Citation: *Canada Employment Insurance Commission v AA*, 2026 SST 107

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	Canada Employment Insurance Commission
Representative:	Stephanie Tollefson
Respondent:	A. A.

Decision under appeal:	General Division decision dated November 19, 2025 (GE-25-2816)

Tribunal member:	Stephen Bergen
Type of hearing:	Teleconference
Hearing date:	February 11, 2026
Hearing participants:	Appellant Respondent's representative
Decision date:	February 17, 2026
File number:	AD-25-788

Decision

[1] I am allowing the appeal. The General Division made an error of law. The matter will go back to the General Division to be reconsidered.

Overview

[2] A. A. is the Appellant. I will call him the Claimant because this appeal is about his claim for Employment Insurance (EI) benefits. The Respondent is the Canada Employment Insurance Commission, which I will call the Commission.

[3] The Claimant did not apply to renew his work permit until it had already expired. As a result, he had neither a valid work permit nor implied status (legal work status), and he was not legally permitted to work in Canada.

[4] The Commission decided that the Claimant was not available for work, which meant he was disentitled from receiving benefits. The Claimant disagreed and asked the Commission to reconsider, but it would not change its decision.

[5] He appealed to the General Division which agreed that he was available. It said that he had acted reasonably in his efforts to file his work permit renewal application on time.

[6] The Commission is now appealing to the Appeal Division.

[7] I am allowing the appeal. The General Division made an error of law by ignoring binding case authority. The law does not permit the General Division to decide that a claimant was available for work just because it accepts that the claimant acted reasonably in efforts to maintain their availability.

[8] I am returning the matter to the General Division to decide whether the Claimant was available despite having lost legal work status.

Issue

[9] Did the General Division interpret the law in a way that ignores binding authority from the Federal Court of Appeal

Analysis

General Principles for appeals to the Appeal Division

[10] 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.[1]

Error of law

[11] The General Division made an error of law.

[12] The *Employment Insurance Act* (EI Act) says that a claimant is not entitled to benefits if they are not "capable of and **available** for work, and unable to find suitable employment."[2]

[13] The "availability" part is evaluated under the three criteria of the "*Faucher* test."[3] Claimants must have a desire to return to work as soon as possible, they must express that desire through their efforts to find work, and they must not set personal conditions that unduly limit their chances of finding work (the "*Faucher* factors").

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[1] 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* (DESDA).
[2] See section 18(1)(a) of the *Employment Insurance Act* (EI Act).
[3] *Faucher v Canada Employment and Immigration Commission*, A-56-96.

[14] The Commission concedes—and I agree—that the General Division applied the correct test for availability. It described the test correctly, and it considered each of the three *Faucher* factors, as it was required to do. Nonetheless, the Commission argued that the General Division made an error of law in the way that it justified its finding on the third *Faucher* factor.

[15] The Commission had found that the Claimant set a personal condition that unduly restricted his chances of returning to work. The personal condition was the loss of his legal work status in Canada.

[16] The Claimant lost his legal ability to work because he took too long to apply to renew his work permit. If a person applies for a renewal while their work permit is still valid, they have "implied status." This means that they may continue to work legally while they are waiting to receive the new permit. However, if a person delays their renewal application until after their permit expires, they are not legally permitted to work until they receive the new work permit.

[17] The General Division held that the Claimant satisfied the third factor. It accepted that the Claimant had no legal work status because he did not file his renewal application until after his permit had expired. But it found that this was not a personal condition. According to the General Division, "what the [Claimant] could do with his work permit is a matter of law, not a personal condition."

[18] The General Division also found that the Claimant relied on the "Newcomer centre" to advise and assist him in filing his permit renewal and that it was the Newcomer centre's mistake that resulted in his late application. The General Division held that it was reasonable for the Claimant to have relied on the Newcomer centre to file his renewal application on time.

[19] The Commission argues that the General Division interpreted the law in a way that ignores binding authority from the Federal Court of Appeal.[4] It focused on two aspects of the decision.

[20] First, the Commission challenged the General Division's statement that what [the Claimant] could do with a work permit was a matter of law. It observed that the Claimant did not actually obtain a work permit. So, what he could have done with his permit (if he had actually held one) did not support, or was unrelated to, its conclusion that the Claimant had not set personal conditions.

[21] I understand the Commission's argument. The reason the Commission originally decided that the Claimant was not available was that he had no legal work status—which was not disputed. What the Claimant could have done if he had had a work permit has nothing to do with how the loss of legal work status affected his availability.

[22] However, I am not sure the General Division said what it intended to say. I think the General Division simply expressed itself inelegantly. It likely meant that the Claimant's *inability to work without a work permit* is a matter of law. I believe it was trying to make the point that the Claimant's inability to work depended on the legal status of his permit and not on his personal choice. If this is what the General Division meant, then it was merely stating its view of how "personal condition" should be interpreted under the law.

[23] The General Division had a single justification for suggesting that the Claimant's inability to legally work was not a personal condition. It said that it was reasonable for the Claimant to rely on the Newcomer centre.[5] It appeared to accept this as a good or sufficient reason for not renewing his work permit on time, so it "shouldn't reflect on the [Claimant's] lack of trying to find a job."[6]

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[4] See Canada (Attorney General) v Bertrand (1982), A-613-81 (FCA); *Vezina v. Canada (Attorney General)*, 2003 FCA 198; *Canada (Attorney General) v. Leblanc*, 2010 FCA 60.
[5] See para 38 of the General Division decision.
[6] See para 39 of the General Division decision.

[24] However, the General Division did not refer to any legal authority that would support an analysis based on the Claimant's reasonable reliance on the Newcomer centre," or any other reason, however compelling. It did not show how the Claimant's loss of legal work status would not be a personal condition that unduly restricted him from finding work—under the law.

[25] The Commission argues that the case law does not allow the General Division to use a claimant's reasons for their unavailability as the basis for a conclusion that they **are** available. It pointed to *Bertrand*, *Vezina*, and *Leblanc*, which are three decisions of the Federal Court of Appeal.[7] It says that these cases state that the test for availability is objective: Whether a claimant is available for work does not depend on the claimant's reasons for their availability.

[26] The Claimant believes that the General Division made a decision based on the evidence, and he agrees with how the General Division analyzed his availability. In response to the Commission, he suggests that the facts were different in the three court decisions that the Commission referenced. He asserts that those decisions should not be followed. I presume that he means to argue that the decisions do not establish principles that are binding on the General Division in his particular circumstances.

[27] He is correct that there are differences in the facts. His own case is about the effect of the loss of his legal work status. *Bertrand* concerned a woman who was unable to show that she was available because of her family obligations. She could not find childcare, despite strong and reasonable efforts. In *Vezina,* the claimant was a full-time student who admitted he was not available to work except on weekends. His school schedule was found to be a "personal restriction." *Leblanc* was about a claimant who lost his house and all his possessions in a fire. He was not available because he did not have the proper clothing and could not get to work.

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[7] See Canada (Attorney General) v Bertrand (1982), A-613-81 (FCA); *Vezina v. Canada (Attorney General)*, 2003 FCA 198; *Canada (Attorney General) v. Leblanc*, 2010 FCA 60.

[28] Even though the circumstances of the claimants in these Federal Court of Appeal decisions are not the same as those of the Claimant, I accept that the decisions establish a principle that applies in this case.

[29] In reaching its decision, the Court in *Bertrand* said this:

> 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 on the particular reasons for the restrictions on availability however** these may evoke sympathetic concern. (emphasis added)

[30] The *Vezina* decision relied on the *Bertrand* decision. It also found that the claimant was not available and its reasons simply adopted the above passage from *Bertrand*.

[31] The *Leblanc* Court gave its reasons as follows:

> While availability implies that a person is motivated by a sincere desire to work, willingness to work is not in itself necessarily synonymous with availability. In order to decide whether or not an individual is available for work, one must determine whether that individual is struggling with obstacles that are undermining his or her will to work. By obstacle, we mean any constraint of a nature to deprive someone of his or her free choice, such as family obligations or a lessening of the individual's physical strength. **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 mitigating circumstances and the sympathy one may feel for the claimant cannot shorten the period of disentitlement. (emphasis added)

[32] These decisions establish a legal principle that is independent of their facts. They all say that it does not matter why a claimant is not available for work. A claimant who is not available is not entitled to benefits, regardless of the reason they are not available.

[33] In *GN*, the Appeal Division applied the same principle to facts that are similar to those of the Claimant.[8] It found that the claimant could not meet the third *Faucher* factor because he had not renewed his work permit. He was waiting for another country to send a renewal passport which he needed for his application. So, like the Claimant in this appeal, the claimant in *GN* could not renew his work permit due to circumstances that were outside of his control.

[34] I am not bound by other decisions of the Appeal Division, but I agree that the Claimant cannot be found to be available because he acted reasonably in trying to obtain or maintain his legal work status or because he could not control the fact that his work permit application was not submitted on time.

[35] The General Division made an error of law by basing its decision that the Claimant was available on his reasons for being unavailable.

Remedy

[36] Since I have found an error in the General Division's decision, I have the power to send the matter back to the General Division to reconsider, or I may make the decision that the General Division should have made.[9]

[37] Both the Claimant and the Commission ask that I make the decision the General Division should have made.

[38] I disagree. I do not accept that the Claimant had a fair opportunity to provide evidence on all the issues of this appeal and the file is not complete. I am returning the matter to the General Division.

Why I must return the matter to the General Division

[39] The Claimant told the General Division that he was actually working during the time he had no legal work status. However, the General Division's focus on the reasons the Claimant was late in applying to renew his work permit, operated to limit the scope

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[8] *Canada Employment Insurance Commission v GN*, 2025 SST 374.
[9] See section 59(1) of the DESDA.

of the hearing. The Claimant was given little opportunity to elaborate on how he could still be available during the time when he had no legal work status, and the General Division made no mention of this in its decision. The General Division may have failed to appreciate that this evidence could be relevant.

[40] In this appeal, neither party has made a clear argument that was directed to whether the General Division should have considered whether the Claimant was available to work during the period that he did not have legal work status. The Claimant was satisfied with the General Division decision because it was in his favour, so he was not interested in challenging the basis for its decision. And it is not surprising that the Commission did not support its own appeal of the General Division decision with an argument that could lead back to the same decision result.

[41] However, the Claimant did argue that he was available because he had a part-time job while he was waiting for his permit renewal, and that he was looking for additional work at the same time – despite his lack of legal work status. This much was also in evidence before the General Division.

[42] I asked both the Claimant and the Commission for their positions on whether a claimant could still be available without legal work status. It was apparent that the Claimant believed he showed his availability by working without legal work status. The Commission's representative argued that this would not align with the purpose of the EI Act. She was not aware of any legal authority on this point in the employment insurance context. However, she argued that the EI Act should not be interpreted to encourage unlawful behaviour, as a matter of policy.

[43] I accept that a claimant's lack of legal work status would normally be sufficient to show that they are not available. However, this is not true in every case. In the *LM* decision, the Appeal Division found that a claimant—who could not prove they could legally work—had not unduly set a personal condition, and that he was actually available.[10]

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[10] *LM v Canada Employment Insurance Commission*, 2022 SST 617.

[44] In *LM*, the Appeal Division found that it was an error for the General Division not to have considered evidence demonstrating that the claimant had been able to work even between his legal work permits. It also noted that the General Division may have made an error by focusing on whether the Claimant had legal work status, and not on whether he was **unduly** limited by his work status.

[45] As in *LM*, the General Division in this appeal did not consider whether the Claimant's lack of legal work status unduly limited his chances of finding work. Instead, the decision was based on whether the Claimant had acted reasonably to prevent the loss of legal work status.

[46] *LM* was decided on the basis of a constellation of facts, which it described as an "unusual set of circumstances." The fact that the claimant worked between valid work permits was only one of the circumstances considered.

[47] I agree with *LM* that a claimant's lack of legal work status is not always unduly limiting, but that it depends on the circumstances of the case. I also agree that the actual employment of a claimant during a period in which the claimant had no legal work status is relevant to whether such status is unduly limiting.

[48] There is another reason I have decided to send the matter back to the General Division. In the time that the Claimant was working without legal status, his employment was only part-time. His part-time employment might have helped him to show that he was available for part-time work, but claimants are required to show that they are available for "suitable employment" under section 18(1)(a) of the EI Act.[11] So, a decision would have to be made whether his part-time employment was "suitable employment."

[49] The reconsideration file does not include the complete claim application, or the Claimant's Record of Employment, or other information on his pre-claim employment. So, I cannot compare his pre-claim employment to the employment he held without legal work status. This means I cannot assess whether the Claimant was "available" for

[11] And as understood by *Page v Canada (Attorney General)*, 2023 FCA 169.

suitable employment (in the period that he was without legal work status), and I cannot assess whether he was “unable to find suitable employment.”

[50] Finally, I note that the Claimant has had little opportunity to offer evidence related to the other work he was seeking in the period that he had no legal work status. This evidence could be relevant to whether he had shown he was available for suitable employment. It could also be relevant to whether he was “unable to find suitable employment,” (depending whether he established his claim on a history of full-time or part-time employment).

[51] I am returning the matter to the General Division for all these reasons.

Conclusion

[52] I am allowing the appeal. The General Division made an error of law. I am returning the matter to the General Division.

Stephen Bergen
Member, Appeal Division