



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

[TRANSLATION]

Citation: *R. T. v. Canada Employment Insurance Commission*, 2017 SSTGDEI 45

Tribunal File Number: GE-16-3926

BETWEEN:

**R. T.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**General Division – Employment Insurance Section**

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DECISION BY: Bernadette Syverin

HEARD ON: March 3, 2017

DATE OF DECISION: April 4, 2017

## REASONS AND DECISION

### PERSONS IN ATTENDANCE

The Appellant, Mr. R. T., attended the hearing. The Canada Employment Insurance Commission (the Commission) did not attend.

### INTRODUCTION

[1] The Appellant filed a claim for sickness benefits on April 21, 2016. A benefit period was established and 15 weeks of sickness benefits were paid.

[2] On August 31, 2016, the Appellant advised the Commission that his physician had medically cleared him for light work. However, there was no light work at his place of employment. The Commission explained to the Appellant that he was no longer entitled to sickness benefits, having been paid the maximum of 15 weeks under the *Employment Insurance Act* (Act). The Appellant therefore asked to convert his sickness benefits into regular benefits.

[3] On September 12, 2016, the Commission advised the Appellant that his application for regular benefits had been refused: [translation] "*We are unable to pay you Employment Insurance benefits effective July 31, 2016, because there were restrictions on your availability for work. Due to your restrictions, your employer had no work to offer you. Therefore, we find that you were unavailable for work.*"

[4] The Appellant filed a request for reconsideration of the Commission's decision of September 12, 2016.

[5] In its reconsideration decision rendered on October 6, 2016, the Commission informed the Appellant that the September 12, 2016, decision had been upheld. Furthermore, this decision informed the Appellant that he was not entitled to further weeks of sickness benefits because he had already received the maximum of 15 weeks under the Act.

[6] The Appellant filed an appeal with the Tribunal on October 21, 2016.

[7] The hearing was held by teleconference because that 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.

## **ISSUES**

[8] Is the Appellant entitled to additional weeks of sickness benefits?

[9] Was the Appellant capable of and available for work between August 8 and September 6, 2016, as per section 18 of the Act?

## **EVIDENCE**

[10] On April 21, 2016, the Appellant applied for sickness benefits. (GD3-3 to GD3-11).

[11] A benefit period was established and 15 weeks of special benefits were paid from April 17 to July 30, 2016. (GD4-1)

[12] A medical certificate issued on August 8, 2016, indicates that the Appellant was cleared for light work from August 8, 2016, to September 6, 2016. (GD3-14)

[13] On August 31, 2016, the Appellant advised the Commission that his physician had medically cleared him for light work. However, there was no light work at his place of employment. The Commission explained to the Appellant that he was no longer entitled to sickness benefits, having been paid the maximum of 15 weeks under the Act. The Appellant therefore asked to convert his sickness benefits into regular benefits. (GD3-16)

[14] On September 12, 2016, the Commission advised the Appellant that he was not entitled to regular benefits effective July 31, 2016, because he was unavailable for work. (GD3-17)

[15] The Appellant filed a request for reconsideration of the decision rendered on September 12, 2016, on the ground that he was available for work. The fact that his employer had no light work to offer him was not his fault. (GD3- 18 to GD3-19).

[16] In its reconsideration decision of October 6, 2016, the Commission informed the Appellant that the decision rendered on September 12, 2016, had been upheld. Furthermore,

that decision informed the Appellant that he was not entitled to additional weeks of sickness benefits because he had already received the maximum of 15 weeks. (GD3-21)

[17] The Appellant filed an appeal with the Tribunal on October 21, 2016.

[18] At the hearing, the Appellant made the following arguments:

- a) He is a bus driver. He underwent three surgeries, following which his physician cleared him to return to light work from August 8 to September 6, 2016. The Appellant showed up for work on August 8, 2016, but the employer had no light work to offer him.
- b) He made a second attempt to return to work earlier than expected, but his employer told him to return on September 6, 2016, the date indicated on his medical certificate.
- c) Apart from his job as a bus driver, the only other available jobs at the company were the assistant position and the bus cleaner position. The Appellant could not be tasked with the bus cleaner position because his medical restrictions prevented him from putting his hands in water.
- d) The Appellant testified that he was available to work for his employer. Although he was unable to work due to his medical restrictions, the Appellant did not look for another job from August 8 to September 5, 2016, because he was still employed as a bus driver. The employer did not issue a new Record of Employment putting the Appellant on a leave of absence from August 8 to September 5, 2016.

## **SUBMISSIONS**

[19] The Appellant submits that he should have been eligible for benefits because he was available for work from August 8 to September 6, 2016. According to the Appellant, the fact that his employer was unable to offer him modified duties was a circumstance over which he had no control. He should therefore be entitled to either additional sickness benefits or regular benefits.

[20] According to the Commission, the Act provides the maximum number of special benefits that may be paid in a benefit period. The Appellant received the maximum of 15 weeks of payable benefits under subsection 12(3) of the Act and his claim terminated on July 30, 2016. The Appellant's benefit period could not be extended to permit him to receive additional weeks of sickness benefits.

[21] The Commission also submitted that the Appellant was ineligible for regular Employment Insurance benefits because he had failed to show that he was available for work pursuant to section 18 of the Act.

## **ANALYSIS**

[22] The relevant legislative provisions are reproduced in an appendix to this decision.

### **Additional sickness benefits**

[23] The first issue concerns the number of weeks of sickness benefits that the Appellant would have been entitled to. The relevant provision of the Act is paragraph 12(3)(c), which reads as follows:

*(3) 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.*

[24] The Appellant filed a claim for sickness benefits on April 21, 2016. A benefit period was established and 15 weeks of sickness benefits were paid from April 17, 2016, to July 30, 2016.

[25] On August 8, 2016, the Appellant's physician indicated that he could return to light work, but there was no light work at his place of his employment. Because his employer was unable to offer him a position other than bus driver, the Appellant asked the Commission for additional weeks of sickness benefits. His application was refused because the Act provides that only 15 weeks of benefits may be paid, which is the maximum number of weeks provided under the Act.

[26] After reviewing all the factual evidence submitted, the Tribunal determines that although the Appellant was unable to fully resume his duties as a bus driver due to his medical restrictions, sickness benefits are payable for only a maximum of 15 weeks.

[27] The Tribunal sympathizes with the Appellant, but the applicable legislation does not provide for exceptions. The Tribunal finds that the Commission's refusal to pay additional weeks of sickness benefits was justified under the provisions of the Act.

### **Regular benefits—availability**

[28] Because he could not receive more than 15 weeks of sickness benefits, the Appellant asked the Commission to have his sickness benefits converted into regular benefits. The Commission refused because the Appellant had not shown that he was capable of and available for work from August 8, 2016, to September 6, 2016.

[29] The second issue is therefore determining whether the Appellant was available for work from August 8, 2016, to September 6, 2016.

[30] Paragraph 18(1)(a) of the *Act* provides that a claimant is not entitled to be paid benefits for any working day in a benefit period for which the claimant fails to prove that on that day the claimant was capable of and available for work and unable to obtain suitable employment.

[31] Section 32 of the Regulations defines a working day as any day of the week except Saturday and Sunday.

[32] The Appellant argued that he was available for work but that his employer was unable to offer him lighter duties. He believes that he met the criteria under the Act and should be entitled to regular benefits.

[33] In order for the claimant to be entitled to regular Employment Insurance benefits, he must demonstrate that he was capable of and available for work and unable to obtain suitable employment (*Bois A- 31-00; Cornelissen-O'Neil A-652-93; Bertrand A-631-81*).

[34] Was the Appellant capable of working from August 8 to September 5, 2016?

[35] The Appellant testified that his physician had told him that he could resume light work on August 8, 2016. He could not return to his regular position as a bus driver because it was physically demanding. He told this to his employer, but the employer refused to take him back, having no light work to offer him. The Appellant returned to full-time work as a bus driver on September 6, 2016.

[36] The Appellant's testimony and the medical certificate on file show that the Appellant was unable to fulfill his duties as a bus driver due to his medical restrictions. The Tribunal therefore finds that the Appellant does not meet the work capacity requirement under section 18 of the Act because he was not capable of working in his position as a bus driver during the period in question due to the state of his health.

[37] The Appellant also testified that he had been available and ready for work, but that he could not work because his employer was unable to accommodate him with modified duties.

[38] The Tribunal finds that even though the Appellant believed he was available, he did not meet the legal criteria for availability.

[39] Indeed, in *Faucher v. Canada (Attorney General)* (A-56-96), the Federal Court of Appeal set out three factors to be considered when determining whether a claimant is available for work. In order to be found available for work, a claimant must (1) have a desire to return to the labour market as soon as a suitable employment is offered; (2) express that desire to return to work through efforts to find suitable employment; and (3) not set personal conditions that might unduly limit their chances of returning to the labour market.

#### **Desire to return to the labour market as soon as suitable employment is offered**

[40] In this case, the evidence shows that the Appellant had the desire to return to the labour market. Indeed, the Appellant testified that he showed up for work on August 8, 2016, and the employer told him that he had no light work to offer him. Despite this, the Appellant made a second attempt to return to work before the end of his period of light work, but the employer told him to return to work on September 6, 2016, when he could resume his duties as a bus driver. It is clear that the Appellant had the desire to return to the labour market.

### **Expression of that desire through efforts to find a suitable job**

[41] Availability is a question of fact to be considered on the basis of all the circumstances of each individual case. Demonstrating availability requires the making of reasonable and customary efforts to obtain suitable employment. (*Canada (Attorney General) v. Whiffen*, A-1472-92)

[42] Despite his desire to work, the Appellant clearly stated that he had not looked for other employment during the period in question because he already had a job and was waiting until the end of his period of light work to return to work on September 6, 2016.

[43] The Tribunal finds that the Appellant did not make efforts to find suitable employment between August 8, 2016, and September 5, 2016.

### **Not setting “personal conditions” that might unduly limit the chances of returning to the labour market**

[44] In order to decide whether an individual is available for work, one must determine whether that individual is struggling with obstacles that are undermining his or her willingness to work. Obstacle signifies 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—*Canada (Attorney General) v. Leblanc*, 2010 FCA 60.

[45] The evidence submitted shows that the Appellant clearly intended above all to remain available to his employer because he had medical restrictions that prevented him from fulfilling his duties as a bus driver.

[46] In light of the above, the Tribunal finds that, notwithstanding his desire to return to work, the Appellant was not available within the meaning of the Act due to his medical restrictions, which left him unable to carry out his duties as a bus driver.

[47] On this point, the Tribunal endorses the words of the Federal Court of Appeal in *Leblanc* 2010 FCA 60: “[W]illingness to work is not in itself necessarily synonymous with availability.”



[48] Taking all of the above into consideration, the Tribunal finds that the Appellant did not meet the three criteria set out in jurisprudence to establish his availability for work as required under the Act. The Tribunal finds that the Appellant has not met the onus on him to prove his availability for work for any working day between August 8, 2016, and September 6, 2016.

[49] The Tribunal sympathizes with the Appellant's situation. However, to be entitled to regular benefits, a claimant must demonstrate that he was capable of and available for work and was actively seeking employment for all available days, as prescribed by the Act and jurisprudence. The Tribunal finds that the Appellant's case is no exception to this rule.

### **CONCLUSION**

[50] In this case, the Tribunal concludes that the Commission's decision finding the Appellant ineligible for Employment Insurance benefits conforms to the Act, because in order for the claimant to be entitled to regular Employment Insurance benefits, he must demonstrate that he was capable of and available for work and unable to obtain suitable employment. Furthermore, the Appellant received the maximum of 15 weeks of sickness benefits under the Act. The Tribunal does not have the authority to grant benefits other than those provided under the Act.

[51] The appeal is dismissed.

Bernadette Syverin  
Member, General Division – Employment Insurance Section

## ANNEX

### THE LAW

#### *Employment Insurance Act*

##### **Benefits**

**12 (1)** If a benefit period has been established for a claimant, benefits may be paid to the claimant for each week of unemployment that falls in the benefit period, subject to the maximums established by this section.

##### **Maximum—special benefits**

**(3)** The maximum number of weeks for which benefits may be paid in a benefit period

- (a)** because of pregnancy is 15;
- (b)** because the claimant is caring for one or more new-born children of the claimant or one or more children placed with the claimant for the purpose of adoption is 35;
- (c)** because of a prescribed illness, injury or quarantine is 15;
- (d)** because the claimant is providing care or support to one or more family members described in subsection 23.1(2) is 26; and
- (e)** because the claimant is providing care or support to one or more critically ill children described in subsection 23.2(1), is 35.

**18 (1)** 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;
- (b)** unable to work because of a prescribed illness, injury or quarantine, and that the claimant would otherwise be available for work; or
- (c)** engaged in jury service.

**(2)** A claimant to whom benefits are payable under any of sections 23 to 23.2 is not disentitled under paragraph (1)(b) for failing to prove that he or she would have been available for work were it not for the illness, injury or quarantine.

**12 (1)** If a benefit period has been established for a claimant, benefits may be paid to the claimant for each week of unemployment that falls in the benefit period, subject to the maximums established by this section.

**(2)** The maximum number of weeks for which benefits may be paid in a benefit period because of a reason other than those mentioned in subsection (3) shall be determined in accordance with the table in Schedule I by reference to the regional rate of unemployment that applies to the Claimant and the number of hours of insurable employment of the Claimant in their qualifying period.

**(2.1)** Subject to subsection (2.7), the number of weeks of benefits set out in the table in Schedule I that applies in respect of a claimant is deemed to be the number of weeks that would otherwise apply in respect of the claimant, but for this subsection, increased by five weeks if the following conditions are met:

**(a)** the claimant is not a long-tenured worker;

**(b)** the claimant's benefit period began during the period beginning on January 4, 2015 and ending on July 8, 2017;

**(c)** the claimant's ordinary residence at the beginning of the benefit period was in a region referred to in subsection (2.8); and

**(d)** benefits were paid or payable to the claimant because of a reason mentioned in subsection (2) for at least one week in the benefit period.

**(2.2)** If subsection (2.1) applies in respect of a claimant whose benefit period is deemed under subsection 10(13.2) not to have ended,

**(a)** the claimant may, for weeks beginning on or after July 3, 2016, be paid benefits because of a reason mentioned in subsection (2) for no more than the five additional weeks referred to in subsection (2.1); and

**(b)** the claimant may not be paid those additional five weeks of benefits for any week that began before July 3, 2016.

**(2.3)** Subject to subsection (2.7), the number of weeks of benefits set out in the table in Schedule I that applies in respect of a claimant is deemed to be the number of weeks that would otherwise apply in respect of the claimant, but for this subsection, increased by 25 weeks if the following conditions are met:

**(a)** the claimant is a long-tenured worker;

**(b)** the claimant's benefit period began during the period beginning on January 4, 2015 and ending on October 29, 2016;

**(c)** the claimant's ordinary residence at the beginning of the benefit period was in a region referred to in subsection (2.8); and

**(d)** benefits were paid or payable to the claimant because of a reason mentioned in subsection (2) for at least one week in the benefit period.

**(2.4)** If subsection (2.3) applies in respect of a claimant whose benefit period is deemed under subsection 10(13.4) not to have ended,

**(a)** the claimant may, for weeks beginning on or after July 3, 2016, be paid benefits because of a reason mentioned in subsection (2) for no more than the 25 additional weeks referred to in subsection (2.3); and

**(b)** the claimant may not be paid those additional 25 weeks of benefits for any week that began before July 3, 2016.

**(2.5)** The number of weeks of benefits set out in the table in Schedule I that applies in respect of a claimant is deemed to be the number of weeks that would otherwise apply in respect of the claimant, but for this subsection, increased by 17 weeks if the following conditions are met:

**(a)** the claimant is a long-tenured worker;

**(b)** the claimant's benefit period began during the period beginning on October 30, 2016 and ending on February 25, 2017;

**(c)** the claimant's ordinary residence at the beginning of the benefit period was in a region referred to in subsection (2.8); and

**(d)** benefits were paid or payable to the claimant because of a reason mentioned in subsection (2) for at least one week in the benefit period.

**(2.6)** The number of weeks of benefits set out in the table in Schedule I that applies in respect of a claimant is deemed to be the number of weeks that would otherwise apply in respect of the claimant, but for this subsection, increased by 10 weeks if the following conditions are met:

**(a)** the claimant is a long-tenured worker;

**(b)** the claimant's benefit period began during the period beginning on February 26, 2017 and ending on July 8, 2017;

**(c)** the claimant's ordinary residence at the beginning of the benefit period was in a region referred to in subsection (2.8); and

**(d)** benefits were paid or payable to the claimant because of a reason mentioned in subsection (2) for at least one week in the benefit period.

**(2.7)** If more than one benefit period in respect of a claimant began before July 3, 2016, subsection (2.1) or (2.3), as the case may be, applies to increase the number of weeks of benefits only in the benefit period that began on the day that is closest to that day.

**(2.8)** The regions, for the purposes of subsections (2.1) to (2.6), are the following regions described in Schedule I to the *Employment Insurance Regulations*:

- (a)** the region of Northern Ontario described in subsection 2(3) of that Schedule;
- (b)** the region of Sudbury described in subsection 2(14) of that Schedule;
- (c)** the region of Northern Manitoba described in subsection 6(3) of that Schedule;
- (c.1)** the region of Southern Interior British Columbia described in subsection 7(1) of that Schedule;
- (d)** the region of Northern British Columbia described in subsection 7(5) of that Schedule;
- (e)** the region of Saskatoon described in subsection 9(2) of that Schedule;
- (e.1)** the region of Southern Saskatchewan described in subsection 9(3) of that Schedule;
- (f)** the region of Northern Saskatchewan described in subsection 9(4) of that Schedule;
- (g)** the region of Calgary described in subsection 10(1) of that Schedule;
- (g.1)** the region of Edmonton described in subsection 10(2) of that Schedule;
- (h)** the region of Southern Alberta described in subsection 10(3) of that Schedule;
- (i)** the region of Northern Alberta described in subsection 10(4) of that Schedule;
- (j)** the region of Newfoundland/Labrador described in subsection 11(2) of that Schedule;
- (k)** the region of Whitehorse described in subsection 12(1) of that Schedule; and
- (l)** the region of Nunavut described in subsection 14(2) of that Schedule.

**(3)** The maximum number of weeks for which benefits may be paid in a benefit period

- (a)** because of pregnancy is 15;
- (b)** because the claimant is caring for one or more new-born children of the claimant or one or more children placed with the claimant for the purpose of adoption is 35;
- (c)** because of a prescribed illness, injury or quarantine is 15;
- (d)** because the claimant is providing care or support to one or more family members described in subsection 23.1(2), is six; and

(e) because the claimant is providing care or support to one or more critically ill children described in subsection 23.2(1), is 35.

(4) The maximum number of weeks for which benefits may be paid (a) for a single pregnancy is 15; and (b) for the care of one or more new-born or adopted children as a result of a single pregnancy or placement is 35.

(4.01) If a claim is made under this Part in respect of a child or children referred to in paragraph (4)(b) and a claim is made under section 152.05 in respect of the same child or children, the maximum number of weeks of benefits payable under this Act in respect of the child or children is 35.

(4.1) Even if more than one claim is made under this Act, at least one of which is made under section 23.1 — or even if more than one certificate is issued for the purposes of this Act, at least one of which is issued for the purposes of section 23.1 — for the same reason and in respect of the same family member, the maximum number of weeks of benefits payable under this Act in respect of that family member is 26 weeks during the period of 52 weeks that begins on the first day of the week referred to in paragraph 23.1(4)(a).

(4.2) If a shorter period is prescribed for the purposes of subsection 23.1(5), then that shorter period applies for the purposes of subsection (4.1).

(4.3) When a shorter period referred to in subsection (4.2) has expired in respect of a family member, no further benefits are payable under section 23.1 in respect of that family member until the minimum prescribed number of weeks has elapsed.

(4.4) Even if more than one claim is made under this Act, at least one of which is made under section 23.2 — or even if more than one certificate is issued for the purposes of this Act, at least one of which is issued for the purposes of section 23.2 — for the same reason and in respect of the same critically ill child, the maximum number of weeks of benefits payable under this Act in respect of that child is 35 weeks during the period of 52 weeks that begins on the first day of the week referred to in paragraph 23.2(3)(a).

(4.5) Even if more than one claim is made under this Act, at least one of which is made under section 23.2 — or even if more than one certificate is issued for the purposes of this Act, at least one of which is issued for the purposes of section 23.2 — for the same reason and in respect of the same children who are critically ill as a result of the same event, the maximum number of weeks of benefits payable under this Act in respect of those children is 35 weeks during the period of 52 weeks that begins on the first day of the week referred to in paragraph 23.2(4)(a).

(5) In a claimant's benefit period, the claimant may combine weeks of benefits to which they are entitled because of a reason mentioned in subsection (3), but the maximum number of combined weeks is 50. If the benefit period is extended under subsection 10(13), the maximum number of combined weeks equals the maximum number of weeks in the benefit period calculated under subsection 10(15) less two weeks.

**(6)** In a claimant's benefit period, the claimant may, subject to the applicable maximums, combine weeks of benefits to which the claimant is entitled because of a reason mentioned in subsections (2) and (3), but the total number of weeks of benefits shall not exceed 50 or, if the maximum number of weeks for which benefits may be paid to a claimant because of a reason mentioned in subsection (2) is greater than 45 weeks as a result of the application of any of subsections (2.1), (2.3), (2.5) and (2.6), the number that corresponds to that maximum number of weeks increased by five weeks.

**(7)** [Repealed, 2000, c. 14, s. 3]

**(8)** For the purposes of this section, the placement with a major attachment claimant, at the same or substantially the same time, of two or more children for the purpose of adoption is a single placement of a child or children for the purpose of adoption.