Citation: *Canada Employment Insurance Commission v GN*, 2025 SST 374

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	Canada Employment Insurance Commission
Representative:	Nikkia Janssen
Respondent:	G. N.
Representative:	A. H.

Decision under appeal:	General Division decision dated January 14, 2025 (GE-24-3763)

Tribunal member:	Glenn Betteridge
Type of hearing:	Videoconference
Hearing date:	March 25, 2025
Hearing participants:	Appellant's representative Respondent Respondent's representative Interpreter
Decision date:	April 14, 2025
File number:	AD-25-52

Decision

[1] The Canada Employment Insurance Commission's appeal is allowed.

[2] The General Division used the wrong legal test. I fixed this error by making the decision the General Division should have made.

[3] G. N. isn't entitled to the sickness benefit starting May 3, 2024 because he wasn't otherwise available for work.

[4] The Commission says he might be entitled to benefits from October 2, 2024. He can contact the Commission about this.

Overview

[5] G. N. is the Claimant. He applied for regular Employment Insurance (EI) benefits then asked to change to the sickness benefit. The Commission started to pay him the sickness benefit.

[6] A person who wants the sickness benefit has to show they are "otherwise available" for work.[1] In other words, their sickness is the only thing preventing them from being available for work.

[7] The Commission decided the Claimant wasn't otherwise available starting May 3, 2024. That's the date Immigration Canada refused to renew his work permit because he didn't have a valid passport.[2] The Commission says not having a valid work permit or implied status to work was a personal condition that unduly limited his chances of going back to work. In other words, he wasn't available for work and wasn't otherwise available for work.[3]

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[1] See section 18(1)(b) of the *Employment Insurance Act* (EI Act).
[2] I use Immigration Canada as short for Immigration, Refugees and Citizenship Canada.
[3] Section 18(1)(a) of the EI Act says that to get regular benefits a person has to show they are capable and **available for work**, and unable to find suitable employment.

[8] The General Division allowed the Claimant's appeal. It decided he was otherwise available for work. Although Immigration Canada didn't renew his work permit, he wasn't at fault. Ukraine delayed sending him a new passport because of the war. So he didn't unduly limit his chances of going back to work.

[9] I gave the Commission permission to appeal the General Division decision. The Commission and Claimant disagree about whether the General Division used the correct legal test to decide whether he had a personal condition that unduly limited his chances of going back to work.

Issue

[10] I have to decide three issues.

- Did the General Division use the wrong legal test to decide whether the Claimant set a personal condition that might unduly restrict his chances of going back to work?
- If the General Division made that error, should I decide whether the Claimant can get the sickness benefit?
- Did the Claimant show if he had not been sick, he would have been available for work (otherwise available)?

Analysis

Summary of my reasons

[11] The Commission and the Claimant disagree on the legal test for the third *Faucher* factor. He had to meet this factor to show he was available for work and otherwise available. I accept the Commission's position.

[12] The General Division had to use the objective test the Federal Court of Appeal (Court) set out in the *Bertrand* and *Leblanc* decisions.[4] Instead the General Division

[4] See *Canada (Attorney General) v Bertrand* (1982), A-613-81 (FCA); and *Canada (Attorney General) v Leblanc*, 2010 FCA 60.

based its decision on why the Claimant didn't have legal permission to work, which it found was beyond his control.

[13] Applying the objective test to the evidence shows me the Claimant's lack of a valid work permit or implied status would have unduly restricted his return to work. This means he wasn't available for work, or otherwise available for work. And he can't get the sickness benefit starting May 3, 2024.

[14] The rest of my reasons explain my decision in more detail.

The law I used to decide the appeal

[15] The law gives the Appeal Division powers to fix General Division errors.[5] The law says the Appeal Division can step in when the General Division used an unfair process, or made a legal error, a jurisdictional error, or an important factual error.[6]

[16] The General Division makes a legal error when it doesn't follow a court decision it had to follow or uses the wrong legal test to decide an issue. The General Division made that error.

[17] The General Division had to decide whether the Claimant was otherwise available for work. This meant he had to show he was available using the *Faucher* factors.[7]

[18] Under the third *Faucher* factor, the General Division had to decide whether his lack of a valid work permit or implied status to work was a personal condition that unduly limited his chance of going back to work. If it did, he wasn't available for work, wasn't otherwise available for work, and could not get the sickness benefit.

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[5] See section 59(1) of the *Department of Employment and Social Development Act* (DESD Act).
[6] Section 58(1) of the DESD Act calls these the "grounds of appeal." I call them errors.
[7] See *Faucher v Canada Employment and Immigration Commission*, 1997 CanLII 4856 (FCA). *Faucher* sets out three factors a person has to meet to show they are available for work under section 18(1)(a) of the EI Act.

[19] Court decisions says availability is a question of fact or applying settled law to the facts in a case.[8] This means the General Division had to apply settled law to the evidence it accepted.

The General Division decision and the parties' arguments

[20] The General Division decided the Claimant showed he hadn't set a personal condition that unduly restricted his chances of going back to work. The absence of a formal work permit or implied status wasn't due to his action or inaction. He applied to renew his work permit before it expired. And he applied for a new Ukrainian passport before his work permit expired. World events—outside his control—were at fault (paragraphs 17 to 21).

[21] So the General Division decided he was otherwise available for work. And he wasn't disentitled from getting the sickness benefit (paragraphs 3 and 22).

[22] The Commission argues the General Division misinterpreted the test when it based its decision on the reason he didn't have a valid work permit—Ukraine's delay sending him his new passport. It says to get benefits a person has to prove they are available, not justify their unavailability.[9] This is the objective legal test from the Court's *Leblanc* decision, which has been followed in other Court decisions.

[23] The Claimant argues the *Leblanc* decision isn't of general application and the Claimant's case is distinguishable.[10] The Claimant says the correct legal test distinguishes between inherently personal circumstances and circumstances beyond a person's control. So the General Division didn't make a legal error when it decided he was available because he was not at fault for the delay getting his passport, world events were (paragraphs 17, and 19 to 21).

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[8] See *Canada (Attorney General) v Lavita*, 2017 FCA 82 at paragraphs 5 and 9; and *Page v Canada (Attorney General)*, 2023 FCA 169 at paragraphs 51, 57, 59, 60, and 83.
[9] See AD3-5.
[10] See AD4-6.

I accept the Commission's argument, the General Division used the wrong legal test

[24] The Claimant's representative made thorough submissions that pushed me to think deeply about the correct test. Unfortunately for the Claimant, I can't accept his argument.

[25] The Court has written the third *Faucher* factor using words that might be confusing—when read alone, not taking into account other Court decisions. Leading decisions under section 18(1)(a) might seem to suggest the third *Faucher* factor applies to a condition the person "set" or "imposed."[11]

[26] But the *Bertrand* and *Leblanc* decisions clarify the legal test for the third *Faucher* factor. It's an objective test. It focuses on the **existence** of a personal condition and an assessment of that condition's **effect** on the person's chances of returning to work.

[27] In *Bertrand*, the Court considered the proper test to decide whether the claimant had restricted her availability. She could only work from 4 pm to 10 pm because she had no daytime childcare.

> The question of availability is an objective one—whether a claimant is sufficiently available for suitable employment to be entitled to unemployment insurance benefits—and it cannot depend upon the particular reasons for the restrictions on availability, however these may evoke sympathetic concern. If the contrary were true, availability would be a completely varying requirement depending on the view taken of the particular reasons in each case for the relative lack of it.

[28] In *Leblanc*, the Court agrees with and adopts the following language from an Umpire's decision.[12]

> It goes without saying that a person may not be regarded as available when that person admits to not being available or is in a situation that prevents him or her from being available. Payment of benefit is subject to the availability of a person, not to the justification of his or her unavailability. Consequently, the

[11] See for examples, *Faucher v Canada Employment and Immigration Commission*, 1997 CanLII 4856 (FCA); *Canada (Attorney General) v Lavita*, 2017 FCA 82; and *Page v Canada (Attorney General),* 2023 FCA 169.
[12] See *Canada (Attorney General) v Leblanc*, 2010 FCA 60 at paragraph 5, citing *CUB 25057*.

> mitigating circumstances and the sympathy one may feel for the claimant cannot shorten the period of disentitlement.

[29] Other Court decisions follow the objective test from *Bertrand* or *Leblanc*.[13] I'm not aware of any decision from the Federal Courts that questions this objective test, distinguishes it, or refuses to follow it.

[30] This tells me the legal test for the third *Faucher* factor is objective. And the test involves two questions of fact:

- Does a personal condition exist and, if so, what is it?
- Does that personal condition unduly limit the person's chances of going back to work?

[31] The General Division had to follow the objective test set out in *Bertrand* and *Leblanc*. It didn't cite those cases. And it didn't use the objective test. This means it made a legal error.

The Claimant's argument goes against the law

[32] I reviewed and considered the Claimant's written arguments, including the decisions he cited.

[33] The Claimant didn't refer to any decision that apply directly to his case—legally and factually—that I should follow. Instead, the Claimant based his argument on points courts and tribunals made in decisions, but which didn't decide the availability issue.[14] The Claimant also tried to argue that factual questions and findings from decisions were part of the legal test for the third *Faucher* factor.[15]

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[13] See for examples, *Canada (Attorney General) v Joint* (1989), A-1048-88 (FCA); *Canada (Attorney General) v Whiffen* (1994), A-1472-92; *Vezina v Canada (Attorney General)*, 2003 FCA 198; and *Canada (Attorney General) v Gagnon*, 2005 FCA 321;
[14] *Obiter dicta* is the legal term for the points a court or tribunal makes that aren't essential to the ultimate decision in a case and the analysis it used to get there.
[15] See AD4-4 and AD-5, at paragraphs 28 to 33. The Claimant argues the **legal test** should consider whether a personal condition was procedural versus personal, within a claimant's control versus beyond their control, or whether the limitation was "more technical than real."

[34] None of the Claimant's arguments make me doubt the correct legal test is the objective test from *Bertrand* and *Leblanc*. The objective test doesn't distinguish between "inherently" personal conditions and circumstances beyond a claimant's control. And it doesn't consider whether the person created the condition.

[35] Finally, the legal test doesn't distinguish between "more technical than real" limitations imposed by a personal condition. And it doesn't consider a person's efforts to avoid or mitigate the personal condition. Whether the personal condition is unduly limiting is a question of fact, not law.

Fixing the error by making the decision

[36] The Commission said if I found an error, I should make the decision the General Division should have made. It said both parties had a fair opportunity to give evidence and make arguments at the General Division. And the record is complete, so I have what I need to make the decision.

[37] The Claimant said I should send his case back to the General Division to be reconsidered. He wants a "new set of eyes on it" so it can be considered again from the beginning.

[38] I agree with the Commission. The Appeal Division process isn't a do-over, or second chance to try to win at the General Division. The Tribunal's rules of procedure tell me to decide appeals as simply and quickly as fairness allows.

[39] I reviewed the documents and listened to the hearing. The parties had a full and fair opportunity to present their cases at the General Division. At the hearing, the General Division used plain language to state the issue in the appeal. It gave the Claimant a full and fair chance to present evidence and make arguments. And it asked relevant questions.

– I have to decide one issue

[40] To decide the Claimant's appeal, I have to decide whether he showed he met the third *Faucher* factor.

[41] In the circumstances of this appeal, I won't consider the first and second *Faucher* factors, for two reasons. First, if the Claimant doesn't prove he meets the third *Faucher* factor, he hasn't shown he is available and can't show he is otherwise available. Second, the Commission and the Claimant didn't make arguments about the first and second *Faucher* factors at the General Division or the Appeal Division.[16] This makes sense in the circumstances. Applying the first two *Faucher* factors to decide if a person is otherwise available when they are too sick to work is a fundamentally hypothetical exercise.[17]

[42] I'm not adopting the General Division's factual findings. Because it used the wrong legal test, it considered evidence and made findings that were relevant to that test. To decide this appeal I have to consider evidence and make findings based on the correct, objective legal test.

– The Claimant hasn't shown he met the third *Faucher* factor, starting May 3, 2024

There was a personal condition

[43] As of May 3, 2024, the Claimant didn't have a valid work permit or implied status to work in Canada. Together, this was a personal condition that existed for the Claimant.

[44] I based this finding on copies of documents from Immigration Canada. These documents show

- His work permit expired on January 10, 2024.[18]

[16] The General Division wrote in paragraph 12, "The parties don't dispute that the Appellant wanted to go back to work as soon as a suitable job was available or that he was making efforts to find a suitable job."
[17] See *OK v Canada Employment Insurance Commission*, 2024 SST 111 at paragraph 42. See also *BB v Canada Employment Insurance Commission*, 2021 SST 484 at paragraphs 20 to 22.
[18] See GD3-18.

- He had implied status to work on the same terms and conditions until June 24, 2024, or until Immigration Canada decided his application to renew his work permit.[19]

- Immigration Canada denied his application to renew his work permit on May 3, 2024[20]

[45] I accept this evidence. It comes from a reliable source. I have no reason to believe the copies of Immigration Canada documents are different from the originals. And I have no other reason to doubt this evidence.

The personal condition was unduly limiting

[46] The evidence shows me the Claimant's personal condition unduly limited his chances of returning to work.

[47] I am going to make a commonsense inference (finding of fact) based on the Immigration Canada documents. If there is no evidence to the contrary, having no legal right to work in Canada unduly limited the Claimant's chances of returning to work.

[48] Decisions from this Tribunal's Appeal Division support this type of inference.[21] Appeal Division decisions also give concrete examples where a person has shown (or might be able to show) they met the third *Faucher* factor:

- application to renew work permit wasn't refused meaning a possibility of implied status, the employer believed the person was allowed to work, and their employer rehired them three times during the gap between valid work permits[22]

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[19] See GD3-23.
[20] See GD3-55.
[21] See for examples *Canada Employment Insurance Commission v MM*, 2024 SST 836; *Canada Employment Insurance Commission v JP*, 2024 SST 559; *HM v Canada Employment Insurance Commission*, 2024 SST 572; *LM v Canada Employment Insurance Commission*, 2022 SST 617; *KS v Canada Employment Insurance Commission*, 2020 SST 485; *SB v Canada Employment Insurance Commission*, 2020 SST 442; *AS v Canada Employment Insurance Commission*, 2018 SST 1291.
[22] See *LM v Canada Employment Insurance Commission*, 2022 SST 617.

- a person under the age of 30 whose work permit expired, but they could obtain an open work permit for 18 months almost automatically under a bilateral agreement between Canada and France[23]

- a visitor visa holder whose employment authorization has expired but who was in a catch-22 because she needed to have a job offer to get another employment authorization wasn't required to be able to start work immediately to prove she was available[24]

- a foreign student who applied for the sickness benefit was no longer attending class, but legally their work permit was still valid until the school accepted he officially withdrew, or he failed to enrol for the next semester[25]

[49] Unfortunately for the Claimant, his circumstances aren't the same as or similar to any of these cases.

[50] Two other pieces of evidence support my conclusion the Claimant's personal condition unduly limited his chances of going back to work.

- The Claimant testified employers would not hire him after they found out his work permit had expired.[26] Some said come back after your work permit is renewed.[27] These were his answers when the General Division member asked him about looking for work after his work permit expired (January 10) before the accident made him unfit to work (January 28).

- The Claimant also testified that he hadn't applied to any workplaces that didn't require a work permit, he said he could not do that.[28]

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[23] See *CUB 63940*.
[24] See *CUB 14357*.
[25] See *OK v Canada Employment Insurance Commission*, 2024 SST 111.
[26] Listen to the recording of the General Division hearing at 15:29.
[27] Listen to the recording of the General Division hearing at 17:45.
[28] Listen to the recording of the General Division hearing at 19:58.

Summary

[51] The Claimant hasn't shown he met the third *Faucher* factor. This means he wasn't otherwise available under section 18(1)(b). So he hasn't shown he is entitled to get the sickness benefit starting May 3, 2024.

The Commission says the Claimant may be entitled to benefits from October 2, 2024

[52] The parties agree the Claimant got a new work permit, valid from October 2, 2024. The Commission's representative encouraged the Claimant to contact the Commission about getting benefits starting October 2, 2024.

[53] At the Appeal Division hearing the Commission's representative said the Claimant might be entitled to EI benefits from October 2, 2024. He could get benefits until his entitlement to the **sickness benefit** ends, or his claim ends, whichever comes first.

[54] If the Claimant showed he was **capable and available for work** under section 18(1)(a), he might be able to get **regular benefits**—instead of the sickness benefit, or after his sickness benefit ran out.

Conclusion

[55] The General Division used the wrong test to decide if the Claimant was otherwise available for work. I fixed that error by making the decision the General Division should have made.

[56] The Claimant hasn't shown he was otherwise available for work starting May 3, 2024. This means he wasn't entitled to the sickness benefit from that date.

Glenn Betteridge
Member, Appeal Division