



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

[TRANSLATION]

Citation: *M. B. v. Canada Employment Insurance Commission*, 2017 SSTGDEI 38

Tribunal File Number: GE-16-3472

BETWEEN:

**M. B.**

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: Josée Langlois

HEARD ON: March 14, 2017

DATE OF DECISION: March 30, 2017

## **REASONS AND DECISION**

### **PERSONS IN ATTENDANCE**

[1] The Appellant, Mr. M. B., attended the teleconference hearing alone.

### **DECISION**

[2] The Tribunal finds that, under section 33 of the *Employment Insurance Regulations* (Regulations), the Appellant is eligible to receive benefits from May 9, 2016, to August 19, 2016.

### **INTRODUCTION**

[3] On May 8, 2015, the Appellant filed an initial claim for benefits with the Canada Employment Insurance Commission (Commission). According to the Record of Employment provided by the employer (X School Board), the Appellant held that employment from January 11, 2016, to May 6, 2016. The employer stated that the reason for the Appellant's termination was "M-Shortage of Work / End of Contract or Season" (Exhibits GD3-3 to GD3-16).

[4] On June 27, 2016, the Commission informed the Appellant that he was not entitled to benefits from May 9, 2016, to August 19, 2016, during the school holiday period (Exhibit GD3-22).

[5] On June 18, 2016, the Appellant made a request for reconsideration of the Commission's decision to deny him benefits (Exhibit GD3-23).

[6] On August 17, 2016, the Commission informed the Appellant that it was upholding the decision that it had made on June 27, 2016 (Exhibits GD3-26 and GD3-27).

[7] On September 14, 2016, the Appellant filed a notice of appeal with the Employment Insurance Section of the Tribunal's General Division (Exhibits GD2-1 to GD2-5).

## **TYPE OF HEARING**

[8] The hearing of this appeal was by teleconference for the following reasons (Exhibit GD1):

- a) The fact that credibility might be a prevailing issue;
- b) The fact that the claimant will be the only party in attendance;
- c) The information in the file, including the need for additional information;
- d) The availability of videoconferencing where the Appellant lives; and
- e) This form of hearing respects the requirement under the *Social Security Tribunal Regulations* to proceed as informally and as quickly as circumstances, fairness, and natural justice permit.

## **ISSUE**

[9] The Tribunal must decide whether the Appellant is eligible to receive benefits between May 9, 2016, and August 19, 2016, under section 33 of the Regulations.

## **EVIDENCE**

[10] The evidence in the Commission's file is as follows:

- a) The Appellant's initial claim for benefits filed with the Commission on May 8, 2016, in which he states a shortage of work as the reason for the end of employment (Exhibits GD3-3 to GD3-15);
- b) A Record of Employment dated May 25, 2016, stating that the Appellant worked for the X School Board from January 11, 2016, to May 6, 2016, inclusive. The return date is listed as "unknown" (M-Shortage of Work / End of Contract or Season), (Exhibit GD3-16);

- c) A statement by the Appellant to the Commission indicating that he had accepted a new contract with the X School Board on April 26, 2016, starting on August 22, 2016. The Appellant stated that this contract was conditional upon the number of registrations, that there was no seniority for years of service and that he did not know whether he was covered under his group insurance over the summer (Exhibits GD3-17 and GD3-19);
- d) A statement from the employer to the Commission indicating that the current contract ended on May 7, 2016, and that the Appellant had accepted a new contract on April 22, 2016. This new contract was from August 22, 2016, to May 12, 2017. The employer stated that teachers that taught consecutive semesters accumulated seniority from one semester to the next, that pension contributions accumulate with every contract, that group insurance premiums paid during the summer break are deducted from the last paycheque in June, that employees retain their coverage under the group insurance plan during the summer break because premiums have already been paid by the employees themselves. The employer specified that it was the teacher's choice whether to remain insured (Exhibits GD3-18 and GD3-20);
- e) A Commission decision dated June 27, 2016, informing the Appellant that he was not entitled to benefits during the school holiday period from May 9, 2016, to August 19, 2016 (Exhibit GD3-22);
- f) A request for reconsideration of the Commission's initial decision filed by the Appellant on June 18, 2016, on the ground that the other teachers were entitled to benefits (Exhibit GD3-23);
- g) A reconsideration decision from the Commission dated August 17, 2016, informing the Appellant that it had not modified its initial decision of June 27, 2016 (Exhibits GD2-2).

[11] On September 14, 2016, the Appellant sent a copy of the following documents to the Tribunal:

- a) A reconsideration decision from the Commission dated August 17, 2016, informing the Appellant that it had not modified its initial decision of June 27, 2016 (Exhibit GD2- 2).
- b) A notice of appeal issued by the Commission on August 17, 2016 (Exhibits GD2-3 to GD2-5).

[12] The Appellant submitted the following evidence at the hearing:

- a) The Appellant stated that he had worked for two and a half years at the X School Board;
- b) The Appellant stated that difficult conditions in the region mean that the retention rates for students in the X School Board are very low and the average teaching appointment is around 1.2 years. The Appellant said that, to date, he is the teacher who has been working there the longest;
- c) The Appellant said that the region where he works has several distinguishing characteristics, for example, there are no roads between villages, there is racism toward white people (a teacher was stabbed), there are significant social issues, there is a housing shortage and students show up to class only 50% of the time;
- d) The Appellant stated that his duties as a teacher in the X School Board are different than they would be in another school board, he was required to do various tasks;
- e) The Appellant said that he worked during the holiday period after classes had finished. For example, he worked as a truck driver for a short time in 2015 and as a heavy machine operator during the summer of 2016. The Appellant said that he worked between 80 and 100 hours over three weeks and also worked during the Christmas holidays in December 2016;
- f) The Appellant said that he was able to benefit from group insurance all year, but because it was not beneficial and because he thought he would find other employment, he had opted out of it;

- g) The Appellant said that he contributed to the Government and Public Employees Retirement Plan (RREGOP) each time that he received a contract with the X School Board;
- h) The Appellant said that he had accepted a conditional offer on April 26, 2016, for the 2016-2017 school year, but that he had only signed the contract in August 2016.
- i) The Appellant said that C. M., human resources manager, wrote him an email about his employment status. The Appellant said that the X School Board confirmed that the offer was conditional and not guaranteed (Exhibit GD5);
- j) The Appellant stated that a Tribunal decision containing exactly the same circumstances as his case was in favour of the Appellant, one of his colleagues, on April 10, 2016, *P.D. and Canada Employment Insurance Commission*;
- k) The Appellant filed together a teacher callback list for the X School Board, a Tribunal decision *P.D. v. Canada Employment Insurance Commission*, from April 10, 2016, as well as statements about his employment contract (Exhibit GD5).

## **SUBMISSIONS**

[13] The Appellant submitted the following arguments:

- a) The Appellant noted that the X School Board did not require teacher status. Even if he had a degree in teaching, it was not a requirement of working there. He was more of an instructor. The Appellant said that he had a secondary vocational education, specifically in heavy machinery;
- b) The Appellant stated that contrary to what the employer had said, insurance premiums did not come off the last paycheque in June and that the employer must have gotten confused with "regular" teachers because, in his field, teachers finished in May. He noted that he had the choice whether to benefit from group insurance and that he had decided not to;

- c) The Appellant stated that he had accepted a conditional offer on April 26, 2016, that was not a real contract. First, he was not tied to the offer if he were to find another job; furthermore, the employer was not tied to the offer. The Appellant argued that, contrary to the Commission's position that the contract was conditional upon the number of registrations, the offer was also conditional upon management's approval as well as housing availability;
- d) The Appellant argued that, contrary to the Commission's position that seniority is cumulative from one contract to another, it is actually based on years of experience, which are considered to calculate salary;
- e) The Appellant said that he was a casual employee at the X School Board. First, it was not one contract, but two separate contracts—one for the fall period and another for the winter period. Then, if students withdrew from courses, his contract could end. The Appellant said that there was no continuity between contracts and that they could end at any time;
- f) The Appellant stated that the Commission makes connections with Canada's school boards, but that his working conditions were different in many ways;
- g) The Appellant stated that he was actively looking for other employment because it was difficult not knowing whether his contract would be confirmed.

[14] On September 13, 2016, the Commission sent a written submission to the Tribunal (Exhibits GD4-1 to GD4-8):

- a) The Commission submits that under subsection 33(1) of the Regulations, a teacher is not entitled to Employment Insurance benefits, other than maternity or parental benefits, during a non-teaching period, unless one of the conditions specified in subsection 33(2) of the Regulations is met (Exhibit 4-3);
- b) The Commission submits the following three exceptions: the teaching contract has ended, the employment in teaching was on a casual or substitute basis or the conditions of entitlement to receive Employment Insurance benefits from an occupation other than teaching have been met (Exhibits GD4-3 and GD4-4);

- c) The Commission submits that the Appellant is a "teacher" as defined by the Regulations because he teaches in the vocational sector for the X School Board (Exhibits GD3-7, GD3-17 and GD4-4);
- d) The Commission submits that the Appellant did not show that his contract had ended because he had accepted a new contract on April 26, 2016, while another contract was ongoing and was to end on May 6, 2016. The Commission stated that the Appellant had obtained a contract during the qualifying period, which was established between May 10, 2015, and May 8, 2016, during the contract from August 17, 2015, to May 6, 2016 (Exhibit GD3-18);
- e) The Commission submits that the Appellant had signed a teaching contract with the same school board on April 26, 2016, before his current contract expired (Exhibits GD3-17, GD3-18 and GD3-24). The Commission maintained that the employment relationship continued when the Appellant entered into an agreement with his employer for the next teaching period.
- f) The Commission submits that the Appellant did not meet the second condition because he had a full-time contract between August 17, 2015, and May 6, 2016, and that the Appellant did not submit evidence with regard to the last exemption.

## **ANALYSIS**

[15] The relevant legislative provisions are reproduced in an appendix to this decision. According to subsection 33(1) of the Regulations, the "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. Generally, a school year is comprised of teaching from September through June with July and August as the primary non-teaching period.

[16] Although the definition of a "period of leave" means the "period that occurs annually," it includes all periods of leave (*Canada (Attorney General) v. St-Cœur* [1996], F.C.J. No. 514 (F.C.A.)). Pursuant to subsection 33(2) of the Regulations, a "non-teaching" period is not limited to summer holidays (*Canada (Attorney General) v. Blanchet*, 2007 FCA 377, *Dupuis-Johnson v. Canada (Employment and Immigration Commission)*, 1996 Can LII12471 (FCA)).



[17] Subsection 33(2) of the Regulations, states that a teacher is not entitled to Employment Insurance benefits other than maternity or parental benefits, during a non-teaching period, unless they meet the exempting conditions specified in subsection 33(2) of the Regulations, which 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.

[18] The factor in determining whether a claimant is a teacher within the meaning of the Regulations is the sector in which he works.

[19] The Federal Court of Appeal (Court) determined that continuity of employment is the key element used to determine whether employment was terminated within the meaning of paragraph 33(2)(a) of the Regulations (*Stone v. Canada (Attorney General)*, 2006 FCA 27). Other than a veritable break in the employment relationship, the teacher will not be entitled to benefits for the non-teaching period (*Freddy Giammatei et. al* (A-664-01); *Charlotte Oliver et. al v. Canada (Attorney General)*, 2003 FCA 98; *Canada (Attorney General) v. Robin*, 2006 FCA 175).

[20] The Court determined that employment performed in a continuous and determined manner cannot be considered employment on a casual or substitute basis. Teachers who enter into temporary full-time teaching contracts in the school year no longer meet the definition of a "casual" or "substitute" teacher within the meaning of paragraph 33(2)(b) of the Regulations (*Arkininstall v. Canada (Attorney General)*, 2009 FCA 313; *Blanchet*).

[21] In this case, the Appellant teaches heavy equipment mechanics at the X X Centre in X (*Canada (Attorney General) v. Lafrenière*, 2013 FCA 177) (Exhibit GD3-17).

[22] The Commission claims that the Appellant signed a contract on April 26, 2016, during the qualifying period, which was established to be from May 10, 2015, to May 8, 2016, before his current contract ended. For this reason, the Commission submits that there was continuity of the employment relationship.

[23] The Appellant claims that he had accepted a conditional contract with the same school board on April 26, 2016, before the end of his current contract, but he submits that this offer was not an actual contract. First of all, the Appellant stated that he did not feel tied to the offer and that he was looking for other work that better suited him. Also, he stated that this offer came with several conditions, which he read to the Tribunal during his testimony. The offer of April 26, 2016, was subject to management's approval, housing availability as well as a sufficient number of enrolments. The Appellant submits that the employer was not bound by this offer.

[24] In *Oliver v. Canada (Attorney General)*, 2003 FCA 98, the Court upheld a Board of Referees decision:

He was of the view that a determination of whether a teacher fell or not within the scope of the exemption was not a determination which could be based solely on a purported date of termination stated in a contract. All the circumstances in a particular case had to be examined in light of the purpose and intention of the legislative scheme.

It is only reasonable that, when determining whether a case falls within the purview of paragraph 33(2)(a) of the Regulations, it may be helpful to take into account factors such as:

- i. the length of the employment record;
- ii. the duration of the non-teaching period;
- iii. the customs and practices of the teaching field in issue;
- iv. the receipt of compensation during the non-teaching period;
- v. the terms of the written employment contract, if any;
- vi. the employer's method of recalling the claimant;

- vii. the record of employment form completed by the employer;
- viii. other evidence of outward recognition by the employer; and
- ix. the understanding between the claimant and the employer and the respective duration of the non-teaching period.

These factors are not to be weighed mechanistically. It is entirely inappropriate to simply count the number of factors suggesting a finding of contract termination and the number militating against that conclusion and then endorse the conclusion favoured by the greater number of factors. Instead, to determine whether a teaching contract has terminated within the meaning of paragraph 33(2)(a), all of the circumstances of every case must be examined in light of the purpose of the regulation.

### **Was the Appellant's employment contract terminated?**

[25] The Appellant testified about the particularities of working in a remote area and that the employer, to establish a teacher callback list (Exhibit GD5), had to make this offer to teachers before they left X for the summer to verify their intentions of returning in August if needed. The Appellant stated that unlike teachers who have a two-month holiday during the summer, teachers at the X School Board have four months off (May to August).

[26] For the purposes of the analysis of section 33 of the Regulations, teachers whose contracts are renewed before the end of their teaching contracts, or shortly afterward, for the new school year were not unemployed and had continued employment despite the gap between contracts.

[27] However, regarding the form of the offer and the content of the contract, the Tribunal finds that the conditional aspect of the offer is not a guarantee that the employment contract will be concluded. The Tribunal finds that the Record of Employment from the employer on May 25, 2016, one month after the offer to the Appellant, indicates that the return to work date is "unknown" (Exhibit GD3-16). Furthermore, the Appellant testified that on the conditional offer of employment it is indicated that the teacher must show their intention to accept an eventual position. The Tribunal finds that there is a difference between the intention to accept a contract and the acceptance of a contract, or as the Commission submits, the signing of a contract.

[28] Regarding the employment relationship, the employer told the Commission that teachers that teach consecutive semesters accumulate seniority, that pension contributions accumulate with every contract and that it is the teacher's choice whether to remain covered under group insurance during the summer break (Exhibits GD3-18 and GD3-20). The Appellant explained to the Tribunal that regarding seniority, it is rather years of work experience that are used to determine salary. There is a teacher callback list, but there are no permanent jobs in the professional sector as there are in the regular sector.

[29] As demonstrated by the Court in *Oliver*, the Tribunal finds that the benefits offered to teachers at the X School Board during the summer break are *ex gratia* and do not show a continuing employment relationship.

[30] At the hearing, the Appellant read an email that he had received from C. M., human resources manager, about the employment status of teachers in the professional sector. The Appellant claims that the X School Board confirmed that the offer was conditional and not guaranteed employment. The Appellant stated that the human resources manager told him that a teacher callback list was created for each teaching sector (Exhibit GD5). Similarly, the employer told the Commission that in April of each year, teachers are presented with employment offers (Exhibit GD3-30).

[31] After considering the various elements above regarding the employment contract, the Tribunal finds that the return to work is not guaranteed from one contract to the next, that there are two four-month contracts, and not one, during the school year, that teachers at the X School Board do not get paid between the two contracts and that there is no guarantee that the contract will be renewed. In this case, the Tribunal finds that the contract ended on May 6, 2016, and that a new contract, signed mid-August, came into effect at that time. Although the Appellant intended to accept a contract for the new school year on April 26, 2016, the offer was not an actual contract. This was substantiated by the employer (Exhibits GD5 and GD3-30). For this reason, the Appellant met the conditions listed in paragraph 33(2)(a) of the Regulations (*Stone*).

[32] As the Appellant has submitted arguments about the two other conditions of section 33 of the Regulations and although meeting the first condition is enough to be relieved from the disentitlement to benefits, the Tribunal continued its analysis in order to respond to the Appellant.

**Was the Appellant employed on a casual or substitute basis?**

[33] The Appellant wishes to demonstrate that he was employed on a casual basis. The Appellant alleges that he met this condition because his contracts were temporary.

[34] The Appellant testified that in reality, it was not one contract, but rather two contracts that had ended. One for the fall and another for the winter. Indeed, the Record of Employment submitted by the employer substantiates this information because the start date of employment was January 11, 2016 (Exhibit GD3-16). However, the Tribunal finds that these contracts are continuous for about a four-month period and that during that time, the Appellant's employment is regular. For this reason, the Appellant does not meet the conditions of paragraph 33(2)(b) of the Regulations. The Tribunal finds that the claimant's employment in teaching was sufficiently regular during the period from May 9, 2016, to August 19, 2016, and that although there were two contracts, these periods are determined. The Tribunal finds that just because a contract is temporary, that does not make it casual (*Arkininstall; Blanchet*).

**Had the Appellant accumulated enough insured hours in an occupation other than teaching to qualify to receive Employment Insurance benefits?**

[35] The Appellant said that he had accumulated between 80 and 100 hours as a heavy machine operator while he worked between three and four weeks at the end of July as well as in August 2016. However, he did not provide any evidence or Record of Employment to show that he qualified to receive Employment Insurance benefits from an occupation other than teaching. The Tribunal finds that the claimant is not exempt from being disentitled to receiving Employment Insurance benefits under paragraph 33(2)(c) of the Regulations because he did not show that he had earned enough qualifying hours in an occupation other than teaching.

[36] Finally, the Tribunal notes that it listened to the Appellant's arguments regarding other colleagues at the X School Board who received Employment Insurance benefits, and although the Tribunal finds that the Appellant met the first condition, it would like to clarify that every employee and every conclusion of a contract is different. In other words, the Tribunal analyzes the situation based on the specific and personal file of each employee and, to be eligible for benefits, each claimant must meet the conditions under the Act. However, the Tribunal heard that some other colleagues, having interpreted themselves that the conditional offer was not a contract, simply did not report to the Commission that an offer had been made before the contract was officially signed.

[37] The Court determined in *Stone* that the understanding between the claimant and the employer and the respective duration of the non-teaching period are particular to each case.

[38] Therefore, although the Appellant showed his intention to enter into a new contract on April 26, 2016, if one should be available, the Tribunal finds that the conditional offer was not a guaranteed contract and finds that the Appellant was not on a summer break from May 9, 2016, to August 19, 2016, because his contract ended on May 6, 2016.

[39] The Tribunal finds that the Appellant has demonstrated that his contract ended on May 6, 2016, and that a new contract was concluded, not on April 26, 2016, but mid-August 2016. He therefore met the exempting conditions under paragraph 33(2)(a) of the Regulations.

## **CONCLUSION**

[40] After weighing the evidence and the parties' arguments, the Tribunal finds that the Appellant is eligible to receive benefits from May 9, 2016, to August 19, 2016.

[41] The appeal is allowed.

Josée Langlois  
Member, General Division – Employment Insurance Section

## ANNEX

### THE LAW

#### Employment Insurance Regulations

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

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

*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*)

**(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.