Citation: *Canada Employment Insurance Commission v LS*, 2025 SST 294

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	Canada Employment Insurance Commission
Representative:	Daniel McRoberts
Respondent:	L. S.

Decision under appeal:	General Division decision dated December 10, 2024 (GE-24-3517)

Tribunal member:	Elizabeth Usprich
Type of hearing:	Videoconference
Hearing date:	March 4, 2025
Hearing participants:	Appellant's representative
Decision date:	March 28, 2025
File number:	AD-24-867

Decision

[1] The appeal is allowed.

[2] The General Division made an error of law. I have given the decision that the General Division should have given. The Claimant isn't entitled to benefits because she was working to her full capability at suitable employment.

Overview

[3] The Respondent, L. S., claimed Employment Insurance (EI) benefits. I will refer to her as the Claimant.

[4] The Claimant was off work because she had a heart attack. She received 15 weeks of EI sickness benefits.[1] Those benefits ended on June 18, 2022.

[5] The Claimant then wanted to have her claim converted to EI regular benefits. The Canada Employment Insurance Commission (Commission) denied the conversion. It said the Claimant couldn't work due to a medical condition. So, the Claimant wasn't "available" for work.[2]

[6] The Claimant appealed to the Social Security Tribunal (Tribunal) General Division.[3] The General Division looked at different times. It found the Claimant hadn't shown she was available from June 20, 2022, to November 6, 2022. From November 7, 2022, it decided the Claimant was available and therefore not disentitled to EI regular benefits for that reason.

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[1] This was the maximum allowed at the time of her claim.
[2] The term available for work is in section 18 of the EI Act. There are also factors that are explained in *Faucher v Canada (Employment and Immigration Commission)*, A-56-96 and A-57-96 (FCA).
[3] This appeal to the Social Security Tribunal Appeal Division is actually the second appeal on this same matter. The original appeal was sent back to the General Division for a new hearing because the Claimant required an interpreter to make sure she was understanding things clearly. The original appeal to the Appeal Division was sent back to the General Division on consent of the parties. This new appeal is based on the hearing the Claimant had with the assistance of an interpreter at the second General Division hearing.

[7] The Commission has appealed. The Commission argues the General Division made errors of law and fact. I am allowing the appeal. I have given the decision the General Division should have given. The General Division didn't make a finding about suitable employment and whether the Claimant was working to her full capabilities. The Claimant isn't entitled to EI Regular benefits from June 20, 2022 to March 2023.

Preliminary matter

– The Claimant wasn't at the hearing

[8] The hearing was scheduled for March 4, 2025. The Claimant didn't attend.

[9] A hearing can go ahead without the Claimant if she got the notice of hearing.[4] I am satisfied the Claimant received the notice of hearing. On January 27, 2025, Tribunal staff spoke with the Claimant. She acknowledged the hearing date of March 4, 2025, but requested a change in time from 1:00 p.m. to the morning. During that same phone call, the Claimant also asked to have any documents sent to her by email and also regular mail.

[10] On January 28, 2025, an email was sent to both parties with the new notice of hearing. This reflected the time change as requested by the Claimant. On January 29, 2025, the notice of hearing was also sent by regular mail to the Claimant.

[11] On January 29, 2025, the Claimant sent an email that she was no longer interested in continuing to repeat herself at hearings. The Tribunal still attempted multiple phone calls after this to explain the difference between a General Division hearing and an Appeal Division hearing.

[12] I am satisfied the Claimant was aware of the hearing and made the decision not to participate.

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[4] See section 12 of the *Social Security Tribunal Regulations (Regulations)*.

Issues

[13] The issues in this appeal are:

a) Did the General Division make an error of law or important error of fact about the Claimant's availability for work under section 18(1)(a) of the *Employment Insurance Act* from November 7, 2022 onwards?

b) If so, how should the error be fixed?

Analysis

[14] I can only intervene if the General Division made an error. There are only certain errors I can consider. Briefly, I can intervene if the General Division made at least one of the following errors:[5]

- It acted unfairly in some way.
- It decided an issue it shouldn't have, or didn't decide an issue it should have.
- It made an error of law.
- It based its decision on an important error about the facts of the case.

[15] The Commission agrees with the General Division's except for its analysis of whether the Claimant was available for work from November 7, 2022 onwards. The Commission says the General Division made an error of law because it failed to look at what suitable employment would have been for the Claimant from November 7, 2022 onwards.

[16] The Commission says the General Division made an important error of fact because it overlooked that the Claimant had no additional suitable hours that she could have worked because she was working to her full capabilities.

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[5] See section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).

The General Division made an important error of fact because it ignored that the Claimant was working to her full capabilities from November 7, 2022 onwards

[17] The Claimant was off work because she had been critically ill. She exhausted her EI sickness benefits and wanted to convert the benefits into EI regular benefits.

[18] To receive regular EI benefits the correct legal test is to determine whether the Claimant was capable of and available for work but unable to find a suitable job. This is an ongoing requirement that is set out in section 18(1)(a) of the EI Act.[6]

[19] The General Division decided the Claimant was not capable of working from June 20, 2022 to October 19, 2022.[7] This is not disputed and I see no error with this finding.

[20] The General Division noted the Claimant was cleared for modified work duties by her doctor on October 20, 2022.[8] The General Division found the Claimant was capable of working from that date.[9] The General Division also found that because the Claimant was cleared for work, but chose not to return to work that this was her own choice. The General Division said because she made the choice she wasn't entitled to benefits from October 20, 2022 to November 7, 2022.[10]

[21] From November 7, 2022, onwards the General Division decided the Claimant was only required to find suitable employment within the scope of what her health and physical capabilities allowed her to do.[11]

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[6] See section 18(1) of the *Employment Insurance Act*.
[7] See the General Division decision at paragraph 59.
[8] See the General Division decision at paragraph 26 and GD3-21 a medical note in the Commission's Reconsideration File.
[9] See the General Division decision at paragraph 28.
[10] See the General Division decision at paragraphs 48 and 49.
[11] See the General Division decision at paragraph 43 and see also section 9.002(1) of *the Employment Insurance Regulations* (Regulations).

[22] The General Division correctly identified the Regulation that deals with suitable employment. But it failed to analyze what suitable employment would be for the Claimant. This is an error of law as this is a required finding.

[23] Additionally, the General Division failed to consider the Claimant's evidence about her capability of additional work. After November 7, 2022, the Claimant was working to her full capability. This is an important fact that was overlooked by the General Division. So, this is also an error.

Remedy

[24] Since I have found an error, there are two main ways I can remedy it. I can make the decision the General Division should have made. I can also send the case back to the General Division if I don't feel the hearing was fair or there isn't enough information to make a decision.[12]

[25] The Commission says the Claimant had full opportunity to participate in the General Division hearing. The Claimant had an interpreter at the hearing. There is no indication that there is any more evidence to provide. The Commission says I should give the decision the General Division should have given.

[26] I agree. Neither side has suggested that there is additional information to provide. Instead, the issue that remains is about analyzing the law. I will give the decision that the General Division should have given.

The Claimant was working in suitable employment to her full capabilities

[27] The requirement in section 18(1)(a) is an ongoing requirement. So, a claimant has to be capable of and available for work but unable to find a suitable job. Suitable employment is explained in the EI Regulations. At issue in this case, is whether the

[12] Section 59(1) of the DESD Act allows me to fix the General Division's errors in this way.

Claimant's health and physical capabilities would allow her to commute to her work and perform her work.[13]

[28] I will look at the Claimant's availability in relation to different time periods. So, as things changed for the Claimant, I will consider whether there is a change to her entitlement to EI benefits

– **After the Claimant's sickness benefits were exhausted: June 20, 2022 to October 19, 2022**

[29] I am adopting the General Division's findings that the Claimant wasn't capable of working from June 20, 2022 to October 19, 2022.[14] The Claimant's doctor had not cleared the Claimant to return to work during this time.

– **After the Claimant's doctor said she could return to work on a modified basis: October 20, 2022 to November 7, 2022**

[30] I am also adopting the General Division's findings that the Claimant chose not to work from October 20, 2022 to November 7, 2022.[15] The Claimant was deemed by her doctor to be capable of working during this period. The Claimant made a personal choice to delay her return to work.

– **After the Claimant returned to work on a modified basis from November 7, 2022 to March, 2023**

[31] From November 7, 2022, onwards the Claimant was working. She wasn't working full-time until March 2023. The Claimant's doctor said the Claimant was fit to work in a modified capacity, five hours per day, three days per week.[16] Based on this medical evidence, I find that suitable work for the Claimant was employment she had the health and physical capabilities to perform. Her doctor assessed this as a gradual return-to-work with her employer.

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[13] See section 9.002(1)(a) of the EI Regulations.
[14] See the General Division decision at paragraph 59.
[15] See the General Division decision at paragraphs 48 and 49.
[16] See GD3-21 the October 20, 2022, doctor's note in the Commission's Reconsideration File.

[32] The Claimant was employed and her employer was willing to work with her and accommodate her. The Claimant testified she was working the maximum amount of time she felt capable.[17] So, the Claimant was working in suitable employment, under her doctor's return to work plan.

[33] There is nothing in the law that says a claimant has to work full time. But the law does say that any claimant seeking regular EI benefits must be capable of and available for work each day they seek benefits.

[34] In this case, the Claimant testified she was working to her full capability. That means she wasn't capable of and available for any additional work. I have also considered the November 29, 2022, doctor's note that suggested she could do modified duties with regular hours.[18] Despite her doctor's clearance on November 29, 2022, the Claimant specifically stated she didn't feel capable of working any additional amount.

[35] If the Claimant didn't feel capable of working, that necessarily means she wasn't capable and available for any extra hours. Unfortunately, this means she isn't entitled to EI regular benefits for this period.

Conclusion

[36] The appeal is allowed.

[37] The General Division made an error of law. I have given the decision that the General Division should have given. The Claimant isn't entitled to benefits because she was working to her full capability at suitable employment.

Elizabeth Usprich
Member, Appeal Division

[17] Listen to the General Division hearing recording at 00:26:05.
[18] See GD3-23, the Claimant's doctor's note dated November 29, 2022, in the Commission's Reconsideration File.