[TRANSLATION]

Citation: *LN v Canada Employment Insurance Commission*, 2022 SST 258

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	L. N.
Representative:	Pierre Lachance
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (445490) dated December 31, 2021 (issued by Service Canada)

Tribunal member:	Normand Morin
Type of hearing:	Videoconference
Hearing date:	March 8, 2022
Hearing participants:	Appellant Appellant's representative
Decision date:	March 30, 2022
File number:	GE-22-360

Decision

[1] The appeal is allowed in part. I find that the Appellant has shown that, if he had not been sick, he would have been available for work four working days per week as of April 26, 2021.[1] Therefore, his entitlement to Employment Insurance (EI) sickness benefits (special benefits) has to be established for the applicable days of his benefit period starting April 25, 2021.

Overview

[2] Since September 28, 1979, the Appellant has worked as a [translation] “scale operator” for the employer X (employer).

[3] On May 19, 2021, after a period of employment from April 19, 2018, to April 28, 2021, he applied for EI sickness benefits (special benefits).[2]

[4] On November 15, 2021, the Canada Employment Insurance Commission (Commission) told him that he was not entitled to EI sickness benefits (special benefits) as of April 26, 2021, because he had failed to prove that he would be available for work if he were not sick. The Commission explained to him that he had made the personal choice to reduce his work schedule to four days per week.[3]

[5] On December 31, 2021, after a request for reconsideration, the Commission informed him that it was upholding the November 15, 2021, decision.[4]

[6] The Appellant argues that he would have been available for work if he had not been sick. He indicates that, since March 1, 2020, he has taken advantage of the employer’s program that allows employees to have shorter work weeks. The Appellant says that, since March 1, 2020, in accordance with the conditions of this program, he has normally worked four days per week: Mondays, Tuesdays, Thursdays, and Fridays.

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[1] See section 18(1)(b) of the *Employment Insurance Act* (Act).
[2] See GD3-3 to GD3-11.
[3] See GD3-15 and GD8-51.
[4] See GD3-24 and GD3-25.

He explains that he stopped working on April 28, 2021, because of a labour dispute with the employer. The Appellant indicates that he was unable to work for medical reasons as of May 6, 2021. He says that he went back to work on September 7, 2021, after the labour dispute with the employer was over. The Appellant explains that he was unable to work for health reasons again as of September 10, 2021. He indicates that he started a gradual return to work on January 10, 2022. The Appellant argues that, even though he usually works four days per week, he still has permanent employee status and the benefits that come with it. On January 31, 2022, the Appellant challenged the Commission's reconsideration decision. That decision is now being appealed to the Tribunal.

Issue

[7] I have to decide whether the Appellant has shown that, if he had not been sick, he would have been available for work as of April 26, 2021.[5]

Analysis

[8] The *Employment Insurance Act* (Act) says that 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.[6]

[9] In other words, a claimant has to show that they would have been available for work if they had not been sick, injured, or in quarantine.

[10] The claimant has to prove this on a balance of probabilities. This means that they have to show that it is more likely than not that they would have been available for work if they had not been sick, injured, or in quarantine.

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[5] See section 18(1)(b) of the Act.
[6] See section 18(1)(b) of the Act.

[11] The notion of “availability” is not defined in the Act. Federal Court of Appeal (Court) decisions have set out factors for determining a person’s availability for work and whether they are entitled to EI benefits.[7] These factors are:

- wanting to go back to work as soon as a suitable job is available
- expressing that desire through efforts to find a suitable job
- not setting personal conditions that might unduly limit the chances of going back to work[8]

[12] However, in the case of illness, injury, or quarantine, the claimant does not have to show that they are actually available. They have to show that they would have been able to meet the requirements of all three availability for work factors if they had not been sick, injured, or in quarantine. In other words, the claimant has to show that their illness, injury, or quarantine was the only thing stopping them from meeting the requirements of each factor.

[13] In this case, I find that the Appellant has shown that, as of April 26, 2021, when the Commission disentitled him from receiving EI sickness benefits (special benefits), he was not in a situation that completely stopped him from being available for work if he had not been sick.[9]

[14] The Appellant’s testimony and statements indicate the following:

a) The Appellant has worked for the employer since September 28, 1979. He is one of the employer’s most senior employees. He is 66th in seniority on a list of almost 1,000 employees (945 employees).[10]

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[7] The Federal Court of Appeal (Court) established or reiterated this principle in the following decisions: *Faucher*, A-56-96; *Bois*, 2001 FCA 175; and *Wang*, 2008 FCA 112.
[8] The Court established or reiterated this principle in the following decisions: *Faucher*, A-56-96; *Bois*, 2001 FCA 175; and *Wang*, 2008 FCA 112.
[9] See section 18(1)(b) of the Act.
[10] See the company’s employee list—GD8-4 to GD8-47.

b) Since March 1, 2020, in accordance with the conditions the employer put in place to allow shorter work weeks for employees ([translation] “shorter-week program”), he has worked four days per week: Mondays, Tuesdays, Thursdays, and Fridays. This means that he works 32 hours per week instead of 40.[11]

c) The Appellant says that he made the [translation] “personal choice” to take advantage of the “shorter-week program.” He explains that he could go back to working five days per week. To make that happen, he says that he would just have to ask his employer, and his work schedule would be determined accordingly. He does not think that his employer would force him to do so. The employer has not asked him to work Wednesdays, his usual day off. The Appellant says that he does not want to work five days per week and that he would not agree to do so, whether for his employer or for another employer. He says that he would not make any effort to find a new job for five days per week. He says that he wants to continue working according to his [translation] “shorter-week” schedule, as permitted by his employer.[12]

d) There has been no change in his employee status since he started working four days per week. The Appellant still has permanent employee status. He is still accumulating seniority and still gets public holidays off.[13]

e) Before experiencing periods where he was unable to work for medical reasons, he first stopped working on April 28, 2021, because of a labour dispute with the employer.[14] The Appellant went back to work on September 7, 2021, after the dispute was over.

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[11] See the employer’s letter dated November 10, 2021, indicating that the Appellant is taking advantage of the [translation] “shorter-week program” and that he has worked four days per week since the week ending March 7, 2020 (week starting March 1, 2020)—GD3-14. See also GD3-13 and GD3-23.
[12] See GD3-13 and GD3-23.
[13] See the Appellant’s pay stubs for the following periods of employment: February 16 to 22, 2020; March 15 to 21, 2020; and February 6 to 12, 2022—GD5-10 to GD5-12.
[14] See GD5-13.

f) The Appellant was unable to work for medical reasons during the following periods: [translation] “indefinitely” as of May 6, 2021; from September 10, 2021, to January 9, 2022, inclusive, with a gradual return to work as of January 10, 2022; and from February 23 to 25, 2022, inclusive, with a gradual return to work as of February 28, 2022.[15]

g) The Appellant did not receive benefits after his claim for benefits was renewed on September 20, 2021.[16]

[15] The Appellant’s representative argues as follows:

a) The factors set out by the Court[17] for determining whether a person is available for work have to be considered very differently for someone who is unable to work for medical reasons and waiting to go back to work, compared to someone who is receiving EI regular benefits and not looking for work.

b) The Appellant has shown the desire to go back to work as soon as a suitable job is available. He has worked for his employer for more than 40 years. He already has a suitable job.

c) The Appellant did not look for a job when he was unable to work for health reasons.

d) After his periods off work for medical reasons, the Appellant gradually went back to work.

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[15] See the medical documents describing the Appellant’s periods off work, including a hospitalization from September 10 to 16, 2021, and the periods for his gradual returns to work—GD3-12, GD5-2 to GD5-9, and GD8-3. See also the Record of Employment the employer issued on September 21, 2021, indicating that the Appellant worked during the period from September 6 to 13, 2021, and that he stopped working because of illness or injury (Code D – Illness or injury)—GD5-14, GD11-15, and GD11-16. See also GD3-13.
[16] See GD11-3 to GD11-14 and GD8-52 to GD8-69.
[17] See the Court decision in *Faucher*, A-56-96.

e) The Appellant has not set personal conditions that might unduly limit the chances of going back to work.

f) The collective agreement describes two categories of employees: full-time employees and casual employees. The Appellant is a permanent employee. Even though he works 32 hours per week instead of 40, he still has full-time employee status. This is evidenced by his pay stubs.[18]

g) In one of its decisions, the Tribunal's General Division (General Division) found that a claimant in the same situation and working for the same employer as the Appellant had shown that he would have been available for work if he had not been sick.[19]

h) The Appellant was unable to work for medical reasons as of May 6, 2021, not as of April 25, 2021, even though his benefit period was established effective that date. The Appellant worked on April 26 and 27, 2021. After that, a general strike started at the employer on April 28, 2021. If the Appellant is not entitled to benefits for the period of the labour dispute with the employer—from April 28, 2021, to August 31, 2021, inclusive—because of the general strike, he should be entitled to benefits after that period.

i) The analysis to determine whether the Appellant would have been available for work if it had not been for his illness has to be from September 10, 2021, onward.[20]

j) The Commission's November 15, 2021, decisions denying the Appellant sickness benefits as of April 26, 2021,[21] and disentitling him from receiving benefits because of the labour dispute with the employer[22] were both

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[18] See the Appellant's pay stubs for the following periods of employment: February 16 to 22, 2020; March 15 to 21, 2020; and February 6 to 12, 2022—GD5-10 to GD5-12.
[19] See the decision of the Tribunal's General Division (General Division) in *GG c Canada Employment Insurance Commission*, GE-19-2580, September 30, 2019—GD5-15 to GD5-21.
[20] See GD8-1.
[21] See GD3-15 and GD8-51.
[22] See GD3-18, GD3-19, and GD8-50.

challenged before the Commission.[23] The representative says that both decisions were challenged because he believed that the Appellant's rights had been violated given the Commission's refusal to pay him sickness benefits after he applied for benefits on September 20, 2021.[24]

[16] The Commission, on the other hand, argues as follows:

a) Availability for work is assessed for each working day in a benefit period. The Appellant indicates that he is not available for work one day per week. This means that he does not meet the availability for work requirements of the Act. A claimant has to prove that, if they had not been sick, they would have been available for work each working day in a benefit period.[25]

b) The Appellant has failed to show that he would have worked or would have been available for work, since he has limited his availability for work [to] four days per week since March 2020.[26]

c) The General Division decision in *GG c Canada Employment Insurance Commission*[27] is a case that is almost identical to the one before me. In that decision, the General Division found that, given that there is no definition of a full-time job, working 4 days or 32 hours per week reasonably amounts to a full-time workload.[28] Section 18 of the Act says that a claimant has to be available for work each working day.[29] Section 32 of the *Employment Insurance Regulations* (Regulations) says that, for the purposes of section 18 of the Act, a working day is any day of the week except Saturday and

[23] See GD8-1.
[24] See GD8-1.
[25] See GD4-2 and GD4-3.
[26] See GD4-3.
[27] See the General Division decision in *GG c Canada Employment Insurance Commission*, GE-19-2580, September 30, 2019—GD5-15 to GD5-21.
[28] See GD10-1.
[29] See GD10-1.

Sunday. The Appellant is not available for work each working day, specifically Wednesdays.[30]

d) Although that decision[31] indicates that participating in a pre-retirement program may penalize a claimant in terms of their entitlement to sickness benefits, the decision to go into pre-retirement or work part-time is a voluntary and personal one. On his September 20, 2021, renewal application for benefits, the Appellant indicated that he started receiving his Québec Pension Plan pension on March 1, 2020.[32] The Appellant started the shorter-week program on March 7, 2020 [*sic*] [March 1, 2020]. When someone retires, the normal expectation is for the government pension plan to take over, not EI benefits. A claimant who has retired has to prove their availability for work just like any other EI claimant.[33]

e) Even though that decision also says that [translation] "if Parliament had meant to limit sickness benefits to just workers with full-time jobs, it would have mentioned this in the Act,"[34] Parliament specifically indicated in section 18(1)(b) of the Act that the claimant has to prove that, if it were not for their illness, they "would otherwise be available for work." Whether they are claiming regular benefits or sickness benefits, the claimant has to prove that they are available for work each working day.[35]

f) In that decision, significant weight was given, according to the Commission, to the fact that the claimant had repeatedly said that, if he were to lose his job, he should look for a full-time job.[36] In this case, the Appellant has specifically

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[30] See GD10-1.
[31] See the General Division decision in *GG c Canada Employment Insurance Commission*, GE-19-2580, September 30, 2019—GD5-15 to GD5-21.
[32] See GD11-10.
[33] See GD10-2 and GD10A-1.
[34] See the General Division decision in *GG c Canada Employment Insurance Commission*, GE-19-2580, September 30, 2019 (para 23)—GD5-20.
[35] See GD10-2.
[36] See the General Division decision in *GG c Canada Employment Insurance Commission*, GE-19-2580, September 30, 2019—GD5-15 to GD5-21.

stated that he would not agree to work in another job for five days per week. The Commission says that the Appellant's case differs on this point from the General Division decision in *GG c Canada Employment Insurance Commission*.[37]

g) The Court has confirmed the principle that sickness benefits are payable to a claimant only where their own illness makes them unable to work, and during a period where the claimant was available for work.[38]

[17] In this case, I find that the Appellant has shown that, if he had not been sick, he would have been available for work each working day in his benefit period, except Wednesdays, as of April 26, 2021.

[18] The representative argues that the analysis of the Appellant's case to determine whether he would have been available for work if he had not been sick has to be from September 10, 2021, onward, which is when he was unable to work for medical reasons again following the end of the labour dispute with the employer on August 31, 2021, and following his return to work on September 7, 2021.

[19] Despite his representative's argument on this point, the fact is that the Commission's December 31, 2021, reconsideration decision[39] relates to its initial decision dated November 15, 2021, about his entitlement to receive sickness benefits as of April 26, 2021, after his benefit period was established effective April 25, 2021.[40]

[20] As a result, the decision I am making deals with the Appellant's availability for work as of April 26, 2021, if he had not been sick.

[21] Although there is evidence on file, including a Commission decision also dated November 15, 2021,[41] that refers to a disentitlement to benefits imposed on the

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[37] See the General Division decision in *GG c Canada Employment Insurance Commission*, GE-19-2580, September 30, 2019—GD5-15 to GD5-21. See also GD10-2.
[38] See the Court decision in *Canada (AG) v X*, A-479-94. See also GD4-3.
[39] See GD3-24 and GD3-25.
[40] See GD3-15 and GD8-51.
[41] See the Commission's November 15, 2021, decision—GD3-18, GD3-19, and GD8-50.

Appellant for the period from April 28, 2021, to September 6, 2021, because of a labour dispute with the employer during that period, my decision is not about that. The issue is not whether the Appellant has shown that he may be entitled to EI benefits because of a labour dispute.[42]

[22] I point out that the Commission's December 31, 2021, reconsideration decision concerns only the Appellant's availability for work if he had not been sick.[43] That is the decision under appeal before the Tribunal. So, I have to make a decision on that issue.

[23] On this point, I also note that, as a Tribunal member, I cannot decide an issue that is not before me. The Tribunal can hear only appeals of the Commission's reconsideration decisions.[44]

[24] In this case, although the Appellant's benefit period was established effective April 25, 2021, because he first stopped working on April 28, 2021, due to a labour dispute with the employer, this situation does not prevent him from showing that he would have been available for work if he had not been sick at different times during that benefit period.

[25] Objectively, since April 26, 2021, the Appellant has remained available for work four specific days per week: Mondays, Tuesdays, Thursdays, and Fridays.

[26] I find that, as of that day, the Appellant continued to show the desire to go back to work as soon as a suitable job was available,[45] except Wednesdays when he chose not to work, by taking advantage of the employer's [translation] "shorter-week program."

[27] With his employer's approval, the Appellant made the choice to work four days per week as of March 1, 2020, and therefore to work 32 hours per week.

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[42] See section 36(1) of the Act.
[43] See GD3-24 and GD3-25.
[44] See section 113 of the Act.
[45] One of the factors related to availability for work that the Court established or reiterated in the following decisions: *Faucher*, A-56-96; *Bois*, 2001 FCA 175; and *Wang*, 2008 FCA 112.

[28] However, I find that the Appellant's statements that he would not agree to work five days per week, whether for his employer or for another employer, and that he wants to continue working according to his 32-hour-per-week schedule[46] do not show his desire to go back to work for each working day of the week as of April 26, 2021.

[29] I am also of the view that, if the Appellant had not been sick, he would not have expressed his desire to go back to work through efforts to find a suitable job[47] as of April 26, 2021, given that he was working four days per week.

[30] I find that this is evidenced by the Appellant's statement that he would not make any effort to find a new job for five days per week.[48]

[31] On this point, however, I note that section 18(1)(b) of the Act does not require that a claimant be available to find a suitable job, but rather that they would have been available for work if they had not been sick. I am of the view that, in such a case, a claimant's availability must be examined hypothetically, since they are sick.

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

[33] I am also taking into account that the Appellant has worked for the employer for more than 40 years and that he went back to work as soon as he could following the periods where he was unable to do so for medical reasons.

[34] I am of the view that, by choosing to work four days per week, the Appellant set personal conditions[49] relating to his availability for work. I point out that the Appellant's

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[46] See GD3-13 and GD3-23.
[47] One of the factors related to availability for work that the Court established or reiterated in the following decisions: *Faucher*, A-56-96; *Bois*, 2001 FCA 175; and *Wang*, 2008 FCA 112.
[48] See GD3-13.
[49] An element of one of the factors related to availability for work that the Court established or reiterated in the following decisions: *Faucher*, A-56-96; *Bois*, 2001 FCA 175; and *Wang*, 2008 FCA 112.

October 25, 2021, statement to the Commission reports him as saying that he reduced his work hours by personal choice.[50]

[35] However, I do not have to determine whether, because of this choice, the personal conditions the Appellant set unduly limit his chances of going back to work,[51] since she is still employed by his employer.

[36] Therefore, I do not accept the Commission's argument that the Appellant has failed to show that he would have worked or would have been available for work, since he has limited his availability for work [to] four days per week since March 2020.[52]

[37] I also do not accept the Commission's argument that the Appellant does not meet the availability for work requirements of the Act because he is not available for work each working day in a benefit period.[53]

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

[39] 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 find a suitable job.[54]

[40] I find that, in the Appellant's case, the facts show that, if he had not been sick, he would have been available for work each working day in his benefit period, except Wednesdays. He has proven that he was available for that purpose each of those days in his benefit period.

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[50] See GD3-13.
[51] An element of one of the factors related to availability for work that the Court established or reiterated in the following decisions: *Faucher*, A-56-96; *Bois*, 2001 FCA 175; and *Wang*, 2008 FCA 112.
[52] See GD4-3.
[53] See GD4-2 and GD4-3.
[54] The Court established or reiterated this principle in the following decisions: *Cloutier*, 2005 FCA 73; and *Boland*, 2004 FCA 251.

[41] I note that the Act also says that, when a claimant is disentitled for certain working days in a week, the weekly benefit rate is reduced proportionately.[55]

[42] I agree with the Commission's submission that the General Division decision in *GG c Canada Employment Insurance Commission*,[56] which the representative cited at the hearing, differs from the Appellant's case on the issue of a hypothetical search for full-time work if he had to work for another employer.

[43] That decision[57] was about a claimant who had shown that he was available to work 40 hours per week, which is not the case for the Appellant. In the Appellant's case, he said that he would not agree to work five days per week, whether for his usual employer or for another potential employer.[58]

[44] In summary, I find that the Appellant has shown that, if he had not been sick, he would have been available for work four working days per week as of April 26, 2021.

[45] Therefore, the Commission was not justified in disentitling the Appellant from receiving sickness benefits (special benefits) for all the working days in his benefit period as of that date.[59] This disentitlement should apply only to the working days for which the Appellant did not tell his employer he was available, that is, Wednesdays, as of April 26, 2021.

[46] The appeal has some merit on the issue at hand.

Conclusion

[47] I find that the Appellant has shown that, if he had not been sick, he would have been available for work four working days per week as of April 26, 2021.

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[55] See section 20 of the Act.
[56] See the General Division decision in *GG c Canada Employment Insurance Commission*, GE-19-2580, September 30, 2019—GD5-15 to GD5-21.
[57] See the General Division decision in *GG c Canada Employment Insurance Commission*, GE-19-2580, September 30, 2019—GD5-15 to GD5-21.
[58] See GD3-13.
[59] See section 18(1)(b) of the Act.

[48] Therefore, his entitlement to sickness benefits (special benefits) has to be established for the applicable days of his benefit period, as of that date.

[49] This means that the appeal is allowed in part.

Normand Morin

Member, General Division – Employment Insurance Section