



Citation: *SC v Canada Employment Insurance Commission*, 2023 SST 722

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

## Decision

**Appellant:** S. C.  
**Representative:** Zoe Lambert

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission  
reconsideration decision (569584) dated January 20, 2023  
(issued by Service Canada)

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**Tribunal member:** Glenn Betteridge

**Type of hearing:** In person

**Hearing date:** May 2, 2023

**Hearing participants:** Appellant  
Appellant's representative  
Support person

**Decision date:** May 26, 2023

**File number:** GE-23-423

## Decision

[1] I am dismissing S. C.'s appeal.

[2] To get Employment Insurance (EI) sickness benefits a person has to show that if it wasn't for their sickness, they would be available for work.<sup>1</sup> In other words, their sickness has to be the only thing stopping them from being available for work.

[3] S. C. hasn't proven that if it weren't for her sickness, she would have been available for work from September 27 to October 7, 2022.

[4] This means the Canada Employment Insurance Commission (Commission) can't pay her EI regular benefits for that time.

## Overview

[5] S. C. (the Appellant) lives in Grande Prairie, Alberta. She stopped work in late September 2022.

[6] She applied for EI regular benefits. But later changed her application to EI sickness benefits.

[7] Sadly her fiancé's father passed away shortly after she applied for EI benefits. The Appellant travelled with her fiancé to Cape Breton, Nova Scotia, to attend the funeral.

[8] The Commission looked at the Appellant's situation. It decided she was absent from her home area—and unavailable for work—from September 27 to October 7, 2022. So it didn't pay her EI benefits for that time.

[9] The Appellant doesn't think the Commission's decision is fair.

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<sup>1</sup> See section 18(1)(b) of the *Employment Insurance Act* (EI Act).

## Issue

[10] I have to decide whether the Appellant has proven she was available for work from September 27 to October 7, 2022.

## The law about sickness benefits and availability

[11] To get EI sickness benefits a person has to show that if it weren't for their sickness, they would be available for work.<sup>2</sup> In other words, if they weren't sick, they would be able to search for and take a suitable job on an ongoing basis.

[12] There are two sections of the EI Act that say a person who wants to get EI benefits has to show they are available for work.

[13] One section says that to prove they are **capable of and available for work** but can't find a suitable job, a person has to show three things.<sup>3</sup> (I will list and consider these below.)

[14] The Commission didn't use the other availability section of the EI Act when it denied the Appellant sickness benefits.<sup>4</sup> So I don't have to consider that section when I make my decision.

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<sup>2</sup> See section 18(1)(b) of the EI Act.

<sup>3</sup> See section 18(1)(a) of the EI Act and *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

<sup>4</sup> See section 50(8) of the EI Act. Under that section, a person has to prove they are making **reasonable and customary efforts** to find a suitable job. The Commission listed section 50 of the EI Act (and the associated section of the *Employment Insurance Regulation*) at the beginning of its representations, at GD4-1. And included those sections its appendix of legislation, at GD4-6. But the Commission based its decision and its argument on only section 18(1)(b) of the EI Act. The notes of the Commission's call with the Appellant are also restricted to section 18 (at GD3-24): "A claimant who admits not being available for work does not, of course, meet the availability requirements under the Employment Insurance Act 18".

## Capable of and available for work

[15] The law says the Appellant has to show she was capable of and available for work but unable to find a suitable job.<sup>5</sup> A court decision sets out the three factors she has to prove:<sup>6</sup>

- She wanted to go back to work as soon as a suitable job was available.
- She made efforts to find a suitable job.
- She didn't set personal conditions that might unduly (in other words, overly) limit her chances of going back to work.

[16] She has to prove each factor on a balance of probabilities. In other words, she has to show it's more likely than not.

[17] When I consider each of these factors, I have to look at the Appellant's attitude and conduct.<sup>7</sup>

[18] And I have to consider whether the Appellant has proven her availability for each working day in a benefit period.<sup>8</sup>

[19] Several appeal decisions have found that a person who is **away from home** isn't eligible for EI benefits during the days they were away.<sup>9</sup> These decisions say a person has to be in the area where they live so they can pursue suitable job opportunities. However, a person might be eligible if they can show they were job searching or made

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<sup>5</sup> See section 18(1)(a) of the EI Act.

<sup>6</sup> These three factors come from the Federal Court of Appeal's decision in *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96. I have written the three factors for plain language.

<sup>7</sup> 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.

<sup>8</sup> See *Canada (Attorney General) v Gagnon*, 2005 FCA 321; and *Canada (Attorney General) v Cloutier*, 2005 FCA 73.

<sup>9</sup> See for example decisions of the Umpire, which decided EI appeals before the Social Security Tribunal was created: *CUBs 16076, 16506, and 16046* (where a person receiving EI regular benefits had been away from Toronto for two weeks to attend his mother's funeral in London, Ontario).

arrangements to allow them to look for and accept jobs, during the time they were away.<sup>10</sup>

### **The Appellant hasn't shown she was available**

[20] It is up to the Appellant to prove that if she hadn't been sick, she would have been available from September 27 to October 7, 2022.<sup>11</sup> I find she hasn't done that.

[21] I find that the evidence shows she wasn't available to work during this period. It shows she was in Cape Breton with family for a funeral and wasn't looking for work.

[22] Normally I would consider each of the three availability factors, one after the other.

[23] But in this appeal, I will deal with them together because I find the Appellant hasn't given the Tribunal **any evidence** that might show she was available for work. And there is no other evidence in the appeal file that shows that.

[24] In her appeal notice, the Appellant didn't give any evidence or reasons that challenge the Commission's availability decision.<sup>12</sup>

[25] At the hearing she testified she wasn't looking for work when she was in Cape Breton for the funeral. She said that a Commission agent told her she could get seven days of emergency leave, or something like that. The agent also said the Commission could waive the two-week waiting period for benefits.

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<sup>10</sup> See *CUBs 15569, 17009, 18439*. The [Digest of Benefit Entitlement Principles Chapter 10 - Section 11 - Canada.ca](#) reflects this (at 10.11.4, Sickness or death in the family): "In the case of a sickness or death in the family the claimant may be considered to be available during an absence of up to 7 days, to attend the family member's funeral, if arrangements have been made to be reached without delay. When the absence extends beyond 7 days, the claimant may become subject to a disentitlement as of the eighth day of their absence. Each situation must be assessed individually, based on the specific facts. Of course, availability is not proven in such a situation, if the claimant is unable or unwilling to return home within a reasonable period of time, upon being made aware of an employment opportunity." Commission agents use the Digest as a guide when deciding EI claims. But the Tribunal doesn't have to follow the Digest.

<sup>11</sup> See for example, *CUBs 17784, 17482, 12028*.

<sup>12</sup> See GD2.

[26] I accept her testimony. It is consistent with what she told the Commission about her absence, and not looking for work when in Cape Breton.<sup>13</sup> I have no reason to doubt her testimony, or what she said to the Commission. There is no evidence that goes against it.

[27] I also accept that she was away from her home area, attending her finance's father's funeral, from September 27 to October 7, 2022. There is no evidence that goes against this. And I have no reason to doubt she was in Cape Breton at this time.

[28] At the hearing I gave her representative an opportunity to make submissions. But she didn't.

[29] Finally, the tribunal decisions I cited above support my decision in this appeal.

[30] Unfortunately for the Appellant, I have to follow the EI Act when I make my decision.<sup>14</sup> I have no power to make my decision based on principles of fairness, equity, or compassion.

## **Conclusion**

[31] The Appellant hasn't proven she was available for work from September 27 to October 7, 2022.

[32] This means she isn't eligible to get EI sickness benefits from the Commission for this period.

[33] So I am dismissing her appeal.

Glenn Betteridge  
Member, General Division – Employment Insurance Section

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<sup>13</sup> See the Commission's notes of its call with Appellant at GD3-24.

<sup>14</sup> See *Canada (Attorney General) v Knee* 2011 FCA 301.