



[TRANSLATION]

Citation: *Canada Employment Insurance Commission v MM*, 2024 SST 836

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: Canada Employment Insurance Commission
Representative: Julie Meilleur

Respondent: M. M.

Decision under appeal: General Division decision dated
December 13, 2023 (GE-23-2481)

Tribunal member: Pierre Lafontaine

Type of hearing: Teleconference

Hearing date: July 16, 2024

Hearing participants: Appellant's representative
Respondent
Interpreter

Decision date: July 18, 2024

File number: AD-23-1126

Decision

[1] The appeal is allowed. The Respondent (Claimant) has not shown that she was available for work from March 19 to August 22, 2023.

Overview

[2] The Appellant (Commission) decided that the Claimant is disentitled from receiving Employment Insurance (EI) regular benefits from March 19, 2023, because she was not available for work. The Commission found that the Claimant was not available because she did not renew her work permit before its expiry date, meaning she could not be granted implied status by Immigration, Refugees and Citizenship Canada (IRCC).

[3] On review, the Commission upheld its initial decision. The Claimant appealed to the Tribunal's General Division.

[4] The General Division found that the Claimant wanted to go back to work as soon as a suitable job was available, and that she had made enough effort. The General Division also found that the Claimant did not set any personal conditions that might have unduly limited her chances of going back to work, since not having a permit did not stop her from working nearly 10 months after her permit expired. The General Division found that the Claimant was available within the meaning of the law.

[5] The Appeal Division granted the Commission permission to appeal the General Division's decision. The Commission argues that the General Division made an error in finding that the Claimant showed that she was available for work within the meaning of the law when she was unauthorized to work in Canada. It argues that not having a work permit is clearly a personal condition that unduly limited her chances of going back to work.

[6] I have to decide whether the General Division made an error in finding that the Claimant was available for work under the *Employment Insurance Act* (EI Act), since she was unauthorized to work in Canada.

[7] I am allowing the Commission's appeal.

Issue

[8] Did the General Division make an error in finding that the Claimant was available for work under the EI Act, since she was unauthorized to work in Canada?

Preliminary remarks

[9] It is well established that the Appeal Division does not accept new evidence with some exceptions that do not apply to this file.¹

[10] In deciding this appeal, I have listened to the recording of the General Division hearing held on December 5, 2023.

Analysis

Appeal Division's mandate

[11] The Federal Court of Appeal has determined that the Appeal Division's mandate is conferred to it by sections 55 to 69 of the *Department of Employment and Social Development Act*.²

[12] The Appeal Division acts as an administrative appeal tribunal for decisions made by the General Division and does not exercise a superintending power similar to that exercised by a higher court.

[13] So, unless the General Division failed to observe a principle of natural justice, made an error of law, or based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it, I have to dismiss the appeal.

¹ *Sibbald v Canada (Attorney General)*, 2022 FCA 157.

² *Canada (Attorney General) v Jean*, 2015 FCA 242; *Maunder v Canada (Attorney General)*, 2015 FCA 274.

Did the General Division make an error in finding that the Claimant was available for work under the EI Act, since she was unauthorized to work in Canada?

[14] The Commission says that its challenge is based on the General Division's analysis of the third *Faucher* factor.³ It argues that the General Division made an error in finding that the Claimant had shown that she was available for work within the meaning of the law when she was unauthorized to work in Canada.

[15] The Commission argues that the undisputed evidence shows that the Claimant did not have a valid work permit during the period in question and that she had not tried to renew the one she had before its expiry date on June 9, 2022. The Commission argues that not having a work permit clearly shows a personal condition that unduly limited the Claimant's chances of going back to work.

[16] To be considered available for work, a claimant must show that they are capable of and available for work and unable to find a suitable job.⁴

[17] Availability must be determined by analyzing three factors:

- a) the desire to go back to work as soon as a suitable job is available
- b) the expression of that desire through efforts to find a suitable job
- c) not setting personal conditions that might unduly limit the chances of going back to work

[18] The facts of the case are not really in dispute. The Claimant's work permit expired on June 9, 2022. She contacted her lawyer on June 12, 2022, to apply to renew her work permit. Her lawyer delayed and submitted her application on September 2, 2022. The Claimant continued to work for her employer until March 17, 2023, and

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

⁴ See section 18(1)(a) of the *Employment Insurance Act* (EI Act).

submitted her application for benefits that same day. The Claimant got her new work permit on August 23, 2023.

[19] The General Division found that the Claimant wanted to go back to work as soon as a suitable job was available and that she made enough efforts.

[20] The General Division also found that the Claimant did not set personal conditions that might have unduly limited her chances of going back to work, since not having a permit did not stop her from working nearly 10 months after her permit expired. The General Division found that the Claimant was available within the meaning of the law.

[21] I find that the General Division made an error in finding that the situation the Claimant found herself in did not unduly limit her chances of going back to work. To come to this conclusion, it did not consider the evidence before it.

[22] Under section 18(1)(a) of the EI Act and the *Employment Insurance Regulations*, a claimant must be available for work and unable to find a suitable job.

[23] Availability is determined for **each working day in a benefit period** for which a claimant can prove that, on that day they were capable of and available for work and unable to obtain suitable employment.⁵

[24] It is true that the Claimant was able to work for her employer for 10 months before applying for benefits despite the fact that her work permit was expired. It seems that her employer assumed that she had implied status. The employer let her go her on March 17, 2023.

[25] But, during the Commission's interview held on June 1, 2023, the Claimant said that employers did not want to hire her without a valid work permit.⁶

[26] In her testimony before the General Division on December 5, 2023, the Claimant noted that, during the period in question, she was looking for a job but that no employer

⁵ *Canada (Attorney General) v Cloutier*, 2005 FCA 73.

⁶ GD3-18.

wanted to hire her despite her receipt confirming she had applied for her new work permit because the one she had was not valid.⁷

[27] The Claimant herself admits that her chances of going back to work were limited by the fact that she did not have an official work permit.

[28] The evidence before the General Division shows that the Claimant was facing an obstacle or constraint, that was depriving her of free choice and getting in the way of her willingness to work. Her expired work permit clearly set a personal condition that unduly limited her chances of going back to work.⁸

[29] The Claimant could not be considered available for work within the meaning of section 18(1)(a) of the EI Act from March 19 to August 22, 2023.

[30] For these reasons, I must intervene.

Remedy

[31] Considering that the parties had the opportunity to present their case to the General Division, I will give the decision that the General Division should have given.

[32] During the Commission's interview on June 1, 2023, the Claimant said that employers did not want to hire her without a valid work permit.

[33] In her testimony before the General Division on December 5, 2023, the Claimant noted that, during the period in question, she was looking for a job but that no employer wanted to hire her because she did not have a valid work permit.

[34] The evidence shows that the Claimant was facing an obstacle, or constraint, that was depriving her of her free choice getting in the way of her willingness to work. Her expired work permit clearly set a personal condition that unduly limited her chances of going back to work.

⁷ General Division hearing recording: 1:23:49 to 1:24:55.

⁸ *Canada (Attorney General) v Leblanc*, 2010 FCA 60; *Canada Employment Insurance Commission v GS*, 2022 SST 32.

[35] So, the Claimant was not available for work within the meaning of the EI Act from March 19 to August 22, 2023. This means that she does not meet the requirements to receive EI benefits during this period.

Conclusion

[36] The appeal is allowed. The Claimant has not shown that she was available for work during the period of March 19 to August 22, 2023.

Pierre Lafontaine
Member, Appeal Division