



Citation: *DS vs Canada Employment Insurance Commission*, 2024 SST 1318

Social Security Tribunal of Canada General Division – Employment Insurance Section

Decision

Appellant: D. S.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (677229) dated August 20, 2024
(issued by Service Canada)

Tribunal member: Catherine Shaw

Type of hearing: Teleconference

Hearing date: September 12, 2024

Hearing participant: Appellant

Decision date: September 13, 2024

File number: GE-24-2965

Decision

[1] The appeal is allowed in part.

[2] The Canada Employment Insurance Commission (Commission) had the power to review the Appellant's benefits, and it exercised its discretion fairly when it decided to review them.

[3] On the issue of availability, the appeal is allowed. The Appellant has shown he was available for work from November 11, 2021, to November 19, 2021, while he was outside of Canada.

[4] The Appellant was outside Canada from November 3, 2021, to November 19, 2021. He meets one exception to the disqualification for being out of the country. This means he can be paid EI benefits for seven days while he was outside Canada. He remains disqualified from November 11, 2021, to November 19, 2021. The appeal on this issue is dismissed.

Overview

[5] The Appellant left Canada on November 3, 2021. He travelled to the United Kingdom to see his grandmother, who was seriously ill. She passed away during his visit and he returned to Canada. He returned to Canada on November 20, 2021.

[6] The Commission decided that it couldn't pay the Appellant benefits because he was outside Canada and hadn't shown he was available for work while out of the country. It imposed a penalty on the Appellant because it said he made false statements on his claim reports when he didn't say he was outside Canada.

[7] On reconsideration, the Commission decided the Appellant could be paid benefits for one week that he was outside Canada because he met an exception to the disqualification. It also removed the penalty.

[8] The Appellant says that he contacted Service Canada before he travelled. He asked about his entitlement to benefits while he was outside the country. They told him

that it was a grey area and that he should be able to get benefits while he was away. He followed their guidance and did everything he was supposed to do. Repaying these benefits now would cause him serious financial hardship.

Issues

[9] Did the Commission have the power to review the Appellant's benefits? If so, did it properly exercise its discretion when it decided to review them?

[10] Was the Appellant available while he was outside Canada?

[11] Can the Appellant receive benefits for when he was outside Canada?

[12] Did the Commission act fairly when it gave the Appellant a penalty?

Analysis

Did the Commission have the power to review the Appellant's benefits?

[13] The law gives the Commission broad powers to review any of its decisions about EI benefits.¹ But, the Commission has to follow the time limits set out by the law. Usually, the Commission has three years to review its decisions.² If the Commission paid you EI benefits that you weren't really entitled to receive, it can ask you to repay those EI benefits.³

– The Commission had the power to review the Appellant's availability

[14] I find the Commission respected the law about time limits when it reviewed the Appellant's entitlement to benefits. This is because the Commission paid EI benefits to the Appellant in November 2021. The Commission finished its review and notified the Appellant of its decision on June 12, 2024, within three years.

¹ See section 52 of the *Employment Insurance Act* (EI Act). The Federal Court of Appeal sets out the Commission's broad power under this section in *Briere v Canada Employment and Immigration Commission*, A-637-86.

² See section 52(1) of the EI Act and *Canada (Attorney General) v Laforest*, A-607-87.

³ See section 52(3) of the EI Act.

– **The Commission acted properly when it reviewed his availability**

[15] Even though the law gives the Commission this power, it doesn't say that the Commission **must** use this power. The Commission has the choice to use its review power or not. In other words, the power to review is a discretionary power.

[16] When the Commission decides to use its discretion to review your entitlement to EI benefits, it has to show that it used this power properly. This is called using its discretion judicially.

[17] To show that it used its discretion judicially, the Commission has to show that it:

- Acted in good faith
- Didn't ignore relevant factors
- Didn't consider irrelevant factors
- Didn't act for an improper purpose
- Didn't act in a discriminatory way⁴

[18] The evidence shows that the Commission knew that the Appellant travelled outside Canada in November 2021. The Commission sent the Appellant a questionnaire in July 2023, asking him to confirm the dates of his travel, and to answer questions about the reason for the travel and his availability while outside Canada. He returned this questionnaire on August 3, 2023, stating that he had travelled to the United Kingdom to see his family member who was gravely ill.

[19] Nearly a year later, on June 12, 2024, the Commission sent the Appellant a decision letter and Notice of Debt. The letter said the Commission had decided that he could not be paid EI benefits while he was outside Canada, and that he was not available for work while he was out of the country. This created an overpayment, which was reflected on the Notice of Debt.

⁴ The Federal Court of Appeal sets out what it means for the Commission to exercise its discretion judicially in *Canada (Attorney General) v Purcell*, A-694-94.

[20] The decision letter also said the Appellant had knowingly made false or misleading statements on his reports. This was likely due to the fact that he didn't declare that he was outside of Canada on his bi-weekly claim reports, as he testified to at the hearing.

[21] When I look at everything in the appeal file, I think the Commission used its discretion fairly. It considered every factor and circumstance about the Appellant's absence from Canada, including the fact that he didn't report his absence from the country. It didn't rely on irrelevant or unimportant factors. The Appellant hasn't shown me that the Commission acted in a way that was discriminatory or in bad faith.

[22] This means the Commission used its discretion fairly when it decided to review and reconsider the Appellant's benefits.

Was the Appellant available for work?

[23] To be paid EI benefits, you have to prove that you were available for work.⁵ Availability is an ongoing requirement. This means you have to be looking for a job.

[24] In the Appellant's case, he has to prove that he was available for work from November 11, 2021, to November 19, 2021, when he was outside of Canada.

[25] Case law sets out three factors for me to consider when deciding whether the Appellant was capable of and available for work but unable to find a suitable job. The Appellant has to prove the following three things:⁶

- 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.

⁵ See section 18(1)(b) of the *Employment Insurance Act*.

⁶ 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.

[26] When I consider each of these factors, I have to look at the Appellant's attitude and conduct.⁷

– **Wanting to go back to work**

[27] The Appellant has shown that he wanted to go back to work as soon as a suitable job was available.

[28] The Appellant testified that returning to work was his first priority. He continued to look for work while he was away and was willing to return to Canada immediately if he had received a job offer.

[29] I find the Appellant's attitude and conduct show his desire to go back to work as soon as a suitable job was available.

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

[30] The Appellant has made enough effort to find a suitable job.

[31] The Appellant says that he continued to look for work while he was outside Canada. He regularly looked at the job search website, Indeed, and applied for several jobs while he was away. He could also be contacted by phone or email by any prospective employers.

[32] I believe the Appellant was looking for work. I am satisfied that his job search shows his desire to return to the labour market as soon as a suitable job was available.

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

[33] The Appellant didn't set personal conditions that might have unduly limited his chances of going back to work.

[34] The Commission said being outside of Canada overly limited the Appellant's chances of going back to work.

⁷ 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.

[35] The Appellant disagrees. He was able to continue looking for work and applying for jobs while out of the country. He was willing to return to Canada immediately if he had been offered a job.

[36] The evidence supports that the Appellant wasn't limiting his job search or his willingness to accept employment because he was outside Canada. He was able to continue his job search efforts while he was out of the country. And even though he was outside Canada to see his seriously ill grandmother, he was willing to return to the country as soon as he was offered a job.

[37] Given these factors, I'm not satisfied that the Appellant being outside Canada unduly limited his chances of going back to work.

– **So, was the Appellant capable of and available for work?**

[38] Based on my findings on the three factors, I find that the Appellant has shown that he was capable of and available for work but unable to find a suitable job from November 11, 2021, to November 19, 2021.

Can the Appellant be paid benefits while outside Canada?

[39] The general rule is that you can't get EI benefits if you are outside Canada.⁸ But, the law includes exceptions. For example, you can get EI benefits if you are outside Canada to care for an immediate family member who is seriously ill or injured.⁹

[40] The basic facts aren't in dispute. The Appellant travelled outside Canada on November 3, 2021. He returned to Canada on November 20, 2021. The purpose of his travel was to visit his grandmother, who was seriously ill.

[41] The day you travelled isn't usually included in the disentitlement from benefits.¹⁰ The Appellant left Canada on November 3, 2021. So, his disentitlement began on

⁸ See section 37(b) of the *Employment Insurance Act*.

⁹ See section 55 of the *Employment Insurance Regulations* (Regulations).

¹⁰ 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.

November 4, 2021. He returned to Canada on November 20, 2021. This means his disentitlement ended on November 19, 2021.

[42] The Commission says the Appellant meets one of the exceptions to being disentitled while outside Canada. He travelled to visit a seriously ill or injured family member. This means he is exempt to the disentitlement for up to seven days of his travel.

[43] The Appellant says that he should be paid benefits for the entire time that he was outside Canada, because he was visiting his ill grandmother and he relied on incorrect information from Service Canada.

[44] It's clear that the Appellant acted carefully and diligently before he travelled. He contacted Service Canada and followed the advice the Service Canada officer gave him. Despite that, Service Canada gave the Appellant incorrect information about his ability to receive EI benefits while he was outside Canada. He relied on the information Service Canada gave him to travel outside the country, while counting on the financial support he was assured he would have through EI benefits.

[45] It is truly unfortunate that the Appellant received incorrect information from Service Canada. Regrettably, the fact that he received incorrect information doesn't change my decision. The Courts have held that Service Canada officers can't promise something that the law doesn't permit. And, if they do, the law still prevails. A Service Canada officer's word can't entitle someone to benefits that the law says they aren't entitled to receive.¹¹

[46] I sympathize with the Appellant's circumstances. But, the law is clear that you can't receive EI benefits if you are outside Canada. The only exceptions are the ones

¹¹ The Federal Court of Appeal stated in *Granger v Employment and Immigration Commission*, A-684-85, that Commission agents have "no power to amend the [law]," so any interpretation they make of the law does not, by itself, "have the force of law." The Court also stated that any commitment the Commission's representatives might make, "whether in good or bad faith, to act in a way other than" written in the law, is "absolutely void."

enumerated in the EI Regulations, and those only apply for a period that you are outside Canada, not the entire time you are out of the country.¹²

[47] I don't have the authority to change the law. And I can't interpret the law or rules about EI in a way that is contrary to their plain meaning, no matter how compelling the circumstances.¹³

[48] The Appellant is entitled to a seven-day exception from the disentitlement for being outside Canada. In other words, he may be paid EI benefits from November 4 to November 10, 2021. This means he cannot be paid benefits from November 11, 2021, to November 19, 2021.

Can I reduce or waive the overpayment?

[49] The Appellant asks the Tribunal to reduce the overpayment on his account for compassionate reasons. This all happened during COVID-19 when the rules were ambiguous. He received incorrect information from Service Canada, that he relied on when he travelled to another country. And having to repay this overpayment would cause him significant financial hardship.

[50] I acknowledge the Appellant's concerns about his ability to pay this debt. I sympathize with his situation, but I cannot help him.

[51] The law says that a decision to write-off any amount owing to the Commission is expressly excluded from the reconsideration process.¹⁴ Since my jurisdiction is limited to decisions that have been reconsidered by the Commission, the issue of the Appellant's overpayment is not something I can consider.

[52] I also do not have any discretion to waive, forgive, void, or write-off the overpayment no matter how compelling the Appellant's arguments may be. The law

¹² See section 55 of the Regulations.

¹³ See *Canada (Attorney General) v Knee*, 2011 FCA 301.

¹⁴ See section 112.1 of the *Employment Insurance Act* (EI Act)

simply does not allow me to relieve any claimant from liability for an overpayment.¹⁵ And I cannot ignore the law, even if the result seems unfair.¹⁶

[53] The Appellant can seek relief from this debt in two ways:

- He can ask the Commission to consider writing off the debt because of undue hardship.¹⁷
- He can contact the Debt Management Call Centre with CRA at 1-866-864-5823 and ask about debt relief due to financial hardship.¹⁸

Conclusion

[54] On the issue of availability, the appeal is allowed.

[55] On the issue of being outside of Canada, the appeal is dismissed. Despite being available for work during this time, the Appellant isn't entitled to EI benefits while he was outside Canada from November 11, 2021, to November 19, 2021.

Catherine Shaw

Member, General Division – Employment Insurance Section

¹⁵ Sections 43 and 44 of the EI Act set out that a claimant is liable for an overpayment of EI benefits and must repay any EI benefits they received but were not entitled to.

¹⁶ See *Granger v Canada Employment Insurance Commission*, A-684-85.

¹⁷ Section 56(1)(f)(ii) of the *Employment Insurance Regulations* gives the Commission broad powers to write off an overpayment when it would cause undue hardship for a claimant to repay it. The Claimant must contact the Commission and specifically refer to section 56 of the *Employment Insurance Regulations* in his request for a write-off.

¹⁸ The CRA collects overpayment debts on behalf of the Commission.