Citation: *LL v Canada Employment Insurance Commission*, 2024 SST 1018

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	L. L.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (644338) dated March 19, 2024 (issued by Service Canada)

Tribunal member:	Elyse Rosen
Type of hearing:	**VIDEOCONFERENCE AND IN WRITING**
Hearing participant:	Appellant
Decision date:	July 18, 2024
File number:	GE-24-1638

Decision

[1] The appeal is dismissed.

[2] The Appellant hasn't shown that she was both capable of and available for work during any part of her benefit period.[1] This means that she can't receive Employment Insurance (EI) regular benefits.

Overview

[3] The Appellant is bipolar. In January 2021 she took a leave of absence from her job following a bipolar episode because she was too ill to work.

[4] The Appellant claims that by August 2021 she was feeling much better and was able to work. But she still wasn't able to return to her usual job. She claims that inasmuch as she was able to function well day to day, she wasn't healthy enough to deal with the deadlines and pressure associated with her usual job.

[5] The Appellant applied for regular benefits. Her claim was established effective August 22, 2021, and she began receiving regular benefits from that date.

[6] In October 2021 the Appellant also applied for disability benefits through her group insurance. Her disability claim wasn't resolved until May 2023.

[7] In June 2022, the Commission contacted the Appellant to validate whether she was capable of and available for work. It determined she wasn't available for work and

[1] The Appellant's benefit period ran from August 22, 2021, to August 20, 2022.

therefore not entitled to benefits. It called on her to repay the regular benefits she'd received.[2]

[8] The Appellant asked the Commission to reconsider its decision. She argued that she should be entitled to 15 weeks of sickness benefits and to regular benefits thereafter. In her reconsideration request, she claimed that she was available to work, but that because of her medical condition, most jobs were unsuitable for her.[3] So, she wasn't able to find a job.

[9] The Appellant provided the Commission with a medical certificate indicating that she wasn't capable of working from August 1, 2021, to December 1, 2022.

[10] After reconsideration the Commission decided that the Appellant was entitled to 15 weeks of sickness benefits. It also decided she wasn't entitled to regular benefits because she wasn't capable of working during the period set out in the medical certificate. It called on her to repay the regular benefits she had received. The Commission also allocated the lump sum the Appellant was paid after her disability claim was resolved. It applied that sum in reduction of the sickness benefits that it had decided she could receive.

[11] In appeal, the Appellant claims she was capable of and available for work during her entire benefit period. She says the medical certificate she provided to the Commission only indicates that she wasn't capable of working in her usual employment during the period it sets out. She argues that even though she wasn't ready to return to her usual job, she could have worked in a job that was compatible with her medical condition. She says she got progressively better over time. She points out that she

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[2] The Commission says it reconsidered the Appellant's claim on its own initiative because she had falsely declared that she was capable of and available for work (GD2-72). I'm satisfied that the Commission exercised its power to reconsider judicially. I don't see any evidence that it acted in a discriminatory fashion or for an improper purpose or that it considered irrelevant facts or failed to consider relevant facts. In my view the Appellant genuinely believed that she was capable of and available for work. But this doesn't change the fact that the statement was false (as I explain in more detail, below). In light of the information the Commission had before it, it was reasonable for it to be of the opinion that it was false and to reconsider the claim in accordance with its policy on the use of its power of reconsideration. I'm satisfied that the policy was followed in this case.

[3] I note that despite having made this argument, she appears to have told the Commission agent who dealt with her reconsideration request that she only wanted 15 weeks of sickness benefits (GD3-49).

eventually became well enough to return to her usual job. She went back to that job in December 2022.

[12] The Appellant also argues that she's paid into the EI program her entire working life and never made a claim before. She believes that as a contributor to the program, she should be entitled to receive EI in her time of need.

[13] I have to decide whether the Appellant was capable of and available for work at any point during her benefit period and therefore entitled to regular benefits.

Matters I have to consider first

The Appellant isn't appealing the allocation of her disability payment

[14] During the hearing I confirmed with the Appellant that she isn't appealing the allocation of the disability payment she received in May 2023. So, I will only be considering whether she was capable of and available for work.

The hearing was continued in writing

[15] The hearing began by way of videoconference.

[16] The Tribunal was unable to complete the hearing on the day it was scheduled. The Appellant had become agitated and wasn't able to continue. It was agreed that we would suspend and reconvene on another day.

[17] Prior to the continuation of the hearing, the Appellant contacted the Tribunal to inform us that continuing with a hearing by way of videoconference would be too difficult for her. She asked that the hearing continue in writing.[4]

[18] Having had the benefit of the Appellant's testimony on most of the issues that are relevant to my decision, and having few remaining questions for her, I decided that it was appropriate to honor the Appellant's request that the hearing continue in writing. I

[4] The Appellant was given information about the accommodations the Tribunal could offer her in order to be able to participate fully in her appeal. This is the only accommodation that she requested.

had no concerns that continuing the hearing in writing wouldn't allow for a fair hearing. So, the hearing continued in writing.

[19] I gave the Appellant an opportunity to answer some questions that I had on the few remaining issues we hadn't covered during her testimony. She was also invited to present additional evidence and arguments. Her responses to my questions and her additional evidence and arguments have been labelled GD16, GD17, and GD18. These documents have been taken into consideration when arriving at my decision, along with all of the other documents that were already in the record, as well as with the Appellant's testimony during the portion of the hearing that took place by way of videoconference.

The Appellant didn't want to proceed with a Charter challenge

[20] In a letter to the Tribunal, the Appellant asserted that the law should apply differently to her in light of her disability. She appeared to suggest that the provisions of the law that apply to determining a claimant's availability for work violate her rights under the *Canadian Charter of Rights and Freedoms* (Charter).

[21] I advised the Appellant that there's a process that she would have to follow to make the argument that provisions of the law violate her Charter rights (we call this a Charter challenge). I asked her if she wanted more information about lodging a Charter challenge and gave her a delay to advise me of her intentions.

[22] The Appellant didn't ask for more information about lodging a Charter challenge and didn't indicate that she wanted to lodge one. I therefore wrote to her confirming that my understanding was that she didn't intend to lodge a Charter challenge and didn't intend to argue that any provision of the law violated her rights under the Charter. I didn't hear further from her on that issue.[5]

[5] But I did hear from her on another issue. This further confirms that she has no intention of lodging a Charter challenge.

[23] I therefore haven't considered if the provisions of the law violate the Appellant's Charter rights when making my decision.

Issue

[24] Was the Appellant capable of and available for work?

Analysis

[25] Not everyone who isn't working is able to get EI benefits. To get benefits you need to meet certain conditions. The law says that to get benefits you have to be both capable of and available for work.

The Appellant was capable of working as of February 4, 2022

[26] In order to receive regular EI benefits, the Appellant has to prove that you're capable of working.[6]

[27] The Commission says that the Appellant was too sick to work during her benefit period.

[28] The Appellant disagrees. She admits that her illness prevented her from returning to her usual employment. But she says there were other jobs she could have done.

[29] The law says a claimant is only incapable of work if they are too sick to work in their usual employment **or in any other suitable employment**.[7]

[30] What constitutes **suitable employment** is a question of fact. But the law says that a job isn't suitable if your health and physical capabilities don't allow you to get to your job and perform the required work.[8]

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[6] See section 18(1)(a) of the *Employment Insurance Act* (Act).
[7] See section 40(4) of the *Employment Insurance Regulations* (Regulations) and *Canada (Attorney General) v Caughlin*, A-1168-84 (FCA).
[8] See section 9.002 of the Regulations.

[31] The Appellant says that as of August 2021, she was sufficiently recovered from the bipolar episode that led to her taking a medical leave to be capable of working. However, she says that from August 2021 to August 2022, she would only have been able to work in a job that was stress free, involved simple tasks, and could be performed remotely or otherwise required no contact with other people.

[32] The Appellant explained that her usual job was very stressful. And it was only in about September 2022 that she had built up enough mental resilience to be able to handle that level of stress.[9] But she insists that she could have done something else.

[33] The Appellant provided to the Commission with a medical certificate.[10] It says that she wasn't capable of working from August 2021 to December 2022.

[34] The Appellant claims that despite what is indicated on the medical certificate, she wasn't entirely incapable of working. She testified that when her doctor completed the certificate, he understood the term incapacity to mean the inability to perform the duties of her **usual** employment. But he was of the view that she could work in a job that wasn't as mentally taxing as her usual job. She says she knows this for a fact because she and her doctor discussed it.

[35] The Appellant's testimony regarding what her doctor intended when he completed the medical certificate was cogent and credible. I accept that when the Appellant's doctor certified that she wasn't capable, he meant that she couldn't perform the duties of her usual job. This is consistent with what the Appellant told the Commission from the outset of her claim.[11]

[36] The Appellant claims she would have been capable of working as of August 2021. But I'm unable to find that this is the case.

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[9] She says that in September 2022 she began negotiating accommodations with her employer so that she could return to work. These accommodations included being able to work from home, being able to take time during the day to nap and avoiding personal interactions with others. She returned to her job in December 2022.
[10] GD3-51.
[11] GD3-18.

[37] The medical certificate she provided indicates that the Appellant was hospitalized from October 19, 2021, to February 3, 2022.

[38] The Appellant explained that she was charged with a crime but found by the court to lack the mental capacity to form intent. She was therefore sentenced to time in hospital until she recovered.

[39] The Appellant says she could have worked in a remote job while hospitalized and had the necessary equipment available in hospital to do so.

[40] I have difficulty accepting that the Appellant was able to work in August 2021 if she was hospitalized two months later due to a court's finding that she lacked mental capacity. Moreover, she was only released on February 3, 2022. This tells me that the court that sentenced her found her mental incapacity to be ongoing until that date.

[41] I also have difficulty accepting that the Appellant could have worked while in hospital and would have been given the freedom and autonomy to do so. This is particularly true given that she had been sentenced to hospital in connection with criminal charges laid against her.

[42] If a court found that the Appellant's mental health prevented her being released into the public until February 2022, I'm unable to find that she was well enough to work.[12] And in my view, it's more likely than not that she wouldn't have been permitted to work while hospitalized.

[43] But I am prepared to accept that she was capable of working following her discharge on February 3, 2022.

[44] The Commission argues that the Appellant admitted she was unable to work as a result of her illness and must be found to be incapable of working during her entire benefit period. I disagree. It's clear to me from the evidence that when the Appellant told

[12] As an aside, which has no bearing on my decision, I wish to point out to the Appellant that had I found that she was well enough to work as of August 2021 she wouldn't be entitled to the sickness benefits that she received and would in all likelihood be called upon by the Commission to repay those as well.

the Commission she was too sick to work, she was referring to her inability to return to her usual job.

[45] The Commission also argues that the fact that the Appellant received disability insurance demonstrates that she was too sick to work. But the Appellant explained that her insurer defined disability as the inability to perform the duties of her usual job. So, the fact that she was paid disability insurance benefits doesn't allow me to conclude there weren't any suitable jobs that she was well enough to do.

[46] In my view, the Appellant has proven that she was capable of working in some form of suitable employment as of February 4, 2022. I find that any job that would have allowed her to work from home, not interact with the public, have a measure of control over her schedule, and was low stress would have been suitable for her as of that date.

[47] Having found that the Appellant was capable of working in some form of suitable employment from February 4, 2022 to the end of her benefit period on August 20, 2022, I will now consider whether she was available for work during that period.

The Appellant wasn't available for work

[48] I find that the Appellant wasn't available for work from February 4 to August 20, 2022.

[49] Two different sections of the law say that a person claiming benefits has to show that they are available for work if they want to get benefits.[13]

[50] One of those sections only applies when the Commission asks the claimant to provide proof of their job search.[14] The Commission didn't do that in this case. So, I will only be focussing on the other section of the law.[15]

[13] See sections 18(1)(a) and 50(8) of the Act.
[14] I'm referring to section 50(8) of the Act.
[15] I'm referring to section 18(1)(a) of the Act.

[51] The law says that a person claiming EI benefits has to show that they are **capable of and available for work but aren't able to find a suitable job**.[16]

[52] Case law (in other words decisions of the courts) sets out three things for me to consider when deciding if a person claiming benefits is available for work (the **Faucher factors**).[17]

[53] Those three things are:

i. wanting to go back to work as soon as a suitable job is available

ii. making enough effort to find a suitable job

iii. not setting personal conditions that might overly limit your chances of finding a suitable job

[54] All three conditions have to be met in order for me to conclude the Appellant was available for work. It's up to the Appellant to prove that she meets all of the Faucher factors.

[55] When I decide whether the Appellant has met all of the Faucher factors, I have to look at both the Appellant's attitude and the things that she did or didn't do to make herself available for work.

[56] All three Faucher factors concern being available for a **suitable job**.

[57] As already mentioned, what constitutes a suitable job is a question of fact.

[58] The law sets out a number of criteria for determining whether a job is a suitable job, but these criteria aren't exhaustive.[18] A claimant's personal situation and work history are relevant to determining whether a job is suitable for that particular claimant.

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[16] See section 18(1)(a) of the Act.
[17] These factors are named after the case that sets them out. See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.
[18] See section 9.002 of the Regulations and section 6(4) of the Act.

Their health is also a consideration. And what is or isn't a suitable job for a claimant can change over time.

[59] The Appellant makes the point that those who are bipolar face numerous challenges finding work. She claims that only one in three who suffer with the illness are able to work. She says that because those who are bipolar need accommodations and highly supportive work environments, there are very few suitable jobs available to them. I accept this to be true.

[60] I find that the Appellant's availability must be assessed in relation to what a suitable job would be for her given her particular circumstances and must take her illness into account.[19]

[61] However, the Appellant has failed to show that she meets the Faucher factors.

i. Wanting to go back to work

[62] I'm satisfied that the Appellant wanted to go back to work. But I'm not satisfied that she was prepared to go back as soon as a suitable job was available.

[63] She testified that her usual job was both interesting and challenging. She enjoyed her work and felt she was very good at it. Working increased her self-esteem.

[64] She says that while she was on leave, she missed the intellectual stimulation and sense of self-worth that she got from working. Being at home, with nothing to do, wasn't good for her mental health.

[65] She says she also wanted to return to work for financial reasons.

[19] As I decided in *JG v Canada Employment Insurance Commission,* 2023 SST 2005 (upheld on appeal in *Canada Employment Insurance Commission v JG*, 2024 SST 299) claimants must only make themselves available for suitable employment. A claimant who want to work, is looking for work, and who hasn't set any personal conditions is available even if there aren't any jobs that are suitable for them.

[66] As soon as she was recovered enough to handle the stress of her usual job, she began making arrangements for her return to work. She returned to her usual job in December 2022.

[67] I find that her attitude and conduct demonstrate a desire to go back to her **usual** job. But she hasn't convinced me that she wanted to work as soon as a suitable job was available. As I set out in more detail, below, she wasn't prepared to look for or accept jobs that would have been suitable for her.

ii. Making efforts to find a suitable job

[68] I find that the Appellant didn't make enough effort to find a suitable job.

[69] The Appellant testified that she spoke to friends and family and sought their help finding a suitable job.

[70] She says she spent one entire day looking through job postings on job search websites to try to find something that might be appropriate for her in light of her health limitations. She says that 99% of the jobs appeared to be unsuitable. She became discouraged and never looked again.

[71] The Appellant says a friend of hers, who was employed doing transcriptions, suggested she apply for the same job. But the Appellant says there were too many requirements to meet in order to apply. She had to obtain a security clearance and provide a reference. She felt this was too much effort given that she expected the job to be temporary. And her friend wouldn't give her a reference because of her illness. She believed that finding a reference would likely be difficult in light of her recent bipolar episode and the fact that she had to take a leave. So, she decided not to attempt to get a reference or a security clearance and didn't apply for the job.

[72] This was the extent of her efforts to find a job.

[73] The Appellant says I have to consider her disability when I decide if she was making enough effort to find a job. She says she was emotionally fragile and potentially suicidal. Searching for work when 99% of the available jobs she came across weren't

suitable for her was discouraging. She claims this compromised her mental health. She says she shouldn't be required to make the same job search efforts as someone who doesn't suffer from bipolar disorder. She says continuing to search would have put her health at risk.

[74] I agree with the Appellant that her disability is a relevant consideration when I decide whether she made enough effort to find a suitable job. I accept that there were a limited number of suitable jobs available for her and that this was discouraging and may have impacted her mental health.

[75] However, the Appellant's disability doesn't absolve her from having to engage in a serious search for work.

[76] I find that the Appellant's efforts weren't sufficient. Even if there were few jobs that might be suitable for her, spending only one day looking at job postings over a period of several months isn't sufficient, even in her condition. To be available for work you need to make consistent efforts to look for work through any and all means that you can. And in my view the Appellant didn't do this.

[77] Since the Appellant says she was well enough to work, I have to conclude that she was well enough to look for work. I can understand that she didn't have the mental strength and stability to search on as sustained a basis as someone in good mental health. But I don't accept that she couldn't search at all after the one day that she spent doing so. That pretension is inconsistent with her testimony to the effect that she was capable of working. Having convinced me that she was capable of working as of February 4, 2022, I find that she was well enough to engage in a more sustained job search than the one she engaged in.

[78] So, I find that the Appellant wasn't making enough effort to find a suitable job.

iii. Unduly limiting one's chances of going back to work

[79] I find that the Appellant set personal conditions that unduly limited her chances of finding a suitable job.

[80] The restrictions that the Appellant placed on her job search that were the result of her illness aren't personal conditions. Although they may have limited her chances of finding work, I'm of the view that any job which she wasn't well enough to do wasn't a suitable job.

[81] But the Appellant was unwilling to accept work that would have been suitable for her.

[82] The Appellant explained that she is highly educated. She said she wasn't willing to do something that she considered to be below her intellectual capacity. She testified that she could have found work doing something like shelving books, but that this was beneath her. She wasn't prepared to do that kind of work.

[83] Inasmuch as one's personal circumstances and past job experience are relevant to determining what jobs are suitable, given the Appellant's health restrictions, it was incumbent on her to take a broader view of the type of work she was willing to do. In my view, a job shelving books would have been suitable for her until she became well enough to take on a more demanding job that was more in keeping with her level of education and her intellectual capacity.

[84] I also find that the Appellant wasn't willing to pursue any jobs that required effort to obtain. She said she didn't feel it was worth it to spend time obtaining things like clearance certificates or references for a job that she expected to be temporary.

[85] By refusing to accept or pursue work that she thought was beneath her, and by being unwilling to make extra efforts such as obtaining clearance certificates or references in order to secure a job, the Appellant unduly limited her chances of returning to the job market.

[86] Based on my analysis of the Faucher factors, I'm unable to conclude that the Appellant was available for work. She didn't want to go back to work as soon as a suitable job was available, wasn't making enough effort to find a suitable job and placed conditions on her job search which unduly limited her chances of finding work.

[87] I empathize with the Appellant. I have to imagine that it's very difficult to enter and remain in the workforce when one suffers from bipolar disorder. I'm pleased for her that her previous employer has been able to provide her with the accommodations that she requires to be able to work.

[88] But the Appellant hasn't satisfied me that prior to returning to her usual employment she was available for work but unable to find a suitable job because there were so few suitable jobs available. Her attitude and efforts, taken in the context of her illness, simply weren't in keeping with the attitude and efforts of someone who is available for work within the meaning of the law.

Contributing to the EI program doesn't guarantee entitlement

[89] The Appellant argues that she's contributed to the EI program her entire working life and has never filed a claim before. She believes that this should entitle her to benefits. But she's mistaken.

[90] The EI program isn't a savings account, it's an insurance plan. Like other insurance plans, you have to meet certain requirements to receive benefits.[20] In this case, the Appellant doesn't meet all of those requirements.

[91] The monies the Appellant contributed to the EI fund don't belong to her, they are insurance premia meant to insure against the risk of unemployment under certain conditions. Because those conditions weren't met, she wasn't entitled to the regular benefits she received. Therefore, she must repay them.

Conclusion

[92] The appeal is dismissed.

[93] I find that the Appellant wasn't capable of working until February 4, 2022.

[94] I find that as of that date she wasn't available for work.

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[20] See *Pannu v. Canada (Attorney General)*, 2004 FCA 90.

[95] This means she isn’t entitled to the regular benefits she received and must repay them.

Elyse Rosen
Member, General Division – Employment Insurance Section