Citation: *LS v Canada Employment Insurance Commission*, 2024 SST 1710

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

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

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (657746) dated April 25, 2024 (issued by Service Canada)

Tribunal member:	Gary Conrad
Type of hearing:	Teleconference
Hearing date:	December 5, 2024
Hearing participant:	Appellant
Decision date:	December 10, 2024
File number:	GE-24-3517

Decision

[1] The appeal is allowed in part.

[2] The Appellant cannot be paid regular Employment Insurance (EI) benefits from June 20, 2022, to October 19, 2022, because she was still ill and unable to work at all. If a person cannot work at all, they are not available.

[3] Further, she cannot be paid regular EI from October 20, 2022, to November 6, 2022, as she was able to return to work at that time, but she chose to delay so that she could finish attending all her doctor appointments. This is a personal condition that overly limited her chances of returning to the labour market.

[4] However, she has proven she was capable of and available for suitable employment starting on November 7, 2022. This means the Appellant should not be disentitled from benefits from November 7, 2022, onward.

Overview

[5] The Appellant was working as a Personal Support Worker she suffered a catastrophic heart attack; so bad she was pronounced dead at one point. She also suffered complications from her heart attack. One of which required three fingers to be amputated.

[6] Subsequently, the Appellant applied for, and was paid, EI sickness benefits.

[7] After she got the maximum amount of sickness benefits allowed by law, she then asked for her benefits to be converted to regular benefits as she did a graduated return to work.

[8] The Canada Employment Insurance Commission (Commission) decided that the Appellant is disentitled from receiving EI regular benefits from June 20, 2022, because she has not proven she is available for work.

[9] The Commission says that the Appellant was limited to working partial days for a period of time, which shows she was not capable of working.

[10] Also, the Commission says that the Appellant did not immediately return to work when cleared to do so, and did not immediately start working full-time when cleared to do, which shows a lack of desire to work, and shows that she imposed conditions on herself that limited her ability to work.

[11] The Appellant says that she worked as her medical condition and doctor allowed her.

[12] I must decide whether the Appellant has proven that she is available for work. The Appellant has to prove this on a balance of probabilities. This means that she has to show that it is more likely than not that she is available for work.

Matters I have to consider first

50(8) disentitlement

[13] In their submissions the Commission states they disentitled the Appellant under subsection 50(8) of the *Employment Insurance Act* (Act). Subsection 50(8) of the Act relates to a person failing to prove to the Commission that they were making reasonable and customary efforts to find suitable employment.

[14] I do not see any requests from the Commission to the Appellant to prove her reasonable and customary efforts, or any explanations from the Commission to the Appellant about what kind of proof she would need to provide to prove her reasonable and customary efforts.

[15] While not bound by it, I find the reasoning in *TM v Canada Employment Insurance Commission*, 2021 SST 11 persuasive, that the Commission must specifically ask for proof from the Appellant and explain to her what kind of proof would meet a “reasonable and customary” standard.

[16] I also do not see explicit mention of disentitling the Appellant under section 50(8) of the Act, or anything about the Appellants lack of reasonable and customary efforts, in the reconsideration decision.[1]

[17] Based on the lack of evidence the Commission asked the Appellant to prove her reasonable and customary efforts to find suitable employment under subsection 50(8) of the Act, the Commission did not disentitle the Appellant under subsection 50(8) of the Act. Therefore, it is not something I need to consider.

Issue

[18] Is the Appellant available for work?

Analysis

Capable of and available for work

Capable

[19] In order to be considered available under the law, the Appellant must be capable of work.[2]

[20] I find the Appellant is capable of working, but only from October 20, 2022, onward.

[21] For the period of June 20, 2022, to October 19, 2022, I find the Appellant is incapable of working. Here are my reasons why:

[22] The Appellant testified that she suffered a catastrophic heart attack; so bad she was pronounced dead at one point. She also suffered complications from her heart attack, requiring a pacemaker to be implanted and the amputation of three fingers.

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[1] GD03-32
[2] See section 18(1)(a) of the *Employment Insurance Act* which says the Appellant must be **capable of** and available for work.

[23] The Appellant testified that from June 20, 2022, to October 19, 2022, she was not able to work. She had not yet recovered from the amputation of her fingers, or the implantation of a pacemaker.

[24] She says at that point in time she thought she would never work again.

[25] She also told the Commission she was not allowed to return to work until October 20, 2022.[3]

[26] I find the Appellant's testimony is corroborated by the information from her doctor, as the first information supporting that she is able to return to work is a Fit to Work (FTW) form, dated October 20, 2022, which says the Appellant can return work on modified duties with modified hours; 5 hours a day, 3 days a week.[4]

[27] Her doctor also completed a FTW form dated November 29, 2022, which says the Appellant needs to stay on modified duties, but suggests she return to her regular work hours.

[28] So, I find, that from October 20, 2022, the Appellant is capable of working as per her testimony and her doctor's opinion.

[29] However, since she was not capable of working prior to October 20, 2022, that means from June 20, 2022, to October 19, 2022, she was not available for work, as in order to meet the test for availability the Appellant must also be capable of working.[5]

[30] It is true that she was incapable of working due to something outside of her control (a severe heart attack) however, the Federal Court of Appeal has said that if someone is completely incapable of working, then the reasons for why that is, do not matter.[6]

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[3] GD03-18
[4] GD03-21
[5] See Section 18(1)(a) of the *Employment Insurance Act*
[6] *Canada (Attorney General)* v *Leblanc*, 2010 FCA 60

[31] So, the Appellant should be disentitled from benefits for the period of June 20 to October 19, 2022.

Available

[32] Case law sets out three factors for me to consider when deciding whether the Appellant is available for work but unable to find a suitable job. The Appellant has to prove the following three things:[7]

a) She wants to go back to work as soon as a suitable job is available.

b) She has made efforts to find a suitable job.

c) She hasn't set personal conditions that might unduly (in other words, overly) limit her chances of going back to work.

[33] When I consider each of these factors, I have to look at the Appellant's attitude and conduct over the entire period of the disentitlement (June 20, 2022, onward).[8]

– Wanting to go back to work

[34] I find the Appellant has shown she wants to go back to work as soon as a suitable job is available. I find the fact she actually went back to work, even after suffering such a debilitating illness, and with multiple restrictions, demonstrates her desire to work.

– Making efforts to find a suitable job

[35] The Appellant need only accept suitable employment. One of the criteria of suitable employment is that the Appellant's health and physical abilities allow her to perform the work.[9]

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[7] 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.
[8] 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.
[9] Section 9.002 of the *Employment Insurance Regulations*

[36] I find the Appellant was making efforts to find suitable employment as once her doctor cleared her to return to work, she returned to the same employer she was working for prior to her heart attack, with the necessary accommodations for her physical limitations.

[37] The fact the Appellant secured work and has continued to work in that position to this day, clearly shows that her efforts to obtain work were sufficient.

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

[38] I find the Appellant set a personal condition that would unduly or overly limit her chances of returning to the labour market, but only from October 20, 2022, to November 7, 2022.

[39] While not bound by it, I find the Appeal Division decision in *Canada Employment Insurance Commission v KJ*, 2022 SST 339 persuasive where it says that some restrictions on a person's availability are caused by factors beyond their control and what I need to look at is whether the limits on a person's availability are self-imposed.

[40] I find, that while the Appellant does have restrictions of the type of work she can do, these are not personal conditions that she has set. She did not choose to have a severe heart attack or have three fingers amputated,[10] and she has not chosen what limitations she suffers as a result of her heart attack and related complications.

[41] The restrictions that she has on the type of work that she can do are something that she has absolutely no control over.

[42] Further, the Appellant is not totally unable to work with her restrictions, as the Appellant's doctor says that she is capable of working, just with modified duties,[11] and she has returned to work, showing she is capable of working with her restrictions.

[43] Also, the law allows the Appellant to have restrictions due to her illness, as the Appellant is only required to seek and accept suitable employment, which is

[10] GD03-20 and 21
[11] GD03-23

employment that her health and physical capabilities allow her to do.[12] This means she cannot not be punished for a restriction allowed by the law.

[44] So, any restrictions on her ability to work, such as only being able to work with modified duties or with reduced work days/hours, is not a personal condition, since it stems from something she has absolutely no control over (her illness and resulting further complications). It is also a restriction allowed by the law.

[45] However, even with that said, there are a couple contentious points that need to be addressed.

[46] The first point is that while the Appellant was cleared to return to work part-time on October 20, 2022, she says that she did not start working again until November 7, 2022.[13]

[47] I asked her why, if she had been cleared to return to work, she did not do so immediately. She testified that she still had some doctor appointments to attend, and so she waited for those to be over before she returned to work.

[48] I find this is a personal condition that would overly limit her chances of returning to the labour market. She was cleared to work, so could have worked, but she chose to not do so until her doctor appointments were over. Clearly, choosing not to work is overly limiting.

[49] This means that for the period of October 20, 2022, to November 6, 2022, she should be disentitled from benefits, since she had an overly limiting personal condition.

[50] The second contentious point is that the Appellant says her doctor said she could return to full-time hours starting November 29, 2022, but she did not start working full-time until March 2023.[14]

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[12] Section 9.002(a) of the *Employment Insurance Regulations*
[13] See GD02-8 and in her testimony.
[14] See GD02-8 and her testimony.

[51] I asked the Appellant why she did not immediately start working full-time. She says that with where her health was at, she did not feel capable of working full-time until March 2023.

[52] She says that she had just gone through a critical illness (a heart attack so bad she ended up being declared dead at one point) and she did not want her health to deteriorate again, so she had to take it slow, despite what her doctor said, in order to not reinjure herself.

[53] I find the Appellant delaying working full-time is not an overly limiting personal condition.

[54] First, she was already working, so it clearly did not overly limit her from returning to the labour market.

[55] Second, there is nothing in the law that says a person must be working full-time to be considered available.

[56] Third, the doctor says that the Appellant was **suggested** to continue doing modified duties at regular hours.[15] The word "suggest" means to me that working at regular hours is something the Appellant is encouraged to try. In other words, it is not carved in stone that she is completely capable of working full-time at that moment, just that it is something the doctor believes she is capable of doing, so she should try it.

[57] So, in short, the Appellant was not refusing to work full-time, as she did return to full-time work, it was just that she was not recovered enough to work full-time until March 2023. The cause of this delay in being able to work full-time was not any fault of the Appellant's, as her illness, and the impact it had on her, is something that was beyond her control.

– **So, is the Appellant capable of and available for work?**

[58] Based on my findings on the three factors, I find as follows:

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[15] GD03-23

[59] The Appellant was not capable of working at all from June 20, 2022, to October 19, 2022. This means she should be disentitled for that period.

[60] She was not available for the period of October 20 to November 6, 2022, as she was able to return to work at that time, but she chose to delay so that she could finish attending all her doctor appointments. This is a personal condition (it was her choice to not work at that time) that overly limited her chances of returning to the labour market. This means she should be disentitled for that period.

[61] However, from November 7, 2022, I find the Appellant is capable of working and meets all the availability factors. This means that she should **not** be disentitled for this period, so may be payable benefits.

Conclusion

[62] The appeal is allowed in part.

[63] The Appellant cannot be paid regular EI benefits from June 20, 2022, to November 6, 2022, because she has not proven for that period that she was capable of and available for work.

[64] However, she has proven she was capable of and available for suitable employment starting on November 7, 2022. This means the Appellant should not be disentitled from benefits from November 7, 2022, onward.

Gary Conrad
Member, General Division – Employment Insurance Section