



Citation: *Canada Employment Insurance Commission v KM*, 2023 SST 1130

## Social Security Tribunal of Canada Appeal Division

# Decision

**Appellant:** Canada Employment Insurance Commission  
**Representative:** Isabelle Thiffault

**Respondent:** K. M.

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**Decision under appeal:** General Division decision dated March 9, 2023  
(GE-22-2295)

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**Tribunal member:** Janet Lew

**Type of hearing:** Teleconference

**Hearing date:** August 11, 2023

**Hearing participants:** Appellant's representative  
Respondent

**Decision date:** August 18, 2023

**File number:** AD-23-327

## **Decision**

[1] The appeal is allowed. The Respondent, K. M. (Claimant), has not proven that she was available for work from February 7 to 25, 2022. She is not entitled to be paid Employment Insurance benefits for this time frame.

## **Overview**

[2] The Appellant, Canada Employment Insurance Commission (Commission), is appealing the General Division decision. The General Division found that the Commission had failed to prove that the Claimant lost her job because of misconduct. It also found that she was available for work from February 7, 2022 to May 16, 2022. This meant that she was entitled to receive Employment Insurance benefits.

[3] The Commission argues that the General Division overlooked some of the evidence when it examined whether the Claimant was available for work from February 7, 2022 to February 25, 2022. The Commission asks me to give the decision it says the General Division should have made. It says the General Division should have determined that the Claimant was unavailable for work and therefore not entitled to be paid Employment Insurance benefits from February 7, 2022 to February 25, 2022.

[4] The Claimant argues that she should receive Employment Insurance benefits for this time frame. Her employer terminated her, leaving her in a vulnerable position, without any financial support. She notes that she has diligently contributed to the Employment Insurance fund. She says that Employment Insurance serves as an important safety net to protect workers and to ensure their well-being.

## **Issues**

[5] The Commission is not contesting the misconduct issue nor the Claimant's availability from February 26, 2022 to May 26, 2022. To be clear, this appeal is only about the Claimant's availability from February 7, 2022 to February 25, 2022.

[6] The issues in this appeal are as follows:

- a) Did the General Division overlook any of the evidence when it considered whether the Claimant was available for work?
- b) If so, how should the error be fixed?

## **Analysis**

[7] The Appeal Division may intervene in General Division decisions if the General Division made any jurisdictional, procedural, legal, or certain types of factual errors.<sup>1</sup>

[8] For factual errors, the General Division had to have based its decision on that factual error, and it had to have made that finding in a perverse or capricious manner or without regard for the material before it.<sup>2</sup>

### **Did the General Division misapprehend or overlook any of the evidence?**

[9] The Commission argues that the General Division overlooked some of the evidence that showed that the Claimant was unavailable for work from February 7, 2022 to February 25, 2022. The Commission argues that the Claimant was unavailable because she was medically unfit to work during this time. The Claimant did not address any of this evidence.

#### **– The General Division decision**

[10] The General Division wrote:

[96] ... [The Claimant's] return to work was to occur on January 25, 2022. The [Claimant's] doctor placed her off work for an additional week and indicated she would be able to return to work on the graduated schedule starting February 1, 2022.

[97] The [Claimant] testified when she was told her employment was terminated she experienced a setback in her mental health for a couple weeks. She said beginning on February 26, 2022 her doctor cleared her for part-time work two to

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<sup>1</sup> Section 58(1) of the *Department of Employment and Social Development Act* (DESDA).

<sup>2</sup> Section 58(1)(c) of the DESDA.

three days a week for one to three months. As a result, I find suitable employment for the [Claimant] to be employment that she could perform for four hours a day three days a week from February 7 to February 26, 2022 and two to three days a week from February 26 to May 26, 2022 (the three months as recommended by her doctor).

– **Evidence of the Claimant’s availability**

[11] The Commission argues that the General Division overlooked the following pieces of evidence:

- Question 10 of the doctor’s medical form dated January 5, 2022. The doctor advised that the Claimant was fit for a return to work on a graduated return to work plan starting January 25, 2022.<sup>3</sup>
- Doctor’s sick note dated January 26, 2022. The doctor advised that he had reassessed the Claimant that day. He found that she was unfit to work that week. She was fit to return to work on February 1, 2022 on a graduated schedule.<sup>4</sup>
- Doctor’s sick note dated February 25, 2022. The doctor wrote “Remains depressed and unfit [sic] job search for now 1-3/12.”<sup>5</sup>

– **Other evidence of the Claimant’s availability**

[12] At the General Division hearing, the Claimant testified that her former employer dismissed her from her employment. She did not immediately see her doctor. The Claimant testified that, after her dismissal, she did not have “the power in [herself] to continue a job search or anything.”<sup>6</sup>

[13] The Claimant saw her doctor two weeks later, on February 25, 2022. She described how she was feeling. She testified that she was really depressed and still

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<sup>3</sup> Doctor’s medical form dated January 5, 2022, at GD 10-111.

<sup>4</sup> Doctors sick note dated January 26, 2022, at GD 10-113.

<sup>5</sup> Doctor’s sick note dated February 25, 2022, at GD 10-114.

<sup>6</sup> At approximately 1:42:50 to 1:43:14 of the audio recording of the General Division hearing.

struggling. Her doctor provided a sick note that said she was unfit to look for work for one to three months.<sup>7</sup>

[14] The Claimant further testified that, despite her doctor's note, she was certain that she began searching for work in March 2022.<sup>8</sup>

– **The General Division misapprehended and overlooked the evidence**

[15] The General Division found that the Claimant had testified that her doctor cleared her for part-time work two to three days a week for one to three months, beginning on February 26, 2022.

[16] I do not see any evidence of this.

[17] The General Division may have relied on the medical form of January 5, 2022 and sick note dated January 26, 2022, declaring that the Claimant was fit for a progressive return to work on February 1, 2022. In the medical form, the doctor agreed that a graduated return to work schedule of four hours a day, three days a week was appropriate.<sup>9</sup>

[18] However, this evidence was dated. The evidence also shows that there was an important change in the Claimant's circumstances after January 2022. The Claimant's former employer dismissed her from her employment on February 7, 2022. The dismissal caused a setback to the Claimant's mental health.<sup>10</sup> It triggered a recurrence or exacerbation of the very symptoms that had caused the Claimant to miss work in late 2021 and into January 2022.

[19] The Claimant saw her doctor on February 25, 2022. The Claimant's doctor was of the opinion that the Claimant remained depressed and that she was unfit to look for work for the next one to three months. The Claimant confirmed that the doctor verbally

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<sup>7</sup> At approximately 1:37:53 to 1:40:34 and 1:41:48 to 1:42:30 of the audio recording of the General Division hearing.

<sup>8</sup> At approximately 1:39:24 of the audio recording of the General Division hearing.

<sup>9</sup> Doctor's medical form dated January 5, 2022, at GD 10-111.

<sup>10</sup> Termination notice dated February 7, 2022, at GD 3-73.

told her this. She explained that her doctor could not be certain when she would be fit to start looking for work, so gave a time frame of one to three months.

[20] It is clear that the General Division did not understand the Claimant's oral evidence on this point. Even so, the documentary evidence did not support the General Division's findings.

[21] The General Division seemed to have overlooked the fact that there was a subsequent medical note dated February 25, 2022. It was aware of the circumstances that gave rise to this visit to the Claimant's doctor and the February 25, 2022 medical note. However, the General Division failed to appreciate the impact of the dismissal on the Claimant.

[22] If the General Division did not overlook the medical note of February 25, 2022, it misinterpreted what the note said. The note states that the Claimant was not fit to look for work for one to three months, but the General Division understood this to mean the Claimant could work part-time for one to three months.

### **Fixing the error**

[23] The Commission asks me to give the decision that the General Division should have given. The Commission says the evidence points to only one conclusion: that the Claimant was not available for work from February 7, 2022 to February 25, 2022.

[24] The Claimant asks me to dismiss the appeal. She argues that it would be unfair to deprive her of the financial assistance that she needs. She notes that she has contributed to the Employment Insurance fund. She says that I should also determine whether she was entitled to any additional weeks of Employment Insurance sickness. She questions whether she can access other benefits.

[25] The alternative to giving my own decision is to return the matter to the General Division. But all the evidence is before me to make my own determination. And returning the matter would only delay matters. There is no justification to return the matter, so I will give the decision that the General Division should have given.

[26] The evidence shows that the Claimant experienced an exacerbation or recurrence of symptoms after her employer dismissed her on February 7, 2022. She testified that, after the dismissal, she could not continue any kind of job search. She testified that she was really depressed and still struggling.

[27] The Claimant saw her doctor on February 25, 2022 and described her symptoms. The doctor found she was unfit to look for work for one to three months. Despite this advice, the Claimant managed to resume looking for work in March 2022. The evidence on file suggests that the Claimant began applying for work in mid-March 2022. This is consistent with her evidence that she began looking for work that month.

[28] Based on both the oral and documentary evidence, it is clear that the Claimant was medically unfit to look for work from February 7, 2022. She was unable to make reasonable and customary efforts to find suitable employment. As she was unfit to look for work, she was unavailable for work from February 7, 2022 to at least February 25, 2022, when the Claimant saw her doctor and reported that she was still struggling.

[29] Given the doctor's medical note of February 25, 2022, I might have considered whether the Claimant was available for work after February 25, 2022, but the Commission accepts that the Claimant was available for work from February 26, 2022. Any question of the Claimant's availability after February 25, 2022, did not form part of the appeal before me.

[30] I accept that, due to medical reasons, the Claimant was unavailable for work from February 7, 2022 to February 25, 2022.

[31] The Claimant argues that she should receive Employment Insurance benefits because she contributed to the Employment Insurance fund. However, contributing to the fund alone does not guarantee qualification for or entitlement to benefits. A claimant has to meet the qualifying requirements and not be disentitled nor disqualified from receiving benefits.

[32] A claimant has to prove that they were capable of and available for work and unable to obtain suitable employment. Otherwise, they are not entitled to be paid benefits.<sup>11</sup> That is the situation facing the Claimant.

[33] The Claimant has two enquiries:

- i. Whether she is entitled to any additional weeks of Employment Insurance sickness benefits – as the General Division noted, the Claimant already received the maximum 15 weeks of sickness benefits from October 31, 2021 to January 15, 2022.<sup>12</sup> No further sickness benefits are available to the Claimant on this claim.
- ii. Whether she can access other benefits for February 7, 2022 to February 25, 2022 – I am unaware of other benefits under the *Employment Insurance Act* that might be available. The Commission confirms this as well.

## Conclusion

[34] The Commission's appeal is allowed. The Claimant has not proven that she was available for work from February 7, 2022 to February 25, 2022 for the purposes of paragraph 18(1)(a) of the *Employment Insurance Act*.

Janet Lew  
Member, Appeal Division

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<sup>11</sup> *Employment Insurance Act*, section 18.

<sup>12</sup>The law has since changed so a claimant who makes a claim on or after December 18, 2022 may be entitled to upwards of 26 weeks of sickness benefits.