



Citation: *Canada Employment Insurance Commission v HA*, 2022 SST 54

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: Canada Employment Insurance Commission
Representative: Rachel Paquette

Respondent: H. A.

Decision under appeal: General Division decision dated November 3, 2021
(GE-21-1816)

Tribunal member: Janet Lew

Type of hearing: Teleconference

Hearing date: February 1, 2022

Hearing participants: Appellant
Respondent's representative

Decision date: February 4, 2022

File number: AD-21-404

Decision

[1] The appeal is allowed. The Respondent, H. A. (Claimant) is entitled to Employment Insurance sickness benefits up to January 16, 2021. He is disentitled to Employment Insurance regular benefits after that date.

Overview

[2] This is an appeal of the General Division decision. The General Division found that the Claimant was capable of and available for work. It concluded that he was not disentitled from receiving Employment Insurance regular benefits.

[3] The Appellant, the Canada Employment Insurance Commission (Commission), argues that the General Division made a legal error by misinterpreting what it means to be available under the *Employment Insurance Act*.¹ The Commission also argues that the General Division made a factual error without regard for the evidence before it.

[4] The Commission asks the Appeal Division to allow the appeal. The Commission says the Claimant should be disentitled from receiving benefits. If the Claimant is disentitled to benefits, this would effectively result in an overpayment of benefits because the Commission already paid benefits to the Claimant.

[5] The Claimant says that he should not be responsible for any overpayment because he had filed reports disclosing that he was unavailable. He says the Commission should have stopped paying him benefits immediately. Instead, it kept paying him benefits. He asks the Appeal Division to dismiss the appeal.

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

Issues

[6] The issues in this appeal are:

- a) Did the General Division misinterpret what it means to be available under the *Employment Insurance Act*?
- b) Did the General Division make a factual error without regard for the evidence before it when it found that the Claimant had made sufficient efforts to find suitable employment?

Analysis

[7] The Appeal Division may intervene in General Division decisions if there are jurisdictional, procedural, legal, or certain types of factual errors.²

Did the General Division misinterpret what it means to be available under the *Employment Insurance Act*?

[8] The General Division found that the Claimant was capable and available for work. Therefore, he was not disentitled to receiving benefits. The Commission argues that the General Division misinterpreted what it means to be available under the *Employment Insurance Act*.

[9] The question about whether the Claimant was available for work is moot because the Claimant agrees that he was not available. He says that when he filled out his reports with the Commission, he said that he was not available for work.

[10] As well, the Claimant says that he brought his application for Canada Pension Plan disability benefits with him to his local Service Canada office and asked about cancelling his Employment Insurance claim. He asked about cancelling his claim because he was getting Canada Pension Plan disability benefits.

² See section 58(1) of the *Department of Employment and Social Development Act*.

[11] The Claimant spoke with an agent and supervisor. He understood from them that he did not have to end his claim. They told him that the Employment Insurance scheme does not treat disability benefits as income. So, he continued to file reports. He continued to get benefits.³

[12] The Claimant says that he attended at a Service Canada office again after that. He also spoke by telephone with agents. He says that, each time, he told Service Canada that he was not available, but each time, an agent encouraged him to continue with his claim and to continue filing reports.

[13] It is clear from the Claimant's position throughout that he was not available for work for the purposes of determining his entitlement to Employment Insurance benefits. Indeed, he stated in his Notice of Appeal at the General Division that he wrote on his reports that he was not available to work because he was a very sick man.⁴

[14] Although the issue about the Claimant's availability is settled, I will offer some comments.

[15] Section 18(1)(a) of the *Employment Insurance Act* states:

18.(1) Availability for work, etc. – 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

(a) capable of and available for work and unable to obtain suitable employment.

[16] The parties agree on the central facts. The Claimant was able to work only 12 hours per month because of his disability. He confirmed this in his reports.

³ See Claimant's email of December 10, 2021, at AD4.

⁴ See Claimant's Notice of Appeal – Employment Insurance Form, at GD2-3.

[17] The General Division found that the Claimant:

1. Held a desire to return to the labour market as soon as a suitable job is available
2. Expressed his desire through his efforts to find a suitable job, and
3. Did not set any personal conditions that could unduly limit his chances of returning to the labour market.

[18] The General Division found that the Claimant did not set any personal condition, although he was limited to 12 hours of work per month. The General Division explained that the Claimant did not set personal conditions, given that he did not choose to get sick and did not decide what limitations his illness placed on him.

[19] The Commission argues that the availability test set out in section 18(1)(a) of the *Employment Insurance Act* requires claimants to show that they are capable of and available for work each working day in a benefit period. They also have to be unable to obtain suitable employment to be entitled to regular benefits.

[20] The Commission notes that the Federal Court of Appeal set out this definition of availability in *Canada (Attorney General) v Cloutier*.⁵

[21] The Claimant may have found suitable employment. But, he did not meet the first part of the test under section 18(1)(a) of the *Employment Insurance Act*. He was unable to prove that he was capable of and available for work. He was not capable of working owing to his medical condition.

[22] The General Division made a legal error when it found that the Claimant had been available for work. It found that the Claimant was available for work because he was unwell and did not decide his limitations. But, the fact that he was unwell and did not decide his limitations did not somehow render him capable of and available for work.

⁵ See *Canada (Attorney General) v Cloutier*, 2005 FCA 73 at para 7.

The Claimant was not entitled to be paid benefits as he was not capable of and available for work each working day in a benefit period.

[23] The General Division also made a factual error without regard for the evidence before it. The Claimant freely acknowledged that he was not available for work. The General Division did not address this part of the evidence.

[24] The Commission has made other arguments. I do not have to address all of them. I have found that the General Division made legal and factual errors.

Remedy

[25] How can I fix the General Division's error? I have two basic choices.⁶ I can substitute my own decision or I can refer the matter back to the General Division for reconsideration. If I substitute my own decision, this means I may make findings of fact.⁷

[26] I will give the decision that the General Division should have given. I have the necessary information to make a decision. The parties agree on the basic facts. Neither the Claimant nor the Commission have asked me to return this matter to the General Division for a reconsideration.

– The parties' positions

[27] The Commission asks me to allow the appeal and find that the Claimant was unavailable. This would disentitle the Claimant from receiving Employment Insurance regular benefits.

[28] The Commission notes that the Claimant was entitled to a maximum of 15 weeks of Employment Insurance sickness benefits. The Claimant received 10 weeks of sickness benefits under his claim.

[29] The Commission also asks me to accept a modification of the Claimant's reports to sickness. This way, the Claimant would get an additional five weeks of sickness

⁶ Section 59 of the *Department of Employment and Social Development Act*.

⁷ *Weatherley v Canada (Attorney General)*, 2021 FCA 58, at paras 49 and 53, and *Nelson v Canada (Attorney General)*, 2019 FCA 222, at para 17.

benefits. This would mean getting sickness benefits up to January 16, 2021. The Commission says that the Claimant would be disentitled to regular benefits after January 16, 2021, rather than on December 20, 2020. The modification would slightly reduce the amount of the overpayment.

[30] The Claimant says he should not have to repay any benefits at all. The Claimant says the Commission should write off the amount of the overpayment. He has been honest with his claim. He denies that he ever reported that he was available, other than on the days that he was able to work. Further, he was the one who informed the Commission that he was getting disability benefits.

[31] The Claimant says that when the Commission became aware that he was collecting Canada Pension Plan disability benefits, it continued to pay him, even though it ultimately decided that he was not available.

[32] The Claimant argues that he should not have to bear responsibility for the Commission's delay in cutting him off from benefits. He says that if he had not been so forthcoming, no one would have known that he was not available and no one would have asked him to repay the benefits.

[33] In this case, unfortunately several months had passed—from December 2020 to May 2021—before the Commission recognized that the Claimant was getting Canada Pension Plan disability benefit and that he was not available for work. However, by then, the Claimant had already received several months of regular benefits.

– **Appeal Division decision**

[34] Given the facts before me, it is appropriate to allow the appeal. The Claimant was not available for work. He was not capable of and available for work. The Claimant was unwell and limited to being able to work for 12 hours a month.

[35] The Claimant was entitled to receive a total of 15 weeks of sickness benefits. I am granting the modification of the Claimant's reports. He is entitled to sickness

benefits up to January 16, 2021. Practically, this means any additional sickness benefits will be set off against any overpayment.

[36] The Claimant is disentitled to regular benefits after January 16, 2021. An overpayment remains, although for a slightly lesser amount because of the modification.

[37] I do not have any authority to waive or write off any the overpayment.

The Claimant's options

[38] The Claimant says that he is facing financial hardship. He says that, as it is, his disability pension is barely enough for him to survive. He has two options:

1. He can ask the Commission to consider writing off the debt because of undue hardship. If the Claimant does not like the Commission's response, his option then is to appeal to the Federal Court, or
2. He can phone Canada Revenue Agency's Debt Management Call Centre at 1-866-864-5823. He can ask them to consider writing off the overpayment or about accepting a repayment schedule.

Conclusion

[39] The appeal is allowed. The Claimant was not capable and available for work due to illness. Because of his ongoing illness, he is entitled to Employment Insurance sickness benefits up to January 16, 2021. He is disentitled to Employment Insurance regular benefits after that date.

Janet Lew
Member, Appeal Division