



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

[TRANSLATION]

Citation: *LC v Canada Employment Insurance Commission*, 2021 SST 35

Tribunal File Number: GE-20-2394

BETWEEN:

L. C.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Normand Morin

HEARD ON: January 19, 2021

DATE OF DECISION: January 22, 2021

Decision

[1] The appeal is allowed in part. I find that the Appellant has shown that, had it not been for her illness, she would have been available for work four working days per week, as of November 1, 2020.¹

Overview

[2] Since February 2003, the Appellant has worked as a facilitator for the employer X (employer), an organization offering learning activities for people living with an intellectual disability.

[3] On October 29, 2020, the Appellant stopped working for the employer for health reasons.²

[4] On November 6, 2020, she made an initial claim for benefits (sickness benefits).³ A benefit period was established effective November 1, 2020.⁴

[5] On December 4, 2020, the Canada Employment Insurance Commission (Commission) informed the Appellant that she was not entitled to Employment Insurance sickness benefits (special benefits) as of November 1, 2020, because she had failed to prove that she would be available for work if she were not ill. The Commission indicated that it had been informed that the Appellant was available only part-time—four days per week.⁵

[6] The Appellant argues that she would have been available for work as of November 1, 2020, if she had not been ill. She explains that she stopped working on October 29, 2020, for medical reasons and that she will return to work when she is recovered. The Appellant indicates that, since September 2020, with her employer's approval, she had been working four days per week—that is, Monday to Thursday. She notes that she also has a medical document indicating

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

² See GD3-14 and GD3-15.

³ See GD3-3 to GD3-13.

⁴ See GD3-3 to GD3-13 and GD4-1.

⁵ See GD3-19.

that she can work only four days per week. The Appellant argues that she has been contributing to Employment Insurance since she entered the labour market. She says she finds it unfair that she is not entitled to receive benefits. On December 23, 2020, the Appellant challenged the Commission's reconsideration decision. That decision is now being appealed before the Tribunal.

[7] I must determine whether the Appellant has proven that, if she had not been ill, she would have been available for 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 would have been available for work if she had not been ill.

Issue

[8] I must determine whether the Appellant has shown that, if it had not been for her illness, she would have been available for work as of November 1, 2020.⁶

Analysis

[9] A claimant is not entitled to be paid benefits for a working day in a benefit period for which the claimant fails to prove that, on that day, the claimant was unable to work because of a prescribed illness, injury, or quarantine, and that the claimant would otherwise be available for work.⁷

[10] The notion of "availability" is not defined in the Act. Federal Court of Appeal (Court) decisions have set out criteria that can be used to establish a person's availability for work and whether they are entitled to Employment Insurance benefits.⁸

[11] Availability is a question of fact that calls for the consideration of three general criteria. These three criteria are:

⁶ See section 18(1)(b) of the Act.

⁷ See section 18(1)(b) of the Act.

⁸ The Court established or reiterated this principle in the following decisions: *Faucher*, A-56-96; *Bois*, 2001 FCA 175; *Wang*, 2008 FCA 112.

- 1) the desire to return to the labour market as soon as a suitable job is offered;
- 2) the expression of that desire through efforts to find a suitable job; and
- 3) not setting personal conditions that might unduly limit the chances of returning to the labour market.⁹

[12] In this case, I find that the Appellant has shown that, as of November 1, 2020, when the Commission disentitled her from receiving Employment Insurance sickness benefits (special benefits), she was not in a situation that completely stopped her from being available for work if she had not been ill.¹⁰

[13] The Appellant's testimony and statements to the Commission indicate the following:

- 1) The Appellant has worked at the employer since February 2003. It was a full-time job at the rate of five days per week. She worked 35 hours per week.¹¹
- 2) In September 2020, the Appellant started working four days per week. From then on, she worked Monday to Thursday, from 8 a.m. to 3 p.m., for a total of 28 hours per week. The Appellant made an agreement with the employer so she could work four days per week. She plans to continue with that schedule until she retires. It is still a permanent position. Her employer considers it a full-time position.¹²
- 3) Her work as a facilitator with people with intellectual disabilities is demanding. The Appellant is no longer able to work five days per week. It has become too difficult for her. She explains that, in addition to her age, the situation related to the COVID-19 pandemic¹³ has made her work even more difficult, given her involvement with the clients she works with (for example, enforcing hygiene measures like hand washing).¹⁴

⁹ The Court established or reiterated this principle in the following decisions: *Faucher*, A-56-96; *Bois*, 2001 FCA 175; *Wang*, 2008 FCA 112.

¹⁰ See section 18(1)(b) of the Act.

¹¹ See GD2-5, GD3-18, and GD3-24.

¹² See GD3-16 to GD3-18, GD3-22, and GD3-24.

¹³ 2019 coronavirus disease.

¹⁴ See GD3-16 to GD3-18, GD3-22, and GD3-24.

- 4) Even though her November 6 and 25, 2020, statements to the Commission indicate that she made the choice to work four days per week,¹⁵ the Appellant talked to her doctor in November 2019, or even earlier, about wanting to reduce her number of working days per week, given the demands of her job. Her doctor told her that working four days per week would be a good idea and would be better for her, given the stress she was under at work. In December 2020, her doctor gave her a medical document indicating that she had to reduce her work schedule to four days per week as of September 2020, for health reasons.¹⁶
- 5) On October 20, 2020, the Appellant stopped working for medical reasons.¹⁷ Her doctor gave her certificates for that purpose.¹⁸
- 6) The Appellant's last day of work was actually October 19, 2020. After talking to her doctor that day, he recommended a leave from work. The Appellant has not worked as of October 20, 2020. She first used her five days of sick leave and then used the overtime she had accumulated. This explains why the employer indicated on the Record of Employment it issued that she had worked until October 29, 2020 (last day paid).¹⁹
- 7) The Appellant will return to her job as soon as her health condition allows her to do so.²⁰

¹⁵ See GD3-16 to GD3-18.

¹⁶ See the document issued by Dr. Raymonde Laplante from the Laurentian Integrated Health and Social Services Centre [Laurentian CISSS] on December 15, 2020, called [translation] "Medical prescription other than medication," indicating that the Appellant had to reduce her work schedule to four days per week in September 2020, for health reasons, and that she was on leave from work from October 20, 2020—GD2-13.

¹⁷ See GD2-5, GD3-16, GD3-17, GD3-22, and GD3-24.

¹⁸ See the documents issued by Dr. Laplante from the Laurentian CISSS on October 20, 2020; November 17, 2020; December 15, 2020; and January 12, 2021, called [translation] "Certification of leave from work"—GD2-10, GD2-11, GD2-12, and GD5-2. These documents indicate that the Appellant was taking leave from work for medical reasons for the following periods: from October 20, 2020, to November 21, 2020, inclusive (see GD2-10); from November 17, 2020, to December 20, 2020, inclusive (see GD2-12); from December 15, 2020, to January 16, 2021, inclusive (see GD2-11); and from January 12, 2021, to January 31, 2021, inclusive (see GD5-2). See also the document issued by Dr. Laplante on December 15, 2020, called [translation] "Medical prescription other than medication," indicating that the Appellant had to reduce her work schedule to four days per week in September 2020, for health reasons, and that she was on leave from work from October 20, 2020—GD2-13.

¹⁹ See GD3-14 and GD3-15.

²⁰ See GD2-5.

- 8) The Appellant argues that she should be entitled to receive benefits, given that she is unable to work for health reasons.²¹
- 9) The Appellant argues that she has contributed to Employment Insurance since she started working. She says she finds the Commission's decision to refuse to pay her benefits unfair.²²

[14] The Commission, in turn, argues the following:

- 1) The Appellant has failed to show that she would have worked or would have been available for work because she reduced her work hours to four days per week. The Appellant's usual work schedule is five days per week. If an illness or injury had not stopped the Appellant from working, she would not have worked full time after September 2020, and she would have given her employer an availability of only four days per week until she retires.²³
- 2) Even though the Appellant started working four days per week in September 2020 and plans to do so until she retires, it is a recent situation, and the evidence on file does not show that there is a permanent disability.²⁴
- 3) Under the basic availability requirements set out in the Act, claimants have to be available for work each working day, Monday to Friday.²⁵
- 4) The Appellant has shown the desire and the capacity to work part-time from now on. She reduced her availability at her employer shortly before claiming sickness benefits (special benefits). For the period when the Appellant claimed this type of benefits, she was therefore not available for full-time work.²⁶

²¹ See GD2-1 to GD2-14, GD3-18, and GD3-22.

²² See GD3-24.

²³ See GD4-3.

²⁴ See GD4-2.

²⁵ See section 18(1)(a) of the Act and section 32 of the *Employment Insurance Regulations* (Regulations)—GD4-3 and GD4-5.

²⁶ See GD4-3.

- 5) The Appellant is no longer available for work under the usual conditions of her position.²⁷
- 6) By reducing her availability for work from five to four days per week, citing the demands of her job and her age, the Appellant set a condition to her return to full-time work.²⁸

[15] In this case, I find that the Appellant has shown that, if she had not been ill, she would have been available for work as of November 2020 on the days she had been working since September 2020, before she stopped working on October 29, 2020.

[16] Objectively, since November 1, 2020, the Appellant has remained available for work four specific days per week—that is, Monday to Thursday.

[17] I find that the Appellant has shown her desire to return to the labour market as soon as a suitable job is offered,²⁹ as of November 1, 2020, except Fridays when she chose not to work, after getting her employer's authorization.

[18] With her employer's approval, the Appellant made the choice to work four days per week, Monday to Thursday, and therefore to work 28 hours per week. According to the Appellant, she made this choice because she found it too difficult to continue working five days per week.

[19] I find that, despite this situation, the Appellant has not shown her desire to return to the labour market for each working day of the week as of November 1, 2020.

[20] I also find that, if the Appellant had not been ill, she would not have expressed her desire to return to the labour market through efforts to find a suitable job,³⁰ as of November 1, 2020, given that she chose to work four days per week.

²⁷ See GD4-3.

²⁸ See GD4-3.

²⁹ One of the criteria related to availability for work that the Court established or reiterated in the following decisions: *Faucher*, A-56-96; *Bois*, 2001 FCA 175; *Wang*, 2008 FCA 112.

³⁰ One of the criteria related to availability for work that the Court established or reiterated in the following decisions: *Faucher*, A-56-96; *Bois*, 2001 FCA 175; *Wang*, 2008 FCA 112.

[21] On that point, I note that section 18(1)(b) of the Act does not require that a claimant be available to obtain suitable employment, but rather that they would be available for work, if it were not for their illness. I am of the view that, in such a case, a claimant's availability must be examined hypothetically, since they are ill.

[22] I also note that section 9.002 of the Regulations, which describes the criteria for determining what constitutes suitable employment, mentions that it applies when a question of availability is raised under section 18(1)(a) of the Act. This section does not mention section 18(1)(b).

[23] I am of the view that, by choosing to work four days per week, the Appellant set personal conditions³¹ relating to her availability for work. I note that, in her statements to the Commission, the Appellant indicated that she had reduced her availability by personal choice.³²

[24] I find that the medical document indicating that the Appellant had to reduce her work schedule to four days per week in September 2020, for health reasons,³³ does not constitute a diagnosis showing that she was unable to work more than four days per week, for medical reasons, as of September 2020. I find that this document, dated December 15, 2020, is an acknowledgement of the Appellant's decision, made several months earlier, to work four days per week as of September 2020.

[25] I am of the view that, despite this document, the Appellant's decision to work four days per week remains a personal choice, even though it is supported by excellent reasons.

[26] However, I do not have to determine whether, because of this choice, the personal conditions the Appellant set unduly limit her chances of returning to the labour market,³⁴ since she is still employed by her employer.

³¹ An element of one of the criteria related to availability for work that the Court established or reiterated in the following decisions: *Faucher*, A-56-96; *Bois*, 2001 FCA 175; *Wang*, 2008 FCA 112.

³² See GD3-16 to GD3-18.

³³ See the document issued by Dr. Laplante on December 15, 2020, called [translation] "Medical prescription other than medication," indicating that the Appellant had to reduce her work schedule to four days per week in September 2020, for health reasons, and that she was on leave from work from October 20, 2020—GD2-13.

³⁴ An element of one of the criteria related to availability for work that the Court established or reiterated in the following decisions: *Faucher*, A-56-96; *Bois*, 2001 FCA 175; *Wang*, 2008 FCA 112.

[27] I do not accept the Commission's argument that the Appellant has failed to show that she would have worked or would have been available for work full time if an illness or injury had not stopped her from doing so, given that she reduced her work hours to four days per week.³⁵

[28] I note that the Act does not specifically require a claimant to be available for full-time work.

[29] The Court tells us that a person's availability is assessed for each working day in a benefit period for which they can prove that, on that day, they were capable of and available for work and unable to obtain suitable employment.³⁶

[30] I find that, in the Appellant's case, the facts show that, if it had not been for her illness, she would have been available for work each working day in her benefit period, from Monday to Thursday, inclusive. She has proven that she was available for that purpose each of those days in her benefit period.

[31] I note that the Act states that, when a claimant is disentitled for certain working days in a week, the weekly benefit rate is reduced proportionately.³⁷

[32] I also do not accept the Commission's argument that the Appellant is no longer available for work under the usual conditions of her position.³⁸

[33] The Appellant's testimony indicates that, with the employer's approval, she set conditions to work four days per week as of September 2020, until she retires. I find that these are usual conditions of the position the Appellant has held since September 2020—that is, several weeks before she stopped working for medical reasons. The Appellant also indicated that, when she went back to work, she would do it based on the conditions set in September 2020.

³⁵ See GD4-3.

³⁶ The Court established or reiterated this principle in the following decisions: *Cloutier*, 2005 FCA 73; *Boland*, 2004 FCA 251.

³⁷ See section 20 of the Act.

³⁸ See GD4-3.

[34] I find that the Appellant has shown that, if she had not been ill, she would have been available for work four working days per week as of November 1, 2020.

[35] Therefore, the Commission was not justified in disentitling the Appellant from receiving Employment Insurance benefits (special benefits) for all the working days in her benefit period, as of November 1, 2020.³⁹

[36] This disentitlement should apply only to the working days for which the Appellant did not tell her employer she was available, that is, Fridays, as of November 1, 2020.⁴⁰

[37] The appeal on the issue has merit in part.

Conclusion

[38] I find that the Appellant has shown that, if she had not been ill, she would have been available for work four working days per week as of November 1, 2020.

[39] The appeal is allowed in part.

Normand Morin
Member, General Division – Employment Insurance Section

HEARD ON:	January 19, 2021
METHOD OF PROCEEDING:	Teleconference
APPEARANCE:	L. C., Appellant

³⁹ See section 18(1)(b) of the Act.

⁴⁰ See section 18(1)(b) of the Act.