Citation: *MS v Canada Employment Insurance Commission*, 2022 SST 513

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

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

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (446758) dated January 17, 2022 (issued by Service Canada)

Tribunal member:	Teresa M. Day
Type of hearing:	Teleconference
Hearing date:	April 5, 2022
Hearing participants:	Appellant Appellant's representative
Decision date:	April 7, 2022
File number:	GE-22-532

Decision

[1] The appeal is dismissed.

[2] The Appellant is disentitled to employment insurance (EI) sickness benefits from September 14, 2021 to January 9, 2022 because she was outside of Canada.

Overview

[3] The Appellant works as an administrator with X (X) in Vancouver, BC. Her job is to schedule health services and nursing care for X patients. She took an extended medical leave of absence starting on February 28, 2021 in order to travel to India for in vitro fertilization (IVF) treatment.

[4] On September 14, 2021, while she was in India, she applied for sickness benefits because she became ill and could not return to Canada. She was pregnant with twins but experiencing complications and her health was deteriorating. Her doctor in India told her she was medically unable to fly because of the high risk she would have a miscarriage. She was admitted to hospital and prescribed complete bed rest. The Commission imposed a disentitlement on her claim because she was not in Canada and did not prove she would be available for work if she were not sick.

[5] The Appellant asked the Commission to reconsider. She explained that she went to India to undergo IVF treatment because it was cheaper to have it there than in Vancouver. She also submitted e-mails that showed she maintained contact with her employer while she was in India and fully intended to return to her job as soon as she was able.

[6] But the Commission maintained the disentitlement on her claim. The Commission said the Appellant did not provide a medical certificate from a Canadian doctor confirming that the medical treatment was not readily available in Canada[1], and

[1] This is a requirement for the medical treatment **exception** (provided for in paragraph 55(1)(a) of the *Employment Insurance Regulations*) to the rule against receiving EI benefits while outside of Canada (provided for in subsection 37(b) of the *Employment Insurance Act*).

did not prove that she would have been available for work if she was not sick[2]. The Appellant appealed that decision to the Social Security Tribunal (Tribunal).

[7] The Appellant suffered a miscarriage in India on December 12, 2021 and returned to Canada after that. She asks the Tribunal to approve her claim for sickness benefits from September 14, 2021 to January 9, 2022[3].

Issue

[8] Is the Appellant entitled to sickness benefits on her claim?

Analysis

[9] The law unequivocally says that a claimant is not entitled to receive EI benefits of any kind for any period during which the claimant is not in Canada[4], unless the claimant falls under one of the exceptions set out in the regulations[5].

[10] There is an exception for medical treatment, but it is limited in scope. It provides that a claimant may receive EI benefits while outside of Canada ***if*** the travel is for the specific purpose of undergoing medical treatment that is not readily or immediately available in Canada[6].

[11] The Appellant is relying on the medical treatment exception. This means it is up to her to prove that the medical treatment she traveled to India for is not available in Canada[7].

[12] If she meets the medical treatment exception, the Appellant must then demonstrate that, but for her illness, she would have been available for work[8].

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[2] Even if a claimant comes within one of the exceptions to the rule against receiving EI benefits while outside of Canada, the law says they must still prove their availability for work (if claiming regular EI benefits) ***or*** that they would have been available for work but for their illness (if claiming sickness benefits): subsection 55(1) of the *Employment Insurance Regulations.*
[3] See GD3-21.
[4] Section 37(b) of the *Employment Insurance Act.*
[5] Section 55 of the *Employment Insurance Regulations*.
[6] Paragraph 55(1)(a) of the *Employment Insurance Regulations*.
[7] See *CUB 60750*, and *C.E.I.C. v. G.Z.*, 2016 SSTADEI 136.
[8] See *Canada (Attorney General) v. Elyoumni*, 2013 FCA 151.

[13] The Appellant can only be paid the sickness benefits she has requested if she brings herself within the medical treatment exception **AND** proves that her illness was the only reason she was not available for work.

Issue 1: Does the Appellant meet the medical treatment exception?

[14] To meet the medical treatment exception, the Appellant must prove that she traveled to India at the behest of a doctor and for the purposes of medical treatment that was not readily or immediately available in Canada[9].

[15] The words "immediately available" have to be interpreted as being immediately available within the realities of the medical system in Canada[10].

[16] The Appellant concedes that IVF treatment is readily and immediately available in Canada. But she says she had valid reasons for going to India for her IVF treatment.

[17] The Appellant's evidence at the hearing[11] was:

- She suffered a miscarriage in 2015. Her doctors were not able to explain why she miscarried. Since then, she has undergone multiple fertility treatments in Canada, but her doctors have never given her an answer for why the treatments didn't work. These things have caused her to lose faith in the fertility resources here.

- Her brother-in-law knew a doctor in India who would look into the reasons why she was not able to get pregnant.

- And IVF is available in India at a far more reasonable cost than in Canada.

- She and her husband did not want to wait 2 years to save up for IVF in Canada when it was far less expensive in India.

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[9] See *M.L. v. C.E.I.C.*, 2019 SST 452.
[10] See C*.E.I.C. v. C.P.* 2019 SST 356.
[11] Both the Appellant and her husband (her representative on this appeal) testified at the hearing. This is a summary of their testimony.

- Also, IVF in Canada “has a 70% success rate”, but in India it is “definitely more than 70%”. As it turned out, both times she underwent the IVF treatment in India she did become pregnant. The facility “may not have been the best”, but they felt it “guaranteed” a higher rate of success.

- Sadly, she experienced complications with her pregnancies while she was in India, had to be hospitalized, and ultimately miscarried.

[18] I am deeply sympathetic to the Appellant’s situation and experiences. She was understandably devastated by the outcome of her IVF treatments in India.

[19] But she has not proven that she traveled to India for the purpose of receiving medical treatment that was not readily or immediately available in Canada.

[20] There is no dispute that IVF treatment is readily and immediately available in Vancouver, which is her area of residence in Canada. And differences in the manner or cost of the treatment are not relevant to the determination of whether or not treatment for the medical condition is available in Canada[12].

[21] Also, she must have left Canada for the purpose of receiving medical treatment not available here – not be struck ill while away[13].

[22] This means she has not met the medical treatment exception and, therefore, is not entitled to EI benefits while she was in India.

[23] Having failed to bring herself within an exception to the rule against receiving EI benefits while outside of Canada, the Appellant cannot be paid sickness benefits from September 14, 2021 to January 9, 2022 because she was outside of Canada during this time.

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[12] See *CUB 77010*.
[13] See CUB 57105.

Issue 2: Availability for work

[24] The law says that a claimant is not entitled to EI benefits for any of the time they spend outside of Canada, except for the limited exceptions described in the regulations.

[25] And a claimant can only rely on an exception if they can also show that they were available for work[14] (or, in the case of sickness benefits, that they would have been available for work but for their illness or injury) while outside of Canada.

[26] The Appellant has **not** brought herself within the medical treatment exception and, therefore, I do not need to consider whether she has proven her availability for purposes of sickness benefits.

[27] However, she provided passionate and emotional evidence and testimony to refute the Commission's determination that she did not prove her availability for work. So I will set out her evidence and conduct the availability analysis to acknowledge the effort she put into communicating with her employer while she was in India.

[28] The Appellant's evidence[15] is that:

- Her intention was to go to India for IVF treatment, get pregnant, and then return to Canada and work until approximately one (1) month before her due date, at which time she would apply for EI maternity and parental benefits.

- Her employer would not allow her to work remotely from India, but said she could come back to work when she returned to Canada.

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[14] A claimant must meet all of the requirements to qualify for an exception under the regulations. One of those requirements is availability for work. Subsection 55(1) of the *Employment Insurance Regulations* states that it is "subject to" section 18 of the *Employment Insurance 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. Subsection 18(1) of the *Employment Insurance 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. The Federal Court of Appeal interpreted subsection 55(1) in a decision called *Elyoumni (supra).* The Court said 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] Both the Appellant and her husband (her representative on this appeal) testified at the hearing. This is a summary of their testimony.

- She took an extended medical leave of absence starting in February 28, 2021, but was in regular e-mail communication with her employer throughout her leave, providing updates on her treatments and plans to return to Canada.

- She has produced copies of these e-mail exchanges[16]. These are proof of her intention to come back to Canada as soon as possible and return to work.

- But by September 2021, she was experiencing complications with her pregnancy. Her doctor said it was too risky for her to fly back to Canada.

- She applied for sickness benefits on September 14, 2021 because she was ill and could not return to Canada.

- The whole time she was ill in India, she wanted to be back in Canada and wanted to work.

- The only reason she could not come back to Canada and return to work was because her doctor said she would have a miscarriage if she attempted to fly home. She has provided a medical certificate to prove this[17].

[29] Case law sets out 3 factors for me to consider when deciding whether a claimant is available for work. A claimant has to prove the following 3 things[18]:

a) They want to go back to work as soon as a suitable job is available.

b) They are making efforts to find a suitable job.

c) They haven't set personal conditions that might unduly (in other words, overly) limit their chances of going back to work.

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[16] See GD2-8 to GD2-16
[17] See GD2-17.
[18] 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.

[30] For sickness benefits, the Appellant doesn't have to show that she was actually available for work. She just needs to show that she would have been able to meet the requirements of all three factors if she hadn't been sick.

[31] In other words, the Appellant has to show that her illness was the ***only*** reason she could not return to work between September 14, 2021 and January 9, 2022.

[32] I have no hesitation in finding that the Appellant has met the first 2 requirements. I accept the emphatic testimony at the hearing and her e-mail communications as credible evidence of her desire to return to work as soon as possible ***and*** her efforts to protect and maintain her employment relationship with X.

[33] Her problem is with the third requirement. The Commission has correctly pointed out that her illness was **not** the only reason she was unable to return to work. There was also the fact that she was in India, and unable to do her job from there or return to Canada to resume her employment here. She clearly had valid personal reasons for remaining in India. However, her absence from Canada between September 14, 2021 and January 9, 2022 was a personal condition that would have unduly limited her chances of returning to work if she had not been sick.

[34] Since she has not met all 3 factors, she has not proven that she would have been available for work even if she hadn't been sick between September 14, 2021 and January 9, 2022.

[35] This means that she would be disentitled to EI sickness benefits even if she had met the medical treatment exception.

Conclusion

[36] The Appellant is disentitled to EI benefits because she was outside of Canada and failed to prove she qualifies for any of the statutory exceptions provided for in subsection 55(1) of the *Employment Insurance Regulations*.

[37] The appeal is dismissed.

Teresa M. Day
Member, General Division – Employment Insurance Section