Citation: *LB v Canada Employment Insurance Commission*, 2025 SST 791

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	L. B.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (0) dated May 30, 2025 (issued by Service Canada)

Tribunal member:	Teresa M. Day
Type of hearing:	Teleconference
Hearing date:	July 28, 2025
Hearing participant:	Appellant
Decision date:	July 30, 2025
File number:	GE-25-1764

Decision

[1] The appeal is dismissed.

[2] The Appellant cannot receive employment insurance (EI) benefits from September 22, 2024 to January 10, 2025 because she didn't prove she was available for work according to the law. The disentitlement imposed on her claim must remain.

Overview

[3] The Appellant started a claim for EI **sickness** benefits on March 17, 2024. She received the 26-week maximum entitlement for sickness benefits[1] and then asked for **regular** EI benefits starting the week of September 23, 2024.

[4] To be entitled to **regular** EI benefits, the law says you must be capable of and available for work but unable to find suitable employment[2].

[5] The Appellant was on a graduated return to work plan and provided a series of notes from her doctor setting out how much she was allowed to work in a week.

[6] The Respondent (Commission) decided the Appellant wasn't entitled to regular EI benefits starting from September 22, 2024 because she said she'd only work 3 days per week and, therefore, hadn't proven her availability for full-time work.

[7] The Appellant asked the Commission to reconsider its decision. She said her position is full-time, but she was following her doctor's advice about returning to work with restrictions on her activities and the number of hours/days per week she could work while recovering from her hip surgery. Her employer was accommodating the conditions set by her doctor. She also said Service Canada told her she'd be able to switch to regular EI benefits when she gradually returned to work.

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[1] See section 12(3)(c) of the *Employment Insurance Act* (EI Act). The maximum entitlement used to be 15 weeks, but for claims that started on or after December 2022, the maximum for sickness benefits was increased to 26 weeks. Claimants must serve 1 of the weeks as a mandatory waiting period.
[2] Section 18(1)(a) of the EI Act.

[8] On January 15, 2025, the Appellant's doctor cleared her to return to work full-time. The Commission modified the disentitlement imposed on her claim so that it only ran from September 23, 2024 to January 10, 2025[3].

[9] The Appellant appealed that decision to the General Division of the Social Security Tribunal (Tribunal). It decided the Appellant proved she was available for work and allowed her appeal. The Commission appealed that decision to the Tribunal's Appeal Division (the AD).

[10] The AD decided the General Division made errors and sent the appeal back to a different member of the General Division for a new hearing. The AD also directed the Appellant be given an opportunity to provide additional evidence about the hours she was capable of and available to work but wasn't scheduled for work.

[11] The appeal was assigned to me. I gave the Appellant a chance to file evidence on a week-by-week basis about the hours she was scheduled to work and to make submissions on whether her health was a medical restriction that made her unavailable for work after her sickness benefits expired. The Appellant filed the materials at RGD03. I then gave the Commission an opportunity to file any submissions it wished to make in response to RGD03, and it filed the representations at RGD05.

[12] The new hearing was held on July 28, 2025, and this is my decision.

Issues

[13] Was the Appellant capable of working in suitable employment after her sickness benefits ended?

[14] If yes, did she show she was available for work from September 23, 2024 to January 10, 2025?

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[3] See the January 15, 2025 reconsideration decision at GD3-48. The Commission originally imposed the disentitlement as of September 22, 2024 because that is a Sunday and all claims start on a Sunday of a week of benefits. But the Commission corrected the start date to Monday, September 22, 2024 to reflect that disentitlements due to availability start on a Monday because that is the first working day of a week within a benefit period.

Analysis

[15] The Appellant's sickness benefits were exhausted as of September 21, 2024.

[16] To *convert* your claim to **regular** EI benefits ***after*** being paid **sickness** benefits, you must prove your condition has improved to the point you are capable of working again. This is generally done by providing a medical note certifying that your health and physical capabilities allow you to commute to the place of work and perform the work[4].

[17] To *be paid* **regular** EI benefits, the law says you must prove your availability for work by showing you are **capable** of and **available** for work **but unable to find suitable employment**[5]. I have highlighted the 3 separate elements you must prove to satisfy the test for availability according to section 18(1)(a) of the *Employment Insurance Act* (EI Act).

[18] Availability for work is an on-going requirement. This means you must show you were capable of and available for work **on each working day** but were unable to find suitable employment[6].

[19] I accept that the Appellant's medical evidence shows she was **capable** of performing work as of September 23, 2024. So I will consider the other 2 elements of the test: whether she has proven she was **available for work** and **unable to find suitable employment** between September 23, 2024 and January 10, 2025 (the period of the disentitlement).

[20] I will start by considering her availability. Then I will address whether the Appellant was unable to find suitable employment[7].

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[4] See section 9.002 of the EI Regulations.
[5] See section 18(1)(a) of the EI Act. I am adopting the analysis in paragraphs 9 through 14 of the first General Division decision and will only consider whether the Appellant was capable of and available for work under section 18 of the EI Act.
[6] See *Attorney General of Canada v. Cloutier*, 2005 FCA 73.
[7] I do this under Issue 3 below.

[21] The Federal Court of Appeal has said that to prove you are **available for work** for purposes of section 18(1)(a) of the EI Act, I must consider 3 factors:

a) the desire to return to the labour market as soon as a suitable job is offered;

b) the expression of that desire through efforts to find a suitable job; and

c) not setting personal conditions that might unduly limit the chances of returning to the labour market[8] .

These 3 factors are commonly referred to as the "*Faucher* factors", after the case in which they were first laid out by the court.

[22] When I consider each of these factors, I have to look at the Appellant's attitude and conduct[9].

[23] I will start by considering what was suitable employment for her during the period of the disentitlement.

Issue 1: What was suitable employment for the Appellant between September 23, 2024 and January 10, 2025?

[24] The law says a job is suitable if your health and physical capabilities allow you to commute to the workplace and perform the job[10].

[25] There's no dispute that the Appellant's doctor recommended – and the Appellant was following – a gradual return to work plan with reduced hours and activities following the Appellant's hip surgery.

[26] The Appellant was unable to work at all from March 14, 2024 to August 18, 2024[11]. Then the gradual return to work plan was as follows:

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[8] See *Faucher v. Canada (Employment and Immigration Commission)*, A-56-96.
[9] See *Canada (Attorney General) v. Wiffen*, A-1472-92.
[10] See section 9.002(1) of the EI Regulations.
[11] See the Appellant's doctor's notes at GD3-18 to GD3-20.

- Starting the week of August 19, 2024, her doctor authorized her to work 2 days per week for 3 hours per day (on non-consecutive days); and after 2 weeks at that rate, she could increase to 3 days per week for 3 hours per day (on non-consecutive days)[12].

- From September 18, 2024 to January 14, 2025, her doctor authorized her to work 5-6 hours per day for 3 days per week (on non-consecutive days)[13].

- Starting from January 15, 2025, her doctor authorized her to resume full-time work up to 8.5 hours per day.

[27] I find that suitable employment for the Appellant between September 23, 2024 and January 10, 2025 was employment which her health and physical capabilities allowed her to perform according to the gradual return to work plan directed by her doctor.

[28] The evidence shows the Appellant was back at work during this period and employed in accordance with the said gradual return to work[14]. I therefore find she was capable of suitable employment when her sickness benefits ended.

[29] This means her claim can be converted from sickness benefits to regular EI benefits.

[30] Now I will consider if the Appellant can be paid regular EI benefits.

Issue 2: Was the Appellant available for work according to the *Faucher* factors?

Short answer:

[31] No. The Appellant hasn't proven she satisfied all 3 *Faucher* factors.

[12] See GD3-21.
[13] See GD3-23 and GD3-39.
[14] I review the evidence under Issue 2 below.

My findings on the Faucher factors:

a) Wanting to go back to work as soon as suitable employment was available

[32] The evidence supports that the Appellant wanted to get back to work as soon as suitable employment was available between September 23, 2024 and January 10, 2025.

[33] The Appellant is an adult and presumably needs to work to pay her bills and expenses. She testified at the hearing that she only wanted to be off work for as long as was necessary to recover from her hip surgery. She returned to work as soon as her doctor said she could start putting in a few hours on light duties.

[34] She testified that the employer hired a new manager about a year-and-a-half ago. He notifies the clerks of the weekly schedule using the online app Seven Shifts. His practice at the time was to set the schedule 2 weeks in advance. She was always willing to work the maximum number of hours her doctor authorized her to do, and she gave her medical notes to the manager so he could schedule her accordingly.

[35] I find the Appellant has shown a desire to get back to work as soon as suitable employment was available. This means she has satisfied the first *Faucher* factor for the period September 23, 2024 to January 10, 2025.

b) Making efforts to find suitable employment

[36] The evidence shows the employer kept the Appellant's job open for her when she took a medical leave of absence for her hip surgery. When her doctor said she was ready to start a gradual return to work, the employer began giving her hours again and she eventually resumed her full-time position.

[37] I find the Appellant has shown that her 8-year employment relationship with the employer remained viable between September 23, 2024 and January 10, 2025, and that maintaining this relationship by a gradual return to work was her best chance not only of finding suitable work but of returning to her full-time position as soon as possible.

[38] This is sufficient to satisfy the second *Faucher* factor for the period September 23, 2024 to January 10, 2025.

c) Limiting conditions on her availability

[39] For the third *Faucher* factor, the Appellant must prove she did **not** set personal conditions that unduly limited her chances of returning to the labour market for every working day of her benefit period from September 23, 2024 to January 10, 2025.

[40] She has not done so.

[41] The Appellant testified that:

- Service Canada never told her she had to be back to work full-time in order to get regular EI benefits. She was led to believe she could get regular EI benefits as she gradually returned to work.
- She works as a clerk in a busy convenience store in her community.
- She followed her doctor's advice about how much she could do as she recovered from her hip surgery. This included her doctor's recommendations for a gradual return to work.
- She obtained medical notes from her doctor setting out the duties and hours she was authorized to work.
- She gave these medical notes to the store manager so he could schedule her according to what her doctor authorized her to do.
- The manager didn't always schedule her for the maximum hours her doctor permitted her to work.
- In the first 2 weeks of the disentitlement (September 23 – October 6, 2024), she was authorized to work 15 to 18 hours per week, but she was only scheduled for 13 and 12 hours respectively.

- This is because the manager had already set the schedule for those 2 weeks before she went to see her doctor (on September 18th).

- So the adjustments for her permitted increase in hours couldn't happen until the following 2-week period in the schedule (October 7 to October 20, 2024). Then she worked 16 and 18 hours per week, respectively.

- This happened again for the 2-week period October 21 to November 3, 2024.

- She was authorized to work up to 24 hours per week, but she was only scheduled for 15 and 13.5 hours per week, respectively, because the manager had already set the schedule by the time she saw her doctor again (on October 16th).

- This meant the adjustments for her increased hours couldn't happen until the following 2-week period on the schedule (November 4 to 17, 2024). Then she worked 24 and 23 hours per week, respectively.

[42] The Appellant submits she was available for work and the employer failed to schedule her.

[43] I disagree. I will explain why.

[44] There are **16 weeks** within the period of the disentitlement.

[45] The Appellant has provided 167 pages of evidence about her work schedule in each of these weeks (RGD03). There are also 2 helpful summaries: one prepared by the Appellant (at RGD3-164 to RGD3-167) and one prepared by the Commission (at RGD5-1). They say the same thing, albeit in different formats.

[46] I have looked at each of the 16 weeks individually and make the following findings:

a) The Seven Shifts schedules for the period of the disentitlement show there were at least 3 or 4 other "clerks" being scheduled in any given week.

Weeks 1 and 2

b) The doctor's note dated September 18, 2024 (at GD3-23) was provided to the manager ***after*** he'd already set the schedule for the first 2 weeks of the disentitlement (September 23, 2024 to October 6, 2024).

c) So even though the Appellant's doctor authorized her to work 15 to 18 hours per week in the first 2 weeks of the disentitlement, the schedule for these weeks **had already been set**.

   Nonetheless, the employer scheduled the Appellant to work 13 and 12 hours in these weeks, respectively – which was **a significant increase** from the hours authorized by the doctor's note in effect at the time the schedule was set. That note, dated August 15, 2024, only authorized the Appellant to work up to 9 hours per week (at GD3-21).

   Therefore, while the Appellant's hours in these first 2 weeks (13 and 12, respectively) fall short of the 15–18 hours/week range the Appellant's doctor said she could work, I don't consider this to be evidence the employer failed to schedule her. Especially when the timing of the Appellant's doctor's notes didn't provide the employer with advance notice of the change in authorized hours and the employer had, nonetheless, started to increase the Appellant's hours beyond what was authorized ***before*** she provided the updated doctor's note on September 18, 2024.

   I therefore find that in weeks 1 and 2 the Appellant was scheduled to work more hours than she was authorized to work according to the medical note in effect at the time these weeks were scheduled.

Weeks 3 and 4

d) The Appellant worked 16 and 18 hours per week in weeks 3 and 4 (October 7 – 20, 2024), respectively. These weeks are within the 15-18 hours/week range her doctor said she could work.

Weeks 5 and 6

e) On October 2, 2024, the Appellant's doctor said she should continue to work the same 15–18 hours/week (at GD3-39).

f) On October 16, 2024, the doctor said her hours could increase.

g) But the doctor's note dated October 16, 2024 (at GD3-40) was provided to the manager ***after*** he'd already set the schedule for weeks 5 and 6 of the disentitlement (October 21, 2024 to November 3, 2024).

h) So even though the Appellant's doctor authorized her to work up to 24 hours per week in weeks 5 and 6, the schedule for these weeks **had already been set**.

The employer scheduled the Appellant to work 15 and 13.5 hours in these weeks, respectively. This means week 5 was within the 15-18 hours/week range authorized by the doctor's note in effect prior to October 16, 2024; but week 6 is 1.5 hours short of the 15-18 hours/week range.

However, I don't consider this to be evidence the employer failed to schedule her. Especially when there were other clerks relying on the scheduling and the timing of the Appellant's doctor's notes didn't provide advance notice of the change in authorized hours.

I therefore find that in weeks 5 and 6 the Appellant was scheduled according to the notice the employer had been given of her medical capabilities.

Weeks 7 to 16

i) The Appellant's doctor said she could work a maximum of 24 hours per week in remaining the 10 weeks of the disentitlement (November 4, 2024 to January 12, 2025).

j) The Appellant was scheduled to work *at least* 24 hours per week **in 8 of these 10 weeks**.

k) The exceptions occurred in week 8 and week 14.

l) In week 8, the Appellant worked 23 hours. This is 1 hour short of the 24 hours/week maximum authorized by the Appellant's doctor but nonetheless falls within the increased range specified by her doctor, namely 4 days per week for "up to" 6 hours per day[15].

   I therefore find that for week 8 the Appellant was scheduled according to the notice the employer had been given of her medical capabilities.

m) In week 14, the Appellant worked 18 hours. This is 6 hours short of the 24 hours/week maximum authorized by the Appellant's doctor. The Appellant was scheduled for 18 hours over 3 days (6 hours per day), which is within the increased range specified by her doctor, namely 4 days per week for "up to" 6 hours per day. And I agree with the Commission that week 14 was unique because of the statutory holidays that fell between December 23-29, 2024.

   I therefore find that for week 14, the Appellant was scheduled according to the notice the employer had been given of her medical capabilities.

[47] In my view, the evidence does not show the employer failed to schedule the Appellant to the full extend of her capability.

[48] To the contrary, it shows the employer was scheduling her at, above, or very close to the maximum number of hours and days she was authorized her to work according to the doctor's note on file at the time the scheduling was done:

a) In **11 of the 16 weeks** in the disentitlement period the Appellant was **scheduled at (*or above*) the maximum hours** her doctor authorized her to work[16].

b) Of the 5 weeks she wasn't scheduled at the maximum, **3** of them were **scheduled within the narrow range** authorized by the doctor's note in effect

[15] See the October 16, 2024 doctor's note at GD3-40.
[16]; Weeks 1 and 2 were scheduled above the authorized range prescribed by the medical note in effect when the schedule was set. 4, 7, 9, 10, 11, 12, 13, 15 and 16.

> when the schedule was set[17], and **1** of them was a week which included 2 statutory holidays that fell on working days[18]. Only **1** week saw the Appellant scheduled for slightly less than the range authorized by her doctor and I've already found this was not because the employer failed to schedule her[19].

[49] I therefore find the employer scheduled the Appellant for work at, above, or very close to the maximum number of hours and days prescribed by her doctor throughout the 16-week period of the disentitlement.

[50] This means the Appellant was working the maximum amount authorized by her doctor and couldn't work any additional hours between September 23, 2024 and January 10, 2025.

[51] You must be able to accept work if you want to receive regular EI benefits.

[52] The Appellant was unable to accept work during this period because her medical condition necessitated a gradual return to work plan directed by her doctor and she'd already maxed-out her hours at the store[20].

[53] I believe that adhering to the gradual return to work plan between September 23, 2024 and January 10, 2025 was a good personal decision for the Appellant. As she testified, she was still recovering from her hip surgery and had to be careful not overdo it by lifting too much or being on her feet for too long.

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[17] Weeks 1 and 2 were scheduled **above** the authorized range prescribed by the medical note in effect when the schedule was set; weeks 3, 5 and 8 were within the range of the note in effect when the schedule was set.
[18] In week 14, Christmas Day was on Wednesday, December 25, 2024 and Boxing Day was on Thursday, December 26, 2024.
[19] See paragraph 41(g) above. In week 6, the Appellant's hours were 1.5 hours short of the range authorized by her doctor. I have found this was due to the timing of notice to the employer of the increased hours authorized by her doctor and do not consider this to be evidence the employer failed to schedule her.
[20] Take for example a week in which the Appellant was authorized to work up to 24 hours per week. If the employer had only scheduled her to work 8 hours, she was still medically capable of performing up to another 16 hours of work per week and, therefore, would be able to accept work. But if she was authorized to work up to 24 hours per week and the employer was scheduling her for 24 hours of work per week, she was **not** medically capable of working any additional hours and, therefore, ***unable to accept work***.

[54] However, the restrictions in the gradual return to work plan were a condition which unduly limited the Appellant's chances of returning to the labour market for every working day of her benefit period between September 23, 2024 and January 10, 2025.

[55] I therefore find she hasn't satisfied the third *Faucher* factor.

Conclusion on the Faucher factors for September 23, 2024 to January 10, 2025:

[56] The Appellant must satisfy all 3 of the *Faucher* factors to prove her availability according to section 18(1)(a) of the EI Act. Based on my findings, she hasn't satisfied the third factor.

[57] I therefore find the Appellant hasn't proven her availability according to the law for the period September 23, 2024 to January 10, 2025.

[58] This means she's not entitled to regular EI benefits during this period.

Issue 3: What about the Appellant's other argument?

[59] The Appellant testified that she wasn't given the correct information by Service Canada. She wants the Commission to pay her the regular EI benefits she was told she could get.

[60] The Appellant said that every time she phoned in, Service Canada told her they were still making a decision about converting her claim from sickness benefits to regular EI benefits. She did what she was told to do, sent in her doctor's notes, and completed her claimant reports. She was repeatedly led to believe she'd get regular EI benefits as she gradually returned to work. So she was surprised to get the negative decision letter which said she wasn't going to be paid EI because she was only working part-time. She thought she was going to get regular EI benefits to make up the difference between the full-time hours she usually worked and the reduced hours she was on while gradually returning to work.

[61] I acknowledge the Appellant was hoping for a different outcome on her appeal.

[62] But the court has said that misinformation from the Commission will not relieve her from complying with the requirements in the EI Act[21].

[63] To receive regular EI benefits, she must comply with section 18(1)(a) of the EI Act. This section requires the Appellant to prove her availability for work by showing she was **capable** of and **available** for work, but **unable to find suitable employment**. I have highlighted the 3 elements of the test.

[64] The Appellant hasn't satisfied 2 of them:

a) She hasn't proven she was available for work according to the *Faucher* factors; ***and***

b) She hasn't shown she was unable to find a suitable job.

   I've found that a suitable job for the Appellant was employment which her health and physical capabilities allowed her to perform according to a gradual return to work plan directed by her doctor. Between September 23, 2024 and January 10, 2025, she was consistently working at or close to the maximum number of hours authorized by her doctor – for an employer who was accommodating her gradual return to work plan. So it cannot be said she was unable to find suitable employment during the period of the disentitlement.

[65] I therefore find the Appellant hasn't satisfied all 3 elements required to prove her availability according to section 18(1)(a) of the EI Act for the weeks between September 23, 2024 and January 10, 2025.

[66] This means she cannot be paid regular EI benefits for these weeks.

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[21] See *Canada (Attorney General) v. Shaw*, 2002 FCA 325.

Conclusion

[67] The Appellant is disentitled to regular EI benefits from September 23, 2024 to January 10, 2025 because she didn't prove she was available for work according to section 18(1)(a) of the EI Act.

[68] This means the disentitlement imposed on her claim for this period must remain.

[69] The appeal is dismissed.

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