



Citation: *LD v Canada Employment Insurance Commission*, 2023 SST 76

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

## Decision

**Appellant:** L. D.  
**Representative:** J. D.  
**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission  
reconsideration decision (440734) dated December 3,  
2021 (issued by Service Canada)

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**Tribunal member:** Raelene R. Thomas  
**Type of hearing:** Teleconference  
**Hearing date:** January 17, 2023  
**Hearing participant:** Appellant  
Appellant's representative  
**Decision date:** January 23, 2023  
**File number:** GE-22-3355

## Decision

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

[2] The Claimant has shown that he was available for work while in school taking training. This means that he isn't disentitled from receiving employment insurance (EI) benefits. So, the Claimant may be entitled to benefits.

## Overview

[3] The Canada Employment Insurance Commission (Commission) decided that the Claimant was disentitled from receiving EI regular benefits from September 8, 2021 because he wasn't available for work. A claimant has to be available for work to get EI regular benefits. Availability is an ongoing requirement. This means that a claimant must be searching for a job.

[4] The Claimant first appealed the denial of EI benefits to the Tribunal's General Division in December 2021. The General Division member dismissed the Claimant's appeal.<sup>1</sup>

[5] The Claimant appealed the General Division's decision to the Tribunal's Appeal Division. The Appeal Division member found the Claimant's appeal should not have been dismissed. She ordered the appeal to be returned to the General Division for a redetermination of the issue of whether the Claimant set restrictions that unduly limited his chances of returning to work.<sup>2</sup>

[6] The Commission argued at the appeal division the evidence shows the Claimant did not take on other suitable work for which he was qualified. In other words, the Commission said, the evidence shows the Claimant could have also looked for work in the retail sector.

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<sup>1</sup> See *LD v Canada Employment Insurance Commission*, 2022 SST 989

<sup>2</sup> See *LD v Canada Employment Insurance Commission*, 2022 SST 988

[7] The Claimant says he cannot work in the retail sector. He says that he has medical conditions that prevent him from doing so. While he may have worked in the retail sector in the past, changes in that sector mean that he can no longer work there due to his medical conditions. The Claimant also says that employment in the retail sector is not suitable because it is at a lower rate of income than what he has earned in the marine industry. The Claimant argued that he also looked for work in other areas.

## **Matter I have to consider first**

### **The Claimant's appeal was returned to the General Division**

[8] As noted above, the Claimant first appealed the denial of EI benefits to the Tribunal's General Division in December 2021.

[9] The Tribunal's Appeal Division member ordered the appeal to be returned to the General Division for a redetermination of the issue of whether the Claimant set restrictions that unduly limited his chances of returning to work.

[10] This decision is a result of that hearing.

## **Issue**

[11] Has the Claimant set restrictions that unduly limited his chances of returning to work?

## **Analysis**

[12] The Act says that a claimant has to prove that they are "capable of and available for work" but aren't able to find a suitable job.<sup>3</sup>

[13] Case law sets out three factors for me to consider when deciding this. The Claimant has to prove the following three things:<sup>4</sup>

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<sup>3</sup> See section 18(1)(a) of the EI Act.

<sup>4</sup> 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.

- a) He wants to go back to work as soon as a suitable job is available.
- b) He has made efforts to find a suitable job.
- c) He did not set personal conditions that might have unduly (in other words, overly) limit chances of going back to work.

[14] When considering each of these factors, Tribunal Members look at the Claimant's attitude and conduct.<sup>5</sup>

[15] The Appeal Division has instructed me to determine the third factor only.

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

[16] The Claimant has not set personal conditions that might unduly his chances of going back to work. My reasons for this finding follow.

[17] After the Claimant's appeal was returned to the General Division, his representative sent the Tribunal a submission regarding the Claimant's health. The submission included a 2017 Disability Tax Credit Certificate with a physician certification dated March 24, 2017 attached and a second physician certification dated January 21, 2022.

[18] The Claimant's representative, affirmed to give evidence, explained the Claimant was his dependant (for income tax purposes) in 2017 when the Disability Tax Credit was sought. He said that the Claimant is assessed every 4 to 5 years for the purposes of claiming the Disability Tax Credit. The 2017 assessment was completed by a paediatrician because the Claimant was of an age to be treated by a paediatrician. The Representative testified the 2022 assessment was completed by a new physician. This physician is not a paediatrician. The new physician assessed the Claimant in a number of visits held in October, November and December 2021. The physician then completed the certification form on January 21, 2022.

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<sup>5</sup> 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.

[19] I note that the certificate completed on March 24, 2017 states the Claimant became markedly restricted in performing mental functions necessary for everyday life in 2008. One of the mental functions is adaptive functioning which includes abilities to initiate and respond to social interactions and common, simple interactions.

[20] I note that the certificate completed on January 21, 2022 states the Claimant's diagnoses of "Attention Deficit Hyperactive Disorder and ? Anxiety" impact his ability to perform mental functions. On this certificate adaptive functioning includes initiating and responding to social interactions.

[21] In the 2022 certificate, there is the question "Describe any devices or therapy the patient uses that aid their ability to perform mental functions necessary for everyday life."

[22] The physician wrote: "Needs to be constantly reminded by parents to complete daily routine tasks / chores. Very difficult to perform under pressure + labil emotions, low workload to minimize stress."

[23] The Claimant testified that he worked in a retail store during the COVID-19 pandemic. There were restrictions in place limiting the number of customers in the store. He stopped working at that store. When he returned to work he was transferred to a larger store with the same retailer and the restrictions were lifted. That meant there were no limits on the number of people in the store. He found it difficult to be around so many people.

[24] The Claimant's representative said he noticed a change in the Claimant when he went to work in the larger store with no limits on the number of customers. He said the Claimant's anxiety went very high. He said that the Claimant does not deal with change in his environment very well. The Representative said there was a change in the Claimant's emotions when he was working in the larger store.

[25] To assess the Claimant's availability, I must first define what is considered suitable employment for the Claimant. The criteria to consider when determining what constitutes suitable employment are: (a) the claimant's health and physical capabilities

allow them to commute to the place of work and to perform the work; (b) the hours of work are not incompatible with the claimant's family obligations or religious beliefs; and, (c) the nature of the work is not contrary to the claimant's moral convictions or religious beliefs.<sup>6</sup>

[26] I find that suitable employment for the Claimant constitutes employment that he has the mental abilities to perform as certified by his physician. I note that the physician has certified the Claimant's medical conditions impact his mental abilities, including his ability to initiate and respond to social interactions. I think social interactions would be a part of work performed in a retail store. I accept the evidence of the Claimant's representative, the Claimant experienced increased anxiety and a change in his emotions as the number of customers increased in the retail store.<sup>7</sup> This evidence tells me that Claimant's health does not permit him to perform work in a retail store. As a result, performing work in a retail store does not meet the definition of suitable employment as set out in the EI Regulations.

[27] Further, the Claimant's medical limitations are not personal conditions that unduly limit his return to the workplace. A claimant is not required to be available for jobs unless the jobs are suitable. Any jobs that exceed a claimant's capabilities would not be suitable jobs.<sup>8</sup> As stated above, the Claimant's medical limitations restricts what is suitable employment for him. However, there is no evidence that the Claimant has set personal conditions outside of the ones imposed by his medical conditions.

[28] The Claimant applied for jobs working on a fishing vessel and also working on shipping vessels. He also applied for work as a student assistant. The Claimant's representative said the fishing vessel was owned and operated by a person who was aware of the Claimant's medical issues. He expected that the Claimant would be able

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<sup>6</sup> *EI Regulations*, subsection 9.002

<sup>7</sup> A claimant does not need a medical certificate to prove that he has health issues. Medical evidence can take many forms, it can be oral testimony from the claimant, it can be from a specialist orally or in writing, or it can be from other persons. See *Canada Umpire Benefits (CUB) 52107*. Although I am not bound by CUBs, I am applying these principles to the circumstances of this appeal

<sup>8</sup> I agree with the reasoning of the Tribunal's Appeal Division (AD) in *S.A. v Canada Employment Insurance Commission*, AD-20-390. The AD stated that a claimant who is unwilling to work at any job that would exceed his or her health and physical capabilities is not setting "personal conditions."

to work in that environment because there were few other crew on the boat. The Claimant through his studies would be able to accept and perform work in the lower ranks on shipping vessels. A student assistant position at his place of study would be performed in an environment that he was familiar with. The evidence tells me the Claimant applied for work that was consistent with his education and work experience. In my opinion, this means the Claimant did not set personal conditions that might have unduly limited his chances of going back to work.

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

[29] Yes. Based on the findings on the first two factors and my findings on the third factor, I find that the Claimant has shown that he was capable of and available for work but unable to find a suitable job.<sup>9</sup>

## **Conclusion**

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

[31] This means that the appeal is allowed.

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

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<sup>9</sup> The General Division found the Claimant had shown a desire to return to work and had made enough effort to find a suitable job. See *LD v Canada Employment Insurance Commission*, 2022 SST 989