2021, to October 8, 2021, because the Appellant didn't show that she was otherwise available for work, if not for her illness, because she was on an approved leave of absence.

[12] Upon the initial review of the appeal, it appeared that the Appellant was also appealing an overpayment resulting from an allocation of earnings. So on January 12,

¹ See section 113 of the Act.

2022, I asked the Commission to provide additional submissions regarding my jurisdiction to consider issues relating to an allocation of earnings.

[13] On January 13, 2022, the Commission clarified that it had not issued a decision in relation to an allocation of earnings.² Instead, the overpayment in question results from declared earnings on amended report cards.

[14] The Commission submitted that during the course of the reconsideration process, the Appellant provided amended reports for the weeks of July 11, 2021, and July 18, 2021. In the week of July 11, 2021, she reported a full workweek. For the week of July 18, 2021, she reported six hours of work and \$91.00 in earnings. An overpayment resulted when the Commission processed these amended reports.

[15] The Appellant was given an opportunity to respond to the Commission's supplementary representations.³ In turn, the Commission provided two additional supplementary representations in its attempts to clarify the overpayment and other questions raised by the Appellant.⁴ The Tribunal received the Appellant's final submissions on February 7, 2022.⁵

[16] I recognize that the Commission provided additional submissions to clarify how the overpayment occurred and other questions raised by the Appellant. However, the Commission has not formally reconsidered those issues. This means that I don't have jurisdiction to determine issues stemming from an overpayment arising from declared earnings or issues raised in the additional communications between the parties. Instead, my jurisdiction relates only to the reconsideration decision regarding the two disentitlements, as set out above.

² See the Commission's supplementary representations in pages GD6-1 to GD6-2.

³ See the Appellant's additional documents coded GD7, GD9, and GD10.

⁴ See the Commission's supplementary representations coded GD8 and GD11.

⁵ See the document coded GD12.

English as a second language

[17] At the outset of the hearing, the Appellant's representative / witness explained that English is the Appellant's second language. He says that she may not understand what to say in response to my questions.

[18] I explained that the Tribunal could provide the Appellant with an interpreter to assist her. Upon further clarification, the Appellant and her representative / witness refused the assistance of an interpreter. Instead, they requested that we proceed with the hearing as scheduled. They both agreed that if they didn't understand what was being discussed, they would ask me to restate or clarify what was said.

[19] Throughout the hearing, both the Appellant and her representative / witness spoke entirely in English. I rephrased what they stated to confirm my understanding. Each time they acknowledged that I had understood what they had said.

[20] In addition, both the Appellant and her representative / witness were fully responsive to what I said in English. I also gave each of them opportunities to request clarification and ask questions. Each time they confirmed that they understood what we discussed.

[21] Based on the foregoing, I am satisfied that despite English being the Appellant's second language, she had a full and fair opportunity to present her evidence and arguments during the hearing.

Clerical errors

[22] It is unfortunate that the Commission made clerical errors throughout the reconsideration process and in their representations. Those errors combined with the Commission's use of preformatted form letters created unnecessary confusion for the Appellant and her representative/witness.

[23] The Federal Court of Appeal has held that in cases where the Commission made errors, its decision is to remain if there is no prejudice to the claimant.⁶

[24] I find that in this case, the Commission's clerical errors doesn't cause the Appellant any prejudice because she wasn't prevented from appealing the reconsideration decision.

[25] Appeals before the Tribunal are *de novo*. This means the adjudication of the Appellant's claim begins anew where she can present all relevant evidence to the Tribunal. Accordingly, I will now consider the merits of the Appellant's appeal.

Issues

[26] Can the Appellant receive EI benefits while outside Canada?

[27] Does the Appellant meet the otherwise availability requirements for sickness EI benefits while on an approved period of leave outside Canada?

Analysis

Outside Canada

[28] The general rule is that you can't get EI benefits if you are outside Canada.⁷ But the law includes exemptions. For example, you can get up to seven days of EI benefits if you are outside Canada to attend the funeral of an immediate family member.⁸

[29] The day you travelled isn't usually included in the disentitlement for being outside Canada.⁹

⁶ In *Desrosiers v Canada (AG)*, A-128-89, the judicial review relating to CUB 16233 was dismissed. In that case, the Federal Court of Appeal upheld the Umpire's determination that an error, which does not cause prejudice, is not fatal to the decision under appeal, so the decision is to be maintained.

⁷ See section 37(b) of the Act.

⁸ See section 55 of the *Employment Insurance Regulations* (Regulations).

⁹ In *Canada (Attorney General) v Picard*, 2014 FCA 46, the Federal Court says that the length of the disentitlement is to be calculated in complete, whole days, during which the Appellant was outside Canada.

[30] The Commission submits that the Appellant is not entitled to an exemption because she failed to prove her availability while outside Canada. It determined the Appellant is disentitled from EI benefits from July 23, 2021, to October 7, 2021.

[31] The Appellant argues that the law says that she is not required to prove her availability during the 7-day period she is outside Canada to attend a funeral.¹⁰ She also says that she is not disentitled from EI benefits if she is outside Canada and is incapable of working due to her illness.¹¹

– **Exemption while attending a funeral**

[32] I find that the Appellant is exempt from disentanglement for seven consecutive days while outside Canada to attend her mother's funeral. This is because she meets the availability requirements within the context of this exemption.¹²

[33] In this case, the Appellant left Canada July 22, 2021, and returned on October 8, 2021. Her travel dates aren't considered. This means the Appellant is exempt from disentanglement for the seven days from July 23, 2021, to July 29, 2021.

[34] The Appellant remains disentitled from EI benefits for being outside Canada from July 30, 2021, to October 7, 2021. Here is what I considered when making this determination.

[35] I agree with the Commission that the Appellant must prove her availability while outside Canada during the seven-day exemption period.¹³ However, the law says that the Appellant's availability for the exemption period must be considered in the context of the funeral exception.¹⁴

[36] If the purpose of the trip is to attend the funeral of a family member, the availability of a claimant is assessed on a case-by case basis. In that context, a

¹⁰ See section 55(1) of the Regulations.

¹¹ See section 55(5)(b) of the Regulations.

¹² See sections 18(1) of the Act and 55 of the Regulations.

¹³ See sections 55(1) of the Regulations and 18(1) of the Act.

¹⁴ See *HR v Canada Employment Insurance Commission*, 2021 SST 221, *Canada (Attorney General) v Elyoumni*, 2013 FCA 151.

claimant who made arrangements to be contacted for work while outside of Canada, is not to be disentitled from benefits for the seven-day period.¹⁵

[37] In this case the Appellant consistently says she remained available to be contacted by her employer while she was outside Canada. When she first learned her mother was gravely ill, she took steps to secure her employment by requesting a leave of absence so she could visit her mother.

[38] The Appellant says her initial plan was to leave Canada to visit her mother who was seriously ill. However, prior to departing Canada her mother passed away on July 20, 2021. So the purpose of her trip outside Canada changed to attend her mother's funeral. While outside Canada the Appellant became ill herself which limited her ability to immediately return to Canada. She provides a medical note stating that she was unable to work due to her illness from July 22, 2021, to October 20, 2021.¹⁶

[39] Based on the evidence before me, I find the reasons the Appellant was outside Canada and on claim, meet the requirements for a seven-day exemption. Specifically, she was outside Canada to attend her mother's funeral and while there, she remained available to be contacted by her employer. Unfortunately, her circumstances continued to change when she became unable to work or immediately return to Canada due to her illness.

[40] The Appellant is exempt from disqualification for seven days from July 23, 2021, to July 29, 2021. She remains disentitled from EI benefits for being outside Canada from July 30, 2021, to October 7, 2021.

– **Illness while outside Canada**

[41] The law states that a claimant, who establishes a claim for EI benefits from **insurable employment outside Canada**, is not disentitled from receiving benefits for

¹⁵ See *Canada (Attorney General) v Elyoumni*, 2013 FCA 151.

¹⁶ See the medical note at page GD3-16.

the sole reason that they are outside Canada if the claimant proves that they are incapable of working due to an illness [my emphasis added in bold text].¹⁷

[42] I disagree with the Appellant when she says that she is entitled to EI benefits while outside Canada for this reason. There is no dispute that the Appellant became ill the day she departed Canada to go to Egypt. However, she didn't establish her EI claim with insured hours from employment she worked outside Canada.

[43] The Appellant admits that her September 27, 2020, claim for EI benefits was established using her insured hours from her job at the Hudson's Bay in British Columbia, Canada. She says she has worked for the Hudson's Bay in Canada since 2018. She has not worked for any employers outside Canada since 2018. Therefore, she doesn't qualify for EI benefits while outside Canada under section 55(5) of the Regulations because her claim was established from insured employment inside Canada.

Otherwise available

[44] To be eligible for sickness benefits, a claimant must establish that they are unable to work and if it were not for their illness, they would be available for work.¹⁸ To be considered available for work, a claimant must show that they are capable of and available for work and unable to obtain suitable employment.¹⁹

[45] Case law provides the following three things a claimant has to prove to show that they are "available" in this sense.²⁰

- The Appellant wants to go back to work as soon as a suitable job is available.
- The Appellant has made efforts to find a suitable job.

¹⁷ See section 55(5) of the Regulations.

¹⁸ See section 18(1)(b) of the Act.

¹⁹ See section 18(1)(a) of the Act.

²⁰ See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

- The Appellant hasn't set personal conditions that might unduly (in other words, overly) limit her chances of going back to work.

[46] In this case, the Appellant was on an approved leave of absence from July 20, 2021, to October 20, 2021.²¹

[47] The Appellant consistently says that she was available for her employer to contact her for work while she was outside Canada. She admits that she was not looking for a different job while she was in Egypt. She says that the availability requirements don't apply to her because she was on a leave of absence and not unemployed. She admits that she was restricting her availability to return to work for the same employer upon her recovery and return to the Canada.

[48] I recognize that Appellant's circumstances changed while she was on an approved leave of absence. Specifically she started her leave of absence on July 20, 2021, and she became ill two days later on July 22, 2021.²²

[49] The Appellant returned to Canada on October 8, 2021. She says she contacted her employer to return to work immediately. She says her employer told her she had to stay home and isolate for 14 days before she could return to work.

[50] Based on the evidence as set out above, I find the Appellant doesn't meet the otherwise availability requirements from July 20, 2021, to July 22, 2021, and July 30, 2021, to October 8, 2021. These are the periods she was restricting her availability to her current employer while on an approved leave of absence outside of the seven-day exemption period.

[51] I can't allow an appeal based on humanitarian grounds or financial hardship. The Employment Insurance program is not a needs-based benefit. It is a social benefit program governed by the Employment Insurance law. That law clearly states that you

²¹ See the approved request for leave of absence form on page GD2-24.

²² See pages GD2-24 and GD2-23.

can't receive EI benefits if you are not otherwise available for work or are outside Canada unless you meet one of the exemptions from disqualification.²³

[52] I sympathize with the Appellant given the circumstances she presented. I recognize she took actions to secure her employment. Then her circumstances changed after she started her leave of absence. Even if I were to find that she meets the otherwise availability requirements (which I don't), she is still disqualified from receiving EI benefits because she was outside Canada during this period.

[53] I don't have the authority to change the law. Also, I can't interpret the law in a way that is contrary to its plain meaning, no matter how compelling the circumstances.²⁴ My decision is not discretionary. Instead, it is based on the facts and application of the law.

Conclusion

[54] The appeal is allowed in part.

[55] The Appellant is exempt from disqualification while outside Canada from July 23, 2021, to July 29, 2021. She remains disqualified from July 30, 2021, to October 7, 2021, because she was outside Canada.

[56] The Appellant is disqualified from July 20, 2021, to July 22, 2021, and July 30, 2021, to October 8, 2021, because she doesn't meet the otherwise availability requirements.

Linda Bell

Member, General Division – Employment Insurance Section

²³ See section 18 of the Act and section 55 of the Regulations.

²⁴ See *Canada (Attorney General) v Knee*, 2011 FCA 301.