



Citation: *ML v Canada Employment Insurance Commission*, 2022 SST 1500

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: M. L.

Respondent: Canada Employment Insurance Commission
Representative: Anik Dumoulin

Decision under appeal: General Division decision dated October 19, 2021
(GE-21-1621)

Tribunal member: Stephen Bergen

Type of hearing: Videoconference
Hearing date: December 5, 2022
Hearing participants: Appellant
Respondent's representative

Decision date: December 16, 2022
File number: AD-22-629

Decision

[1] I am dismissing the appeal.

[2] The General Division made an error in how it arrived at its decision so I have corrected that error.

[3] However, I have still reached the same decision as the General Division. The Claimant was not available for work prior to March 5, 2021. As a result, he is disentitled to benefits prior to March 5, 2021.

Overview

[4] The Appellant is the Claimant, M. L. He applied for Employment Insurance (EI) sickness benefits on September 17, 2020. Sometime after his sickness benefits expired, the Respondent, the Canada Employment Insurance Commission (Commission), converted his claim to a claim for regular EI benefits. However, the Commission found that the Claimant was not entitled to regular benefits after January 10, 2021. It decided that he had not proven that he was available for work.

[5] The Claimant did not agree with this decision and he appealed to the General Division. The General Division allowed his appeal in part. It found that the Claimant shown that he was available for work from March 5, 2021 onward, but not from January 10, 2021.

[6] The Claimant appealed the General Division decision to the Appeal Division and I granted him permission to appeal.

[7] This is my decision on the appeal. I find that the General Division made an important error of fact by not considering the evidence of the Claimant's efforts to renew his forklift licence. However, I must reach the same decision as the General Division. Even when I consider the forklift renewal evidence, I find that the Claimant has not proven he was available for work before March 5, 2021. That means that he is not entitled to regular EI benefits until March 5, 2021.

Preliminary matters

New Evidence

[8] The Claimant submitted a document to the Appeal Division self-described as a news release from the Office of the Premier. Its headline reads, “Ontario Announces Province wide Shutdown to Stop Spread of Covid-19 and Save Lives” (News Release).

[9] When the Appeal Division hears an appeal from a decision of the General Division, its role is to decide whether the General Division made an error in how it reached its decision. The Appeal Division does not hear new evidence or reweigh the evidence.¹

[10] However, the Appeal Division may receive new evidence under a few narrow exceptions.² One of those exceptions permits me to receive “general background information.” This is information that might assist me to understand the relevant issues. The Claimant confirmed that he was submitting the News Release as general background information and not as proof of any fact that was at issue.

[11] The Commission had no objection so I accepted the News Release as general background information. I have not accepted it as evidence that is relevant to the merits of this appeal.

Issues

[12] The issues in this appeal are:

- a) Was the General Division process unfair in any way?
- b) Did the General Division make an error of jurisdiction by not considering M. L.’s entitlement to benefits prior to January 11, 2021?

¹ See the decision in *Parchment v Canada (Attorney General)* 2017 FC 354.

² See the decision in *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22.

- c) Did the General Division make an error of law by applying a legal test that was not appropriate during a pandemic (the “Covid context”)?
- d) Did the General Division make an important error of fact by,
 - i. Failing to consider how the Covid context affected his availability?
 - ii. Failing to consider evidence that the Claimant was seeking to recertify as a forklift operator?

Analysis

[13] The Appeal Division may only consider errors that fall within one of the following grounds of appeal:

- a) The General Division hearing process was not fair in some way.
- b) The General Division did not decide an issue that it should have decided. Or, it decided something it did not have the power to decide (error of jurisdiction).
- c) The General Division made an error of law when making its decision
- d) The General Division based its decision on an important error of fact.³

– Fairness of the process

[14] When the Claimant completed the Application to the Appeal Division form, he selected all the grounds of appeal, including the ground of appeal about “procedural fairness.”

[15] During the Appeal Division hearing, I described what is meant by an error of “procedural fairness.” I acknowledged that the Claimant disagreed with the General Division result, and that he may view that result as affecting him unfairly. However, as I explained, this would not mean that the General Division made an error of procedural fairness.

³ This is a plain language version of the three grounds. The full text is in section 58(1) of the *Department of Employment and Social Development Act*.

[16] I told the Claimant that he would need to satisfy that the process itself was unfair. I also explained that I was concerned only about the fairness of the General Division process. I explained that I would not be considering the fairness of his dealings with Service Canada or the Commission.

[17] The Claimant did not identify how the General Division process was unfair. Neither his written nor his oral arguments had anything to say about the General Division process. At the same time, nothing on the face of the record suggests that the General Division process was unfair.

[18] I find that the General Division did not make an error of procedural fairness.

– **Jurisdiction to consider benefit entitlement prior to January 11, 2021**

[19] In the Claimant's submissions to the Appeal Division, he referenced his earlier Canada Emergency Relieve Benefits (CERB) and his entitlement to EI sick benefits. He asserted that he had not received the right benefits, or benefits in the right amount, in the period prior to January 11, 2021. The Claimant asked me to consider these questions as well.

[20] The Appeal Division's jurisdiction is limited to considering whether the General Division made an error in how it decided the appeal. It does not have jurisdiction to review whether the Commission properly considered benefits that are unrelated to the decision that the Claimant appealed to the General Division.

[21] However, the Appeal Division is authorized to consider whether the General Division made an error of jurisdiction. If the General Division failed to decide all of the issues that it was required to decide, this would be an error of jurisdiction.

[22] The General Division considered only whether the Claimant was entitled to regular benefits after January 10, 2021. The Claimant argues that the General Division should also have considered the Claimant's entitlement to other benefits up to and including January 10, 2021.

[23] In this case, the General Division was not required to consider the Claimant's earlier benefit entitlements. In fact, it was not permitted to consider them.

[24] The General Division's jurisdiction comes from section 113 of the *Employment Insurance Act* (EI Act). This section says that a party who is dissatisfied with a decision under section 112 may appeal to the Social Security Tribunal. Section 112 refers only to decisions that flow from a request for reconsideration.

[25] The Claimant asked the Commission to reconsider its May 5, 2021, decision letter. There were two decisions in the May 5, 2021, letter. The first decision was that the Claimant was disqualified from receiving benefits because he left his employment without "just cause".⁴

[26] The second decision was about the Claimant's disentanglement to benefits. In that decision, the Commission found that he was not entitled to benefits from January 10, 2021, onward, because he had not proven his availability for work.

[27] In his request for reconsideration, the Claimant addressed the disqualification issue by explaining that his Record of Employment (ROE) was incorrect. He provided a corrected ROE, which stated that it was issued for "shortage of work / end of contract or season."⁵

[28] The Claimant also disagreed with the decision on his availability for work. He stated that he was willing and able to work and that "[his] payments were being withheld due to availability for work." He said that he was asking for the "correct adjustments" so that he could receive payments "from January 10 to June and again from July 3 to present."⁶

[29] The Commission looked at both the disqualification and the disentanglement issues when it considered the Claimant's reconsideration request. It changed its disqualification decision. It found that the Claimant should not have been disqualified

⁴ See section 29(c) of the EI Act.

⁵ See GD3-34.

⁶ See GD3-32.

from receiving benefits. However, the Commission maintained its other decision that the Claimant was disentitled after January 10, 2021 because he had not proven his availability for work.

[30] When the Claimant sent his appeal to the General Division, he acknowledged that the Commission had decided in his favour on the question of his “voluntarily leaving employment” but he asked that the decision “be reviewed retroactive to January 11, 2021, to present.”⁷

[31] It is clear that the Claimant was only appealing the decision on his availability for work. The General Division proceeded accordingly, considering this question alone. In so doing, the General Division did not make an error of jurisdiction.

– **Application of law in the Covid context**

[32] The Claimant’s insisted that the General Division had not considered the Covid context. He said that the General Division should have considered how he was affected by the Covid context.

[33] In response to the Covid pandemic, and to mitigate the economic effects on individuals, the Canadian Parliament brought in benefits such as the Canada Emergency Relief Benefit, which was replaced by the Canada Relief Benefit. These benefits were intended for those whose employment circumstances were affected by the pandemic, but who would not otherwise qualify for EI benefits. In the case of CERB, there was no requirement for a claimant to prove availability for work.

[34] Parliament acknowledged the “Covid context” through these other benefit programs. However, it did not change the eligibility criteria for regular EI benefits.

[35] Section 18(1)(c) of the EI Act states that claimants are not entitled to benefits for any working day for which they fail to prove that they are capable and available for work.

⁷ See GD2-5.

[36] The General Division applied case law which interprets the meaning of available, including what has come to be called the “*Faucher* test”.⁸ This General Division must apply this test when it evaluates a claimant’s availability. It must consider the three factors described in the test, which are:

- a) Whether the claimant has a desire to return to work as soon as possible;
- b) Whether the claimant expresses that desire through a job search, and:
- c) Whether a claimant has set personal conditions that unduly limits their chances of returning to work.

[37] The higher Courts have not revisited this test in the Covid context. There is no legislative authority or court decision to suggest that the General Division should interpret the *Faucher* test in a novel or more flexible manner because of the Covid pandemic or any public health measures implemented in response to Covid.

[38] The General Division found that the Claimant did not have the desire to return to work until March 5, 2022.

[39] Unfortunately, the General Division’s findings are less clear on the second *Faucher* factor; that is, whether the Claimant made efforts to find employment. The General Division introduced its analysis of this factor by saying that “[t]he Claimant has made enough efforts to find a suitable job.”⁹ And, it concluded its analysis by saying that “the Claimant’s job search efforts were enough to satisfy this second factor.”¹⁰ These statements would seem to be clear, except for what lies in the paragraphs between these two statements.

[40] In the intervening discussion, the General Division accepted that the Claimant was actively and regularly engaged with the employment agency from March 5, 2021, onward. It said, “emails and telephone records show that the Claimant was actively

⁸ See the decision in *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

⁹ See the General Division decision at para 20

¹⁰ See the General Division decision at para 25.

looking for work from March 5, 2021, onward. The General Division did not support its conclusion with any evidence of efforts to find a job from before March 5, 2021.

[41] I understand the General Division to have found that the Claimant only made enough efforts to find a suitable job **after** March 5, 2021. I say this because the General Division based its conclusion on evidence of the Claimant's efforts to find a job from March 5, 2021, exclusively. Also, by this point in its analysis the General Division had determined that the Claimant did not have a desire to return to work in the period before March 5, 2021. The General Division could not have concluded that the Claimant "expressed his desire to return to work" during the same period that it had found he had no such desire.¹¹

[42] At any rate, the General Division could have concluded that the Claimant was not available for work within the meaning of the EI Act just by finding that the Claimant had not satisfied one of the *Faucher* factors. Once it found that the Claimant did not have a desire to return to work, it could conclude that he was not available. It did not have to find that his efforts to find a job were not enough.

[43] The General Division applied the correct law and applied it in the correct manner. It found that the Claimant was not available between January 10, 2021, and March 5, 2021, because he did not satisfy all the *Faucher* factors. He had not shown that he had a desire to return to work as soon as possible or that he expressed that desire through efforts to find a job.

– **Failing to consider the Covid context**

[44] The Claimant also argued that the General Division made an important error of fact because it did not consider the Covid context.

[45] The Claimant has little to say about the "Covid context" at the hearing. He said that many offices were closed because of Covid and that he couldn't go into an office to

¹¹ In *Faucher*, the Court said that the decision maker must analyze the claimants' desire to return to work as soon as possible and "the expression of **that** desire through efforts to find a suitable job." (Emphasis added.)

renew his forklift licence.¹² There was no other evidence to suggest that the Covid context might have affected his desire to return to work or prevented him from making greater efforts to find a job. If the Claimant believed that the General Division should take some special notice of the Covid context, he did not argue this at the General Division.

[46] I find that the General Division did not make an important error of fact by not considering evidence of how the Claimant was affected by the Covid context.

[47] First, the General Division is not required to mention each and every piece of evidence. Instead, it may be presumed to have considered all the evidence before it.¹³

[48] Second, to find that the General Division made an important error of fact, I must find that it based its decision on a finding of fact that ignored or misunderstood relevant evidence. In this case, the General Division did not base its decision on whether the Claimant had difficulty making contacts or accessing offices because of Covid. Its finding that the Claimant did not have a desire to return to work did not depend on whether finding work is easy or difficult.

[49] Likewise, the General Division's finding that the Claimant's efforts to find a job were "enough" from March 5, 2021, onward did not depend on what it may have thought about the Covid context.

[50] The General Division evaluated only whether the Claimant's efforts were enough to meet the second *Faucher* factor in the availability test. It relied on evidence of his emails and telephone records of contacts or attempted contacts with his employment agency. It accepted this as proof of his efforts to find work from March 5, 2021, onward. The General Division accepted that the Claimant had made these efforts, and it considered them to be enough.

[51] The Claimant was apparently able to do these things from March 5, 2021, regardless of whether he was hindered by Covid or by closed offices and other

¹² Listen to the General Division audio recording of the hearing at timestamp 0:39:00

¹³ See the decision in *Simpson v Canada (Attorney General)*, 212 FCA 82.

measures taken in response to Covid. There was no evidence that the Covid context made these things more difficult before March 5, 2021 than afterwards.

[52] The Claimant's assertion that businesses were closed or that he could not visit offices in person may have been relevant to whether he had made "reasonable and customary efforts" to find work. But the General Division clearly stated that it was not requiring him to prove he had made reasonable and customary efforts.¹⁴

[53] The General Division did not make an error in finding only that the Claimant had made enough efforts to find a job from March 5, 2021, onward. Its decision that the Claimant was not available prior to March 5, 2021, did not depend on the effects of Covid or measures to control Covid.

– **Failure to consider evidence of the Claimant's attempts to recertify as a forklift operator**

[54] In trying to make his case that he had been available for work, the Claimant brought evidence to establish his contacts with a particular employment agency. He also spoke of his efforts to renew his expired forklift operator licence.

[55] In my leave to appeal decision, I noted that the Claimant testified that he discovered that the expiry date on his licence was December 27, 2010. He said that he contacted W at the employment agency, sent her a copy of his expired licence, and asked that it be renewed. He also testified that he believed he did this in the first week of January.¹⁵

[56] However, the General Division said that there was no compelling evidence that he Claimant wanted to go back to work before March 5, 2021. It did not mention anything about his efforts to renew his forklift licence, or comment on his testimony that he believed he did this in the first week of January.

¹⁴ See the General Division decision at para 12.

¹⁵ Listen to the General Division audio recording of the hearing at timestamp 0:38:00 to 0:39:00. See also GD3-20.

[57] The Commission acknowledged in its submissions that evidence of the Claimant's efforts to activate his forklift licence would be evidence of his desire to return to work. However, the Commission also argued that the General Division decision demonstrated that it considered the Claimant's forklift license evidence in paragraphs 5 and 17.

[58] In paragraph 5, the General Division referred to the Claimant's assertion that he had he had been available for work since January 4, 2021 and that he had proved his availability from at least the last week of February. Footnotes to paragraph 5 referred to GD3-25 (where he claimed to be available since January 4, 2021), GD 11-1 (the Claimant's statement that his log records showed his availability since the last week in February), and to "his arguments at the hearing".

[59] I do not accept that paragraph 5 is any indication that the General Division considered the Claimant's evidence that he was seeking to renew his forklift licence.

[60] In my view, paragraph 5 is a statement of the Claimant's **position** in the appeal, and not a review of the evidence. I say this because that is how it appears on its face. It looks like a summary, setting out the Claimant's view of his position and what he believes he has shown. In addition, paragraph 5 is found within the Overview section of the decision. A statement of position is just what you would expect to find in the Overview. Finally, paragraph 5 footnotes "the Claimants **arguments** made during the hearing." It does not reference the Claimant's evidence during the hearing.

[61] The Claimant's efforts to renew his forklift licence figured prominently in his testimony, and the General Division even questioned him on this point. In its decision, the General Division listed some of the Claimant's efforts to find a suitable job and included "getting his forklift licence renewed" in that list.¹⁶

[62] However, nothing in the decision suggests that the General Division considered the Claimant's evidence of his efforts to renew his forklift licence when it considered whether he had a desire to return to work. Nor does the decision state whether the

¹⁶ See the General Division decision at para 21.

General Division accepted the Claimant's testimony that he was working on his forklift licence renewal at any time before March 5, 2021.

[63] Paragraph 17 speaks of what the General Division can determine from the Claimant's telephone records. The General Division says that the records show that the Claimant made a call to the employment agency on February 25, 2021, and that he started making regular calls around March 5, 2021. It appears that the General Division accepted his records as proof that he contacted the employment agency on February 25, 2021.

[64] However, the Claimant also testified that he began his efforts to renew his licence in January 2021. The General Division does not say that telephone records are a complete record or that they **disprove** any earlier contact between the Claimant and W or the employment agency. She does not say whether she gave any weight to the Claimant's testimony that he believed he contacted W about his forklift licence in the first week of January.

[65] I find that the General Division made an important error of fact. It based its decision on a finding that the Claimant did not have a desire to return to work before March 5, 2021. It failed to consider the Claimant's evidence that he was trying to renew his forklift licence as evidence of that desire. The General Division decision is also based on its finding that the Claimant did not make enough efforts to find work until March 5, 2021. However, the General Division's reasons do not explain whether it considered or accepted the Claimant's evidence that he began his effort to renew his licence as early as January 2021.

– **Summary**

[66] I have found that the General Division made an important error of fact. Now I must consider what I should do about the error (the remedy).

Remedy

Nature of the remedy

[67] I have the authority to change the General Division decision or make the decision that the General Division should have made. I could also send the matter back to the General Division for it to reconsider its decision.¹⁷

[68] Both the Claimant and the Commission would prefer that I make the decision that the General Division should have made. Both agree that there is already evidence in the record on each issue that I need to decide.

[69] I agree. I accept that the Claimant had a fair opportunity to present his evidence to the General Division and that there is evidence on all of the *Faucher* factors, including the two that I will need to consider. I will make the decision that the General Division should have made.

My decision

Scope

– The Issue is availability

[70] To be entitled to regular benefits, a claimant must be “capable and available for work”. The General Division decision was primarily concerned with the Claimant’s availability.

[71] At the Appeal Division hearing, I asked the Commission’s representative if she had any concern that the General Division had not addressed the worker’s capability. The Commission’s representative had no concern. She believed the decision considered capability implicitly.

¹⁷ My authority is set out in sections 59(1) and 64(1) of the DESD Act.

[72] Despite the fact that the law requires claimants to be both capable of and available for work to show that they are entitled to benefits, I accept that availability and capability may be treated as separate issues.

[73] In this case, “capability” was not at issue before the General Division. In its original decision of May 5, 2021, the Commission decision stated that it was unable to pay the Claimant benefits because he had not been looking for work. It said that this meant he had not proven his availability.¹⁸ The decision said nothing about his capability. The reconsideration decision simply maintained this decision.

[74] Finally, I note that the Commission is not arguing that the Claimant was not entitled to benefits because he was incapable.

– **Only the period from January 10, 2021, to March 5, 2021, is disputed**

[75] The General Division found that the Claimant was available from March 5, 2021, onward - but not before. The General Division also found that the Claimant did not set personal conditions that limited his chances of returning to work. The Claimant did not dispute these findings because they were in the Claimant’s favour. At the Appeal Division, the Commission took the position that the General Division did not make any error. Therefore, the Commission did not dispute either of the findings.

[76] There is no obvious error in the General Division’s finding that the Claimant was available for work from March 5, 2021, onward. Given the parties’ positions, I confirm this aspect of the General Division as well. I will only consider whether the Claimant was also available for work in the period between January 10, 2021, and March 5, 2021.

– **The third *Faucher* factor is not disputed.**

[77] Finally, I have not found any error in how the General Division analyzed the final *Faucher* factor so I only need to consider only whether the Claimant had the desire to return to work and whether his efforts to find work were enough. In reviewing these

¹⁸ The decision actually says that the Commission “could not pay benefits from January 10, 2021 because [the Claimant had] been looking for work”” This was clearly typographical and was discussed at the General Division hearing.

factors, I will consider all of the evidence on the record, including the Claimant's evidence of his efforts to renew his forklift licence.

Desire to return to work and efforts to find work: January 10, 2021 to March 5, 2021

[78] I find that the Claimant did not have a desire to return to work between January 10, 2021, and March 5, 2021. Nor did he make enough efforts to find work. I am looking at these two factors together because both factors may be decided on essentially the same evidence.

[79] The Claimant is a forklift operator, but he had been on sick leave for some time. Near the end of December 2020, he discovered his forklift licence had expired. He told the General Division that he tried to get it renewed. He testified that he sent a copy of his expired licence to W at the employment agency, and he requested that she renew it. He said that he believed he did this in the first week of January 2021. He later said that W told him that he would not be able to get it renewed through normal channels because of Covid but that she might be able to arrange a renewal through her sources.

[80] According to the phone records the Claimant sent the General Division, his first contact with either W or the employment agency was on February 25, 2021.¹⁹ The Claimant recognized that his records of phone calls only proved his contacts from late February.²⁰

[81] However, the Claimant did not take back what he had said about having first contacted W in January. According to his testimony, he **sent** a copy of his expired licence in his initial communication with W in early January 2021. So it seems his initial contact with W was in writing, at least in part, although he had no other proof of this.

[82] The Claimant said that all of his emails should be on his phone. He said that his record of those emails was gone and that he could not explain this.²¹ He acknowledged

¹⁹ See GD-10.

²⁰ See GD11.

²¹ Listen to the General Division audio recording of the hearing at timestamp 1:08:45.

that he had no proof of his email contacts with W or anyone else at the employment agency.

[83] I have no reason to doubt that the Claimant sent a message to W as he describes. The General Division made no finding against the Claimant's credibility generally, or in relation to his particular testimony that he sent W his licence with a request to have it renewed. It was in a better position than I am to assess the Claimant's credibility as the trier of fact.

[84] I am not holding it against the Claimant that he cannot produce evidence that he sent a message or email from his phone. It is plausible that those records disappeared or were inadvertently deleted.

[85] I also note that the Claimant seemed to be eager to supply his phone records when the General Division member suggested that these records might supply some proof of his availability.²² He transcribed and provided a list of the calls that he made from January onward, and he identified the recipients. That list did not help him prove his availability from January to February 25, 2021, and his accompanying letter confirmed that he understood this. He might easily have altered the information if he was less honest.

[86] I accept the Claimant's testimony that he contacted W early in January 2021 for the purpose of renewing his forklift licence or learning how to renew his forklift licence.

[87] In my view, a claimant's efforts to renew a specific licence or certification that is required for them to return to their regular work may be evidence in support of a desire to return to work, as well as evidence of efforts to return to work.

[88] However, in this case, the evidence of the Claimant's attempts to renew his licence does not prove either his desire or the sufficiency of his job efforts from January 10, 2021, until March 5, 2021. He began to look into renewing his licence in early January 2021. However, he did not say that he believed or expected his initial

²² Listen to the General Division audio recording of the hearing at timestamp 1:11:10.

message to W had begun the process to renew his licence. When he did speak to W, he learned that W would “contact her sources” to see if she could help him with the renewal because “entering into offices to get [his] licence renewed was not an option.”²³

[89] There is little evidence that the Claimant knew whether he had begun a renewal process in January, or of the steps he took to find out what was going on with the renewal, or how to move it forward.

[90] The General Division asked the Claimant if he had any evidence of his availability between January and March. He responded that he could not locate any email or text message for that period but had no explanation for this other than that it was “odd”.²⁴ However, he asserted that he was in contact with the employment agency “continually”.²⁵

[91] The Claimant also stated that he had no phone calls for the same period. However, when the member later asked him if he had any phone records of calls he made, he said that he did not think of those records. He reviewed his phone briefly during the hearing and then agreed to send the member records of his phone calls records. However, his phone records did not show any contacts with either W or the employment agency until February 25, 2021,²⁶ a point the Claimant conceded.²⁷

[92] I think what most likely happened is that the Claimant only found out was happening in response to his initial licence renewal message when he spoke with W. I find that he did not speak to W until February 25, 2021, at the earliest. I say this because the Claimant seemed to be convinced that most offices were closed because of Covid, and he has never said he had met with W to speak about his licence. That means the Claimant was probably talking to her on the phone.

²³ Listen to the General Division audio recording of the hearing at timestamp 00:38:00 to 00:38:30.

²⁴ Listen to the General Division audio recording of the hearing at timestamp 1:10:10.

²⁵ Listen to the General Division audio recording of the hearing at timestamp 1:10:20

²⁶ See GD10.

²⁷ See GD11.

[93] At the same time, I think that this had to be the same phone from which he supplied his phone records. When he was asked for records to prove he was available, he offered to send the General Division the records from his phone. He told the General Division that he did “everything” on his phone.²⁸

[94] The phone records supplied by the Claimant do not show any calls to the number the Claimant identifies as the employment agency until February 25, 2021, or any calls to W’s phone line until March 5, 2021. However, they do show that the Claimant contacted, or tried to contact, the Commission numerous times between January 5, 2021 and February 25, 2021,²⁹ before refocusing on calls to the employment agency, W, or the company at which he eventually obtained forklift training.³⁰

[95] On this evidence, I accept that the Claimant’s phone records would have shown any calls to the employment agency or W, prior to February 25, 2021, if he had made them. I find that he did not try to call either the employment agency or W in this period.

[96] I also find that the Claimant did not try to find out what was happening with his licence renewal until he finally followed up with W, which was not earlier than February 25, 2021.

[97] The Claimant may have wanted to renew his licence so that he could return to work as a forklift operator at some point, but I find that he was not diligent to obtain the renewal. His efforts to renew his forklift licence do not satisfy me that he either desired to return to work as soon as possible or that he was making a sufficient effort to find a job.

[98] The Claimant’s initial message to W was not one-of-a-series of actions, which continued from the first week of January into the period in which he was required to be available for work. It was an isolated action.

²⁸ Listen to the General Division audio recording of the hearing at timestamp 1:09:15.

²⁹ See GD9 and GD10.

³⁰ See GD6-7

[99] The next call on February 25, 2021, is the only documented call to the employment agency for **any** reason between his initial message to W and March 5, 2021. However, as the General Division noted, the Claimant only began to call the employment agency and W with some frequency on March 5, 2021.

[100] I recognize that the Covid pandemic and the government's response would likely have affected the number and types of job opportunities, and the Claimant's ability to obtain government services. However, the Claimant must still be able to prove his desire to work and his efforts to find work. The General Division was satisfied that the Claimant had proven his availability only during the period that he demonstrated he was in regular contact with a single employment agency.

[101] That is not a high bar. The Claimant could have done at least as much prior to March 5, 2021, regardless of the Covid context. The evidence of the Claimant's efforts to find a job, including his efforts to renew his forklift licence, tells me that he did not have a desire to return to work as soon as possible, or that he had made enough efforts to find a job, until March 5, 2021.

Conclusion

[102] The appeal is dismissed.

[103] The General Division did not properly consider the evidence of the Claimant's efforts to renew his forklift licence when it analyzed the *Faucher* factors. However, I have taken that evidence into consideration, and I must reach the same decision as the General Division.

[104] I confirm that the Claimant was not available for work prior to March 5, 2021.

Stephen Bergen
Member, Appeal Division