



Citation: *JB v Canada Employment Insurance Commission*, 2025 SST 126

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

## **Decision**

**Appellant:** J. B.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission  
reconsideration decision (674830) dated July 24, 2024  
(issued by Service Canada)

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**Tribunal member:** Audrey Mitchell

**Type of hearing:** Teleconference

**Hearing date:** January 21, 2025

**Hearing participant:** Appellant

**Decision date:** January 24, 2025

**File number:** GE-24-4100

## Decision

[1] The appeal is allowed in part. The Appellant isn't entitled to benefits while he was outside Canada. The Appellant has proven that he was otherwise available for work while he was outside Canada. The Appellant has to repay the overpayment.

## Overview

[2] The Commission decided that the Appellant was disentitled from receiving Employment Insurance (EI) regular benefits from December 27, 2018, to March 29, 2019, because he was outside Canada.

[3] I have to decide if the Appellant was entitled to benefits while he was outside Canada. Usually, claimants aren't entitled to benefits while outside Canada. To be entitled to benefits, they have to prove that they meet one of the exemptions listed in the law.

[4] The Commission says the Appellant wasn't entitled to benefits while outside Canada. The Appellant says he was only temporarily outside Canada and made a mistake by not reporting it.

[5] The Appellant wasn't able to work because of his illness. To be able to receive EI sickness benefits, the Appellant must "otherwise be available for work."<sup>1</sup> In other words, the Appellant's illness has to be the only reason why he wasn't available for work.

[6] The Commission says the Appellant would not have been available for work anyway because he was in school outside Canada.

[7] The Appellant says this is his first time applying for EI benefits and he was naïve to the process. He's asking for the overpayment to be waived.

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<sup>1</sup> Section 18(1)(b) of the *Employment Insurance Act* (Act) sets out this rule and uses this wording.

## Issues

[8] Could the Commission re-examine the Appellant's claim for benefits, or was it too late?

[9] Was the Appellant entitled to EI benefits while he was outside Canada?

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

[11] Does the Appellant have to repay the overpayment?

## Analysis

### Re-examining the Appellant's claim for benefits

[12] The law says the Commission can reconsider (re-examine) a claim for benefits within 36 months after benefits have been paid.<sup>2</sup> And if the Commission is of the opinion that a claimant has made a false or misleading statement or representation, it has 72 months to re-examine the claim.<sup>3</sup> The Commission doesn't have to prove that the false or misleading statement was made knowingly; but there should be a reasonable basis for it to conclude that a false or misleading statement or representation was made.<sup>4</sup>

[13] The Commission's ability to extend the reconsideration period from 36 months to 72 months is part of an "exceptional system". So, the Commission has a heavy burden to show that there is a reasonable basis for it to exercise its power. The Commission also has a duty to explain to a claimant "precisely why ... the statement seems false".<sup>5</sup>

[14] The Commission learned from the Canada Border Services Agency (CBSA) that the Appellant had been outside Canada. So, it asked the Appellant about this. The Appellant confirmed that he had been outside Canada while getting EI benefits. He said he had made a mistake by not declaring his absence to Service Canada.

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<sup>2</sup> See section 52(1) of the Act.

<sup>3</sup> See section 52(5) of the Act.

<sup>4</sup> See *Canada (Attorney General) v Langelier*, 2002 FCA 157.

<sup>5</sup> See *Canada (Attorney General) v Langelier*, 2002 FCA 157.

[15] The Commission included bi-weekly reports of the Appellant's claims for benefits for the period December 23, 2018, to April 6, 2019. One of the questions is, "Were you outside Canada between Monday and Friday during the period of this report?". The Appellant responded "no" to this question in each bi-weekly report. But he sent the Commission a copy of his airline tickets showing that he was outside Canada from December 27, 2018, to March 30, 2019. So, I find that means his responses were false.

[16] The Commission completed its re-examination of the Appellant's claim with the notice of decision to the Appellant on May 17, 2024, and notice of debt issued on May 18, 2024. So, I find that it wasn't too late for the Commission to re-examine the Appellant's claim for benefits. This is because it had 72 months to do so since the Appellant didn't declare that he was outside Canada when he claimed benefits.

## **Outside Canada**

[17] Appellants are not entitled to receive benefits for any period when they are not in Canada.<sup>6</sup> There are some exceptions to this rule.<sup>7</sup>

[18] The Commission learned from the CBSA that the Appellant was outside Canada while getting EI benefits and that he returned on March 30, 2019. In response to questions from the Commission, the Appellant said he was outside Canada to attend school. He said he made the mistake of not saying he was outside Canada.

[19] The Appellant confirmed at the hearing that he was outside Canada from December 27, 2018, to March 30, 2019. He testified that this was the only reason he left Canada. He explained that although he was attending a course in the United States, it was mostly online, so he could have stayed in Canada.

[20] Since the Appellant didn't give any other reasons for being outside Canada, I accept his evidence as fact and find that he left Canada to attend school. I find that no

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<sup>6</sup> See section 37(b) of the Act.

<sup>7</sup> See section 55(1) of the *Employment Insurance Regulations* (Regulations).

exemptions apply. For this reason, I find that a disentitlement should be imposed from December 27, 2018, to March 30, 2019, because the Appellant was outside Canada.

### **Otherwise available**

[21] It is clear that, if you are sick or injured, you aren't available for work. The law for EI sickness benefits reflects this. However, the law says that, if you are asking for sickness benefits, you must **otherwise** be available for work. This means that the Appellant has to prove that his illness is the only reason why he wasn't available for work.<sup>8</sup>

[22] The Appellant 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 would have been available for work if it hadn't been for his illness.

### **Available for work**

[23] Case law sets out three factors for me to consider when deciding whether a claimant is available for work. A claimant has to prove the following three things:<sup>9</sup>

- 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.

[24] The Appellant doesn't have to show that he is actually available. He has to show that he would have been able to meet the requirements of all three factors if he hadn't been sick. In other words, the Appellant has to show that his illness was the only thing stopping him from meeting the requirements of each factor.

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<sup>8</sup> See section 18(1)(b) of the Act.

<sup>9</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.

– **Wanting to go back to work**

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

[26] The Appellant testified that he had injured his back while he was at work. But he said that even though he was receiving sickness benefits, he was looking for work in Canada. He said that even though he was enrolled in school in the United States, his courses were online.

[27] I asked the Appellant when he was expecting to start work. He said as soon as possible. And he said that since his courses were online, he would have returned to work to start a job.

[28] I found the Appellant's testimony to be clear, concise and candid. So, I have no reason to doubt his testimony that he was looking for work even though he was dealing with a back injury, and he was in school. So, I'm satisfied that he wanted to return to work as soon as a suitable job was offered.

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

[29] The Appellant has shown that he would have made enough efforts to find a suitable job.

[30] Since he was unable to work and was receiving sickness benefits, the Appellant would not ordinarily have had to prove that he was making efforts to find a job. But as noted above, the Appellant testified that he had been looking for work in Canada even though he was sick and in the United States. So, I find it that he would have made enough efforts to find a suitable job even though he was outside Canada and in school.

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

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

[32] The Appellant said he was looking for work, even though he was in school. And even though he was at school outside Canada, he testified that if he had found a job, he would have returned to accept it.

[33] I have no reason to disbelieve the Appellant's testimony. And since the Appellant was in the United States, I find that he could reasonably have returned to Canada quickly to accept a job. And I don't find that his online studies presented a barrier to this. So, I find that the Appellant attending school outside Canada wasn't a personal condition that would have unduly limited his chances of returning to work.

**– So, would the Appellant have been available for work?**

[34] Based on my findings on the three factors, I find that the Appellant has shown that he would have been available for work.

[35] The Appellant still would have met the requirements of all three factors, even if he hadn't been sick.

**Does the Appellant have to repay the overpayment?**

[36] Yes, the Appellant has to repay the overpayment.

[37] The law says that a person who gets benefits they are not entitled to has to return the benefits.<sup>10</sup>

[38] Because the Appellant didn't declare that he was outside Canada, he received sickness benefits that he wasn't entitled to. This resulted in an overpayment of \$7,330.

[39] The Appellant testified that he was naïve about the EI process. He said he made a mistake by not declaring that he was outside Canada. He said he is facing financial hardship because his wife is on long-term disability. So, he is asking the Tribunal to waive the debt.

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<sup>10</sup> See sections 43 and 44 of the Act.

[40] The Commission said the Appellant's responsibility to repay the overpayment is outside its jurisdiction.

[41] In response to the Appellant's request, I can't write off or waive his overpayment. I can only consider whether the Commission correctly calculated the overpayment. But this isn't what the Appellant is asking.

[42] The Commission can decide to write off an overpayment in certain situations—for example, if paying it back would cause the Appellant undue hardship. The Appellant can ask the Commission to write off his overpayment. Or he can contact the Canada Revenue Agency to discuss payment arrangements.

[43] Since I have found that the Appellant isn't entitled to the benefits he received while he was outside Canada, I find that he has to repay the overpayment. While I sympathize with the Appellant's situation, I can't change the law.<sup>11</sup>

## **Conclusion**

[44] The Appellant hasn't shown that he was outside Canada for one of the reasons listed in the law.

[45] The Appellant has shown that he was otherwise available for work within the meaning of the law.

[46] The Appellant has to repay the overpayment.

[47] This means that the appeal is allowed in part.

Audrey Mitchell

Member, General Division – Employment Insurance Section

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<sup>11</sup> See *Pannu v Canada (Attorney General)*, 2004 FCA 90.