Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

[TRANSLATION]

Citation: *D. B. v. Canada Employment Insurance Commission*, 2016 SSTGDEI 108

Tribunal File Number: GE-16-1387

BETWEEN:

D. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Me Dominique Bellemare, Vice-Chairperson, General Division - Employment Insurance Section

HEARD ON: August 11, 2016

DATE OF DECISION: August 18, 2016

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Appellant attended by teleconference. She was accompanied by her representative, Sylvain Bergeron from LASTUSE du Saguenay, who also testified after being duly sworn. The Respondent, the Canada Employment Insurance Commission (Commission), did not attend.

INTRODUCTION

[1] The Appellant filed an appeal from a reconsideration decision made by the Commission on August 19, 2013, in which it found that the Appellant was not entitled to regular employment insurance benefits starting on January 28, 2013. She was denied regular benefits after receiving the 15 weeks of sickness benefits on the ground that she had not shown that she was capable of and available for work and unable to obtain suitable employment. A medical certificate issued by Dr. Gagné confirmed the diagnosis of illness.

[2] This appeal was heard by teleconference for the following reasons:

(a) The complexity of the issue(s).

(b) The fact that credibility did not seem to be a determinative issue.

(c) The fact that the Appellant would be the only party in attendance at the hearing.

(d) The information in the file, including the need for additional information.

(e) The availability of videoconferencing in the area where the Appellant resides.

(f) This form of hearing respects the requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

PRELIMINARY ISSUES

[3] This case was initially heard in the General Division, which rendered a decision on December 11, 2013. The Appellant appealed the General Division's decision, and on July 3, 2015, the Appeal Division rendered a decision finding that the General Division had erred in law by not considering a medical opinion issued on September 10, 2013.

[4] After the Appeal Division's decision, the file seems to have been "forgotten" in the Appeal Division and was not referred back to the General Division. It was not until April 2016 that the file was opened again in the General Division. Following those events, the Appellant filed a motion for a stay of proceedings. This decision is both a decision on the motion for a stay of proceedings and a decision.

ISSUES

[5] Was the Appellant entitled to receive regular employment insurance benefits after January 28, 2013 because of her medical condition?

[6] Can the Appellant's motion for a stay of proceedings be allowed on the basis of the additional delay between July 2015 and March 2016 that affected her case?

THE LAW

[7] **Paragraph 12(3)(c) of the Act**:

> (3) Subject to subsection (7), the maximum number of weeks for which benefits may be paid in a benefit period
>
> (c) because of a prescribed illness, injury or quarantine is 15.

[8] **Section 18 of the Act:**

A claimant is not entitled to be paid benefits for a working day in a benefit period for which the claimant fails to prove that on that day the claimant was

> (a) capable of and available for work and unable to obtain suitable employment;

. . .

[9] **Section 43 of the Act:**

A claimant is liable to repay an amount paid by the Commission to the claimant as benefits

(a) for any period for which the claimant is disqualified; or

(b) to which the claimant is not entitled.

[10] **Canadian Charter of Rights and Freedoms**

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

11. Any person charged with an offence has the right

(a) to be informed without unreasonable delay of the specific offence;

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

[11] **Canadian Bill of Rights**

2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to

(e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations.

EVIDENCE

Documentary evidence

[12] The file contains the claim for benefits, the Commission's notes, the initial decision, the request for reconsideration, the reconsideration decision and, finally, the notice of debt. There are also the electronic reports that she filed during her benefit period, that is, between October 14, 2012 and March 2, 2013. It can be seen from those reports that sickness benefits alternated with regular benefits.

[13] There are three medical certificates in the form of doctor's notes signed by Dr. Caroline Gagné. One of them, dated May 23, 2013, states that the Appellant was off work for a month. A second, dated June 10, 2013, states that the Appellant had mood disorders that made her unable to work as of October 2012. Those first two notes are in the file at page GD3-11. Finally, the third note, dated September 10, 2013, states that the Appellant has had a medical diagnosis of dysthymic disorders since October 2012 and has fluctuating depressive episodes. Dr. Gagné specifies that at times the Appellant is more symptomatic and that at other times her mood is normal. This last note is in document RGD9. In the same document, the Appellant filed an excerpt from the Diagnostic and Statistical Manual of Mental Disorders by the American Psychiatric Association.

[14] The file also contains a report on the Appellant's interview with the Commission on June 6, 2013. In that interview report, the Appellant acknowledged that she completed her employment insurance reports herself by Internet and that no one else had her access code. In the same report, the Appellant stated that she was not available for work but that she was looking for a job anyway. When asked why she alternated her periods of sickness benefits and regular benefits, she replied that she did so to survive, since otherwise she would be bankrupt, and to get out of poverty, and that it was done to extend her claim for benefits. She said that everyone does this and that it was not the first time she had done it. She said that she was prepared to work even though she was sick.

Testimonial evidence

Appellant

[15] The Tribunal asked the Appellant questions concerning both the motion and the merits of the case. With regard to the motion, the Appellant testified that the additional delay in hearing her case caused her psychological harm by stressing her out, adding to her anxiety and aggravating her health condition. She was afraid to get her mail or go on the Internet because she did not know what might happen to her. She said that she contacted her representative twice between July 2015 and March 2016 to find out what was happening with her case. She said that the situation made her sick, and she asked what point there was in finding a job and what it would do for her. The Tribunal asked her whether she had a specific medical report describing the situation, and the answer was no.

[16] With regard to the merits of the case, the Tribunal also asked the Appellant if she had read the interview report of June 6, 2013 and if she disagreed with its content or with parts of its content. The answer was that no, everything was there, and that the reason she acted that way was that she had no choice. She confirmed that she is still sick. Dr. Gagné has been seeing her for several years, and therefore since October 2012. According to the information in the file, she has found work. She stated that she is still sick, that she is looking for work and that she looked for work during the period to which this case relates. She cannot work, but she would not refuse work.

Sylvain Bergeron

[17] The Tribunal asked the Appellant's representative to testify, for which he was duly sworn, but only on certain aspects related to the motion for a stay of proceedings. The witness is the Appellant's representative. Since the creation of the Tribunal in 2013, he has handled about 30 cases. According to him, the delay for getting a hearing is about two and a half to three months; longer than that is a long time. The Tribunal asked him whether he contacted Tribunal Operations after October 2015. He said that he did not contact the Tribunal until mid-March 2016. He is very busy, and he does not look at a case until he receives a notice of

hearing. It is possible that he contacted the Tribunal before that date and that he mentioned this case [translation] “in passing”, but he did not recall.

[18] The Tribunal asked the witness whether he filed such a motion in response to the nearly 18 months that passed between the General Division hearing in 2013 and the Appeal Division hearing. He said that he did not, since he was not using that argument at the time. In addition, he has no statistics about what a “reasonable delay” should be other than his own figures and his own experience before the Tribunal.

PARTIES’ ARGUMENTS

[19] The Appellant made the following arguments:

(a) With regard to adjudicative jurisdiction, the Tribunal is an administrative tribunal that perfectly embodies the essential characteristics of the adjudicative function, which involves an appeal, grounds of appeal, a hearing, practice and procedure, testimony, parties and decisions to be recorded. While the Tribunal is characterized as quasi-judicial, the fact remains that it is a real tribunal, and for this reason this jurisdiction to grant this motion, since the jurisdiction encompasses the interpretation of a legislative or regulatory provision or a legal principle or rule established by the case law. The Tribunal can therefore render a decision on an application for a stay of proceedings.

(b) A question of fact concerns a finding that an event has occurred or that a thing or person exists as well as the expression of an opinion about the event, thing or person. As a tribunal, the Tribunal is subject to the stare decisis rule in relation to the decisions of superior courts. The Federal Court of Appeal’s decision A-500-011 dealing with unreasonable delay was rendered in an employment insurance case. The Federal Court of Appeal never stated that the umpire had no power to deal with this matter.

(c) Because of the importance of the application for a stay of proceedings and the seriousness of the error made by the Tribunal’s office, the proceedings must be terminated pursuant to sections 7, 11 and 24 of the Charter of Rights and Freedoms and section 2 of the Canadian Bill of Rights. The Applicant argued that her right to be heard

within a reasonable time, as provided for in section 11(b) of the Canadian Charter of Rights and Freedoms, was infringed for the following reasons: (1) she did not waive the delay in any way; (2) both the systematic delay and the institutional delay are attributable to the Crown and to the congestion of the Tribunal; (3) the inordinate delay has directly caused significant psychological harm to the Appellant and attached a stigma to her reputation, such that the human rights system would be brought into disrepute; (4) the Appellant has come to have significant stress and fears and has questioned her right to be sick since that time. In terms of reputation and dignity, despite section 11(d) of the Canadian Charter of Rights and Freedoms, the Appellant is seen as a fraudster by the Commission and feels unimportant because the Tribunal's office decided to close the file despite the decision of July 3, 2016 referring the case back to the General Division; (5) the Appellant questions her right to make full answer and defence, since the Tribunal's office decided to close the file by overriding her rights; (6) the Applicant has a right to make full answer and defence.

(d) The Applicant never waived her right to be tried within a reasonable time. The hearing before the Tribunal's Appeal Division was held on June 30, 2015. The Appeal Division's decision was rendered on July 3, 2015. On April 6, 2016, during a telephone conversation with the Tribunal, it was learned that the file had been closed; on average, it takes four months for other files to be referred back to the General Division. This delay, but above all the closing of the file contrary to a tribunal's decision, could therefore bring the administration of justice into disrepute.

(e) Pursuant to section 7 of the Canadian Charter of Rights and Freedoms and section 2(e) of the Canadian Bill of Rights, several rules of fundamental justice could be denied to the Appellant.

(f) The Appellant is therefore entitled to respectfully ask this honourable Tribunal to direct a stay of proceedings under sections 11(b) and 24(1) of the Canadian Charter of Rights and Freedoms. The Tribunal should also restore the Appellant's rights given that the cause of the delay in holding the hearing is attributable to the Tribunal's office, since this infringes the right to natural justice.

(g) The delays in the case were caused by the Crown, the justice system or the Tribunal. In Attorney General of Canada v. Norman, 2002 FCA 423, Desjardins J.A. cited the Supreme Court of Canada, which has defined the concept of "institutional delay" as follows: "this is the period that starts to run when the parties are ready for trial but the system cannot accommodate them". Contrary to the Appeal Division's decision, an official from the Tribunal's office decided to close the file and thereby penalize the Appellant. The Tribunal must recognize the fact that there was an unreasonable delay caused by the system and must end the process by granting a remedy to the Applicant.

(h) With regard to the remedy sought, in light of how serious the error made by the Tribunal's office was, it is necessary to terminate the proceedings, to give precedence to the Appellant's version when it comes to a remedy and thus to restore her rights, since the Tribunal's office is responsible for the problematic aspects.

(i) Like other rights set out in section 11 of the Canadian Charter of Rights and Freedoms, the right to be heard within a reasonable time provided for in section 11(b) is directly related to fundamental legal guarantees. As well, the purpose of section 11(b) is to protect individual rights and ensure compliance with the rules of natural justice guaranteed by section 7 of the Canadian Charter of Rights and Freedoms and section 2(e) of the Canadian Bill of Rights: see Perrin v. R., 500-01-003474, an income security case in which the Court of Quebec directed a stay of proceedings.

(j) Section 24(1) of the Canadian Charter of Rights and Freedoms could not be any clearer. Justice was brought into disrepute because the Appellant was denied the right to a reasonable delay, but above all to fairness, and the principles of fundamental justice were negated. Whether under procedural, criminal or administrative law, human rights and freedoms are universal, and no discrimination is possible. Sections 7, 11(b) and 24(1) of the Canadian Charter of Rights and Freedoms and section 2(e) of the Canadian Bill of Rights are therefore rules of fundamental justice applicable to all individuals at every moment of their lives.

(k) In Norman, the Federal Court of Appeal noted that in Blencoe v. British Columbia (Human Rights Commission), [2000] 2 S.C.R. 307, Bastarache J., writing for a majority

of the Supreme Court of Canada, stated that "[t]o justify a stay in the administrative law context . . . proof that significant prejudice has resulted from an unacceptable delay is required. A breach of natural justice and the duty of fairness may occur when the delay impairs a party's ability to answer the complaints against him or her because, for example, memories have faded, essential witnesses have died, or evidence has been lost. In short, the undue delay must impair the fairness of the hearing."

(l) In Blencoe, Bastarache J. recognized that where inordinate delay has caused significant psychological harm to a person or attached a stigma to a person's reputation, such that the human rights system would be brought into disrepute, such prejudice may be sufficient to constitute an abuse of process.

(m) In Kodellas (the citation was not provided by the Appellant), supra, the Saskatchewan Court of Appeal held that the exercise of determining whether a delay is unreasonable is partly a comparative one, since it involves comparing the length of the delay in the case in question with the time normally required to proceed in the same jurisdiction or elsewhere in Canada.

(n) With regard to the merits of the appeal, the appeal must be allowed because an error was made. The Commission made an error by [translation] "converting" the Appellant's regular benefits to sickness benefits. She should never have received sickness benefits until the regular benefits were exhausted, which should have been the case, but the fact is that she was found to be disentitled the weeks when she was not on sickness benefits, and so her benefit period would have continued while she was unemployed. As shown by the American Psychiatric Association's description of her medical condition, the Appellant has a particular medical condition in which she is well some weeks and not well sometimes, on an alternating basis. The Commission should therefore have deferred those weeks until the end of the unemployment period or at least until after the regular benefits ended. The Appellant tried to find work while she was receiving regular benefits, even though she was sick.

[20] The Respondent made the following arguments:

(a) Paragraph 12(3)(c) of the Act clearly states that the maximum number of weeks for which benefits may be paid in a benefit period because of a prescribed illness, injury or quarantine is 15.

(b) In this case, the Appellant had already received sickness benefits for the maximum period of 15 weeks from October 14, 2012 to January 26, 2013. As a result, she could no longer receive sickness benefits during her benefit period. The Federal Court of Appeal has affirmed the principle that paragraph 12(3)(c) of the Act authorizes the payment of a maximum of 15 weeks of sickness benefits: see Brown v. Canada (AG), 2010 FCA 148. In a similar case, Marin J. reiterated the principle that the Act does not permit the maximum period of sickness benefits to be extended, nor does it authorize either the Tribunal or an umpire to grant an extension to that period, regardless of the specific circumstances involved in the appellant's situation: see CUB 76759.

(c) Moreover, according to the medical certificate completed by her attending physician, she has been unable to work since October 2012 (page GD3-11). This means that she is also unable to establish her entitlement to regular benefits under paragraph 18(a) of the Act. Unfortunately, the result of this situation is that the Appellant cannot establish her entitlement to regular benefits as long as she is unable to return to work and this is specified by her medical doctor. The Commission argued that the case law supports its decision.

(d) After reading the medical certificate submitted by the Appellant on September 10, 2013, the Commission filed additional arguments. The Commission considered the medical doctor's argument that the Appellant has had fluctuating depressive symptoms since October 2012 and that those symptoms are stronger at some times than at others. However, based on the evidence in the file, the Commission is of the view that the medical certificate cannot serve to show that this was the Appellant's situation in the fall and winter of 2012.

(e) As illustrated by the Commission at pages GD4-1 and GD4-2 of its initial arguments, two (2) weeks of sickness benefits followed by two (2) weeks of regular benefits were paid systematically throughout the claimant's benefit period until she had been paid the maximum number of weeks of both sickness and regular benefits. Although the medical certificate clearly establishes a diagnosis of dysthymia, it does not mention any specific period when the Appellant had or did not have those symptoms. Further, the Commission cannot ignore the medical certificate dated June 10, 2013 (page GD3-11), in which the same medical doctor stated that symptoms related to mood disorders had made the Appellant unable to work since October 2012.

(f) Accordingly, the Commission stands by its position that the Appellant was unable to work as of October 14, 2012, that she was entitled to sickness benefits until January 26, 2012 and that subsequently, since she had received the maximum number of weeks of sickness benefits she could receive, she became disentitled to regular benefits as of January 27, 2012, since she had not provided any proof that she was capable of work.

(g) With regard to the motion for a stay of proceedings filed by the Appellant, the Commission argued that the Tribunal still has jurisdiction in this case. The argument that sections 11(b) and 24(1) of the Charter of Rights and Freedoms do not serve the Appellant's interests.

ANALYSIS

Motion for a stay of proceedings

[21] The Appellant raised two points of law in support of her motion for a stay of proceedings. The first involves a constitutional argument based on sections 11(b) and 24(1) of the *Charter of Rights and Freedoms* and section 2(e) of the *Canadian Bill of Rights.* The second is based on administrative law principles as enunciated by the Supreme Court in *Blencoe*, *supra*.

[22] The constitutional argument, by its very terms, cannot succeed. The Appellant's representative relied on section 11(b), but that provision applies in criminal and penal proceedings, as indicated by its opening words: "[a]ny person charged with an offence has the right . . ." (emphasis added). The Appellant is not charged with anything. The Act contains

offences and the punishment associated with them, but the Act is not criminal or penal in nature. Moreover, those provisions of the Act are not criminal or penal in nature but fall strictly under administrative law. In any event, none of those provisions was raised in relation to the Appellant.

[23] The argument based on section 24(1) is merely the remedy for a potential infringement of the provisions of section 11, but again, this does not apply. Indeed, the only court decision filed by the Appellant is a decision of the Court of Quebec in the criminal and penal context. It is true that that case involved fraud under social legislation, but this is not the case here. It is possible for criminal or penal charges to be laid for fraud under the Act, but in such cases adjudicative jurisdiction will lie with the ordinary courts, not with the Tribunal.

[24] As for the constitutional argument based on section 2 of the *Canadian Bill of Rights*, there is no question in this case of any breach of the principles of natural justice or fundamental justice. The Appellant received a fair hearing before the Tribunal, she was heard, she presented her arguments and she was represented. This leaves the question of increased delay, but it will be addressed in the part of the analysis dealing with the administrative law argument.

[25] The second argument in support of the motion to dismiss the proceedings is based on administrative law principles enunciated by the Supreme Court in *Blencoe, supra*, and by the Federal Court of Appeal in *Norman, supra*. The Appellant's argument is that this is a situation in which the delay in obtaining a hearing was inordinate and that this violated the principles of natural justice and caused her psychological harm.

[26] However, Bastarache J. of the Supreme Court of Canada stated the following in ***Blencoe***, *supra*:

> *There are remedies available in the administrative law context to deal with state-caused delay in human rights proceedings. However, <u>delay, without more, will not warrant a stay of proceedings as an abuse of process at common law. There must be proof of significant prejudice which results from an unacceptable delay.</u> Here, the respondent's ability to have a fair hearing has not been compromised. Proof of prejudice has not been demonstrated to be of sufficient magnitude to impact on the*

fairness of the hearing. Unacceptable delay may also amount to an abuse of process in certain circumstances even where the fairness of the hearing has not been compromised. Where there is no prejudice to hearing fairness, the delay must be clearly unacceptable and have directly caused a significant prejudice to amount to an abuse of process. It must be a delay that would, in the circumstances of the case, bring the human rights system into disrepute. A court must be satisfied that the proceedings are contrary to the interests of justice. There may also be abuse of process where conduct is oppressive. A stay is not the only remedy available for abuse of process in administrative law proceedings and a respondent asking for a stay bears a heavy burden. In this case, the respondent did not demonstrate that the delay was unacceptable to the point of being so oppressive as to taint the proceedings. While the stress and stigma resulting from an inordinate delay may contribute to an abuse of process, the delay in processing the complaints was not inordinate.

The determination of whether a delay is inordinate is not based on the length of the delay alone, but on contextual factors, including the nature of the case and its complexity, the purpose and nature of the proceedings, and whether the respondent contributed to the delay or waived the delay. Here, although the Commission took longer than is desirable to process the complaints, the delay was not so inordinate as to amount to an abuse of process. The case may not have been an extremely complicated one, but the various steps necessary to protect the respondents in the context of the human rights complaints system take time. The trial judge found that only the 24-month period between the filing of the complaints and the end of the investigation process should be considered for the delay, stating that the Human Rights Tribunal could not be criticized for not setting the hearing dates earlier as the respondent did not press for earlier dates. During that 24-month period, there was no extended period without any activity in the processing of the complaints, except for an inexplicable five months of inaction. The respondent challenged the lateness of the complaints and brought forward allegations of bad faith and, as a result, the process was delayed by eight months. The Commission should not be held responsible for contributing to this part of the delay. When all the relevant factors are taken into account, in particular the ongoing communication between the parties, the delay in processing the complaints is

> *not one that would offend the community's sense of decency and fairness.* (Emphasis added)

[27] Finally, in *Norman*, *supra*, Desjardins J.A. concluded as follows: "*I have strong reservations about applying principles developed in the human rights context to the realm of economic rights*".

[28] The Tribunal concludes that yes, it is possible to obtain a remedy in administrative law, but the principles enunciated by Bastarache J. in ***Blencoe***, *supra*, and by Desjardins J.A. in ***Norman***, *supra*, set the bar very high for obtaining a remedy, and a stay of proceedings is also not the only solution, as Bastarache J. stated in *Blencoe*, *supra*.

[29] According to the Appellant's arguments, a "reasonable" delay is two to three months, which is supposedly the normal delay. But when is a delay unreasonable? In this case, the error by the Tribunal's administrative services caused a delay of seven or eight months. That delay is certainly regrettable, but is it unacceptable to the point of tainting the proceedings? In the Tribunal's view, it is not. For a delay to be unacceptable based on the criteria in *Blencoe*, *supra*, it must be capable of compromising the fairness of the hearing, which is not the case here. Moreover, there was a delay of over 24 months in *Blencoe*, *supra*, whereas the delay in the present case was at most seven or eight months. The Appellant has not proved how the fairness of the hearing was compromised, especially since the Tribunal also heard her on the merits of her appeal at the same time.

[30] The Appellant stated several times that the Tribunal made a serious error by closing her file, which caused an unreasonable delay. Yet the Tribunal finds no serious error, and the file was not "closed". It was in fact "closed" in the Appeal Division, since the appeal was over, but it was not "open" in the General Division. For an error to be serious, the fairness of the hearing must be compromised, which is not the case here.

[31] Under its Regulations (section 3), the Tribunal has no time limit for hearing its cases, except that it must do so as quickly and efficiently as possible. The Appellant argued what a "normal" delay is, but this was based solely on her representative's statistical data and nothing more. A seven-month delay is long, but it in no way taints the proceedings or compromises the

fairness of the hearing. The evidence is still available, no witness is missing or has died and the Appellant does not have memories that have faded. In addition, while the Appellant did not cause the delay, the least the Tribunal can say is that her representative did nothing to shorten it. He said that he is too busy to monitor cases individually, but the Appellant went to see him approximately twice between October 2015 and March 2016 and he could have contacted the Tribunal. He is an experienced representative who has defended about 30 cases before the Tribunal. He could have contacted the Tribunal before March, but he did not do so. Given the speed with which he filed his motion for a stay of proceedings once the new file was open in the General Division, it appears rather that he allowed time to elapse so he could present his motion.

[32] Moreover, the "psychological harm" allegedly suffered by the Appellant has not been proved. She has no medical or psychological opinion to this effect, and she contacted her representative only twice. It must also be considered what economic prejudice was suffered. The result of the situation was that her overpayment was not payable for seven to eight additional months, with no interest. The Appellant therefore benefited from the additional delay rather than being a victim of it.

[33] Finally, the Tribunal agrees with the reservation expressed by Desjardins J.A. in ***Norman***, *supra*, that ***Blencoe***, *supra*, was a human rights case and that the context is different in cases involving economic rights.

[34] The motion for a stay of proceedings is therefore dismissed, since the Appellant has been unable to prove that the delay was unreasonable and that the fairness of the hearing was compromised.

Main issue

[35] When the Appellant filed her electronic reports every two weeks, she alternated between claiming sickness benefits and claiming regular benefits.

[36] When the Commission asked the Appellant to provide it with a medical certificate confirming her illness, it realized that the Appellant had claimed regular benefits and sickness benefits on an alternating basis. The sickness benefits therefore extended from October 2012 to

January 2013, since the Appellant reported that she was unable to work because of her health condition every two weeks.

[37] Following its reconsideration, the Commission upheld its decision on the sickness benefits but found that the Appellant was not entitled to regular benefits because of her health condition, which made her unable to work.

[38] On the main issue, it must be determined whether the Appellant was entitled to receive regular employment insurance benefits after receiving the maximum sickness benefits, that is, starting in January 2013.

[39] Contrary to what the Appellant argued, it was not the Commission that [translation] "converted" the regular benefits to sickness benefits; rather, the Appellant was the one who reported being sick and being healthy on an alternating basis, for two weeks at a time.

[40] The Appellant's situation is very unusual, since it worked out exactly to alternating periods of sickness benefits and regular benefits every two weeks. During her interview with the Commission on June 6, 2013, the content of which she confirmed during the hearing, she said that she was sick but that she took this approach mainly for economic reasons and that [translation] "everyone does this".

[41] It is true that the file contains the three medical reports in the form of notes from Dr. Gagné confirming her depressive state and dysthymic disorders. The book from the American Psychiatric Association filed by the Appellant does state that things sometimes go well and sometimes go badly with such a condition, but there is no evidence that the Appellant regularly had such symptoms two weeks out of four. The Tribunal does not see how she could keep a job in such circumstances. Indeed, the third doctor's note dated September 10 from Dr. Gagné does not refer to discontinuous periods of being off work but rather confirms or reaffirms the diagnosis of March 10, 2013 to the effect that the Appellant had been off work since October 2012. It is true that the note of September 10, 2013 refers to dysthymic disorders, but it does not refer to a factual situation involving symptoms as described by the Appellant. As a result, it cannot be considered in the manner suggested by the Appellant. The book filed from the American Psychiatric Association states that, as a consequence of dysthymia, a patient may

alternate between good periods and bad periods, but the text filed refers rather to shorter periods, even over the course of a single day. There is therefore no medical evidence of the Appellant's [translation] "alternating every two weeks" health condition.

[42] The Commission concluded that the sickness benefits were justified, just like the Appellant. The criteria in paragraph 12(3)(c) of the Act are met: the Appellant has a medical condition that prevents her from working, and there is supporting medical evidence.

[43] As for the regular benefits, for the Appellant to be entitled to receive benefits, section 18 of the Act requires that she be (1) capable of work and (2) available for work and unable to obtain suitable employment.

[44] According to the case law, and particularly the Federal Court of Appeal's decision in *Faucher* [A-56-96], the Appellant must meet the following three criteria to satisfy the availability requirement:

[45] 1. a desire to return to the labour market as soon as a suitable job is offered;

[46] 2. the expression of that desire through efforts to find a suitable job;

[47] 3. not setting personal conditions that might unduly limit the chances of returning to the labour market.

[48] It is true that the Appellant filed quite a complete list of her job searches, and the Tribunal has no doubts about her good faith in this regard. However, while she had a desire to return to work and she expressed that desire through her efforts to find a job, her medical condition made her unable to work, and she is therefore disentitled.

[49] The Tribunal therefore comes to the same conclusion as the Commission. Because of her health condition, the Appellant was indeed disentitled after the period of sickness benefits. Furthermore, if she ought rather, according to her representative, to have reported that she was disentitled every two weeks during her "regular" periods, she did not do so.

CONCLUSION

[50] The appeal is dismissed, the Commission's decision is confirmed and the motion for a stay of proceedings is also dismissed.

Me Dominique Bellemare
Vice-Chairperson, General Division - Employment Insurance Section