



Citation: *NH v Canada Employment Insurance Commission*, 2023 SST 1364

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

Decision

Appellant: N. H.
Representative: B. S.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (545986) dated November 2,
2022 (issued by Service Canada)

Tribunal member: Greg Skelly

Type of hearing: Teleconference

Hearing date: March 16, 2023

Hearing participants: Appellant
Appellant's representative
Witness

Decision date: March 17, 2023

File number: GE-22-3797

Decision

[1] The appeal is dismissed. The Tribunal disagrees with the Appellant.

[2] The Appellant wasn't able to work because of his illness. But the Appellant would not have been available for work anyway, even if he hadn't been sick because he was caring for his wife, who has been seriously ill.

[3] This means that the Appellant can't receive Employment Insurance (EI) sickness benefits.

Overview

[4] The Appellant wasn't able to work because of his illness. To be able to receive EI sickness benefits, the Appellant must "otherwise be available for work."¹ In other words, his illness has to be the only reason why he wasn't available for work.

[5] The Canada Employment Insurance Commission (Commission) says that the Appellant would not have been available for work anyway because the Appellant was looking after his wife, who has been ill, on a full-time basis.

[6] The Appellant disagrees and says that he was sick from May 7, 2022, to June 30, 2022. He says that he had satisfied the Commission by producing a medical certificate that it accepted. He said that he would have been available for work in August 2022 when another family member could have taken over caregiver duties for his wife.

Issue

[7] The Appellant wasn't able to work because of his illness. But, was his illness the only thing stopping him from being available for work?

Analysis

[8] It is clear that, if you are sick or injured, you aren't available for work. The law for EI sickness benefits reflects this. However, the law says that, if you are asking for

¹ Section 18(1)(b) of the *Employment Insurance Act* (EI Act) sets out this rule and uses this wording.

sickness benefits, you must **otherwise** be available for work. This means that the Appellant has to prove that his illness is the only reason why he wasn't available for work.²

[9] The Appellant has to prove this on a balance of probabilities. This means that he has to show that it is more likely than not that he would have been available for work, if it hadn't been for his illness.

Available for work

[10] Case law sets out three factors for me to consider when deciding whether an Appellant is available for work. An Appellant has to prove the following three things:³

- a) They want to go back to work as soon as a suitable job is available.
- b) They are making efforts to find a suitable job.
- c) They haven't set personal conditions that might unduly (in other words, overly) limit their chances of going back to work.

[11] The Appellant doesn't have to show that he is actually available. He has to show that he would have been able to meet the requirements of all three factors, if he hadn't been sick. In other words, the Appellant has to show that his illness was the only thing stopping him from meeting the requirements of each factor.

– Wanting to go back to work

[12] The Appellant hasn't shown that he would have wanted to go back to work as soon as a suitable job was available.

² See section 18(1)(b) of the EI Act.

³ 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.

[13] The Appellant received EI family caregiver benefits from June 2021 to October 2021. He then received Canada Recovery Caregiving Benefit from October 2021 to April 2022.⁴

[14] He then applied for EI sickness benefits and produced a medical certificate that was acceptable to the Commission.⁵ The period of illness was from May 7, 2022, to June 30, 2022.

[15] During this period, he was on an unpaid leave of absence with a job available when he was ready to go back to work according to his employer.⁶

[16] The Appellant wasn't in contact with his employer.⁷

[17] The Appellant told the Commission that he wasn't able to work from May 7, 2022, to June 30, 2022, as he had to take care of his wife, who has been seriously ill, full-time. He said that he had to take care of her until mid-August 2022 when another family member was available to take care of her.⁸

[18] The Appellant told the Commission several times that he could not work from May 7, 2022, to June 30, 2022. He said it was because of his own illness **plus** having to take care of his wife on a full-time basis.⁹

[19] In testimony the Appellant said that he was available to go back to work from May 7, 2022, to June 30, 2022, if he hadn't been ill. But he also said that he would have been too worried about what was going on at home to work, even if he hadn't been ill and had others looking after his wife.

⁴ See GD3-23.

⁵ See GD3-13.

⁶ See GD3-29.

⁷ See GD3-23.

⁸ See GD3-27.

⁹ See GD3-14, GD3-15, GD3-17, GD3-25, GD3-27, and GD3-28.

[20] I find that the Appellant didn't have a desire to work, as, even if he hadn't been sick, his priority was caring for his wife rather than working. He said on multiple occasions that he could not work due to having to care for his wife.

[21] The Appellant testified that he continues to be off work while looking after his wife although he is getting some assistance from his daughter.

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

[22] The Appellant hasn't shown that he has made efforts to find a suitable job.

[23] The Appellant has shown that he has a suitable job to return to once he is no longer on leave.

[24] As noted above, the Appellant has a job to return to and the employer confirmed this.¹⁰ He was aware that he was still an employee on leave as he was receiving medical benefits and emails from the company.¹¹

[25] However, the Court has determined that a claimant "cannot merely wait to be called in to work but must seek employment in order to be entitled to benefits."¹²

[26] I find that while the Appellant has a suitable job available, he has made no further efforts to find work and doesn't meet this test.

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

[27] The Appellant did set a personal condition that would have unduly limited his chances of going back to work.

[28] At the hearing, the Appellant described the support and care that he was providing his wife, who has been seriously ill. He said that from May 7, 2022, to June 30, 2022, he was the only one providing that care.

¹⁰ See GD3-29.

¹¹ See GD3-23 and GD3-28.

¹² *De Lamirande v Canada (Attorney General)*, 2004 FCA 311.

[29] The Appellant says that the Commission made an error when it said that he is unemployable. He says that he could return to work after his leave and that he was eligible for sickness benefits.¹³

[30] The Appellant says that he would be available for work but didn't know the exact date when he could work again due to the pandemic and his wife's condition. He said that a Service Canada agent told him that he would be eligible for benefits.¹⁴

[31] At the hearing, the Appellant said that he could have his sister (who is semi-retired) and daughter look after his wife. But he also said that he would have been too worried to work. He also testified that no one was helping care for his wife from May 18, 2022, to June 30, 2022.

[32] Both the Appellant and his witness at the hearing described the work he was doing looking after his wife while he was also on sick leave. This included the following tasks:

- handling and cleaning a feeding tube
- taking his wife to medical appointments
- helping her with mobility
- managing her forgetfulness
- preparing her meals

[33] The Commission says that the Appellant submitted a medical certificate that satisfied the first requirement for sickness benefits. But he set a personal condition of looking after his wife that would have restricted his availability if he hadn't been sick.¹⁵

¹³ See GD2-5.

¹⁴ See GD3-23.

¹⁵ See GD4-2.

[34] In reviewing the evidence, there are multiple examples of the Appellant clearly saying that from May 8, 2022, to June 30, 2022, he could not have worked because he had to care for his ill wife.¹⁶

[35] In one instance, he did say that he would have been available for work at that time.¹⁷ Later, he clarified that he wasn't available for work from May to June 2022 due to the need to look after his wife.¹⁸

[36] The Appellant was the only one taking care of his wife during that period. So, even if he wasn't sick, he could not have worked as he testified that she needed a lot of care.

[37] It is clear that the Appellant was the only one taking care of his wife. This means that he was unable to leave her alone and he could not work. He testified that even if someone else was looking after his wife, he would have been too worried to work.

[38] In the Appellant's testimony, he said that he could have had someone else look after his wife. While that might have been possible, it didn't happen. The Appellant said that he was the sole caregiver for his wife while he was sick.

[39] I find that the Appellant has set a personal condition that might unduly (in other words, overly) limit his chances of going back to work. His decision to stay home and care for his wife would overly limit his ability of returning to work. She needed constant care, and he was unable to leave to go to work.

[40] It is certainly not the Appellant's choice to have a wife who is seriously ill. While I can empathize with his situation, it is still something that would overly limit his availability for work. Her requirements for care were clearly outlined by the Appellant. While he was sick, he was the one taking care of her.

¹⁶ See GD3-14, GD3-15, GD3-17, GD3-25, GD3-27, and GD3-28.

¹⁷ See GD3-25.

¹⁸ See GD3-27 and GD3-28.

– **So, would the Appellant have been available for work?**

[41] Based on my findings on the three factors, I find that the Appellant hasn't shown that he would have been available for work if he hadn't been sick.

Conclusion

[42] The Appellant has not proven that, if not for his illness, he would have been available for work. I find that he hasn't demonstrated that he wanted to go back to work or that he had made any efforts to find work.

[43] It is clear to me that even if he hadn't been sick that his personal condition of taking care of his wife would have overly limited his availability for work. Her care needs were so extensive that they would have prevented him from working.

[44] Since his illness was not the only thing preventing him from working, this means that he cannot be paid EI sickness benefits.

[45] This means that the appeal is dismissed.

Greg Skelly

Member, General Division – Employment Insurance Section