



Citation: *SM v Canada Employment Insurance Commission*, 2021 SST 874

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

Decision

Appellant: S. M.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (430189) dated August 6, 2021
(issued by Service Canada)

Tribunal member: Raelene R. Thomas

Type of hearing: Teleconference

Hearing date: September 8, 2021

Hearing participant: Appellant

Decision date: September 29, 2021

File number: GE-21-1397

Decision

[1] The appeal is allowed. The Tribunal agrees with the Claimant, S. M..

[2] The Claimant wasn't able to work from June 13, 2021 to July 2, 2021 because of illness prior to giving birth. I find the Claimant would have been available for work during that period if she hadn't been sick. Her illness was the only thing stopping her from being available for work.

[3] This means that the Claimant isn't disentitled from receiving Employment Insurance (EI) sickness benefits from June 20, 2021 to July 2, 2021. So, the Claimant may be entitled to benefits.

Overview

[4] The Claimant was pregnant and was placed off work due to illness by her doctor. She received paid sick leave from her employer until that leave ran out. The Claimant then applied for EI sickness benefits. She received one week of sickness benefits before the Canada Employment Insurance Commission (Commission) started her EI maternity benefits despite the Claimant not giving birth until 2 weeks later.

[5] To be able to receive EI sickness benefits, the Claimant must "otherwise be available for work."¹ In other words, the Claimant's illness has to be the only reason why she wasn't available for work.

[6] The Commission says that the Claimant would not have been available for work because claimants are only considered otherwise available until the week prior to the estimated date of birth. It says this is true even if the birth occurs later than expected.

[7] The Claimant disagrees and says that she should be able to receive sickness benefits in the weeks prior to her child's birth. The Commission's decision means that she will get less parental benefits than a claimant who is well enough to work until the week they give birth.

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

Issue

[8] The Claimant wasn't able to work because of her illness. But, was she otherwise available for work?

Analysis

[9] 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 Claimant has to prove that her illness is the only reason why she wasn't available for work.²

[10] The Claimant 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 it weren't for her illness.

Available for work

[11] 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:³

- 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.

[12] The Claimant doesn't have to show that she is actually available. She has to show that she would have been able to meet the requirements of all three factors if she hadn't been sick. In other words, the Claimant has to show that her illness was the only thing stopping her from meeting the requirements of each factor.

² See section 18(1)(b) of the EI Act.

³ 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**

[13] The Claimant has shown that but for her illness she would have wanted to go back to work as soon as a suitable job was available.

[14] The Claimant testified that she works to have money. She planned to take one year off work and is not capable of taking more time off. She works overtime as much as she can to increase her income. She did not want to take time off work before she gave birth. The Claimant's doctor placed her off work until her expected date of delivery. She continued to be placed off work by her doctor until she gave birth 12 days later. The Claimant will be returning to work once her maternity leave is over on July 2, 2022, which is one year after the birth of her child. This evidence tells me that the Claimant wants to go back to work as soon as a suitable job is available.

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

[15] The Claimant has shown that she would have made enough efforts to find a suitable job.

[16] The Claimant testified that when she was employed she would call the employer's staffing office to see if there was any additional work available to her above her scheduled hours. This would be overtime work. She said that she called the staffing office prior to going off work and was told that there was nothing available in the way of additional work because at that time of year, that is June, there were students available to work. She said that if she had been able to work she would have continued working and also looked for overtime work. After her child was born the Claimant contacted her employer's human resources office to arrange for her maternity leave. Her leave will expire on July 2, 2022. This evidence tells me that, but for her illness, the Claimant would have made efforts to find additional work.

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

[17] The Claimant did not set personal conditions that would unduly her chances of going back to work.

[18] The Claimant says she did not set personal conditions because she was prevented from working due to illness prior to giving birth. She testified that her doctor put her off work when she was 36 weeks pregnant due to complications with her pregnancy. She was able to take paid sick leave from her employer until that leave ran out. Her last day at work was June 14, 2021. She continued to be on leave after that date. She applied for EI sickness benefits on June 16, 2021.

[19] The Claimant's doctor placed her off work at the 36th week of her pregnancy due to illness associated with her pregnancy. She took paid sick leave from her employer until it ran out on June 14, 2021. The Claimant's health did not change after that date and her illness continued beyond her expected date of birth until she gave birth on X. She arranged for her maternity leave from her employer to start after she gave birth. In my opinion, the Claimant's illness prior to giving birth is not a personal condition that would unduly limit her chances of returning to work. As a result, I find that the Claimant did not set any personal conditions that would limit her chances of returning to work.

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

[20] Yes, based on my findings on the three factors, I find that the Claimant has shown that she was otherwise available for work. But for her illness, the Claimant would have met all three factors.

[21] The Claimant submitted a "Medical Certificate for Employment Insurance Sickness Benefits" to the Commission. The certificate states the expected date of confinement was June 22, 2021 and that the date on which the patient became unable to work due to their medical condition was June 14, 2021. The certificate states the patient is incapable of working until June 22, 2021. The certificate is signed by a doctor and dated June 16, 2021.

[22] The Claimant did not give birth on June 22, 2021. She saw her doctor June 23, 2021. The Claimant testified that the doctor added handwritten information to the original Medical Certificate.

[23] The changed Medical Certificate has “or date of delivery” added next to the date that was originally indicated that the patient was incapable of working to. Also added in the formerly empty comments section is the handwritten note “This lady is pregnant. Incapable of work for remainder of pregnancy.”

[24] The Claimant said she emailed the changed Medical Certificate to Service Canada as an attachment but was told by an agent that it could not be opened. The Claimant attached the changed certificate to her request for reconsideration.

[25] The Claimant testified she gave birth on X. She contacted her employer after she gave birth to let them know she wanted to start maternity leave. The employer’s human resources department emailed her on July 19, 2021 that her maternity leave would expire July 2, 2022.

[26] The Commission says that it approved the Claimant for EI sickness benefits from June 14, 2021 to June 19, 2021. After that it would pay her 15 weeks of EI maternity benefits followed by 35 weeks of standard parental benefits.

[27] The Commission says that the Claimant asked to have sickness benefits from June 13 to July 2, 2021 as she was off work due to medical reasons and to start her maternity benefits on X the day her child was born. The Commission says it told the Claimant that she could not claim sickness benefits for the weeks starting June 20, 2021 and June 27, 2021 because the week of the expected date of birth is when maternity benefits must begin. It also said that being available for work was a condition of receiving benefits and because she would have been on maternity leave as of the week of June 20, 2021 she did not meet that condition.

[28] The Commission submitted that it is common for sickness benefits to be claimed immediately before the start of a claimant’s maternity benefits. Claimants in those circumstances must meet the same conditions as others receiving sickness benefits

and show they are otherwise available for work. It says in these circumstances, claimants are considered otherwise available for work until the week prior to the expected date of birth. It says this is true even if the birth occurs later than expected.

[29] The Commission says that the expected date of birth was June 22, 2021. Therefore, it says the Claimant is otherwise available until the week starting June 13, 2021. It says she does not meet this requirement starting June 20, 2021 because it was the intended start date of her maternity leave and she would not be working.

[30] I do not agree with the Commission for two reasons.

[31] First, there is no evidence to support that the Claimant planned to start her maternity leave in the week starting June 20, 2021. The Claimant provided a Medical Certificate that stated the Claimant was incapable of working from June 14, 2021. It also stated that her expected date of delivery was June 22, 2021. It does not, however, state that she will be starting her maternity leave as of that date. The Claimant's testimony is clear, she intended to work until her child was born. Her doctor placed her off work at the 36th week of her pregnancy. She was able to take paid sick leave until June 14, 2021. She continued to be on leave from her employer. She then applied for EI sickness benefits. She did not arrange her maternity leave with her employer until after her child was born.

[32] Second, the Commission's decision to not pay sickness benefits for a period of illness that extends beyond the expected date of birth where the birth occurs later than expected is not supported by the law.

[33] The law says that maternity benefits may be payable for each week of unemployment in a period that begins on the earlier of 12 weeks prior to the week in which the date of expected birth occurs and the week in which the birth occurs.⁴ The period in which maternity benefits may be paid ends 17 weeks after the later of the

⁴ See section 22(2)(a) of the EI Act.

week in which the date of birth is expected and the week in which the confinement occurs.⁵

[34] This section of the law serves to define the period in which maternity benefits may be paid. A woman may start her maternity benefits at the earliest at any time within the 12 week period prior to the expected date of birth or if the birth occurs before the 12 weeks before the expected date of birth, maternity benefits may start in the week of the birth. The law does not say that maternity benefits must commence in the week a claimant gives birth.⁶ It also does not say that a claimant is considered otherwise available until the week prior to the estimated date of birth.

[35] The law says that for the purposes of serving a waiting period the provisions of section 18 that deal with availability do not apply to the week immediately before the start of the period in which maternity benefits may be paid.⁷ This part of the law speaks to the Claimant's availability for work on any working day in the waiting period prior to the period in which maternity benefits may be paid.⁸ This part of the law does not say that a claimant is not available if her illness occurs in the weeks following an expected date of birth where the birth occurs after the expected date of birth.

[36] A pregnancy is not an illness. However, one does not exclude the other.⁹ There are circumstances where a pregnant claimant may be entitled to sickness benefits.

[37] A claimant is entitled to receive EI benefits where she can show that she was unable to work on any working day because of a prescribed illness and that she would otherwise be available for work.¹⁰ The law says that an illness is any illness that

⁵ See section 22(2)(b) of the EI Act.

⁶ Claimants may delay their maternity benefits following a birth but if they do so they will reduce the weeks of maternity benefits they are entitled to receive.

⁷ See section 22(4) of the EI Act

⁸ Section 32 of the Employment Insurance Regulations (EI Regulations) says a working day is any day of the week except Saturday or Sunday.

⁹ Canada Umpire Benefits (CUB) 17184. Although I am not bound to follow CUBs I am guided by this decision.

¹⁰ See section 18(1)(a) of the EI Act

renders a claimant incapable of performing the duties of their regular or usual employment or other suitable employment.¹¹

[38] The Claimant has shown that but for her illness she would have been otherwise available for work within the meaning of the law. Because of this, I find that the Claimant isn't disentitled from receiving EI sickness benefits from June 20, 2021 to July 2, 2021. So, the Claimant may be entitled to benefits.

Conclusion

[39] The appeal is allowed.

Raelene R. Thomas
Member, General Division – Employment Insurance Section

¹¹ See section 40(4) of the EI Regulations.