



Citation: *Canada Employment Insurance Commission v JP*, 2024 SST 559

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: Canada Employment Insurance Commission
Representative: Joséé Lachance
Respondent: J. P.

Decision under appeal: General Division decision dated February 16, 2024
(GE-24-12)

Tribunal member: Elizabeth Usprich
Type of hearing: Teleconference
Hearing date: May 2, 2024
Hearing participant: Appellant's representative
Respondent
Decision date: May 17, 2024
File number: AD-24-172

Decision

[1] The appeal is allowed. The General Division made an error of law because it didn't apply the correct legal test.

[2] I am giving the decision that the General Division should have given. The Claimant wasn't legally entitled to work in Canada due to an expired work permit. So, the Claimant was not entitled to Employment Insurance (EI) benefits because he was not available as considered by the *Employment Insurance Act* (EI Act) and case law. The Claimant is disentitled from receiving EI regular benefits from November 14, 2022 to July 3, 2023.

[3] The parties agree the Claimant has proven his availability from July 4, 2023 because he had a valid work permit that allowed him to work in Canada.

Overview

[4] J. P. is the Claimant. He applied for EI benefits.

[5] The Canada Employment Insurance Commission (Commission) denied him EI benefits from November 14, 2022 onwards. This is because he had an expired work permit so he wasn't allowed to work in Canada.

[6] The Claimant appealed to the Social Security Tribunal (Tribunal) General Division. The General Division found the Claimant was available under the EI Act and entitled to EI benefits.

[7] The Commission appealed that decision.

[8] I am allowing the appeal. The General Division made an error of law because it didn't apply the correct legal test. The Claimant had an expired work permit which meant he wasn't legally allowed to work in Canada. This means he wasn't available to work.

[9] I have given the decision the General Division should have given. The Claimant wasn't available for work due to his expired work permit from November 14, 2022 to July 3, 2023. The Claimant got a new work permit on July 4, 2023 and is therefore available from that day on.

Issue

[10] The issues in this appeal are:

- a) Did the General Division make an error of law by deciding that the Claimant didn't set any personal conditions and was therefore available under the EI Act?
- b) If so, how should the error be fixed?

Analysis

[11] I can intervene (step in) only if the General Division made a relevant error. There are only certain errors I can consider.¹ Briefly, I can intervene if the General Division made at least one of the following errors:

- It acted unfairly in some way.
- It decided an issue it should not have, or didn't decide an issue it should have.
- It made an error of law.
- It based its decision on an important error about the facts of the case.

[12] Under the EI Act a claimant has to meet all of the legal requirements in order to qualify for EI benefits. In this case, the Commission says the Claimant doesn't meet the

¹ Section 58(1) of the *Department of Employment and Social Development Act* (DESD Act) sets out the grounds of appeal.

requirement that he be capable and available for work but unable to obtain suitable employment.²

The General Division made an error of law by deciding that the Claimant didn't set any personal conditions and was therefore available under the EI Act

[13] If a claimant has a personal condition that unduly limits their return to work, they are said to not be available under the EI Act.

[14] The legal test for availability has three factors that must be considered.³ According to *Faucher*, being available for work means:

- wanting to go back to work as soon as a suitable job is available
- showing that you want to go back to work by making efforts to find a suitable job
- not setting personal conditions that might unduly (overly) limit your chances of going back to work

[15] The facts of this case aren't disputed. The Claimant had a job which he had a valid work permit for. The Claimant decided not to renew his contract with that employer as he thought he had found a job he preferred. He was hired by the new employer on October 28, 2022.⁴

[16] The Claimant's Canadian work permit expired on November 11, 2022. The Claimant had the help of a consultant to try to assist him with the process of remaining in Canada and working. The consultant applied for a tourist visa for Claimant after his work permit expired. A tourist visa doesn't allow a person to work.

[17] Eventually the Claimant got a new work permit. It was issued on July 4, 2023.

² See section 18(1)(a) of the *Employment Insurance Act* (EI Act).

³ See *Faucher v Canada (Employment and Immigration Commission)*, A-56-96 and A-57-96.

⁴ See GD3-21.

[18] The Commission says because the Claimant didn't have a valid work permit, he wasn't available for work. The Commission agrees that after the new work permit was issued, the Claimant would have become available for work once again. This means the Commission agrees the Claimant was available for work from July 4, 2023 onwards.⁵

– **The Claimant had personal conditions that prevented him from working**

[19] The General Division correctly identified the legal test for availability.⁶ The General Division then set out three factors that case law requires must be considered.⁷ One of those factors is that a claimant must not set any personal conditions that would unduly limit their chance of returning to work.

[20] It isn't disputed that the Claimant wanted to go back to work and was making efforts to find a suitable job.⁸

[21] But the Commission says because the Claimant didn't have a valid work permit, it means there was a personal condition that unduly limited his chance to return to work.⁹ In this case, the Commission argues the General Division didn't follow established case law and therefore made an error of law.

[22] The General Division decided what the Claimant was able to do with his work permit was a matter of law and not a personal condition.¹⁰ So, it found that the Claimant hadn't set any personal conditions and was available for work.

[23] Respectfully, this is an error of law. The Claimant was allowed to work in Canada while he had a valid work permit. Unfortunately, once that work permit expired it meant the Claimant wasn't legally allowed to work. The Claimant should have applied earlier for a renewal of his work permit, or gotten assistance earlier to do so.

⁵ See AD2-4.

⁶ See the General Division decision at paragraphs 10 to 12.

⁷ See the General Division decision at paragraph 22.

⁸ See the General Division decision at paragraphs 24 to 31. See also the Commission's representations at AD2-4.

⁹ See AD2-4.

¹⁰ See the General Division decision at paragraph 33.

[24] As well, the General Division found the Claimant couldn't apply for another work permit with a different employer until he found another employer willing to hire him. But it also said the Claimant did have an offer of a new job with a new employer prior to his work permit expiring.¹¹ This means the Claimant did have a new employer.

[25] Whether a claimant is available for work under the EI Act is an objective test. This means that a person's availability is what must be decided, rather than a reason for their unavailability.¹²

Remedy

[26] I have found an error. So, there are two main ways I can remedy (fix) it. I can make the decision the General Division should have made. I can also send the case back to the General Division if I don't feel the hearing was fair.¹³

[27] The parties agreed that all evidence was before the General Division. This means I can give the decision that the General Division should have given. That includes deciding whether the Claimant was available for work.

The Claimant wasn't available because he had a personal condition that unduly limited his chance of returning to work

[28] The parties agreed there wasn't an error with how the General Division considered the first two factors of the Faucher test. So, I adopt the General Division's reasoning that the Claimant met the first two parts of the Faucher test.

[29] For whatever reason, the Claimant didn't renew his work permit before it expired. While I empathize that the Claimant had problems getting a new work permit, that doesn't mean he was available for work under the law. Because he didn't have a valid work permit it means he wasn't allowed to work in Canada.

¹¹ See the General Division decision at paragraph 3.

¹² See *Canada (Attorney General) v Leblanc*, 2010 FCA 60 at paragraph 5.

¹³ Section 59(1) of the DESD Act allows me to fix the General Division's errors in this way.

[30] So, unfortunately, by not having a valid work permit the Claimant wasn't available for work. The Claimant also hadn't applied for a renewal (or new) work permit before his current one had expired.¹⁴

[31] If the Claimant had applied for renewal of his work permit before his permit expired, the Commission typically will still consider a person available provided the person meets the other requirements.¹⁵

[32] Since this wasn't done, it can be viewed as the Claimant unduly limiting his chances of returning to work.¹⁶ The Claimant, whether intentionally or not, set a personal condition that unduly limited his chances of returning to work.¹⁷ This means he wasn't available.

Conclusion

[33] The appeal is allowed. The General Division made an error of law because it didn't correctly apply the legal test.

[34] I am giving the decision that the General Division should have given. The Claimant wasn't legally entitled to work in Canada due to an expired work permit. The Claimant is disentitled from receiving EI regular benefits from November 14, 2022 to July 3, 2023.

[35] The parties agree the Claimant has proven his availability from July 4, 2023 because he had a valid work permit that allowed him to work in Canada.

Elizabeth Usprich
Member, Appeal Division

¹⁴ See section 201(1)(a) of the *Immigration and Refugee Protection Regulations*.

¹⁵ See the Commission's Digest of Benefit Entitlement Principles at 10.2.4.1.

¹⁶ The legal test for availability is from *Faucher v Canada (Employment and Immigration Commission)*, A-56-96 and A-57-96 (Faucher). The General Division correctly identified this test but didn't apply it correctly.

¹⁷ There is other recent Appeal Division that made a similar finding which I am persuaded by. See *Canada Employment Insurance Commission v GS*, 2022 SST 32 at paragraph 22.