[TRANSLATION]

Citation: *MM v Canada Employment Insurance Commission*, 2023 SST 1656

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	M. M.
Representative:	Pierre Lachance
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (578420) dated April 20, 2023 (issued by Service Canada)

Tribunal member:	Josée Langlois
Type of hearing:	In person
Hearing date:	October 10, 2023
Hearing participants:	Appellant Appellant's representative
Decision date:	October 11, 2023
File number:	GE-23-1299

Decision

[1] The appeal is allowed.

[2] I find that the Appellant has shown that she would have been available for work from October 23, 2022, if she hadn't been sick.

Overview

[3] On October 28, 2022, the Appellant applied for sickness benefits.

[4] On April 20, 2023, the Commission decided that the Appellant wasn't available for work from October 23, 2022, because she would not have been available for work if she hadn't been sick. The Commission said that the Appellant worked part-time.

[5] The Appellant disagrees with this decision. She says that, if she hadn't been sick, she would have been available to work the same number of hours she normally worked with her two employers.

[6] I have to determine whether, even though she was unable to work because of an illness, the Appellant would otherwise have been available for work from October 23, 2022.

Issue

[7] If she hadn't been sick, would the Appellant have been available for work from October 23, 2022?

Analysis

[8] A claimant isn't entitled to receive benefits for a working day in a benefit period for which they fail to prove that on that day they were unable to work because of a

prescribed illness, injury, or quarantine and that they would otherwise be available for work.[1]

[9] A recent Federal Court of Appeal decision found that allowing claimants who work part-time to collect benefits is consistent with the Act and Regulations which require workers **to pay premiums for Employment Insurance from their part-time wages**.[2] Although the decision deals specifically with a student's availability during the exceptional circumstances of the COVID-19 pandemic, that statement applies to part-time workers.

[10] The undisputed evidence on file shows that the Appellant was off work from September 22, 2022. A medical certificate dated October 24, 2023 [*sic*], says that she was unable to work for a period of six to eight weeks.[3]

[11] The Commission says that the Appellant has failed to show that she would have worked or would have been available for work if she hadn't been sick, because she doesn't meet the hours of work factor, which is a fixed factor for determining availability.

[12] The Commission argues that the Appellant hasn't proven her availability because she voluntarily reduced her hours and is restricting her hours to work part-time. The Commission says that the Appellant is in pre-retirement.

[13] According to the Appellant, she started working 25.5 hours per week for the employer X in September 2021. She says that, at that time, she took advantage of a pre-retirement agreement, as permitted by her collective agreement. Before September 2021, she worked 33 hours per week and had a regular, full-time position with her employer.

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[1] See section 18(1)(b) of the *Employment Insurance Act* (Act).
[2] See *Page v Canada (Attorney General)*, 2023 FCA 169 at para 71.
[3] The Appellant had been off work since September 22, 2022, and she applied for benefits on October 28, 2022. A benefit period was established effective October 24, 2022.

[14] At the hearing, she explained that, in preparation for her retirement, she wanted to gradually leave the child care sector. She accepted another job, with X.

[15] The Appellant says that she works at X every Monday. So, she works almost the same number of hours per week she worked before entering into her pre-retirement agreement with the employer X. According to her, she needed the extra income to [translation] “make ends meet.”

[16] The Appellant argues that she would have worked the number of hours offered by her two employers if she hadn’t been sick. She also says that she went back to work at both places as soon as her period of illness ended, on December 26, 2022.

[17] It is true that a claimant isn’t entitled to receive benefits for a working day in a benefit period for which they fail to prove that on that day they were unable to work because of a prescribed illness, injury, or quarantine and that they would otherwise be available for work.[4]

[18] For the purposes of this analysis, I don’t accept one of the decisions submitted by the representative, since the *Faucher* factors don’t need to be applied when it comes to availability during a period [of] illness. On this point, the Appellant was sick, and she doesn’t have to prove that she was looking for a job.[5]

[19] So, I partially agree with the Commission when it says that, if she hadn’t been sick, the Appellant would not have been available for work [translation] “each working day of her benefit period” because she had been in pre-retirement since September 2021 and had asked her employer to reduce her hours. She worked between 24 and 27.5 hours per week at X after entering into a pre-retirement agreement. It is true that

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[4] See section 18(1)(b) of the Act.
[5] See GD-16 [*sic*] *et seq.*: General Division decision, *GG c Canada Employment Insurance Commission*, file GE-19-2580. In that case, the appeal was allowed. The appellant wanted sickness benefits and had a pre-retirement agreement. However, I don’t accept the representatives’ arguments about applying *Faucher* in analyzing the file.

she could have continued working 33 hours per week, but she chose to reduce her hours at that place.

[20] However, given the recent Federal Court of Appeal decision, I find that the Appellant would have been available for work if she hadn't been sick. She would have been available for work under the same circumstances as before she was sick.

[21] As the Appellant's representative argued at the hearing, the Appellant would have continued working 33 hours per week if she hadn't been sick.

[22] In addition, the Appellant's case is unique. Although she reduced her schedule by one day per week with X from September 2021 to take advantage of pre-retirement, she made up for the number of hours worked. On this point, she worked for X on a casual basis every Monday.

[23] The Appellant explained that she wanted to gradually leave the child care sector to find extra work for her retirement.

[24] Particularly in her case, her entering into a pre-retirement agreement with X didn't change her work schedule.

[25] In addition, the Appellant's representative argued that, if she were dismissed, the Appellant would look for full-time employment to work the same number of hours she was working.

[26] This means that the Appellant would have been available for work [translation] "each working day of her benefit period."

[27] It is true that neither the Act nor the Regulations set out the number of hours per week that amounts to full-time employment. Especially given that, according to the Court, a claimant who works part-time may be entitled to benefits and that working part-time doesn't automatically disentitle them from receiving benefits.

[28] In other words, a claimant who meets the conditions to be entitled to benefits and has enough insurable hours of employment to get benefits can receive benefits even if they were employed part-time.[6]

[29] In my view, that is the case here. If the Appellant hadn't been sick, she would have continued working 33 hours per week with her two employers. If it hadn't been for her illness, she would have been available for work.

[30] For the above reasons, I find that the Appellant has shown that, even though she was unable to work while she was sick, she would otherwise have been available for work from October 23, 2022.

Conclusion

[31] The appeal is allowed.

Josée Langlois
Member, General Division – Employment Insurance Section

[6] See *Page v Canada (Attorney General)*, 2023 FCA 169.