



Citation: *LM v Canada Employment Insurance Commission*, 2021 SST 769

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

# **Decision**

**Appellant:** L. M.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission  
reconsideration decision (422086) dated April 30, 2021  
(issued by Service Canada)

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**Tribunal member:** Catherine Shaw

**Type of hearing:** Teleconference

**Hearing date:** June 15, 2021

**Hearing participant:** Appellant

**Decision date:** June 15, 2021

**File number:** GE-21-808

## Decision

[1] L. M. is the Claimant. I am allowing his appeal.

[2] The Claimant has shown that he is available for work. This means that he is not disentitled from receiving EI benefits. So, the Claimant may be entitled to benefits.

## Overview

[3] The Canada Employment Insurance Commission (Commission) decided that the Claimant is disentitled from receiving EI regular benefits as of February 7, 2021, because he wasn't available for work.

[4] I must decide whether the Claimant has proven that he is available for work.

[5] The Commission says the Claimant did not have a valid work permit so cannot be considered available for work.

[6] The Claimant disagrees and says that he applied for a renewal of his work permit before it expired, so he was able to continue working on implied status. He was ready and willing to go back to work at any time.

## Issue

[7] Is the Claimant available for work?

## Analysis

[8] The law says that a claimant has to prove that they are "capable of and available for work" but aren't able to find a suitable job.<sup>1</sup> The Claimant 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 was available for work.

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

[9] Case law sets out three factors for me to consider when deciding whether the Claimant is capable of and available for work but unable to find a suitable job. The Claimant has to prove the following three things:<sup>2</sup>

- a) He wants to go back to work as soon as a suitable job is available.
- b) He has made efforts to find a suitable job.
- c) He hasn't set personal conditions that might unduly (in other words, overly) limit his chances of going back to work.

[10] When I consider each of these factors, I have to look at the Claimant's attitude and conduct.<sup>3</sup>

– **Wanting to go back to work**

[11] The Claimant has shown that he wants to go back to work as soon as a suitable job is available.

[12] The Claimant was laid off from his job in February 2021 due to COVID-19 shutdowns. He told the Tribunal that he wanted to return to work as soon as possible. He explored being a delivery driver for Door Dash and Uber, but was told by Uber that he could not be hired while he was on implied status.

[13] The Claimant explained that he needed a current work permit to start a job with a new employer. So, he waited to be recalled to his employment. He was recalled in May 2021 and returned to work immediately.

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<sup>2</sup> 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.

<sup>3</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.

[14] A desire to go back to work has to be sincere and demonstrated by looking at the Claimant's conduct. I note that the Claimant continued to work in his job until employer closed due to COVID-19 restrictions. When pandemic restrictions lifted, he returned to work. His efforts to find another job also make it clear that he was trying to return to work as soon as possible. I believe that the Claimant wanted to go back to work.

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

[15] The Claimant has made enough efforts to find a suitable job.

[16] The Claimant was laid off from his employment due to COVID-19 restrictions. He was waiting to be recalled when the provincial lockdown ended.

[17] Case law states that a claimant waiting imminent recall should not be immediately disentitled for failing to seek other jobs if their best chances for employment are with the expected recall.<sup>4</sup> This principle does not relieve the Claimant making efforts to find work.

[18] The Claimant had an updated resume prepared. He was signed up for several job search websites and received regular notifications about new job postings. He also made efforts to find a new job as a delivery driver with several companies, but ultimately he was unable to apply for jobs with new employers until he received his work permit.

[19] I find the evidence supports the Claimant's best chance of employment was to be recalled to his job. His layoff from unemployment was due to the impact of COVID-19 lockdown in his province. For this same reason, employment opportunities were limited. I find the Claimant's conduct of waiting for imminent recall and his efforts to find work as a delivery driver are enough to meet the requirements of this second factor because he made reasonable efforts to find work despite the limitations due to COVID-19.

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<sup>4</sup> See *Canada (Attorney General) v MacDonald*, A-672-93. This principle is also set out in Canadian Umpire Benefits (CUB) decisions 14685, 14554, and 21160.

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

[20] The Claimant hasn't set personal conditions that might unduly limit his chances of going back to work.

[21] The Commission says the Claimant could not be considered available because he did not have a valid work permit from April 11, 2020. It argued that the Claimant's failure to re-apply for his work permit prior to its expiry restricted his availability for work.

[22] The Claimant disagrees. He says that he applied to renew his work permit on February 18, 2020, and provided a copy of the receipt for the renewal application.

[23] The Commission questioned whether this receipt represented the renewal of the Claimant's permit, as it did not have the Claimant's name listed as the cardholder who made the payment. The Claimant explained at the hearing that the payment was made by his lawyer, who he confirmed is the name listed as the cardholder on the receipt. He said that the Immigration and Citizenship online payment system did not accept his prepaid credit card, so he had his lawyer process the payment.

[24] I accept the Claimant's explanation of why the receipt bears a different name as the cardholder who made the payment. The Claimant gave sworn testimony of these events at the hearing and I have no reason to doubt his credibility. I find it is most likely that the Claimant applied to renew his work permit through his lawyer on February 18, 2020.

[25] The Claimant provided documents defining the concept of implied status. These documents state that if a temporary resident applies for a new work permit before their most recent work permit expired, they are able to continue working under the conditions of the expired work permit until a decision is made on their application. This is called implied status.

[26] The Claimant states that he had implied status and was able to continue working under the same conditions of his previous work permit. The Claimant provided a copy of his work permit valid from April 11, 2019 to April 11, 2020. As the Claimant has proven

that he applied to renew his work permit on February 18, 2020, before the expiry date of his work permit, I accept that he had implied status.

[27] I find the Claimant's lack of a work permit did not unduly limit his chances of returning to the labour market. This is because he was able to continue working in Canada while under implied status.

[28] I have also considered whether the Claimant's implied status unduly limited his chances of returning to work.

[29] The Claimant stated at the hearing that he was unable to start work at another company while he was on implied status. He said the companies that he applied to required him to provide a copy of a current work permit, which he did not have. He had applied for the renewal in February 2020, but due to a change in housing he did not receive a copy of his updated permit. The Claimant was able to continue working with his employer under his implied status because the employer accepted his documents showing that he had applied for his renewal before his work permit expired.

[30] While the lack of a current work permit may have limited the Claimant's employment opportunities, I also recognize that the only reason the Claimant stopped working in February 2021 was due to COVID-19 shutdowns. This tells me that potential employment opportunities would be limited as a consequence of the provincial lockdown in effect. As I have found that the Claimant's best chance of returning to the labour market was being recalled to his employment at this time, I do not find that his implied status unduly limited his chances of returning to work.

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

[31] Based on my findings on the three factors, I find that the Claimant has shown that he is capable of and available for work but unable to find a suitable job.

## **Conclusion**

[32] The Claimant has shown that he is available for work within the meaning of the law. Because of this, I find that the Claimant isn't disentitled from receiving EI benefits. So, the Claimant may be entitled to benefits.

[33] This means that the appeal is allowed.

Catherine Shaw  
Member, General Division – Employment Insurance Section