Citation: *LM v Canada Employment Insurance Commission*, 2022 SST 617

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	L. M.
Respondent:	Canada Employment Insurance Commission
Representative:	Angèle Fricker

Decision under appeal:	General Division decision dated January 20, 2022 (GE-21-2576)

Tribunal member:	Shirley Netten
Type of hearing:	Teleconference
Hearing date:	June 1, 2022
Hearing participants:	Appellant Respondent's representative
Decision date:	July 8, 2022
File number:	AD-22-147

Decision

[1] The appeal is allowed. The Claimant, L. M., was available for work in February 2021.

Overview

[2] The Claimant wants employment insurance (EI) benefits from February to May 2021. The Canada Employment Insurance Commission (Commission) decided not to pay him benefits because he wasn't considered available for work without a valid work permit.

[3] The Social Security Tribunal's General Division agreed with the Commission that the Claimant wasn't available for work. The Claimant appealed to the Appeal Division.

[4] I have found that the General Division erred by not considering important evidence about the Claimant's chances of returning to work. The Claimant met the criteria for being available for work. His disentitlement is lifted.

Issues

[5] The issues in this appeal are:

a) Did the General Division make an error of fact by not considering relevant evidence about the Claimant's chances of returning to work?

b) Did the General Division make other reviewable errors?

c) How should the General Division's error be fixed?

Some aspects of the General Division are not disputed

[6] The parties have not disputed the following aspects of the General Division decision:

- To get benefits, the Claimant had to prove that he was capable of and available for work.[1]

- The General Division correctly set out the three factors (commonly called the "*Faucher* factors") that must be considered on the question of availability.[2]

- The first two *Faucher* factors – wanting to go back to work and making efforts to find a suitable job – were met.[3]

[7] It is the third *Faucher* factor – whether the Claimant set personal conditions that might unduly limit his chances of going back to work – that is in dispute.

The General Division made an error of fact

[8] One of the grounds of appeal to the Appeal Division is that the General Division based its decision on an erroneous finding of fact that it made without regard for the evidence before it.[4]

[9] As the Commission's representative points out, this ground of appeal requires deference to the General Division's findings of fact. The Appeal Division can only intervene if a finding was contrary to the evidence, unsupported by the evidence, or did not take into account important evidence.[5]

[10] The General Division found that the Claimant was limited in his chances of going back to work because he had not proven that he was legally able to work in February 2021.

[11] The Claimant didn't have a work permit between April 12, 2020 and July 19, 2021. So, the General Division focused on whether the Claimant met the conditions for

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[1] The requirement to be capable and available is found in section 18(1)(a) of the *Employment Insurance Act.*
[2] These factors are set out in the case law. See Federal Court of Appeal decision *Faucher v Canada (Employment and Immigration Commission),* 1997 CanLII 4856 (FCA). The *Faucher* factors have been applied consistently since then; see, for example, *Canada (Attorney General) v Lavita*, 2017 FCA 82.
[3] See paragraphs 19 to 27 of the General Division decision.
[4] Section 58(1)(c) of the *Department of Employment and Social Development Act*
[5] See, for example, *Walls v Canada (Attorney General)*, 2022 FCA 47.

implied status, looking at the evidence about the Claimant's work permit applications to Immigration, Refugees and Citizenship Canada (IRCC). The General Division wasn't persuaded that the Claimant had met IRCC's criteria for implied status.

[12] But, in finding that the Claimant had limited his chances of returning to work in February 2021, the General Division ignored uncontested and important evidence: the Claimant **had** returned to work, repeatedly, during the April 2020 to July 2021 gap between work permits. His regular employer re-hired him three times (in July 2020, November 2020, and May 2021). In total, the Claimant worked for over 9 months of the 15-month gap period. He and his employer relied (whether correctly or not) on implied status.

[13] I agree with the Commission's representative that the General Division was aware that the Claimant had returned to work in May 2021.[6] The General Division said that the employer's understanding of the Claimant's work status did not **prove that status**.[7] But the General Division didn't consider the Claimant's demonstrated ability to work between work permits when it decided **whether he had unduly limited his chances of going back to work**.[8] The General Division made this finding of fact without regard to the material before it.

[14] This error allows me to intervene.

I don't need to decide about other errors

[15] Two other possible errors have come up in this appeal.

[16] First, a question of procedural fairness. At the hearing, the General Division member told the Claimant that she had accepted his evidence about applying for a work permit through his lawyer in 2020, and that she recognized that he had implied status at that time. In her decision, she rejected this evidence and concluded that the Claimant hadn't proven implied status.[9] This raises a concern about the Claimant's right to be

[6] See paragraph 21 of the General Division decision.
[7] See paragraph 46 of the General Division decision.
[8] See paragraphs 29 and 55 of the General Division decision.
[9] See paragraphs 40 to 45 of the General Division decision.

heard. He may well have assumed that he did not need to provide additional information about implied status based on the member's assurances.

[17] Second, a possible legal error. Another way to think about the error of fact discussed above is as a legal error: the General Division may have applied the wrong legal test by focusing solely on whether the Claimant met IRCC criteria for implied status and not on whether his situation unduly limited his chances of returning to work.

[18] Because I can intervene based on the error of fact, I need not decide whether the General Division made these other errors.

How should I fix the General Division's error?

[19] I see no benefit to returning this matter to the General Division, where it started over a year ago. The General Division's error relates to only one aspect of its decision, and I can now give the decision the General Division should have given if it hadn't made that error.[10] There is sufficient evidence for me to decide the disputed third factor: Did the Claimant set personal conditions that might unduly limit his chances of going back to work?

The absence of a formal work permit didn't unduly limit the Claimant's chances of going back to work

[20] I recognize that not having a work permit will usually limit, if not eclipse, a claimant's chances of returning to work. But this is a question of fact in every case.

[21] The Commission's representative identified two Appeal Division decisions that found claimants unavailable because they couldn't prove that they could legally work.[11] I don't find those decisions persuasive, because the facts are different. Unlike the present appeal, those claimants' work permit applications had been formally denied, and neither claimant had demonstrated an ability to work in the absence of a formal work permit.

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[10] Section 59(1) allows me to give the decision that the General Division should have given.
[11] *SB v Canada Employment Insurance Commission*, 2020 SST 442; *Canada Employment Insurance Commission v LB,* 2015 SSTAD 1332

[22] In one of those decisions, the Appeal Division specifically noted that the claimant did not have a willing employer and found that he was "unable to work due to the absence of a valid work permit."[12] In the present appeal, the Claimant was able to work **despite** the absence of a formal work permit.

[23] Having reviewed the evidence that was before the General Division, I find it more likely than not that the absence of formal work authorization did **not** unduly limit the Claimant's chances of returning to work. The following details are important:

- The Claimant had formal work permits both before and after he applied for EI benefits in February 2021, and a regular employer.

- IRCC allows temporary residents to keep working under implied status, if they've applied to extend their status, until a decision is made. Although IRCC makes a decision about the work permit, there is no indication that IRCC makes a decision about implied status.

- The Claimant did not, on a balance of probabilities, receive a work permit refusal from IRCC. I make this finding based on the Claimant's unchallenged testimony, the absence of any documentation to the contrary, and the eventual approved work permit. Despite the long gap period from April 2020 to July 2021 and IRCC's advertised service standards, I can't assume that the Claimant received a refusal during that period.[13] Moreover, I find it unlikely that the Claimant, a temporary resident regularly reporting to immigration authorities (as he testified), would have risked his status in Canada by working after a work permit refusal.

[12] See paragraphs 16 and 17 of *SB v Canada Employment Insurance Commission*, 2020 SST 442.
[13] The General Division was also not prepared to make this inference.

- The Claimant may or may not have met IRCC criteria for implied status.[14] Nevertheless, he and his employer acted on the assumption that he was allowed to work.

- The employer re-hired the Claimant three times during the gap between work permits, before and after February 2021.

- Canada Revenue Agency categorized the Claimant's employment during this period as insurable, without raising any red flags about the legality of this employment.

[24] Ultimately, I am persuaded by the **possibility** of informal work status together with the key players' **reliance** on implied status and the Claimant's **actual** work history. In this unusual set of circumstances, the Claimant's chances of returning to work in February 2021 was not in fact limited by the absence of a formal work permit.

The Claimant was available for work

[25] I have found that the Claimant's work permit situation did not unduly limit his chances of returning to work.

[26] The Commission has not argued that the Claimant set any other limiting personal conditions. I recognize that the Claimant prioritized a return to work with his regular employer: he expected to return when pandemic restrictions were lifted and a new employer may not have accepted implied status. The General Division determined that this was the Claimant's best chance of returning to work, and noted that the nature of his layoff would also have affected other employment. There is no basis for me to interfere with these (undisputed) findings of fact by the General Division. On these facts, I find it more likely than not that focusing on a return to his regular employment did not

[14] This reflects the General Division's finding that the Claimant did not prove that he was on implied status. While proving that status would certainly have helped the Claimant, not proving implied status is not determinative in this case. This is why I didn't consider it necessary to decide the procedural fairness issue and possibly give the Claimant further opportunity to prove that status. This would have delayed the Appeal Division proceedings (for submissions on the issue, which hadn't been raised before the hearing) as well as the ultimate outcome of the dispute (by requiring a return to the General Division).

unduly limit the Claimant's chances of returning to work as soon as possible.[15] Indeed, the Claimant's period of unemployment was relatively brief.

[27] Accordingly, the third (and only disputed) *Faucher* factor has been met. So, the Claimant was available for work when he applied for benefits in February 2021. The disentitlement is lifted.

Conclusion

[28] The appeal is allowed. The General Division made a factual error. The Claimant's work permit situation did not unduly limit his chances of returning to work in February 2021. The disentitlement for being unavailable for work is lifted.

Shirley Netten
Member, Appeal Division

[15] The Federal Court of Appeal has accepted this approach in cases such as *Carpentier v Canada (Attorney General)*, 1998 CanLII 8081 (FCA), *Canada (Attorney General) v Macdonald,* A-672-93, *Canada (Attorney General) v Lavita*, 2017 FCA 82.