



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *D. G. v. Canada Employment Insurance Commission*, 2017 SSTGDEI 35

Tribunal File Number: GE-16-3830

BETWEEN:

D. G.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Angela Ryan Bourgeois

HEARD ON: February 16, 2017

DATE OF DECISION: March 15, 2017

REASONS AND DECISION

PERSONS IN ATTENDANCE

D. G. – Appellant

INTRODUCTION

[1] During the 2015-2016 school year, the Appellant worked as a teacher for the Lennox Island Band (Lennox) in the mornings and for the English Language School Board (ELSB) in the afternoons. After the Appellant's teaching contracts ended in June 2016 she applied for regular employment insurance benefits (EI) under the *Employment Insurance Act*. The Respondent denied her request at both the initial and reconsideration levels, determining that she did not fall within one of the exemptions set out for teachers in section 33 of the *Employment Insurance Regulations* (Regulations).

[2] The Appellant has appealed the Respondent's reconsideration decision to the Tribunal.

[3] 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

[4] The Tribunal must decide whether the Appellant is disentitled from receiving EI pursuant to section 33 of the Regulations.

EVIDENCE

[5] The Appellant is from X X, Nova Scotia, but has been teaching Mi'kmaq Culture and Language on Prince Edward Island with both Lennox and ELSB. The Appellant indicated that she first started at Lennox and when the program was expanded to ELSB in 2011 she was hired for the three-year pilot project. The project has been renewed annually since the end of the three-year project.

[6] The details of her employment with her two employers are as follows:

English Language School Board

Last day of Work:	June 30, 2016
Occupation:	Mi'kmaq Culture & Language teacher
Hours:	Afternoons only
Type of employment relationship:	The position is funded through the federal government. According to the Respondent's notes from a telephone conversation with the employer on August 8, 2016, the Appellant has a yearly position on a year-to-year contract, is not a permanent teacher and would have a contract for the next year from "September to August" (GD3-21).
Benefits:	She receives sick days (according to the Appellant she cannot carry them over but the notes from the Respondent's telephone conversation with the employer indicates that she can carry them over (GD3-21 and GD3-30)). She contributes to a pension based on the collective agreement. She is entitled to group insurance and would have access over the summer had she not opted out of the insurance. She does not accumulate seniority.
2016-2017 school year	She accepted a contract for this year. The details of the offer and acceptance are set out below.

Lennox Island Band

Last day of Work:	June 24, 2016
Occupation:	Mi'kmaq Culture & Language Teacher
Hours:	Mornings only
Type of employment relationship:	Yearly (GD3-19)
Benefits:	She does not contribute to a pension. She receives sick days but they are not carried over. She does not accumulate seniority. She does not receive group insurance coverage over the summer and in any event she opted out of the health insurance coverage.
2016-2017 school year:	Noted on August 9, 2016 that she was returning on a yearly contract in September 2016 (GD3-20)

[7] It should be noted that on first glance the Respondent's telephone records with Lennox at GD3-20 may not appear to indicate which employer the discussion was with, however, by comparing the telephone number on the Respondent's note at GD3-20 with those on the Lennox Record of Employment at GD3-17 it is evident that GD3-20 refers to a telephone conversation with Lennox.

[8] The Teachers Questionnaire relating to ELSB (GD3-7) completed by the Appellant when she applied for EI indicates that she received a verbal offer of employment on June 21, 2016 to start on August 30, 2016 but that she was unsure whether she would accept the position because she was taking university courses in Nova Scotia and would like to find work closer to the university. At the hearing, the Appellant suggested that she did not indicate that she had received a verbal offer on the Teachers Questionnaire. She indicated that she had help from an agent at the Service Canada Centre although this may not have been when she first applied but at a later date. She also indicated that she received the verbal offer after approval was granted for the ELSB position and that the position was posted in the newspapers.

[9] The Appellant indicated that she has deferred pay with ELSB but not with Lennox. Her deferred pay comes off her cheque every two weeks for ten months and is given to her at the end of her contract. She explained that this is not extra funding; it is what is deducted from her during the year.

[10] On September 10, 2016, according to the Respondent's notes at GD3-31, the Appellant advised the Respondent that:

- a) She was offered the same teaching job for September with ELSB in June prior to her previous contract end date;
- b) She did not accept the position right away because she was applying for jobs in X X;
- c) She accepted the position in early August;
- d) She received EI during the summer of 2015;
- e) She opted out of the dental and medical plan because she could not afford to pay the premiums; and
- f) She had used all of her sick leave days.

[11] By letter dated August 4, 2016 ELSB wrote to the Appellant to confirm her appointment to a 50% fixed term contract position for the period between September 1, 2016 and June 30, 2017. The Appellant's notations on the letter are that she called ELSB on August 4, 2016 and asked for the letter to be sent so that she could continue her appeal. Enclosed with the letter was an unsigned copy of the Fixed Term Contract. (GD2-4,5) The Appellant indicated at the hearing that she only recently signed her contract although she has been teaching since September 2016.

[12] On August 11, 2016 the Appellant provided a note to the Respondent (GD3-26) that indicated that she was sending a copy of her 2015-2016 English Language School contract, that she had applied for jobs in X X too and may not reconsider her contract for September 1, 2016.

[13] Also on file is a copy of the 2015-2016 Fixed Term Contract which is dated September 2, 2015. (GD2-6)

SUBMISSIONS

Appellant's Submissions

[14] The Appellant submitted that she considers her position at ELSB to be casual because there is no guarantee that the position will be funded by the federal government from year to year. Further, both of her contracts are part-time and temporary. They are only good for a year and benefits end at the end of her contract.

[15] The Appellant submitted that she is under the same type of contract for Lennox as she is for ELSB, and therefore, if the contract with Lennox is acceptable for EI, so too should the contract for ELSB.

[16] The Appellant indicated that she has been paying into employment insurance for more than 15 years and she noted that fishers work for only a few months and get paid top stamps for rest of the year. Teachers are responsible for the education of children and must upgrade their skills every year. She works hard for ten months and she cannot understand why she would have to find another job for two months in the summer. Without employment insurance during these months, who will pay her expenses? She does not understand why she cannot be accommodated for the two months when she does not have a contract.

[17] The Appellant suggested a change in the employment insurance scheme that would allow teachers to pay into the employment insurance scheme for a few years and then be entitled to one year of assistance if it was necessary to leave a job for good reason.

Respondent's Submissions

[18] Although the Respondent does not specifically state that its decision was based solely on the Appellant's employment with ELSB, its submissions relate only to this employment, not her employment with Lennox, despite setting out facts relating to her employment with Lennox in the fact portion.

[19] The Respondent submitted that the Appellant has not met the onus of proving that her teaching contract ended on June 30, 2016 (the date her employment ended with ELSB; her employment with Lennox ended on June 24, 2016) and that she will not be returning to work with her employer following the non-teaching period.

[20] The Respondent relies on the following which it submits as fact:

- a) the Appellant was offered another teaching contract with the same school board in June 2016, before the end of her existing contract and accepted it in early August 2016, during the non-teaching period; (GD3-31)
- b) the employer confirmed that her pension and unused sick leave credits are carried forward during the summer non-teaching period and the Appellant would have had access to group medical and dental insurance during the non-teaching period into September. (GD3-30)

[21] Given these facts, the Respondent submitted that the employment relationship continued when the Appellant entered into an agreement with her employer (presumably ELSB) for the following teaching period and therefore does not meet the exception under paragraph 33(2)(a) of the Regulations.

[22] With respect to the exemption under paragraph 33(2)(b), the Respondent stated that the Appellant's employment from September 2, 2015 to June 30, 2016 was sufficiently regular, continuous and pre-determined that it does not meet the definition of casual or substitute teaching within the meaning of paragraph 33(2)(b) of the Regulations.

[23] With respect to the exemption under paragraph 33(2)(c), the Respondent stated that there was no evidence that the claimant qualified for benefits in an occupation other than teaching and consequently, paragraph 33(2)(c) of the Regulations does not apply.

ANALYSIS

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

[25] There have been no submissions that the Appellant was not employed in “teaching” as defined by 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.

[26] 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:

- 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.

[27] 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)

[28] 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. The two Records of Employment on file relate to the Appellant’s teaching work.

[29] On the evidence before it, the Tribunal is satisfied on a balance of probabilities 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)

[30] 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 basis as set out in paragraph 33(2)(b) of the Regulations.

[31] 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).

[32] The Federal Court of Appeal has also found that even though a contract of employment may be temporary and precarious, if employment as a teacher is exercised in a continuous and predetermined way throughout the school year it is not "occasional or substitute" within the meaning of the Regulations. (*Arkininstall v. Canada (Attorney General)*, 2009 FCA 313)

[33] In this case, the Appellant's employment was not on a substitute basis as she had written employment contracts for the 2015-2016 school year for both Lennox and ELSB. The crux of the question as it relates to this exemption is whether her employment was on a casual basis, as the Appellant submits it was.

[34] Because the Appellant had a written employment contract for her work at both of the schools which provided her with regular employment, the Tribunal finds that the Appellant's position during the 2015-2016 school year was not on a casual basis. Her positions may be on a year-to-year basis, however, during the terms of the respective contracts, her employment was continuous and pre-determined. The Appellant's employment was sufficiently regular, by the terms of her written contracts, that it cannot be found to fall within the exemption in paragraph 33(2)(b).

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

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

[36] 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 it is to decide whether the Appellant is entitled to receive employment insurance benefits because she was in fact, unemployed. (See paragraphs 44 and 51 of *Bazinet*).

[37] 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.” The test is whether there is a veritable break in the continuity of the Appellant’s employment. (Justice Létourneau in *Oliver v. Canada (Attorney General)* 2003 FCA 98)

[38] The Tribunal finds, based on the totality of the evidence before it, that the Appellant received a verbal offer of employment from ELSB on June 26, 2016, before the end of her term on June 30, 2016.

[39] With respect to the Appellant’s evidence that she did not indicate that she had received a verbal offer on June 26, 2016 when she completed the Teachers Questionnaire, the Tribunal prefers what was actually written in the Teachers Questionnaire to her oral evidence. The Tribunal prefers the facts set out in the Teachers Questionnaire because:

- a) they are supported by the notes of the telephone conversation between the Appellant and the Respondent’s agent at GD3-31; and
- b) the Tribunal finds that if a verbal offer had not been made by ELSB then the Appellant would not have called ELSB to request the August 4, 2016 letter which supplied evidence of the terms of her employment which she believed would support her appeal.

[40] The Tribunal finds that the Appellant accepted the offer in early August as supported by the telephone conversation notes at GD3-31, as well as by the August 20, 2016 notes from the Respondent’s agent’s telephone conversation with ELSB at GD3-21 where it was stated that the Appellant would have a teaching contract for the upcoming year.

[41] The Tribunal has carefully considered and weighed the evidence before it and finds that with regard to the Appellant’s employment with ELSB that she was never truly unemployed in the true sense of the word because she received an offer of employment (June 26, 2016) from ELSB before her term contract ended (June 30, 2016) with that same employer. The Appellant may not have agreed to take the position until August, however, the position was offered to her

and as such she was never truly unemployed: there was no veritable break in the continuity of her employment.

[42] The Tribunal notes the Appellant's handwritten notes on the August 11, 2016 initial decision (GD3-26) that state that she may not reconsider the contract for September 1, 2016. However, whether the Appellant accepted the offer or not, the offer was available to her, and therefore, she was not truly unemployed.

Submissions

[43] The Tribunal has carefully considered all of the Appellant's submissions, including those not specifically set out in this decision. The Tribunal acknowledges that the Appellant is looking for employment closer to home, that she finds it difficult to make ends meet over the summer months, and that she has paid into the employment insurance scheme for many years; however, these are not factors that the Tribunal can consider under the jurisprudence and the employment insurance legislation with respect to the exemptions set out in section 33 of the Regulations. The Tribunal is bound by the law.

[44] The Tribunal acknowledges that there is no guarantee that the ELSB position will be reoffered from year to year. If the Appellant had received the offer and the program had been cancelled because of lack of funding, this may have been a relevant factor. However, where the Appellant was offered the exact same position before her 2015-2016 contract ended for the upcoming year and where she accepted the position and the program did, in fact, continue, the Tribunal does not consider this to be a relevant factor.

[45] The Appellant states that she has the same type of contract with Lennox as she does with ELSB. As stated above, the Tribunal is satisfied on a balance of probabilities that neither of the Appellant's contracts were on a casual or substitute basis and therefore the Appellant did not meet the exemption set out in paragraph 33(2)(b) of the Regulations.

[46] With respect to paragraph 33(2)(a) of the Regulations, the Tribunal notes that the onus is on the Appellant to prove that she falls within one of the three exemptions. Where the Appellant does not meet the exemption in 33(2)(a) with respect to her work with ELSB it is not necessary for the Tribunal make a finding with respect to Lennox.

[47] The Tribunal acknowledges the hard work done by teachers and their dedication to the education of children. However, as stated above, the Tribunal must interpret the law as it is written: the Tribunal is not permitted to consider such equitable factors in the interpretation of section 33 of the Regulations.

CONCLUSION

[48] Based on the evidence before it and for the reasons set out above, the Appellant has not met the burden of proof and the Tribunal is not satisfied on a balance of probabilities that the Appellant falls within any of the exemptions set out in subsection 33(2) of the Regulations. The Appellant is not entitled to receive EI pursuant to section 33 of the Regulations.

[49] The appeal is dismissed.

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.