



Citation: *ML v Canada Employment Insurance Commission*, 2023 SST 660

Social Security Tribunal of Canada General Division – Employment Insurance Section

Decision

Appellant: M. L.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (553052) dated November 23, 2022 (issued by Service Canada)

Tribunal member: Ambrosia Varaschin

Type of hearing: Videoconference

Hearing date: May 2, 2023

Hearing participant: Appellant

Decision date: May 16, 2023

File number: GE-22-4261

Decision

[1] The appeal is allowed.

Overview

[2] The Appellant is a dental hygienist who works for a dental practice and for the British Columbia Dental Hygienists Association. She applied for Employment Insurance (EI) sickness benefits because she was unable to continue working while pregnant due to gestational diabetes. Her last day of work was June 10, 2022, and she had arranged to go on maternity leave as of June 25, 2022.

[3] The Canada Employment Insurance Commission (Commission) decided that the Appellant wasn't able to establish that she would have been available for work if she wasn't sick because she would have been on a pre-arranged maternity leave.

[4] The Commission disentitled the Appellant from sickness benefits for the period after June 25, 2022, and placed the Appellant on maternity benefits instead.

[5] The Appellant disagrees, and says she should have received sickness benefits until her baby was born because she only requested early maternity leave due to her health problems. The Commission's decision means that she will get less parental benefits than a claimant who is well enough to work until the week they give birth.

Issue

[6] Did the Appellant qualify for sickness benefits until the birth of her baby?

Analysis

[7] The Appellant is not entitled to sickness benefits for a working day in a benefit period unless she can prove that she was unable to work because of a prescribed illness, injury or quarantine, and that she would otherwise be available for work.¹

¹ Section 18(1)(b) of the *Employment Insurance Act* (Act).

[8] The Appellant has to prove that she was unable to work because of illness for the period from June 10, 2022 to August 23, 2022.² This is the period of time that she is requesting EI sickness benefits.

[9] The Appellant also needs to prove that she would have otherwise been available to work, if not for her illness, for the same period.

The Appellant was unable to work due to illness

[10] I find that the Appellant has proven that she was unable to work from June 10, 2022, to August 23, 2022, due to illness. The medical evidence and her testimony support that she was incapable of working because of gestational diabetes.

[11] The Appellant testified that she had blood tests done on May 29, 2022, and saw her doctor on June 10, 2022. Her doctor told her she needed to stop work immediately because she had developed gestational diabetes and it wasn't safe for her or the baby to continue working.

[12] The Appellant provided a medical certificate³ and a medical note⁴ to support her claim. The medical note was completed on June 10, 2022, and says she needs to be off work from June 10, 2022, "until her due date." The medical certificate states she needs to be off work from June 17, 2022, and was completed on June 14, 2022.

[13] The Commission has already accepted both the medical note and the medical certificate, and established a claim for sickness benefits.

[14] Since it's undisputed, I accept that the Appellant was incapable of working due to medical illness or injury from June 10, 2022, to August 23, 2022.

² See GD02-10, which states her child was born August 23, 2022.

³ See GD03-31.

⁴ See GD03-32.

The Appellant was otherwise available for work

[15] I find that the Appellant has proven that she was otherwise available to work from June 10, 2022, to August 23, 2022, if not for her illness.

[16] Case law sets out three factors for me to consider when deciding whether a claimant is available for work. A claimant has to prove the following three things:⁵

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

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

– Wanting to go back to work

[18] The Appellant has shown that but for her illness she would have wanted to go back to work as soon as a suitable job was available.

[19] The Commission argues the Appellant couldn't receive sickness benefits after June 25, 2022, because she would have been on a pre-planned maternity leave. Since she wouldn't have been at work even if she wasn't sick, she wasn't entitled to sickness benefits. This meant she wouldn't have wanted to go back to work as soon as a suitable job was available.

⁵ 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.

[20] The Appellant disagrees. She says that she only pre-arranged her maternity leave for June 25, 2022, because:

- She was feeling “run down” and exhausted.
- She felt she wasn’t able to do her job properly anymore.
- She thought she had to give a minimum of four weeks notice to her employer, and she was feeling progressively worse.

[21] The Appellant submitted copies of text messages that show she was originally planning to go on maternity leave in August. Then she started thinking July. She never mentioned June as a possible date.⁶

[22] The texts also support her testimony that her fatigue and stress levels were progressively getting worse and contributing to an earlier maternity leave.⁷ She says several times that she wanted to go on maternity leave “tomorrow,” or that she wished she could go sooner, but that she couldn’t because she had professional obligations and for financial reasons.

[23] The Appellant provided a copy of her professional practice requirements. The British Columbia Professionals College of Oral Health Professionals requires hygienists be “fit to practice.” Fitness to practice includes “having the consistent ability” to “meet the physical demands” of practice, “sustain concentration and focus while practicing dental hygiene,” and use “fine motor skills...instruments or equipment.”⁸ The Canadian Dental Hygienists Association’s *Code of Ethics* requires the Appellant to “inform the appropriate regulatory authority in the event of becoming unable to practise safely and competently.”⁹

[24] I find that the Appellant was under professional licensing requirements to stop practicing because of the symptoms from her illness. Excessive fatigue could affect her ability meet the physical demands of being a hygienist, limit her focus and concentration

⁶ See GD05.

⁷ See GD05.

⁸ See GD06-4.

⁹ See GD06-19.

levels, and reduce her fine motor skills. This means she might not have been able to practice “safely and competently.”

[25] The Appellant says she asked for her leave to begin on June 25, 2022, because she thought she had to provide at least four weeks notice under the *British Columbia Employment Standards Act*¹⁰ and she was barely able to get through a day’s work when she submitted her request.

[26] The Appellant testified that she thought sickness benefits were for critically ill claimants, or for women who were bedridden because of pregnancy. She says she thought she was supposed to go on maternity leave instead of on sickness benefits. She stated she didn’t understand how sickness and maternity benefits worked until her doctor explained she should go on sickness benefits on June 10, 2022.

[27] The Appellant testified that she gave her employer notice for her maternity leave on May 24, 2022. She was sent for bloodwork on May 29, 2022.

[28] Since there was only five days between asking for leave and having tests done, I find, on the balance of probabilities, that the Appellant was suffering from the symptoms of gestational diabetes when she asked for her early maternity leave.

[29] For the same reasons, I find that she wouldn’t have asked for early maternity leave if she wasn’t suffering from her illness.

[30] So, the Appellant wanted to go back to work as soon as a suitable job was offered to her, if not for her illness.

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

[31] The Appellant has shown that she would have made enough efforts to find a suitable job if she wasn’t sick.

[32] She says that if she had been able to work, she would have done so while pregnant because her and her husband have a lot of debt and can’t afford to be off

¹⁰ See GD05-23.

work.¹¹ She also says that they are living with her husband's family because they can't afford not to.

[33] Text messages provided by the Appellant show that she had "things to wrap up" at work, and her friend teased her for acting as if "the baby can wait."¹² She also "felt guilty" for being forced onto sickness benefits because her employer was having difficulty finding staff.¹³

[34] This evidence tells me that, but for her illness, the Appellant would have made efforts to find additional work.

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

[35] The Appellant did not set personal conditions that would unduly her chances of going back to work.

[36] The Appellant says she did not set personal conditions because she was prevented from working due to illness prior to giving birth. Her doctor placed her off work due to illness associated with her pregnancy.

[37] The Appellant's health did not change after the Commission disentitled her, and her illness continued beyond her delivery date.

[38] The *Employment Insurance Regulations* say a claimant needs to be healthy enough and physically able to perform the work duties for a job to be suitable.¹⁴ So, the Appellant's illness prior to giving birth is not a personal condition that would unduly limit her chances of returning to work.

[39] As a result, I find that the Appellant did not set any personal conditions that would limit her chances of returning to work.

¹¹ See GD05-14-15, and GD05-17 for additional evidence of this.

¹² See GD05-10.

¹³ See GD05-13.

¹⁴ Section 9.002(1)(a) of the *Employment Insurance Regulations* sets this out.

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

[40] Based on my findings on the three factors, I find that the Appellant has shown that but for her illness, she would have met all three factors.

[41] So, the Appellant was otherwise available for work if not for her illness.

Conclusion

[42] The appeal is allowed.

[43] The Appellant is entitled to sickness benefits until August 23, 2022.

Ambrosia Varaschin
Member, General Division – Employment Insurance Section