



Citation: *LM v Canada Employment Insurance Commission*, 2022 SST 173

## 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:** Leanne Bourassa

**Type of hearing:** Teleconference

**Hearing date:** January 6, 2022

**Hearing participants:** Appellant

**Decision date:** January 20, 2022

**File number:** GE-21-2576

## Decision

[1] The appeal is dismissed. The Tribunal disagrees with the Claimant.

[2] The Claimant hasn't shown that he was available for work. This means that he can't receive Employment Insurance (EI) benefits.

## Overview

[3] The Appellant, L. S., is the Claimant in this case. He was laid off from his job in February 2021 due to the Covid-19 pandemic and applied for regular Employment Insurance (EI) benefits.

[4] The Canada Employment Insurance Commission (Commission) asked the Claimant to provide a copy of his permit to work in Canada. The Claimant told them he had applied for a renewal of his permit that expired in April 2020, but it had not been issued yet. The Commission denied the claim for benefits because the Claimant did not provide a valid employment authorization. The Claimant was considered to be not available for work in Canada as of February 7, 2021.

[5] The Claimant appealed this decision to the Tribunal's General Division. The General Division decided that he was able to work in Canada under implied status, since he had made an application to renew his work permit in February 2020. It found that the Claimant was available for work.

[6] The Commission appealed that decision to the Tribunal's Appeal Division. The Appeal Division found that the General Division made an error in law by ignoring relevant facts and contradictory evidence. The file is now sent back to the General Division to reconsider whether the Claimant received a valid work permit, or other decision in response to his application to renew filed in February 2020.

[7] I must decide whether the Claimant has proven that he was available for work. 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. To show this, he

would have to show that he was legally eligible to work in Canada as of February 7, 2021.

[8] The Commission says that the Claimant wasn't available because he failed to prove that he had a valid permit and was thus unable to work legally in Canada.

[9] The Claimant disagrees and states that he was able to work in Canada because he had applied to renew his work permit before it expired and was therefore on implied status and able to return to his regular employer.

## **Matter I have to consider first**

### **The file is being returned from the Appeal Division**

[10] The General Division of the Tribunal first heard this matter on June 15, 2021 and allowed the appeal on the same day. The Commission appealed that decision and the Appeal Division agreed to hear it. On December 16, 2021, the Appeal Division determined that the file should be returned to the General Division for reconsideration.

[11] The Appeal Division returned the matter to the General Division to reconsider whether the Claimant had received a valid work permit, or other decision, in response to his application to renew his work permit filed in February 2020.

[12] I understand that the intention of the Appeal Division in referring the matter back to the General Division for reconsideration is that I reconsider the Claimant's availability for work, in particular whether or not he had proved he had a valid permit to work in Canada from February 7, 2021.

[13] In the interests of efficiency, I did review previously submitted evidence and have listened to the recordings of the previous General Division and Appeal Division hearings. I also invited the parties to provide any new evidence they wished to submit. Neither party provided any new documentary evidence.

[14] I held a new hearing on January 6, 2022, and at the outset, I advised the Claimant that I would be focusing my questions on the issue of his work permit. Since I

had access to the previous evidence and hearing recordings, I would be considering some of the evidence that had been tested in previous hearings when making my decision, but I did not intend to question him about those points again. At the end of the hearing, he could mention any evidence already on the record that he felt I should take note of, or that needed to be clarified. He agreed to go forward with the hearing with that in mind.

## **Issue**

[15] Was the Claimant available for work?

## **Analysis**

[16] The Employment Insurance Act 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 the balance of probabilities. This means that he has to show that it is more likely than not that he was available for work.

## **Capable of and available for work**

[17] Case law sets out three factors for me to consider when deciding whether the Claimant was 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 wanted to go back to work as soon as a suitable job was available.
- b) He made efforts to find a suitable job.
- c) He didn’t set personal conditions that might have unduly (in other words, overly) limited his chances of going back to work.

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

<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.

[18] 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***

[19] The Claimant has shown that he wanted to go back to work as soon as a suitable job was available.

[20] The Claimant was laid off in February 2021. He explains that while he was laid off, he explored working as a delivery driver but was told that he could not be hired because he was waiting to receive his work permit that allowed him to work in Canada.

[21] The Claimant believed he needed a current work permit to start a job with a new employer, so he could only go back to his former employer when the COVID-19 restrictions were lifted. He waited to be recalled and returned to work as soon as he was recalled in the third week of May 2021.

[22] In looking at the Claimant's conduct, I find he has shown his desire to go back to work was sincere. He only stopped working because his employer closed due to COVID-19 restrictions. He looked for other jobs when he was laid off, which shows he was trying to return to work. As soon as his employer could re-open, he went back to work. He has shown he wanted to go back to work.

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

[23] The Claimant made enough effort to find a suitable job.

[24] The Claimant's efforts to find a new job included applying to Uber and Doordash. He also had a resume prepared for a job search and was subscribed to job websites. He testified that he was receiving job notices. He was also talking to people he knew about job opportunities.

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<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.

[25] Case law says that a claimant who is waiting to be recalled to his employment 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> A claimant does still need to make efforts to find work.

[26] I find that the Claimant's best chance of returning to work was with his expected recall to his job. Because of the COVID-19 situation that shut down his employer, other jobs would be also be limited. His situation was also restricted by the fact that since he still had not received the work permit he says he had applied for, other employers may be hesitant to hire him. Until or unless his permit was delivered, his best choice for employment was likely being recalled by his employer.

[27] Those efforts were enough to meet the requirements of this second factor because the Claimant was looking for job while remaining in touch with his employer. He was prepared to return as soon as he was recalled.

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

[28] The Claimant had personal conditions that might have unduly limited his chances of going back to work.

[29] I find that the Claimant was limited in his chances of going back to work because he could not prove that he had a valid work permit in February 2021.

[30] 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 did not prove he had been issued a work permit that was valid after April 11, 2020. He also had not proven that he reapplied for his work permit before it expired and qualified for implied status. This limited his chances of going back to work.

[31] The Claimant says he was not restricted from working and was therefore available. He says in February 2020 he had applied to renew his work permit that was

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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) decision 14685, 14554 and 21160.

expiring on April 11, 2020. While he was awaiting his new permit, he was on implied status and only allowed to work in Canada for his previous employer, who would recall him as soon as possible. It was not his fault that he did not get a new permit because he applied for it in time.

– ***Has the Claimant proven he had a valid work permit as of February 7, 2021?***

[32] I find the Claimant has not shown that he had a valid work permit after April 11, 2020.

[33] It is up to the Claimant to prove that he did not have limitations on his ability to work in Canada when he applied for benefits in February 2021. This means he had to show he was legally able to work in Canada. He could have done that by showing that he had a valid work permit.

[34] Since the Claimant submitted a work permit that was valid from April 1, 2019 to April 11, 2020, there is no disagreement that he was entitled to work freely in Canada until April 11, 2020.

[35] There is no copy in the record of a work permit issued to the Claimant after April 11, 2020.

[36] The Claimant confirms that he never received an official work permit document covering a time period between April 12, 2020 and July 19, 2021.<sup>5</sup>

[37] The Claimant could not have been surprised by the need to prove he was entitled to work in Canada. This was not the first time the Commission had asked him about a work permit after his expired in April 2020. The evidence shows that the Claimant had a prior claim for benefits. During that claim, the Commission had asked him in July and October of 2020 to provide a copy of his work permit. His response was only that the permit had not been issued yet. It appears that the Claimant was content to wait for the permit and argue that he was on implied status until something arrived. Unfortunately,

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<sup>5</sup> The Claimant advised the Tribunal that he had received a work permit that covers the period of July 19, 2021 to July 19, 2022.

this was not sufficient to meet his obligations when he made a claim for benefits in February 2021.

– ***Was the Claimant on “implied status” from February 7, 2021?***

[38] A claimant who applied to renew a work permit before the expiry date of a valid permit is entitled to continue working in Canada under the same conditions of the valid permit until a decision is made on the renewal. This is called “implied status”.

[39] The Claimant argues that since he paid to renew his permit before it expired on April 11, 2020, he was allowed to work in Canada under “implied status” on the same conditions, until he was sent a new permit.

[40] The Claimant submitted documents to the Commission, including the following:

- An “Official Receipt” showing a payment of \$155.00 on February 18, 2020;
- An “Application to change conditions, extend my stay or remain in Canada as a worker”, signed by the Claimant on December 18, 2020;
- A “Confirmation Notice” showing a payment by the Claimant of \$155.00 on March 29, 2021;

[41] The “Official Receipt” issued on February 18, 2020, is for a payment to the Government of Canada, Immigration, Refugees and Citizenship Canada (IRCC). This document does not have the Claimant’s name listed next to “Cardholder”. It does not say what the payment was for, nor does it appear to have any number or code on it that would tie it back to the Claimant. The Claimant’s name is handwritten on the document but it is unclear when this was written or by whom.

[42] The Claimant explained that the cardholder name on the receipt is his lawyer’s name. He says this payment was made to renew his work permit that would expire in April 2020. His lawyer paid the fee for him because the IRCC online payment system did not accept his prepaid credit card. Although he says he paid his lawyer back for this payment, there is no evidence to show that he did so.



[43] I find that the “Official Receipt” submitted by the Claimant is not enough to show that the Claimant had applied to renew his work permit. There is nothing on the face of this document that ties it to the Claimant or to an application for a renewal of a work permit.

[44] I recognize that the Claimant has answered some of the questions about this document through his testimony. However, he also testified that when you apply for a permit, you send in a form with the receipt for the payment attached to it. I do not see any other document in the evidence from that same time period that would confirm that an application to renew the permit was sent in with this payment.

[45] I find that the “Official receipt” does not prove that the Claimant had made an application to renew his permit before April 11, 2020. Therefore I am not convinced that the Claimant benefitted from “implied status” in February 2021.

[46] The Claimant has mentioned that this receipt was enough for his employer to consider him eligible to work in Canada. This may be the case. However I find that for the purposes of showing that he had applied for a new work permit in February 2020 and that he was on implied status in February 2021, this is not sufficient.

[47] The other documents that the Claimant submitted to the Commission do not provide any support to the Claimant’s position that he was on implied status.

[48] On December 18, 2020 the Claimant signed an “Application to change conditions, extend my stay or remain in Canada as a worker”. This form appears very incomplete. The Claimant has not included his address, information about his coming into Canada or a document number on his current work permit. He also does not provide any information about his recent work, and he has checked “NO” next to the question “Have you previously applied to enter or remain in Canada”.

[49] The Claimant testified that this is the form that you need to fill out after you make a payment. He fills this in every year and attaches the receipt for payment. He says that this form was to apply to renew his work permit that was expiring. Although there was very little information on the form, the Claimant says there was enough there for the

department to contact him if there was a problem. He could not say when the permit he was applying to renew would expire.

[50] I find that this document does not support the Claimant's claim that he was on implied status or otherwise entitled to work in Canada in February 2021.

[51] First, there is no evidence that this form was ever sent in. Second, if it was sent in, it is not clear why it was sent in. Third, if the form was sent in to renew a permit, there is no evidence that there was a payment sent in with it or which permit it would have related to. Fourth, if it was to renew the permit expiring in April 2020, it was too late for the Claimant to benefit from implied status. Finally, if this was a valid application for a new work permit, there was no permit issued by February 2021.

[52] The Claimant says that this form was the application for the permit he received in July 2021. If that is the case, then it is not related to the permit that expired in April 2020.

[53] I am also not convinced by this document because the Claimant submitted a receipt for a payment made on March 29, 2021. That document does show that it is a payment for application fees and that the payment was made by the Claimant. If the Claimant had made an application for a permit in December 2020, he would not have needed to make a payment in March 2021.

[54] Also, this receipt is clearly dated after the Claimant applied for benefits. The Claimant testified that he doesn't remember why he made that payment, but it was probably because a permit was going to expire. He could not confirm when a permit would expire, only that it could have been in July. None of this serves as proof that on February 7, 2021, the Claimant had a valid work permit.

[55] I find that the Claimant did not prove he was on implied status or otherwise entitled to work in Canada on February 7, 2021. Because he has not proven this, or shown that he tried to resolve this situation, he did have a condition that limited his chances of returning to work.

[56] The Commission has argued in the alternative that if the Claimant was on implied status because he had applied to renew a work permit in February 2020, it was unreasonable to believe that he was still on implied status when he applied for benefits one year later. They argue that implied status is only applicable until a work permit is issued or the request for the permit is denied. By February 2021, either the work permit would have been issued or the Claimant's application would have been denied. It was the Claimant's obligation to prove that either a permit had been issued or refused, or that it was still awaiting processing.

[57] The Claimant testified that he never received a notice from Immigration and Citizenship Canada saying that his permit had either been granted or refused.

[58] The Commission submitted a document showing that on March 29, 2021, IRCC's processing time for applications was 50 days. They maintain that an application that was submitted in February 2020 would have been processed by the time the Claimant applied for benefits in February 2021. The Claimant should have had some sort of information about his work permit at that point.

[59] I do not agree that the processing times reported by IRCC in March of 2021 necessarily reflect the reality of processing time of applications that were submitted one year prior.

[60] However, I do agree that on the balance of probabilities, by February of 2021 the Claimant should have been in a position to provide some sort of proof of the status of an application for renewal he said he made in February 2020. The evidence he has submitted does not show that a permit was issued, nor does it confirm that he applied for the renewal of a permit before the expiry date of April 2020. If he wanted to prove he was eligible to work in Canada in February 2021, he could have taken steps to inquire with IRCC about the status of his application.

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

[61] Based on my findings on the three factors, I find that the Claimant hasn't shown that he was capable of and available for work but unable to find a suitable job. He has

not proven that he was legally able to work in Canada after April 11, 2020, so he has not proven that he was available for work under the terms of the EI Act.

– ***Communication from the Canada Revenue Agency***

[62] The Claimant has argued aggressively that a document given to him by the Canada Revenue Agency dated April 9, 2021, orders the Commission to pay him EI Benefits. This is not what this letter says.

[63] The letter from the CRA says that the Claimant's employment was insurable under the Employment Insurance Act. The insurability of a claimant's employment is only one of the factors that is considered when determining if a claimant is eligible for EI benefits. The CRA decision does not mean that the Claimant has qualified for EI benefits. It is also not relevant to proving that the Claimant was available for work after February 5, 2021.

## **Conclusion**

[64] The Claimant hasn't shown that he was available for work within the meaning of the law. Because of this, I find that the Claimant can't receive EI benefits.

[65] This means that the appeal is dismissed.

Leanne Bourassa  
Member, General Division – Employment Insurance Section