Citation: *LB v Canada Employment Insurance Commission*, 2025 SST 573

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 (702542) dated January 15, 2025 (issued by Service Canada)

Tribunal member:	Anita Nathan
Type of hearing:	Teleconference
Hearing date:	February 26, 2025
Hearing participants:	Appellant
Decision date:	March 17, 2025
File number:	GE-25-479

Decision

[1] The appeal is allowed. The General Division agrees with the Appellant.

[2] The Appellant has shown that she was available for work. This means that she isn't disentitled from receiving Employment Insurance (EI) benefits. So, the Appellant may be entitled to benefits.

Overview

[3] The Appellant worked for her employer for eight years. She applied for sickness benefits because of hip surgery. She received 26 weeks of sickness benefits from March 17, 2024, to September 21, 2024. The Appellant then applied for Employment Insurance (EI) regular benefits. She provided documentation from her doctor that she could work some hours but not fulltime hours yet as she was still recovering.

[4] The Canada Employment Insurance Commission (Commission) decided that the Appellant was disentitled from receiving EI regular benefits from September 23, 2024, to January 10, 2025[1] because she wasn't available for full-time work. The Commission later approved the Appellant for benefits effective January 12, 2025[2] because her doctor cleared her for fulltime work, but she was not getting fulltime hours from her employer.

[5] An Appellant has to be available for suitable work to get EI regular benefits. I must decide whether the Appellant has proven that she was available for suitable work. The Appellant has to prove this on a balance of probabilities. This means that she has to show that it is more likely than not that she was available for work.

[6] The Commission says that the Appellant wasn't available for full-time work based on her doctor's recommendations for a gradual return to work after hip surgery. The doctor recommended starting with parttime hours and working up to fulltime hours. Since the Appellant wasn't available for full-time work, the Commission says that she's disentitled from receiving EI benefits.

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[1] See GD3-48.
[2] See GD6-1.

[7] The Appellant disagrees and states that she was simply following her doctor's recommendations and someone at Service Canada told her she could get regular EI benefits after she exhausted her sickness benefits.

Issue

[8] Was the Appellant available for work?

Analysis

The Law

[9] Two different sections of the law require Appellants to show that they are available for work. I will only consider one of those sections, I will explain why I'm not considering the other.

[10] First, the Act says that an Appellant has to prove that they are "capable of and available for work" but aren't able to find a suitable job.[3] Case law gives three things an Appellant has to prove to show that they are "available" in this sense.[4] I will look at those factors below.

[11] Second, the *Employment Insurance Act* (Act) says that an Appellant has to prove that they are making "reasonable and customary efforts" to find a suitable job.[5] The *Employment Insurance Regulations* (Regulations) give criteria that help explain what "reasonable and customary efforts" mean.[6]

[12] I won't consider whether the Appellant made reasonable and customary efforts for the following reasons:

- I do not see any requests from the Commission to the Appellant asking her to prove that she made reasonable and customary efforts to find a suitable job.

[3] See section 18(1)(a) of the *Employment Insurance Act* (Act).
[4] See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.
[5] See section 50(8) of the Act.
[6] See section 9.001 of the *Employment Insurance Regulations* (Regulations).

- The Commission did not make any submissions on how the Appellant failed to prove she was making reasonable and customary efforts. The Commission only summarized what the legislation says in section 50(8) of the EI Act and 9.001 of the EI Regulations.[7]

[13] Therefore, based on a lack of evidence that the Commission asked the Appellant to prove her reasonable and customary efforts, and a lack of submissions from the Commission on the issue, I do not need to consider that part of the law when making my decision.

[14] I will only consider whether the Appellant was capable of and available for work under section 18 of the EI Act.

Suitable Employment

[15] Appellants only have to prove their availability for **suitable employment**, not all employment.[8]

[16] The EI Regulations provide some instruction as to what a suitable job is. It says the criteria for determining what is suitable employment are the following:

- the claimant's health and physical capabilities allow them to commute to the place of work and to perform the work
- the hours of work aren't incompatible with the claimant's family obligations or religious beliefs
- the nature of the work isn't contrary to the claimant's moral convictions or religious beliefs.[9]

[17] I agree with the Appeal Division that the Tribunal first has to consider whether the restriction to the Appellant's work hours was due to health and physical capabilities

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[7] See GD4-3.
[8] See section 18(1)(a), section 50(8), and section 27 of the Act that all refer to the "suitable employment."
[9] See section 9.002(1) of *the* Regulations.

within the meaning of section 9.002(1)(a) of the EI Regulations. After that, a decision is required about what suitable employment is for the Appellant. Only after these considerations must I decide whether the Appellant was available for suitable employment.[10]

[18] The Appellant's doctor recommended working reduced hours due to her hip surgery and subsequent recovery. Therefore. the restrictions fall under the health and physical capabilities criteria listed above.

[19] The Appellant supplied the following letters from her doctor:

- A letter dated April 2, 2024, says the Appellant cannot work from March 14, 2024, to June 30, 2024.[11]
- A letter dated June 25, 2024, says the Appellant should remain off work until August 1, 2024.[12]
- A letter dated July 30, 2024, further extends the Appellant's required time off work to August 19, 2024.[13]
- A letter dated August 15, 2024, says the Appellant can begin a gradual return to work the week of August 19, 2024, working two days a week, three hours a day for the first two weeks. After two weeks, the Appellant's doctor said she can increase her work schedule to three days a week, three hours a day. Her doctor says she should work non-consecutive days.[14]
- A letter dated September 18, 2024, says the Appellant can work five to six hours a day for three days a week. Again, he advised that her working days should not be consecutive.[15]

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[10] *SA v Canada Employment Insurance Commission*, 2022 SST 1490 at paras. 51-52.
[11] See GD3-18.
[12] See GD3-19.
[13] See GD3-20.
[14] See GD3-21.
[15] See GD3-23.

- A letter dated October 2, 2024, says the Appellant can continue her current work hours.[16]

- A final letter dated January 15, 2025, says the Appellant can resume fulltime work and work up to 8.5 hours a day.[17]

[20] I find that suitable employment for the Appellant was employment that she had the health and physical capabilities to perform, according to the gradual return to work plan directed by her doctor.

[21] Now that I have determined what suitable employment is for the Appellant, I can consider whether she was capable of and available for work.

Capable of and available for work

[22] 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:[18]

a) She wanted to go back to work as soon as a suitable job was available.

b) She has made efforts to find a suitable job.

c) She didn't set personal conditions that might have unduly (in other words, overly) limited her chances of going back to work.

[23] When I consider each of these factors, I have to look at the Appellant's attitude and conduct.[19]

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[16] See GD3-39.
[17] See GD3-46.
[18] 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.
[19] 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.

– **Wanting to go back to work**

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

[25] The Appellant testified that she started working as soon as her doctor cleared her to. She said she was willing to work according to her doctor's recommendations, but her employer had hired new staff while she was on sick leave, so she wasn't getting even the reduced hours that her doctor recommended.

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

[26] This case is unique because the Appellant had a job to return to after sick leave, so she didn't need to look for work.

[27] I find the Appellant communicated with her employer about her ability to return to work and her doctor's recommendations, which is sufficient to satisfy this criterion.

[28] The Commission didn't suggest that the Appellant should have looked for other work, and I don't think that is reasonable either. The Commission also didn't argue that the Appellant failed to make reasonable and customary efforts to find work.

[29] The Appellant had a long term job (eight years[20]) that she could return to. When her doctor deemed her ready to work, the Appellant's employer gave her hours to work, but those hours were less than the doctor's recommendations of the maximum hours the Appellant could work. The Appellant testified that over the weeks and months, she was given more and more hours and is now close to full-time hours.

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

[30] The Appellant hasn't set personal conditions that might have unduly limited her chances of going back to work.

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[20] See GD3-16.

[31] The Appellant could only work reduced hours due to doctor's recommendations. I don't find that this was a personal condition she set. It was doctor's recommendations and those recommendations impact what is "suitable employment" for the Appellant.

[32] I agree with the Appeal division that the language of "set" and "personal" make clear that this third factor is focused on a condition that is within an appellant's control, not a condition outside an appellant's control that makes certain employment unsuitable.[21]

[33] I note that the Commission didn't argue that the Appellant unduly limited her changes of going back to work.

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

[34] Based on my findings on the three factors, I find that the Appellant has shown that she was capable of and available for work but unable to find a suitable job from September 23, 2024, to January 10, 2025.

[35] I disagree with the Commission that the Appellant was not available for work because she was not available for fulltime work. The law says that the Appellant must be capable of and available for work but unable to find a suitable job. Here I have found that a suitable job was one that complied with the reduced work schedule recommended by the Appellant's doctor.

[36] The Appellant testified that she was ready and willing to work the hours recommended by her doctor, but her employer always scheduled her for less hours because they hired some staff while she was on sick leave. Therefore, the evidence establishes that the Appellant was capable of and available to work reduced hours as per her doctor's recommendations (i.e. suitable employment), but she was not given all of the hours that she could work.

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[21] *SA v Canada Employment Insurance Commission*, 2022 SST 1490 at paras. 48-49.

Conclusion

[37] The Appellant has shown that she was available for work within the meaning of the law. Because of this, I find that the Appellant isn't disentitled from receiving EI benefits. So, the Appellant may be entitled to benefits.

[38] This means that the appeal is allowed.

Anita Nathan
Member, General Division – Employment Insurance Section