



Citation: *MJ v Canada Employment Insurance Commission*, 2023 SST 2039

## **Social Security Tribunal of Canada General Division – Employment Insurance Section**

# **Decision**

**Appellant:** M. J.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (555734) dated November 30, 2022 (issued by Service Canada)

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**Tribunal member:** Paul Dusome

**Type of hearing:** Videoconference

**Hearing date:** March 16, 2023

**Hearing participant:** Appellant

**Decision date:** March 31, 2023

**File number:** GE-23-8

## Decision

[1] The appeal is dismissed. The Tribunal disagrees with the Appellant.

[2] The Appellant was outside Canada. He has not shown that he was entitled to collect Employment Insurance (EI) benefits for more than the one-week period granted by the Canada Employment Insurance Commission (Commission) while he was outside Canada. This means that he can't receive any more EI benefits for when he was outside Canada. The Appellant also failed to prove that he was available for employment while he was outside Canada.

## Overview

[3] The Appellant started receiving EI benefits in September 2021. In late November 2021, he went to Pakistan to care for his ill mother, who was in hospital for most of the time he was away. He told the Commission of his departure before he left. He returned to Canada in late September 2022.

[4] Usually, you can't get EI benefits if you are outside Canada. But there's a one-week exception if you are visiting a member of your immediate family who is seriously ill.

[5] The Canada Employment Insurance Commission (Commission) decided that the Appellant came within the exception for the first week he was out of Canada. That was based on the exception for visiting a seriously ill family member. The Commission decided it wasn't able to pay him benefits for the remainder of his time outside Canada.

[6] The Commission also decided that the Appellant was not entitled to receive EI benefits because he failed to prove his availability for work while he was outside Canada.

[7] The Appellant disagrees. He says that he falls within the exception because he was visiting his seriously ill mother in hospital. He was also looking for work while in Pakistan. What he really wanted was to continue receiving EI benefits on his return to Canada.

[8] I have to decide whether the Appellant has proven that he was outside Canada to visit a family member that falls within the exception. I also have to decide whether he would have been available for work during that week.

## **Matters I have to consider first**

### **The issues that I can deal with in this appeal**

[9] The Appellant has asked that the Commission pay him the balance of EI benefits on his claim. He had received about 15 weeks of EI before leaving Canada. He says he should receive 50 weeks of benefits in total. So he has 35 weeks remaining. Those weeks should be paid to him for the weeks after his return to Canada.

[10] The Commission says that the issue of benefits after the Appellant returned to Canada is not before the Tribunal (GD4-4). The Tribunal only has jurisdiction over a decision that the Commission has made after two things have happened. First, the Commission has made an initial decision on the issue in question. Second, the Commission has made a second decision after it has received a request for reconsideration.<sup>1</sup> The Commission's decision and reconsideration decision in this appeal relate only to the issues of being outside Canada, and availability for work.

[11] The Commission did not make an initial decision and reconsideration decision on the issue of paying the Appellant benefits after his return to Canada. The technical term for that issue is extending the benefit period beyond the normal 52 weeks.<sup>2</sup> As the Appellant testified, the Commission told him verbally on September 28, 2022, that the 52-week period to receive EI benefits had ended in August 2022. The Commission did not say that it had refused to extend his benefit period. Nor did the Commission make a reconsideration decision on that issue, despite the Appellant stating his belief that he should receive the balance of his weeks of benefits on his return to Canada. So the Tribunal cannot make a decision on the extension of the benefit period issue in this appeal. Even if I could rule on that issue, it would be prejudicial to the Appellant to

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<sup>1</sup> See *Employment Insurance Act*, sections 112 and 113.

<sup>2</sup> See *Employment Insurance Act*, section 10.

proceed without evidence whether he would qualify for an extension. The Commission has stated in its Representations that it will review the extension of the benefit period, after the out-of-Canada and availability issues are resolved (GD4-4). The Appellant can then request a reconsideration if the Commission refuses the extension, and appeal if necessary.

### **Appellant's documents to be sent in after the hearing**

[12] The Appellant testified at the hearing about his job search efforts. He said that he had all the information on the website Indeed, including his resumé, to show his job search efforts while out of Canada. I allowed the Appellant ten days to submit those documents to the Tribunal for review. The Appellant submitted documents, which have been reviewed for this decision.

### **Issue**

[13] Was the Appellant outside Canada to visit a seriously ill immediate family member that falls within the exception?

[14] Was the Appellant available for work while outside Canada?

### **Analysis**

#### **The Appellant meets the exception for visiting a seriously ill family member**

[15] I find that the Appellant has shown that he meets this exception to the disentitlement. I explain my reasoning below.

[16] The general rule is that you can't get EI benefits if you are outside Canada.<sup>3</sup> But the law includes exceptions. For example, you can get EI benefits if you are outside Canada to visit a seriously ill immediate family member.

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<sup>3</sup> See section 37(b) of the *Employment Insurance Act* (Act).

[17] For that exception to apply, there are two requirements. First, the person being visited must be an immediate family member. Second, that person must be seriously ill or injured. If those requirements are met, the exception is for a period of not more than seven consecutive days.<sup>4</sup>

[18] The Appellant has to prove that he meets the requirements of the exception.<sup>5</sup> He has to prove this on a balance of probabilities. This means that he has to show that it is more likely than not that he meets the requirements.

[19] I find that the Appellant has shown that he meets this exception, based on his testimony and the documentary evidence he filed.

[20] The first requirement is met. The Appellant's mother is an immediate family member under the exemption.<sup>6</sup>

[21] The second requirement is met. The Appellant filed his airline tickets with the Commission at the reconsideration stage. They show his departure from Canada on November 29, 2021, and his return on September 26, 2022. He also filed documents from the hospital for his mother's care, and photographs of his mother in a hospital bed. The documents confirm his mother was being treated for a heart condition. That evidence satisfies the requirement of the person being seriously ill.

[22] While the Appellant has proven the exception, it does not change the outcome of this appeal. The Appellant must also prove his availability during that one-week exception period. This he failed to do, as set out under the next heading.

### **The Appellant didn't prove that He was available for work**

[23] I find that the Appellant hasn't shown that he met the availability requirement while outside Canada. I explain my reasoning below.

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<sup>4</sup> See section 55(1)(d) of the *Employment Insurance Regulations* (Regulations).

<sup>5</sup> See *Peterson v The Attorney General of Canada*, A-370-95.

<sup>6</sup> See *Employment Insurance Regulations*, section 55(2)(a).

[24] If you meet the requirements of an exception to the disentitlement for being outside Canada, you also have to meet the availability requirement<sup>7</sup> in the law.<sup>8</sup>

[25] This means that the Appellant also has to prove that he was available for work while outside Canada.<sup>9</sup> The period during which he must prove availability is the period of the exemption. Once the exemption has ended, he is disentitled from receiving EI benefits for being out of Canada, even if he proves availability after the exemption ends.<sup>10</sup>

[26] Because I am dealing with an Appellant who was outside Canada for a specific reason, I have to interpret availability based on the context.<sup>11</sup> When an Appellant meets one of the exceptions to the general rule about being outside Canada, their availability has to be assessed on a case-by-case basis.<sup>12</sup>

[27] I find that the Appellant hasn't shown that he was available for work. He had to prove three factors to show his availability. He only succeeded in proving one factor. This conclusion is based on inconsistencies in the Appellant's evidence, as reviewed below.

[28] The Appellant did not file his weekly reports while outside Canada. He filed his last report on November 27, 2021. In a phone conversation in October 2022, he told the Commission that he made arrangements to be contacted for employment activities. He also said he could return to Canada within 48 hours of learning of an employment opportunity. He did not say anything about what he was doing to find work in Canada while he was away. He said that he was available as of September 26, 2022, when he returned. He also agreed that no benefits were payable for the period of his absence.

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<sup>7</sup> See section 18 of the Act.

<sup>8</sup> See section 55(1) of the Regulations and *Canada (Attorney General) v Elyoumni*, 2013 FCA 151.

<sup>9</sup> See section 18(1)(a) of the Act.

<sup>10</sup> See *Canada (Attorney General) v Elyoumni*, 2013 FCA 151; *EA v Canada Employment Insurance Commission*, 2014 SSTGDEI 41.

<sup>11</sup> See *Canada (Attorney General) v Elyoumni*, 2013 FCA 151.

<sup>12</sup> See *Canada (Attorney General) v Elyoumni*, 2013 FCA 151.

[29] In his testimony at the hearing, the Appellant initially said that he had not been looking for work for the entire period he was out of Canada. Then he testified that he was looking for work for the entire period he was out of Canada. He testified that the number of applications he made was high. If he had been offered a job, he would have accepted. He would have hired a caregiver for his mother. He and other family members would have paid for a caregiver. He only stayed because he had no job to pay towards a caregiver.

[30] The Appellant's statement that he was looking for work while he was out of Canada is inconsistent with other statements that he made. In his request for reconsideration, he said he filed his last weekly report on November 27, 2021, and did not submit weekly reports while he was out of the country. Failing to file reports is not consistent with looking for work during the time the reports had to be filed. The Appellant also said in his request that he contacted the Commission on his return to Canada to continue to claim his remaining 35 weeks of unpaid EI benefits. The Commission told him that his one-year benefit period had ended in August 2022, so he would receive no more benefits under that claim. The Appellant's belief that he could put his EI benefits on hold for a year, then collect them on his return to Canada, is inconsistent with him looking for work while outside Canada.

[31] In his Notice of Appeal, the Appellant said he had no other option but to go out of Canada to take care of his ill mother. She has a severe heart condition and diabetes. There was no one else to take care of her. She was admitted to ICU in the hospital multiple times during his stay. The treatment and recovery period took nine months. Once she had recovered, he returned to Canada. He is not seeking benefits for the period he was out of the country. He is seeking an extension of his benefit period. Those statements show that the Appellant's focus while out of Canada was to care for his mother. He had originally planned to stay for two months. He stayed longer because his mother's condition relapsed several times. That focus on his mother, combined with his belief that he could put his EI benefits on hold, is not consistent with the Appellant looking for work while he was out of Canada. The statement that he was

not seeking benefits for his time out of Canada supports a conclusion that he was not looking for work during that time.

[32] To prove availability, the Appellant has to prove the following three factors:<sup>13</sup>

- a) He wanted to go back to work as soon as a suitable job was available.
- b) He has made efforts to find a suitable job.
- c) He didn't set personal conditions that might have unduly (in other words, overly) limited his chances of going back to work.

[33] When I consider each of these factors, I have to look at the Appellant's attitude and conduct.<sup>14</sup>

[34] I find that the Appellant has not proven the first and third of those three factors. For the first factor, I cannot conclude that he wanted to go back to work as soon as a suitable job was available. His belief that he could put his EI benefits on hold while out of Canada shows that he was not wanting to go back to work while out of Canada. He wanted to care for his mother. He did not want to leave her until she had recovered. That did not happen for nine months. For the third factor, the Appellant had set a personal condition that unduly limited his chances of going back to work. The condition was caring for his mother until she recovered.

[35] For the second factor, the Appellant has shown that he made some efforts to find a job in Canada while he was away. Based on the review of the evidence above, I was skeptical of his evidence that he was looking for work while out of Canada. The Appellant submitted copies of email confirmations of applications made on Indeed, from November 6, 2021, to May 26, 2022. The 34 applications in that period were all for jobs in Canada. The relevant period that I have to consider for this appeal is the one week from November 29 to December 6, 2021. That is the one-week period of the exception

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<sup>13</sup> 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.

<sup>14</sup> 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.



for visiting a seriously ill family member. That is the period for which the Appellant must prove his availability. Once the one-week exception has ended, the Appellant is disentitled from receiving EI benefits for being out of Canada. That applies even if he can show availability after the one-week period. For the one-week exception period, the Appellant made one application on December 6<sup>th</sup>. In this case, I must interpret availability in the Appellant's context. In the normal context, one application would not show enough efforts to find a suitable job. The context for the Appellant in that in the one-week exception period involved long distance travel, recovery from jet lag and focusing on his mother. He left Canada on the evening of November 29, 2021, and arrived in Pakistan the morning of December 1, 2021, after a 12-hour layover in the Middle East. In that context, I find that the Appellant did make a sufficient effort to look for work during that week. However, the Appellant has not proven his availability for that week. He did not prove the first and third factors noted above. He had to prove all three factors to prove his availability.

## **Conclusion**

[36] The Appellant has shown that he was outside Canada to visit a seriously ill immediate family member that falls within the one-week exception. Because of this, I find that the Appellant would be entitled to receive EI benefits for the first week he was out of Canada, but only if he proved that he was available for work. Since he has not proven his availability, he is not entitled to receive any EI benefits for the entire period he was outside Canada, November 29, 2021, to September 26, 2022.

[37] This means that the appeal is dismissed.

Paul Dusome  
Member, General Division – Employment Insurance Section