Citation: *AA v Canada Employment Insurance Commission*, 2023 SST 895

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	A. A.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (538539) dated January 25, 2023 (issued by Service Canada)

Tribunal member:	Elyse Rosen
Type of hearing:	Videoconference
Hearing date:	March 21, 2023
Hearing participant:	Appellant
Decision date:	March 28, 2023
File number:	GE-23-473

Decision

[1] The appeal is allowed in part.

[2] The Appellant wasn't able to work between September 27, 2020, and August 14, 2021, because of illness. She would have been available for work if it hadn't been for the fact that she was ill. So, she isn't disentitled from receiving Employment Insurance (EI) sickness benefits (sickness benefits).

Overview

[3] The Appellant was an aesthetician. She was laid off work in March 2020 because of the Covid-19 pandemic. She applied for benefits. She received EI Emergency Response Benefits (EI-ERB) until September 27, 2020. Then, she was automatically converted to EI regular benefits (regular benefits).[1]

[4] The Appellant received regular benefits until August 14, 2021. Then, the Canada Employment Insurance Commission (Commission) began looking at her availability for work during the period she had received those benefits (benefit period). It decided she had not been available for work during the benefit period. Because of this, it said she was disentitled to (in other words, not allowed to get) the benefits she had been paid. On July 17, 2022, it issued a notice of debt saying that the Appellant has to repay $23,000. This represents the 46 weeks of regular benefits she was paid between September 27, 2020, and August 14, 2021.

[5] The Appellant says a back condition and problems with anxiety (illness) prevented her from working during the benefit period. She had surgery for her back condition on August 18, 2021. She says she wanted to work during the benefit period but was unable to because of her illness.

---

[1] Following the outbreak of Covid-19, an interim order amending the *Employment Insurance Act* (EI Act) established the EI-ERB. When the EI-ERB ended, claims automatically transitioned to regular or sickness benefits.

[6] She claims that in 2020, when salons re-opened, she contacted the Commission to enquire about what to do, because she was too ill to return to work. An agent told her that if her illness prevented her from working, she could stay on EI. She was told to continue filing her bi-weekly reports as she had been.

[7] In October 2021, when she started to feel better, she began an online course to become qualified to work in human resources. Because of her back condition, it would no longer be possible for her to work as an aesthetician. She was also unable to do work that would involve physical labor or standing for long periods. She had no qualifications or training in any other field. So, she went back to school to improve her chances of finding work.

[8] The Appellant has appealed the Commission's decision saying that she is disentitled to the benefits she was paid because she wasn't available for work. She says she is unable to repay the amount the Commission has claimed. She says she blames the Commission for the overpayment because it gave her wrong information.

[9] To decide the appeal, I have to determine whether the Appellant met the requirements in the law regarding availability during the benefit period.

Issue

[10] Was the Appellant capable of and available for work during the benefit period?

[11] If not, was her illness the only thing stopping her from being available for work?

Analysis

[12] For the reasons set out below, I find that the Appellant was not **capable of and available for work**[2] during any of the weeks in her benefit period. But, she was **otherwise available for work**.[3] Her illness was the only thing stopping her from being capable of and available for work.

[2] I explain what "capable of and available for work" means further along in this decision.
[3] I explain what "otherwise available for work" means further along in this decision.

Availability under the law

[13] To be able to get regular benefits you must be capable of and available for work.[4] This is an ongoing requirement.

[14] However, if you are sick or injured and are not capable of and available for work, you could be entitled to sickness benefits instead of regular benefits.

[15] To get sickness benefits you must show that you are ill or injured, and that your illness or injury is the only reason you aren't available for work.[5]

[16] Two different parts of the *Employment Insurance Act* (EI Act) deal with a claimant's availability for work.

[17] One part of the law says that to be considered available for work, a claimant has to prove that they are making **reasonable and customary efforts** to find a suitable job.[6] This part of the law only applies to a claim for regular benefits. It does not apply to a claim for sickness benefits.[7] A claimant who is unavailable for work because they are ill or injured is not required to prove that they are looking for work.

[18] Also, to rely on this part of the law to disentitle a claimant to regular benefits, the Commission has to show that it asked them to provide proof of reasonable and customary job search efforts and that the claimant did not do so.[8]

[19] Since there is no evidence in this case that the Commission asked the Appellant to provide it with proof of a job search, I conclude that the Commission did not, and

---

[4] See section 18(1)(a) of the EI Act.
[5] See section 18(1)(b) of the EI Act and section 40(1) of the *Employment Insurance Regulations* (Regulations).
[6] See section 50(8) of the EI Act.
[7] See *TM v Canada Employment Insurance Commission*, 2021 SST 11.
[8] See *TM v Canada Employment Insurance Commission*, 2021 SST 11 and *LD v Canada Employment Insurance Commission*, 2020 SST 688.

could not, disentitle her from receiving benefits for failing to provide this proof.[9] As a result, I am not going to look at her availability under this part of the law.

[20] Another part of the law says that a claimant has to prove that they are either:

i. **capable of and available for work** but aren't able to find a suitable job,[10] **or**,

ii. ill or injured (in other words, not capable) and **otherwise available** for work[11]

[21] In the first case, you may be entitled to regular benefits. In the second case, you may be entitled to sickness benefits.

[22] Sickness benefits are available for a much shorter period of time than regular benefits.[12] This is because the main purpose of the EI Act is to provide benefits to someone who can work, but is temporarily not working. It is not to provide benefits to someone who is ill or injured and won't be able to work for a long period of time.[13] In the Appellant's case, that maximum is 15 weeks.[14]

[23] Being **capable** of work means being able to perform the functions of your regular work or another suitable job.[15]

---

[9] I also note that the initial claim filed by the Appellant was for sickness benefits (see GD3-3). As a result, the application form does not set out any requirements to conduct a reasonable and customary job search or to keep records of a search. The Commission processed the application as a claim for regular benefits.
[10] See section 18(1)(a) of the EI Act.
[11] See section 18(1)(b) of the EI Act.
[12] See section 12(3)(c) of the EI Act. This section was recently amended, and increased the maximum number of weeks that sickness benefits can be paid from 15 weeks to 26 weeks.
[13] See CUB 12250. There are other laws that provide benefits to those who are unable to work for long periods of time because of an illness or injury.
[14] This is because the amendments to the law increasing the maximum to 26 weeks only came into force (in other words, took effect) after the Appellant's benefit period was established.
[15] See *Condon v Umpire*, A-165-84.

[24] A **suitable job** is one where:[16]

- your health and physical abilities allow you to get to the job and do the work
- the hours are not incompatible with your family obligations or religious beliefs
- the nature of the work is not contrary to your moral convictions or religious beliefs

[25] Being **available** for work means: [17]

a) wanting to go back to work as soon as a suitable job is available

b) showing that you want to go back to work by making efforts to find a suitable job

c) not setting personal conditions that might unduly (in other words, overly) limit your chances of going back to work

[26] Being ill or injured but **otherwise available** for work means that you aren't physically capable of work and that your illness or injury is the only reason why you aren't available for work.[18]

[27] To be entitled to benefits, you have to prove that you are either available for work, or otherwise available for work, on a balance of probabilities. This means that you have to show that it is more likely than not that you are available for work, or that you would have been available for work but for your illness or injury.

[16] See section 9.002 of the Regulations.
[17] See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.
[18] See section 18(1)(b) of the EI Act.

How the law applies to the Appellant's circumstances

[28] The Appellant received, and has been asked to repay, 46 weeks of regular benefits. She received regular benefits despite the fact that her initial claim for benefits was for sickness benefits. And, despite the fact that she claims to have told the Commission that she could not work because of her illness.

[29] It is possible to receive sickness benefits and regular benefits in the same benefit period, regardless of which one was claimed.[19] So, I am going to look at her entitlement to both regular benefits and to sickness benefits.

[30] As explained above, the maximum number of weeks of sickness benefits the Appellant could be entitled to is 15. So, to be able to keep all of the benefits she received, she needs to prove that she was:

- **capable of and available for work** for at least 31 of the 46 weeks, **and/or**
- ill, and therefore not capable of work, but **otherwise available** for work for up to 15 of the 46 weeks she received benefits

[31] As set out below, I conclude that the Appellant was not capable of and available for work during any of the 46 weeks she received benefits. However, she has proven she was ill but otherwise available for work during more than 15 weeks of the benefit period.

[32] Because of this, she is disentitled to regular benefits, but she isn't disentitled to the maximum number of weeks of sickness benefits.

Capable of and available for work

[33] I find that the Appellant was not capable of and available for work during the benefit period.

---

[19] See *Canada (Attorney General) v Caughlin*, A-1168-84.

[34] The Appellant testified that her back would “go out” regularly between February 2020 and September 2021. When it did, she was in excruciating pain and confined to bed for days at a time. Between these episodes, movement was difficult. She could not do any physical work, and could not stand or sit for any length of time.

[35] She said that she also suffered from severe anxiety and depression brought on as a result of being in constant pain and being unable to work or do other activities. This became a vicious cycle, as the anxiety made her back pain worse.

[36] In support of her testimony, she filed various reports from doctors’ visits she made during the benefit period.[20] These reports confirm that she was incapacitated and in pain for most of the benefit period. They also confirm that she was being medicated for anxiety and depression. She was on a treatment plan that required regular chiropractic and massage sessions, as well as visits to a pain clinic.

[37] On August 18, 2021, the Appellant had surgery to help with her back condition.[21] She was in recovery for several weeks following the surgery. Only after recovery from surgery did she begin to see an improvement in her back condition and her level of anxiety and depression.

[38] On August 10, 2022, her doctor issued a medical certificate confirming that the Appellant was unable to work between September 27, 2020, and September 11, 2021, for medical reasons.[22] The certificate confirms that she was under medical care throughout that period and that she was following the prescribed course of treatment.

[39] According to notes the Commission took during conversations with the Appellant held on September 15 and September 22, 2021, she said that her back pain came on and off during the benefit period and that it didn’t hinder her ability to work.[23] This

[20] See GD3-28 to GD3-35.
[21] See GD3-41.
[22] See GD3-49. This certificate meets the requirements of section 40(1) of the Regulations.
[23] See GD3-17.

statement is inconsistent with the Appellant's testimony at the hearing and with the medical evidence she has filed.

[40] I suspect the Appellant said what she said to the Commission because she was told she was under investigation, and wanted to give what she thought was the right answer to be able to keep her benefits. I do not give the statements made to the Commission any weight, given that all of the other evidence points to the fact that she was not physically able to work at any point during the benefit period.

[41] From the evidence, I am satisfied that the Appellant was not capable of working during the benefit period.

[42] Having found that she was not capable of working, I do not need to consider whether she was available, as she can't meet the requirement of being capable of **and** available for work.

[43] Because she can't meet the requirement of being capable of and available for work, she is disentitled from getting regular benefits.

[44] Since I have decided that the Appellant was too ill to work, I will now consider if she can prove that she would have been available for work had she not been ill.

Otherwise available for work

[45] I find that the Appellant has proven she was otherwise available for work during the benefit period.

[46] Earlier in my analysis, I explained that there are three factors that must be considered when determining a claimant's availability for work.[24]

[24] For ease of reference, I am repeating them here. They are:
i. wanting to go back to work as soon as a suitable job is available
ii. showing that you want to go back to work by making efforts to find a suitable job
iii. not setting personal conditions that might unduly (in other words, overly) limit your chances of going back to work

[47] The same three factors apply when I consider whether the Appellant was otherwise available for work. However, she doesn't have to show that she was actually available. She just has to show that she would have been able to meet the requirements of all three factors had she been well. In other words, she has to show that her illness was the only thing stopping her from meeting the requirements of each factor.

[48] When I consider each of these factors, I have to look at the Appellant's attitude and conduct.[25]

– **Wanting to go back to work**

[49] The Appellant has shown that she wanted to go back to work as soon as a suitable job was available.

[50] The Appellant said that she absolutely wanted to work during the entire period she was off work, including the period from September 27, 2020, to August 14, 2021.

[51] Several of the things she said during the hearing make that statement believable. The Appellant testified that:

- she has been a workhorse all of her life
- working and having a job is, and has always been, an important part of who she is
- not being able to work caused her to become depressed
- she wrote that she was ready, willing, and able to work on her bi-weekly claim reports because she truly wanted to work as soon as her illness improved
- she missed being at work

[25] 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.

- she racked her brain to think of something she could do with her skillset and experience in spite of the physical limitations caused by her back condition

[52] I have no evidence that indicates that the Appellant did not want to go back to work. Her testimony on this issue was credible and consistent with her previous statements to the Commission.

[53] Considering the evidence, I am satisfied that the Appellant wanted to go back to work. However, there were no suitable jobs available to her in light of her health and physical capabilities.

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

[54] The Appellant didn't make any effort to find a job from September 27, 2020, to August 14, 2021. This is understandable in the circumstances.

[55] The Appellant testified that she was in terrible pain on an almost constant basis from February 2020, when her back went out for the first time, until October 2021. At that point she had recovered from surgery meant to relieve her back pain. Although she began to feel somewhat better after her surgery, she still had to limit her activity to ensure her back would not go out again. Even sitting at a computer continued to be difficult and painful. When she went back to school, she opted to take online rather than in person courses. This is because it would have been too difficult for her to get to class and sit all day.

[56] She also suffered from terrible anxiety and depression during the benefit period. She says she went through periods in that timeframe where she was so overwhelmed, she felt she could not function at all.

[57] During the hearing she confirmed that she would have looked for a job if there was any kind of work she could do in her condition. I have no evidence which contradicts this.

[58] I am therefore satisfied that but for her illness, she would have been looking for a job.

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

[59] I find that the Appellant would not have set personal conditions that would have unduly limited her chances of going back to work had she not been ill.

[60] She did testify that the only thing she felt qualified to do that did not involve physical labor or standing was a call center type job. She said this type of work does not pay enough to cover her expenses and provides no opportunities for advancement. This is why she decided to go back to school. She wanted to become qualified for a well-paying job where there could be opportunities to advance.

[61] These remarks were made in the context of her explaining her decision to go back to school in October 2021, a few months after the benefit period ended. At that point she knew that she could not return to her work as an aesthetician because of her back condition. She needed to find work that earned her enough money to support herself and that did not require physical labor or prolonged standing.

[62] I do not conclude from these remarks that she would not have been willing to take a call center job if she were in good health and had only been temporarily laid off from her job as an aesthetician because of the pandemic. Her evidence is that had it not been for her illness, she would have returned to her work as an aesthetician once salons were allowed to reopen.

[63] I find that the Appellant would not have set personal conditions that could unduly limit her chances of finding work. It is clear to me that her illness was the only thing that limited her chances of going back to work during the benefit period.

[64] Based on my findings on the three factors, I find that the Appellant has shown that she was otherwise available for work. She would have met the requirements of all three factors if she hadn’t been ill.

[65] The Appellant has proven that she was unable to work because she was ill during the entire benefit period and that she was otherwise available for work during that period. So, I find that she isn't disentitled from receiving the maximum number of weeks of sickness benefits.

[66] I trust that the Commission will act quickly to make any changes to the notice of debt that may be needed as a result of my decision about her entitlement to benefits.

Misleading information obtained from the Commission

[67] The Appellant says any overpayment she may have received results from misleading information she obtained from the Commission. She says she called the Commission when salons re-opened and told the agent she spoke with that she could not return to work because she was ill. She was told that she should remain on EI and continue making her bi-weekly reports.

[68] She says that if she had received correct information, and if her claim had been processed as a claim for sickness benefits rather than as a claim for regular benefits, there would have been no overpayment.

[69] Based on her testimony, I agree that the overpayment results from the Commission's mistake. However, even when the Commission gives a claimant wrong information, the claimant is not entitled to more than what the law allows for.[26] So, even if the Commission made a mistake, the Appellant is still disentitled from receiving benefits she did not qualify for.

Write-off of the remaining debt

[70] The Appellant expressed concerns about her ability to repay the amount claimed in the notice of debt. Each time the subject of the debt came up in her testimony, she had to hold back tears.

---

[26] *Granger v Canada (Attorney General),* A-685-85.

[71] As a result of the present decision the amount of the debt may be reduced. However, there will still be a large balance to repay, and this will surely cause the Appellant hardship. She has been without any meaningful income for a long time. She was only able to work a few hours a week while in school, and has only recently gotten a full time job.

[72] I wish to advise the Appellant that she can contact the Commission to request a write-off of the debt.[27] Unfortunately, only the Commission is able to write off a debt owed to it. I have no authority to do so.

[73] I trust that if the Appellant asks for a write-off, the Commission will consider the fact that the notice of debt:

- results from a retrospective (in other words, after the fact) review
- was issued almost two years after the Appellant began receiving the benefits she has been asked to repay
- reflects an overpayment that may have resulted from the failure to process the Appellant's claim as a claim for sickness benefits

Conclusion

[74] I find that the Appellant has shown that had it not been for her illness, she would have been available for work as of September 27, 2020. Therefore, her entitlement to 15 weeks of sickness benefits as of that date must be established.

[75] This means the appeal is allowed in part.

Elyse Rosen

Member, General Division – Employment Insurance Section

[27] She can do this by going to her local Service Canada office. She can take this decision with her.