



Citation: *NH v Canada Employment Insurance Commission*, 2023 SST 1363

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: N. H.
Representative: J. Z.

Respondent: Canada Employment Insurance Commission
Representative: Daniel McRoberts

Decision under appeal: General Division decision dated March 17, 2023
(GE-22-3797)

Tribunal member: Melanie Petrunia

Type of hearing: Teleconference
Hearing date: September 13, 2023
Hearing participants: Appellant
Appellant's representative
Respondent's representative

Decision date: October 9, 2023
File number: AD-23-372

Decision

[1] The appeal is allowed. The General Division made an error of law in its application of the legal test for availability. I have made the decision that the General Division should have made. The Claimant has proven that he was otherwise available for work from May 9, 2022, were it not for his illness.

Overview

[2] The Applicant, N. H. (Claimant), took a medical leave from his work and applied for employment insurance (EI) sickness benefits. He had previously received EI family caregiver benefits and the Canada Recovery Caregiving Benefit. The Claimant was providing care for his wife.

[3] The Respondent, the Canada Employment Insurance Commission (Commission), decided that the Claimant would not have been available for work if he had not been sick. It imposed an indefinite disentitlement starting May 9, 2022.

[4] The Claimant appealed the Commission's decision to the Tribunal's General Division. The General Division found that the Claimant would not have been available for work, were it not for his illness, and dismissed his appeal.

[5] The Claimant is now appealing the General Division decision to the Appeal Division. He argues that the General Division made errors of law and based its decision on important factual errors. The Claimant argues that he has shown that he was available for work were it not for his illness. He says that the Commission and the General Division have focused on his wife's illness, rather than his.

[6] The General Division erred in law by misapplying the legal test for availability. I have decided to give the decision that the General Division should have given. The Claimant has proven his availability for work from May 9, 2022, were it not for his illness.

Issues

[7] The issues in this appeal are:

- a) Is there an arguable case that the General Division made an error of law in its application of the legal test for availability?
- b) Is there an arguable case that the General Division based its decision on important factual errors?

Analysis

[8] I can intervene in this case only if the General Division made a relevant error. So, I have to consider whether the General Division:¹

- failed to provide a fair process;
- failed to decide an issue that it should have decided, or decided an issue that it should not have decided;
- misinterpreted or misapplied the law; or
- based its decision on an important mistake about the facts of the case.

Background

[9] The Claimant established a claim for sickness benefits effective May 28, 2022. He provided a medical certificate that said he was unable to work from May 7, 2022 to June 30, 2022 due to stress. The stress was related to the care that he had been providing to his wife.²

¹ The relevant errors, formally known as “grounds of appeal,” are listed under section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).

² GD3-13.

[10] The Commission decided that the Claimant was not entitled to benefits because he was providing care for his wife and did not show that he would have been otherwise available for work, were it not for his illness.

– **The General Division decision**

[11] In its decision, the General Division found that the Claimant was not available for work, were it not for his illness. It considered the test for determining availability for work. It found that the Claimant did not make efforts to find a suitable job, despite also finding that the Claimant was on leave and had a suitable job to return to once he is well.³

[12] The General Division relied on caselaw and found that the Claimant cannot wait to be called into work but must be seeking employment in order to be entitled to benefits.⁴ It found that he did not meet this test because he did not make further efforts to find work, in addition to having a suitable job available.⁵

[13] The General Division also found that the Claimant did not have a desire to return to work and set personal conditions which unduly limited his chances of returning to work.

[14] The Claimant had been providing care for his wife, who was seriously ill. The General Division relied on the Claimant's testimony and found that he was the only one caring for his wife.⁶ It noted that the Claimant testified that he could have had someone else care for her but found that this did not happen and the Claimant was the only one providing care.⁷

³ General Division decision at paras 22 to 26.

⁴ General Division decision at para 25.

⁵ General Division decision at para 26.

⁶ General Division decision at para 36.

⁷ General Division decision at para 38.

[15] The Claimant's daughter testified as a witness at the hearing and stated that she would have been available to care for her mother if the Claimant had been well enough to return to work.⁸

The General Division made an error of law

[16] To be considered available for work, a claimant must show that they are capable of, and available for work and unable to obtain suitable employment.⁹

[17] Availability must be determined by analyzing three factors:

- (1) the desire to return to the labour market as soon as a suitable job is offered,
- (2) the expression of that desire through efforts to find a suitable job, and
- (3) not setting personal conditions that might unduly limit the chances of returning to the labour market.¹⁰

[18] In addition, availability is determined for each working day in a benefit period for which the claimant can prove that, on that day, they were capable of and available for work and unable to find a suitable job.¹¹

[19] However, claimants who apply for sickness benefits are not entitled to benefits for any period in which they would not otherwise be available for work, were it not for their illness. These claimants are not expected to show that they are actually available, but rather that the illness is the only reason they are not available.

[20] The General Division made an error of law by expecting the Claimant to prove that he was looking for a job during a period when he was not physically capable of work. It found that the Claimant had a suitable job available to him to return to and did not explain why he should also be looking for work.

⁸ Recording of General Division hearing at approx. 28:00.

⁹ See section 18(1)(a) of the *Employment Insurance Act*.

¹⁰ *Faucher v Canada Employment and Immigration Commission*, A-56-96

¹¹ *Canada (Attorney General) v Cloutier*, 2005 FCA 73

[21] The Commission agrees that the General Division erred in its application of the test for availability by expecting the Claimant to show that he was making efforts to find a suitable job.¹² The General Division relied on a Federal Court decision that was not applicable because the claimant in that case was seeking regular benefits while on vacation from his regular employer.¹³

[22] Having found that the General Division made an error, I do not have to address the balance of the Claimant's arguments.

Fixing the error

[23] To fix the General Division's error, I can give the decision that the General Division should have given or I can refer this matter back to the General Division for reconsideration.¹⁴

[24] Both parties say that I should make the decision that the General Division should have made. I agree. The Claimant had an opportunity to fully present his case before the General Division and the record is complete. I find that this is an appropriate case for me to make the decision that the General Division should have made.

The Claimant has shown that he was otherwise available for work

[25] The Claimant was unable to work from May 9, 2022, due to stress. The medical certificate he received noted that the stress was related to the care that he had been providing for his wife during her illness.

[26] The Claimant explained at the General Division hearing in this matter that he had a desire to return to work once he was well enough. It is clear from the record that the Claimant had a suitable job to return to when he was well, and he did not need to make efforts to find a suitable job.

¹² AD4-4

¹³ AD4-5

¹⁴ Section 59(1) of the DESD Act explains the remedies available to the Appeal Division.

[27] In finding that the Claimant was not entitled to benefits, the Commission relied on statements from the Claimant that he was providing care for his wife while he was off work due to his illness.

[28] The General Division asked the Claimant a number of times during the hearing if he would have been able to return to work if not for his illness and he said that he would.¹⁵ The Claimant explained at the hearing before the General Division that he could have received help from his sister and his daughter if he was well enough to return to work.¹⁶

[29] The Claimant's daughter also testified at the hearing and confirmed that she could have provided assistance with her mother's care if the Claimant was well enough to return to work.¹⁷ The Claimant also said that he would be too worried to return to work if someone else was caring for his wife.¹⁸

[30] The Claimant's illness was stress and was related to the care he had been providing for his wife. I find that the Claimant's statement regarding his worry simply confirms that he was not well enough to return to work at that time, due to stress.

[31] The Claimant explained that the care he was providing for his wife did not interfere with his ability to return to work once he was well.¹⁹ He could find other assistance for her if he was working but did not want to have someone else in the home caring for her while he was also ill.²⁰

[32] I find that the Claimant has shown that he did not impose any personal conditions that would have prevented him from returning to work if he was well. He was not able to work, due to his stress-related illness, and he has shown that he was otherwise available for work during this time.

¹⁵ Recording of General Division hearing at 11:30, 14:15 and 19:30.

¹⁶ Recording of General Division hearing at 19:45.

¹⁷ Recording of General Division hearing starting at 26:00.

¹⁸ Recording of General Division hearing at 21:00.

¹⁹ Recording of General Division hearing at 18:25.

²⁰ Recording of General Division hearing at 21:00.

Conclusion

[33] The appeal is allowed. The Claimant was available for work as of May 9, 2022.

Melanie Petrunia
Member, Appeal Division