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

Citation: *D. R. v. Canada Employment Insurance Commission,* 2017 SSTGDEI 34

Tribunal File Number: GE-16-3799

BETWEEN:

D. R.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Angela Ryan Bourgeois

HEARD ON: February 14, 2017

DATE OF DECISION: March 15, 2017

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

Appellant

INTRODUCTION

[1] The Appellant, a teacher who held a long-term substitute position during the 2015-2016 school year, applied for regular employment insurance benefits (EI) on June 30, 2016.

[2] The Respondent denied the Appellant's application as follows:

a) from June 30, 2016 to September 5, 2016 because no benefits can be paid to teachers during a non-teaching period, and the Appellant was working as a teacher and did not fall within one of the exemptions;

b) from September 6, 2016 to June 30, 2017 because she was working a full work week.

[3] The Appellant requested a reconsideration of the Respondent's decision relating to the period from June 30, 2016 to September 5, 2016 stating that she was a substitute without any status, only got paid for the days she worked and was not paid during the summer or other the school breaks.

[4] The Respondent maintained its decision at the reconsideration level and the Appellant has now appealed the reconsideration decision to the Tribunal.

[5] The Tribunal decided to hear the appeal by way of teleconference after considering the following:

a) the complexity of the issue under appeal;

b) the Appellant would likely be the only party in attendance; and

c) the requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as permitted by the circumstances and the considerations of fairness and natural justice.

ISSUE

[6] The Tribunal must decide whether the Appellant is disentitled from receiving EI from June 30, 2016 to September 5, 2016 pursuant to section 33 of the *Employment Insurance Regulations* (the Regulations).

EVIDENCE

[7] The Appellant worked as a long-term substitute teacher during the 2015-2016 school year. She replaced a teacher (the regular teacher) who was off because of sickness. The Appellant was not under the terms of a written contract.

[8] The Appellant explained that if the regular teacher had returned, she would not have had any rights to be placed in another position. This is different from a teacher with a written contract, who would have been placed in a different position had the regular teacher returned.

[9] In any event, the regular teacher did not return and the Appellant was able to work the full year as evidenced by her record of employment (GD3-17). She explained that she was not paid during school breaks, such as Christmas and March Break. She was only paid for the days she actually worked.

[10] The Teachers Questionnaire (GD3-8) was reviewed with the Appellant during the hearing. The Appellant explained as follows:

a) Question 3: Have you received a verbal or written offer of employment for the next year? She answered yes on the form. During the hearing she explained that yes, she was guaranteed to be a substitute teacher, meaning that she had been approved to be a substitute teacher, not that she was guaranteed work, although as a substitute she could be called almost every day. She was not offered or guaranteed a contract position, or even the same position she held during the 2015-2016 year.

b) Question 4: She indicated on the form that her previous teaching experience would be recognized for seniority purposes; that her unused sick days carry forward to the new teaching period and that her pension contributions carry forward to the new teaching period. During the hearing the Appellant explained that her “experience” is

recognized for pay purposes, but she has no "seniority" status because she is neither a term nor full time teacher. She has the same seniority as someone just graduating from university and the year of teaching does not change that because she was not on a contract. The Appellant explained that she accumulated one sick day for every 10 days she worked. She indicated that she was able to carry the sick days over to the new school year because she obtained a long-term substitute position in the 2016-2017 year. If she had not obtained the long-term substitute position she would have lost her sick days. See also article 32.07 of the Nova Scotia Teachers Union Contract (NSTU Contract) provided by the Respondent (GD3-42) which states that sick leave shall accumulate and shall remain to the credit of the teacher for as long as the teacher is *continuously* employed by the School Board.

Note that article 32.08 of the NSTU Contract states that if a substitute teacher teaches for a regular teacher on the last day of the school year and continues to replace that same teacher from the first day of school in the next school year, the substitute teacher's service shall be deemed to be continuous and unbroken. There are two parts to this section, with one part referring to a term contract pursuant to Article 33.01, which Article has not been provided to the Tribunal.

c) Question 6: What type of contract have you been offered? She answered substitute.

d) Question 7: How was this offer made? She answered verbal. She explained at the hearing that she spoke with K. R., Human Resources (HR) department, for her schoolboard. According to the Appellant, Ms. K. R. advised the Appellant that she did not have to do anything further to be a substitute the following year other than reactivate her account on the phone system used to call substitute teachers.

e) Question 8: On what date was this offer made? She answered June 29, 2016. She states that this was the day she called HR about substitute positions. She explained that on the questionnaire she answered that she accepted the position (Questions 9 and 10) on June 29, 2016, because there was nothing further for her to do.

f) Question 11: What is the contract start date? She wrote September 1, 2016. She explained that she put this date because that is when teaching started for the year.

[11] The Appellant explained during the hearing that at no time was she offered anything other than a substitute position and did not have a written contract. She explained that on her EI application she indicated that she would be returning to the same school board in the fall (GD3-4) because she had confirmed with HR that she was approved as a substitute teacher for the school year starting in September 2016. It is noted that on her EI application she did not indicate a date of return (GD3-4).

[12] The Appellant confirmed that as a "long-term substitute" she received the same rate of pay according to her years of service and teaching license as she would have had she had a full time position. However, she indicated that it was still day-to-day teaching and she was only paid for the days she taught.

[13] The Appellant indicated that she had no medical benefits with the school board. She paid into the union, as it is a requirement. She contributes to a pension plan, which is also a requirement.

[14] The Appellant advised that at the end of August 2016 the same position she had held during the 2015-2016 year was posted because the regular teacher was not coming back. It was posted as a substitute position. She indicated that she applied for the position and was interviewed, along with other applicants. She indicated that the applications are graded on a point system. She indicated that she has a Masters in Psychology and because it was a resource position, she had the most points and won the position. She reiterated that at no point was there a verbal agreement that she would have this position and that when she indicated that she had a verbal agreement she was referring to substituting in general, not the long-term substitute position.

[15] The evidence provided by the Respondent as per Supplementary Record of Claim dated July 27, 2016 with respect to the verbal offer is somewhat different from that provided to the Tribunal during the hearing. The Respondent indicated in its written notes prepared from a telephone conversation with the Appellant that:

> Client stated that before the end of the school year she was offered a long term substitute that will be turning into a term contract to replace the same teacher that she was replacing the entire school year of 2015/2016. Client stated that she verbally agreed to this offer prior to her last day worked and she will be returning to work on the same day that all of the permanent teachers will be returning to school as she will be responsible for this class. Client stated that she could not be offered a term contract until the teacher that she is replacing has exhausted all of his sick leave.

[16] At the hearing the Appellant explained that when she spoke with the Respondent's agent and was asked whether there was a chance that she would get the same job the following year, she answered that if the regular teacher remained out sick that the administration explained to her that they would have to post the position by the end of the summer, then they have to interview a minimum of three candidates who are evaluated on a point system.

[17] The Appellant indicated that she applied for work over the summer in various fields, including teaching and as a ticketing agent.

[18] To date, the Appellant has been replacing the same teacher for the 2016-2017 school year on a long-term substitute basis.

[19] Article 32.16 of the Contract states that substitute teachers who become classified as regular teachers who have their consecutive service interrupted by the return of a teacher who is later absent within five working days, shall be reassigned, if available, to the same assignment and the assignment shall proceed as if it had not been broken and the service shall be deemed to have been consecutive service.

[20] A letter dated August 8, 2016 from Ms. K. R., of the HR department confirms that the Appellant held a long-term substitute position with the board during the school year 2015-2016 effective from September 28, 2015 to June 29, 2016. The letter stated that the Appellant had not currently secured a *term* position for 2016-2017 through their posting rounds.

[21] Ms. K. R. was contacted by the Respondent by telephone on July 27, 2016. The Respondent submitted the following notes from that telephone conversation (GD3-19):

> K. R. [Ms. K. R.] stated that she cannot confirm if this client was offered a position for the next teaching period because this would have been an offer by the school Principal directly and HR would not be notified yet of this offer. K. R. stated that she can

confirm that the teacher this client was replacing is not returning to work in September 2016. K. R. stated that it would be reasonable that this client would have been offered to return to work in September 2016 to replace this teacher.

K. R. stated that if this client was offered to return to work to replace the same teacher she would have been offered a long term substitute position immediately and she would not have had to work 18 days to have her pay increased and she would have started at the higher salary immediately.

K. R. stated that as a long term substitute you accumulate sick leave credits and this client would carry over these sick leave credits from the last teaching period ending on 29 June 2016 to the new teaching period staring *(sic)* in September 2016. K. R. stated that this client would have paid into he (*sic*) pension and would be carrying forward pension contributions to the next teaching period. K. R. stated that this client's work experience from the long term substitute position that ended on 29 June 2016 would be taken into consideration for increments in her rate of pay.

SUBMISSIONS

[22] The Appellant submitted that she falls within the exemptions in section 33 of the Regulations because:

a) she did not have an written contract and her employment was ended; and

b) her teaching was on a casual or substitute basis because she was only paid for the days she worked and never had a written contract. She stresses that she has no status or rights in her substitute position.

[23] The Appellant submitted at GD2-5 that she is a substitute without a contract, with day to day pay. She indicated that other substitutes with the same school board who were lucky enough to get a contract for the 2016-2017 school year received EI and also got retroactive pay for the entire month of August.

[24] The Appellant submitted that the Respondent should have spoken with the school's administration (in addition to HR) because a verbal contract or a verbal agreement would never have taken place. Employment is based on a point system.

[25] The Appellant confirmed that she does not qualify to receive benefits in respect of an occupation other than teacher.

[26] The Respondent submitted that the Appellant's employment relationship continued with her employer for the following teaching period and therefore does not meet the exemption under paragraph 33(2) (a) of the Regulations because she verbally accepted another teaching contract with the same school board on June 29, 2016 before the end of her existing contract and her sick leave, pension contributions and seniority will be carried over to the new school year (GD3-18).

ANALYSIS

[27] The relevant legislative provisions are reproduced in the Annex to this decision.

[28] There have been no submissions that the Appellant was not employed in "teaching" as defined in section 33 of the Regulations. The Tribunal has considered the work done by the Appellant and finds, on a balance of probabilities, that the Appellant was employed in teaching as set out in section 33 of the Regulations.

[29] Where the Appellant was employed in teaching, the Appellant is not entitled to receive regular employment insurance benefits pursuant to section 33 of the Regulations unless she falls within one of the exemptions set out in that section. These exemptions are:

[30] the claimant's contract of employment for teaching has terminated;

[31] the claimant's employment in teaching was on a casual or substitute basis; or

[32] the claimant qualifies to receive benefits in respect of employment in an occupation other than teaching.

[33] The onus falls on the Appellant to prove, on a balance of probabilities that she falls within one of these exemptions.

Appellant qualifies for EI by employment other than teaching (paragraph 33(2)(c) of the Regulations)

[34] The Appellant has not provided any evidence that would suggest she has any employment other than teaching employment that would allow her to qualify for EI pursuant to

the exemption set out in paragraph 33(2)(c) of the Regulations; in fact, she has submitted that she does not fall within this exemption.

[35] Therefore, the Tribunal finds that the Appellant does not fall within the exemption set out in paragraph 33(2)(c) of the Regulations.

Substitute or Casual Basis (paragraph 33(2)(b) of the Regulations)

[36] The second exemption available to the Appellant is if she proves, on a balance of probabilities, that her teaching employment was on a casual or substitute bases as set out in paragraph 33(2)(b) of the Regulations.

[37] The Federal Court of Appeal in *Canada (Attorney General)* v. *Blanchet* 2007 FCA 377 confirmed that it is not the status of the teacher's employment, but the performance of the employment that must be assessed to determine if a claimant falls within the exemption at paragraph 33(2)(b). Justice Létourneau, writing for the court at paragraph 38 writes:

> [38] The exception at the end of paragraph 33(2)(*b*) emphasizes *the performance of the employment and not the status of the teacher who holds it*. In other words, a teacher may, for example, have substitute teacher status but, during the qualifying period, be called up and *enter into a contract* to hold employment not on a casual or substitute basis but on a regular full-time or part-time basis. Even if the teacher retains his or her status as a substitute under the collective agreement governing the school board and the teachers' union, he or she is not a substitute teacher for the purposes of the part-time employment he or she contracted. In such a case, the teacher does not meet the conditions of the exception under paragraph 33(2)(*b*). As was stated by our colleague Madam Justice Sharlow at paragraph 2 of *Stephens v. Canada (Minister of Human Resources Development)*, *supra*, it is possible "that *a teacher may have a period of employment as a supply teacher that is sufficiently regular that it cannot be said to be 'employment on a casual or substitute basis*'".
>
> [Emphasis mine]

And continues at paragraph 40:

> Again, the benefit of the exception is not obtained through the teacher's status with the school board, but through the employment held during the qualifying period. If employment is held on a casual or substitute basis, the exception may be invoked regardless of whether or not the teacher loses or maintains his or her substitute status.

[38] The Federal Court of Appeal found that the teachers in that case did not fall within the scope of the paragraph 33(2)(b) exemption because their employment was not casual or on a substitute basis. Each of the teachers in that case had a written employment contract as was required under their collective agreement.

[39] The facts in the Appellant's case are quite different. The Appellant was not a party to a written teaching contract during the 2015-2016 school year and she is not party to a written teaching contract for the 2016-2017 school year. While the contract with the school board states that the Appellant will have certain benefits as a long-term substitute teacher, including pay at the rate of a regular teacher, if the regular teacher was to return to work, the school board has no obligation to find a new position for the Appellant. Even if the position becomes vacant, there is no guarantee that the Appellant will be the successful candidate (see Article 32.18, page GD3-45).

[40] Notwithstanding the differences in the facts at hand and in *Blanchet,* the Tribunal finds that the Appellant's position during the 2015-2016 school year was not on a substitute or casual basis. Her position, as temporary and precarious as it may have been, was continuous and not on a casual or occasional basis. Her employment was so sufficiently regular that it cannot be said that it was employment on a casual or substitute basis as required to fall within the exemption in paragraph 33(2)(b).

Contract of employment for teaching ended (paragraph 33(2)(a) of the Regulations)

[41] The last avenue available for the Appellant is if she satisfies the Tribunal, on a balance of probabilities, that her contract of employment for teaching had terminated in June 2016.

[42] Justice Nadon writing for the Federal Court of Appeal in *Bazinet* v. *Canada (Attorney General)* 2006 FCA 174 confirmed that the purpose of the exercise is not to interpret the contractual provisions between the Appellant and her employer to determine their respective rights, but to decide whether the Appellant is entitled to received employment insurance benefits because she was in fact, unemployed. (See paragraphs 44 and 51 of *Bazinet*).

[43] The Tribunal has carefully considered and weighed the evidence before it, including that the Appellant's carried over sick days and the notes of the various telephone conversations,

including the July 27, 2016 conversations between the Respondent's agent and the Appellant and the Respondent's agent and HR.

[44] The Tribunal accepts the Appellant's testimony that she never received a verbal offer of employment for the substitute position in 2016-2017 and finds that she has offered a reasonable explanation for her answers on the Teachers Questionnaire. In doing so, the Tribunal has placed more weight on the sworn testimony of the Appellant than on the Respondent's notes of conversations with the Appellant and HR. The Tribunal finds that no verbal offer of employment was made for the reasons set out below. Further, the Tribunal is satisfied on a balance of probabilities that the Appellant's contract of employment for teaching terminated on June 29, 2016.

[45] The Tribunal finds that the Appellant's explanation of why she answered the questions the way she did on the Teachers Questionnaire is supported by the fact that she did not indicate a date of return on her EI application. If the Appellant had truly accepted a verbal contract of employment at the time she applied for EI the Tribunal finds that it is more likely than not that the Appellant would have inserted the date that the position was to start. The fact that she did not fill in a date of return supports her testimony that she did not have a verbal offer of employment (including the long-term position which she did not obtain until the end of August) and was only assured of a substitute position. Given the nature of substitute positions it would have been impossible for the Appellant to put a return date on her EI application.

[46] In making these findings the Tribunal puts significant weight on the fact that the long-term substitute position was posted and that the Appellant had to interview for the position, along with at least two other people. These facts do not and cannot support a finding that the Appellant's employment continued.

[47] The exemption in paragraph 33(2)(a) is meant to provide relief to teachers whose contracts terminate and who, as a result, suffer a genuine severance of the employer and employee relationship. In other words, the exemption provides relief to those teachers who are, in the true sense of the word, "unemployed," a term which is not synonymous with "not working." (Justice Létourneau in *Oliver* v. *Canada (Attorney General)* 2003 FCA 98).

[48] Although the Appellant's sick days were carried over, they only carried over because she was successful in a competition AFTER her employment ended. Had she not been successful, they would not have carried over. The carrying over of her sick days is governed by the NSTU contract and is not a true indication of whether her employment was continuous, only that it was considered continuous under that contract. What is relevant is whether the Appellant was in the true sense of the word, "unemployed": the Tribunal finds that despite the carrying over of sick days, until the Appellant interviewed and was rehired at the end of August 2016, she was "unemployed" in the true sense of the word.

[49] While the Respondent's evidence is that the Appellant accepted a verbal offer of employment for the 2016-2017 school year in June 2016, the Tribunal does not agree. The Tribunal is satisfied with the Appellant's explanation of her answers in the Teachers Questionnaire, and finds that her answers are not contrary to the letter provided by HR which did not indicate that she had secured a long-term teaching position, only that she had not, in fact, secured a contract position. The Tribunal finds that any discussion that the Appellant had with the school's administration about her resuming in the same position during the 2016-2017 year could not have been a firm offer of employment and could not reasonably be relied upon by the Appellant. There was a break in her employment in June 2016 until such time as the school year restarted in September 2016.

[50] On the evidence before it, the Tribunal is satisfied on a balance of probabilities that the Appellant was "unemployed" from June 30, 2016 until September 5, 2016. Where the Appellant had to reapply and be interviewed for the position, there was no continuity of employment from June 30, 2016 until school started in September 2016.

CONCLUSION

[51] The Tribunal finds that the Appellant has proven on a balance of probabilities that she meets the requirements for the exemption set out in paragraph 33(2)(a) of the Regulations between June 30, 2016 and September 4, 2016. There was a veritable break in the continuity of her employment as set out in *Oliver, supra.* She has not met the exemptions in paragraphs 33(2)(b) and 33(2)(c), however, this is not required as the conditions are mutually exclusive.

[52] The appeal is allowed.

Angela Ryan Bourgeois

Member, General Division - Employment Insurance Section

ANNEX

THE LAW

Employment Insurance Regulations

33 (1) The definitions in this subsection apply in this section.

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. (*période de congé*)

teaching means the occupation of teaching in a pre-elementary, an elementary or a secondary school, including a technical or vocational school. (*enseignement*)

(2) 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 section 22, 23, 23.1 or 23.2 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.

(3) 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.