

[TRANSLATION]

Citation: *F. B. v. Canada Employment Insurance Commission*, 2014 SSTGDEI 15

Appeal No: GE-13-2161

BETWEEN:

F. B.

Appellant
Claimant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance

SOCIAL SECURITY TRIBUNAL MEMBER: Joanne Blanchard

HEARING DATE: February 13, 2014

TYPE OF HEARING: Teleconference

DECISION: Appeal dismissed in part

PERSONS IN ATTENDANCE

The Appellant, F. B., participated in the hearing.

DECISION

[1] The Tribunal finds that the Appellant's employment contract ended on June 27, 2013, and that there was no continuity of the employment relationship. Therefore, he meets the exception set out in paragraph 33(2)(b) of the *Employment Insurance Regulations* (the Regulations). In addition, the Tribunal finds that the Appellant no longer meets the exempting conditions set out in subsection 33(2) of the Regulations as of August 20, 2013, because on that date he accepted an offer of employment for the 2013-2014 school year.

INTRODUCTION

[2] The Appellant filed an initial Employment Insurance benefit claim that took effect on June 30, 2013 (GD3-2 to GD3-16).

[3] The Canada Employment Insurance Commission (the Commission) determined that the Appellant was employed in teaching and is therefore not entitled to receive Employment Insurance benefits during the summer break and Christmas break when there is no teaching. The Commission therefore imposed a disentitlement from receiving Employment Insurance benefits under subsection 33(2) of the Regulations from July 1, 2013, to August 22, 2013, from December 23, 2013, to January 3, 2014, and from March 3, 2014, to March 7, 2014 (GD3-21 and GD3-22).

[4] The Appellant requested a reconsideration of the Commission's decision rendered on September 10, 2013. On October 23, 2013, the Commission informed the Appellant that it was upholding its initial decision on the disentitlement because the employment relationship continued (GD3-31).

[5] The Appellant appealed from the Commission's revised decision to the Tribunal (GD2-1 to GD2-8).

TYPE OF HEARING

[6] The hearing was held by teleconference for the reasons set out in the Notice of Hearing dated January 21, 2014.

ISSUE

[7] The Appellant appeals from a disentitlement imposed on him under section 33 of the Regulations because he failed to establish that he was entitled as a teacher to receive Employment Insurance benefits during a non-teaching period.

APPLICABLE LAW

[8] Subsection 33(1) of the Regulations defines the terms that apply in section 33:

“Non-teaching period” means the period that occurs annually at regular or irregular intervals during which no work is performed by a significant number of people employed in teaching.

“Teaching” means the occupation of teaching in a pre-elementary, an elementary or a secondary school, including a technical or vocational school.

[9] Subsection 33(2) of the Regulations stipulates that “a claimant who was employed in teaching for any part of the claimant's qualifying period is not entitled to receive benefits, other than those payable under sections 22 and 23 of the Act, for any week of unemployment that falls in any non-teaching period of the claimant unless (a) the claimant's contract of employment for teaching has terminated; (b) the claimant's employment in teaching was on a

casual or substitute basis; or (c) the claimant qualifies to receive benefits in respect of employment in an occupation other than teaching.”

[10] Subsection 33(3) of the Regulations stipulates that “where a claimant who was employed in teaching for any part of the claimant’s qualifying period qualifies to receive benefits in respect of employment in an occupation other than teaching, the amount of benefits payable for a week of unemployment that falls within any non-teaching period of the claimant shall be limited to the amount that is payable in respect of the employment in that other occupation.”

[11] A teacher, as defined in subsection 33(1) of the Regulations, is not entitled to receive benefits, other than maternity, parental or compassionate care benefits, during a non-teaching period, unless one of the exempting conditions set out in subsection 33(2) of the Regulations is met (*Hempel*, A-368-95).

[12] The dominant case law indicates that except in special circumstances, teachers whose contracts finish at the end of June and who are rehired for the next school year are not entitled to receive Employment Insurance in July and August (*Bishop v. Canada (Employment Insurance Commission)*, 2002 FCA 276; *Canada (Attorney General) v. Partridge* (1999), 245 N.R. 163 (FCA); *Gauthier v. Canada (Employment and Immigration Commission)*, [1995] F.C.J. no. 1350 (C.A.); and *Canada (Attorney General) v. Hann*, [1997] F.C.J. no. 1641 (C.A.)).

[13] The Federal Court of Appeal (FCA) reiterated that a teacher was not entitled to receive Employment Insurance benefits in July and August unless there was a clear break in the continuity of his or her employment (*Bazinet*, 2006 FCA 174; and *Robin*, 2006 FCA 175).

[14] In *Ying v. Canada (Attorney General)* (A-101-98), the FCA determined that the establishment of particular facts led to the finding that there was no employment relationship.

[15] Subsection 49(1) of the *Employment Insurance Act* stipulates that a claimant must prove that he or she is entitled to receive benefits (*Falardeau, A-39-85*).

EVIDENCE

[16] The Appellant filed an initial Employment Insurance benefit claim that took effect on June 30, 2013 (GD3-2 to GD3-16).

[17] The Canada Employment Insurance Commission (the Commission) determined that the Appellant was employed in teaching and is therefore not entitled to receive Employment Insurance benefits during the summer break and Christmas break when there is no teaching. The Commission therefore imposed a disentitlement from receiving Employment Insurance benefits under subsection 33(2) of the Regulations from July 1, 2013, to August 22, 2013, from December 23, 2013, to January 3, 2014, and from March 3, 2014, to March 7, 2014 (GD3-21 and GD3-22).

[18] The Appellant requested a reconsideration of the Commission's decision rendered on September 10, 2013. On October 23, 2013, the Commission informed the Appellant that it was upholding its initial decision on the disentitlement because the employment relationship continued (GD3-31).

[19] The Appellant appealed to the Tribunal from the Commission's revised decision. He disagreed with the Commission's decision on his employment relationship with the St-Hyacinthe school board during the summer break. He participated in a contract awarding simulation organized by his employer on June 27, 2013. However, neither a verbal nor a written agreement was entered into at that time. During the meeting, the claimant was informed that the simulation was not a promise of employment and that there was no obligation on either side before the official invitation on August 20, 2013 (GD2-1 to GD2-8).

[20] The teacher signed a formal teaching contract on October 25, 2013 (GD2-7 to GD2-8).

[21] The employer submitted a completed document after the simulation that showed the claimant's name for an assignment with a 33% workload in mathematics (GD3-19).

[22] The employer also confirmed that there is a 10-day reprieve for group insurance if the teacher does not have a contract. The employer also confirmed that the claimant knew during the simulation that he would have a teaching contract for the next school year. He had a contract in hand. The claimant obtained a regular position at the start of the 2013-2014 school year on the basis of his seniority (GD3-29).

SUBMISSIONS OF THE PARTIES

[23] The claimant stated the following:

- (a) An information session was held on June 27, 2013. Although the employer stated that he was offered a possibility of an assignment at 33% at the École Fadette, this was not the case. There was never a question of a contract at the École Fadette in his case. His union, which was in attendance, also corroborated this information. In addition, he would have never accepted an assignment at 33% at Fadette. The information submitted by the employer in his case is erroneous. There was probably a mix-up with another teacher.
- (b) During the information session or simulation, he indicated his preference for working at the secondary school. He asked specifically whether the meeting ensured him a position, and S. L. told him that it was not at all a promise of employment.
- (c) He was told that he would be invited in August to attend a contract awarding session if his services were retained. When he received an offer of employment on August 20, 2013, he immediately contacted the Commission to cancel his benefits.

- (d) On August 20, he was offered a position in mathematics at the secondary school. This is the first year that he was offered a permanent position. In the past, he was always hired on contract. He made his benefit claims in June and he always received benefits during the summer.
- (e) His employer informed him during the simulation on June 27, 2013, that it was not a promise of employment and he was sent his Record of Employment indicating the end of a contract a few days later. He could not expect to be rehired on a permanent basis in August.
- (f) There was therefore no awarding of assignments during the simulation session. In August, he was offered something completely different. He could not have known that he would have a position. During his period of unemployment, he updated his resumé and he searched for a job, in particular as a homework tutor.
- (g) A number of his co-workers received benefits during the period from June to August 2013. Some were initially denied benefits, but the Commission then accepted their claims.

[24] The Respondent argued the following:

- (a) Subsection 33(1) of the Regulations defines teaching as the occupation of teaching in a pre-elementary, an elementary or a secondary school, including a technical or vocational school. Under subsection 33(1) of the Regulations, a teacher is not entitled to receive Employment Insurance benefits, other than maternity benefits and parental benefits, during a non-teaching period, unless one of the exempting conditions set out in subsection 33(2) of the Regulations is met: (a) the claimant's contract of employment for teaching has terminated; (b) the claimant's employment in teaching was on a casual or substitute basis; or (c) the claimant qualifies to receive benefits in respect of employment in an occupation other than teaching.

- (b) An employment contract can be written or verbal. There is a new contract when the employer has made a bona fide offer of employment to teach during the next teaching period and the teacher has accepted the offer. The fact that the signing of the contract was postponed to a later date does not change anything about the fact that a teaching contract was entered into on the date when the offer was made by the employer and accepted by the teacher. The claimant failed to show that his teaching contract ended on June 27, 2013, and that he would not return to his job with his employer after the school break.
- (c) Two factors must be considered to determine that the teaching contract ended: (1) whether the teacher has entered into a new contract or come to a verbal agreement to return to teaching at the end of the non-teaching period (2) whether a link exists between the contracts that will assist in confirming whether or not there has been a complete severance of the employer-employee relationship.
- (d) The claimant's employment from August 23, 2012, to June 27, 2013, was sufficiently regular, continuous and pre-determined; therefore, it does not fall under the definition of teaching on a casual or substitute basis within the meaning of paragraph 33(2)(b) of the Regulations.
- (e) The claimant participated in a position assignment simulation on June 27, 2013, in which he learned that he would have a teaching contract for the next school year. He officially entered into the teaching contract with the school board on August 20, 2013. The employment relationship continued when he came to an agreement with his employer for the next teaching period. Therefore, the claimant does not meet the exception in paragraph 33(2)(a) of the Regulations.
- (f) Other factors show the existence of a link between the contracts, such as the carry forward of seniority from one contract to the next, the carry forward of pension contributions, the payment of a group insurance premium and access to the group insurance plan during the summer.

ANALYSIS

[25] This appeal raises an interpretation issue regarding paragraph 33(2)(a) of the Regulations, which governs the entitlement of teachers to receive Employment Insurance benefits during school breaks.

[26] A teacher, as defined in subsection 33(1) of the Regulations, is not entitled to receive benefits, other than maternity, parental or compassionate care benefits, during a non-teaching period, unless one of the conditions set out in subsection 33(2) of the Regulations is met.

[27] The Tribunal must determine whether the Appellant meets the exceptions set out in subsection 33(2) of the Regulations. It is a matter of determining whether there was a complete severance of the employer-employee relationship, whether he was unemployed during the school break and whether he entered into a new contract or came to a verbal agreement to return to teaching after the non-teaching period.

[28] At the hearing, the Appellant gave credible and structured testimony that was consistent with the previous information submitted to the Commission. He stated that the information session on July 27, 2013, was only a work assignment simulation and that no bona fide offer of employment and no verbal agreement were made during the meeting.

[29] At the hearing, the Appellant also stated that there was no mention of a job assignment at the École Fadette during the contract awarding simulation. He stated that there was a mix-up with another teacher. He also stated that he contacted his union, which corroborated the information. The Tribunal does not doubt the credibility of the Appellant's testimony on that issue.

[30] The FCA stated that a teacher was not entitled to receive Employment Insurance benefits in July and August unless there was a clear break in the continuity of his or her employment (*Bazinet*, 2006 FCA 174; and *Robin*, 2006 FCA 175).

[31] While the dominant case law indicates that except in special circumstances, teachers whose contracts finish at the end of June and who are rehired for the next school year are not entitled to receive Employment Insurance in July and August, the Tribunal is of the view that the facts presented in this case differ significantly and warrant a particular finding (*Bishop v. Canada (Employment Insurance Commission)*, 2002 FCA 276; *Canada (Attorney General) v. Partridge* (1999), 245 N.R. 163 (FCA); *Gauthier v. Canada (Employment and Immigration Commission)*, [1995] F.C.J. no. 1350 (C.A.); and *Canada (Attorney General) v. Hann*, [1997] F.C.J. no. 1641 (C.A.)).

[32] The Tribunal relies on *Ying v. Canada (Attorney General)* (A-101-98) in which the FCA found that in certain circumstances the particular facts led to the finding that there was no employment relationship.

[33] The facts submitted at the hearing distinguish this appeal from other decisions in similar cases. The employer tried a new formula by inviting teachers to participate in a workload assignment simulation on June 27, 2013. During the simulation, the employer clearly informed the teachers that the discussions did not constitute a bona fide offer of employment, but instead constituted an informal exchange for the purpose of determining the teachers' interests. The employer also informed the people in attendance, with their union present, that the simulation did not constitute a guarantee that their services would be retained for the 2013-2014 school year. It was only an informal discussion to determine the teachers' intentions and interests. In the days following the meeting, the school board issued a Record of Employment confirming the end of the Appellant's contract.

[34] While the Commission states that an offer of employment was made to the Appellant at the meeting on June 27, 2013, the Tribunal does not see the meeting that way. The Tribunal is of the view that the discussions that took place during the simulation on June 27, 2013, did not constitute a bona fide offer of employment. The Appellant was never ensured a position for the 2013-2014 school year before he received a concrete offer on August 20, 2013. In addition, the possible assignments discussed during the simulation are completely different

from the position that the Appellant was eventually offered in August 2013. Apart from the simulation on June 27, 2013, the circumstances were identical for the Appellant in June 2013 and June 2012, when he was entitled to receive Employment Insurance benefits.

[35] The Tribunal is also of the view that the maintenance of group insurance and the recognition of his seniority for the purposes of establishing his pay scale do not constitute any guarantee of employment. As specified at the hearing, the collective agreement stipulates the maintenance of group insurance coverage for 120 days after the end of the contract to give employees the opportunity to transition to the coverage of their new employment. In this case, the fact that the Appellant's group insurance remained in effect after the end of his contract on June 27, 2013, does not ensure him a contract for the next school year. The group insurance coverage is linked to his employment for the 2012-2013 school year and not for the 2013-2014 school year.

[36] Given that the simulation on June 27, 2013, did not provide any guarantee of employment to the Appellant, given that no offer of employment was made to the Appellant before August 2013, and given that the maintenance of group insurance is not linked to a continuity of employment, the Tribunal is of the view that the Appellant showed a clear break in the continuity of his employment on June 27, 2013. Given the break in the relationship with his employer, the Tribunal finds that the Appellant was truly unemployed in July and August 2013.

[37] The Tribunal finds that there was no continuity in the employment relationship and that the Appellant meets the exempting conditions set out in subsection 33(2) of the Regulations. However, the Tribunal finds that the Appellant no longer meets the exempting conditions set out in subsection 33(2) of the Regulations as of August 20, 2013, because on that date he accepted an offer of employment for the 2013-2014 school year.

CONCLUSION

[38] The appeal is dismissed in part.

Joanne Blanchard
Member, General Division

DATE OF REASONS: March 25, 2014