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

[TRANSLATION]

Citation: *M. P. v. Canada Employment Insurance Commission*, 2017 SSTGDEI 48

Tribunal File Number: GE-16-3460

BETWEEN:

**M. P.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

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# SOCIAL SECURITY TRIBUNAL DECISION

## General Division – Employment Insurance Section

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DECISION BY: Bernadette Syverin

HEARD ON: March 7, 2017

DATE OF DECISION: April 11, 2017

Canada

## REASONS AND DECISION

## PERSONS IN ATTENDANCE

The Appellant, M. P., attended the hearing. Catherine Frenette, another Tribunal member, also attended as an observer. The Respondent, the Canada Employment Insurance Commission (Commission), did not attend.

## INTRODUCTION

[1] The Appellant filed a claim for sickness benefits on June 21, 2016. The Appellant stated that she had worked as a "teacher/ high school teacher" for the X School Board from August 15, 2016, to June 16, 2016.

[2] On June 19, 2016, the Commission determined that the Appellant was employed in teaching and was therefore not entitled to receive Employment Insurance benefits during the summer non-teaching period. The Commission therefore imposed a disentitlement from receiving Employment Insurance benefits under subsection 32(2) of the *Employment Insurance Regulations* (Regulations) from June 29, 2016, to August 12, 2016.

[3] The Appellant requested reconsideration of the Commission's decision rendered on July 19, 2016. In a decision communicated verbally on August 16, 2016, and dated September 14, 2016, the Commission upheld the decision rendered on July 19, 2016.

[4] On September 9, 2016, the Appellant appealed the reconsideration decision received on August 16, 2016, and dated September 14, 2016.

[5] On September 14, 2016, the Tribunal informed the Appellant that her notice of appeal was incomplete because it was missing mandatory information. The Tribunal advised the Appellant that in order to complete her notice of appeal, she had to provide a copy of the reconsideration decision being appealed and a signed declaration that the information provided is true. The Tribunal specified that if all the missing information needed to complete the notice of appeal was received by October 17, 2016, it would consider the complete notice of appeal received on September 9, 2016.

[6] On September 27, 2016, the Appellant provided the information that the Tribunal had requested.

[7] On March 8, 2017, following the hearing held on March 7, 2017, the Appellant sent a copy of her employment contract signed on September 21, 2016, for the period from August 15, 2016, to December 23, 2016.

[8] The hearing was held by teleconference because that form of hearing respects the requirement under the *Social Security Tribunal Regulations* to proceed as informally and as quickly as circumstances, fairness and natural justice permit.

**ISSUE**

[9] As a teacher, was the Appellant ineligible for Employment Insurance benefits under section 33 of the Regulations?

**EVIDENCE**

[10] The Appellant filed a claim for sickness benefits on June 21, 2016, in which she stated that she was a high school teacher. (GD3- 2 to GD3-16).

[11] Two Records of Employment were submitted in support of the benefit claim:

- A first Record of Employment issued on June 23, 2016, states that the Appellant held a teaching position at the X School Board from August 17, 2015, to March 11, 2016, and that she had stopped working due to illness. (GD3-17)

- A second Record of Employment issued on June 23, 2016, states that the Appellant held a teaching position at the X School Board from March 14, 2016, to June 16, 2016, that her contract had ended due to illness and that her return to work date is unknown. (GD3-18)

[12] On July 8, 2016, during a conversation with the Commission, the Appellant stated that on June 30, 2016, she had been offered a teaching contract for the upcoming school year. She also noted that she accumulated seniority from year to year, but that she was unsure whether pension contributions carried over. (GD3-19)

[13] On July 19, 2016, the Commission determined that the Appellant was employed in teaching and was therefore not entitled to receive Employment Insurance benefits during the summer non-teaching period. The Commission therefore imposed a disentitlement from receiving Employment Insurance benefits under subsection 33(2) of the Regulations from June 29, 2016, to August 12, 2016. (GD3-20 and GD3-21).

[14] The Appellant requested reconsideration of the Commission's decision rendered on July 19, 2016. In support of her reconsideration request, the Appellant explained that although she had been offered a conditional contract for the upcoming school year, the contract had not been signed. Thus, she is not bound to her employer and remains uncertain whether she will have a new contract for the upcoming school year. Considering that her teaching contract ended in June 2016, she should be eligible for benefits. (GD3- 22 to GD3-23).

[15] In a document entitled "Note/Contract" dated June 29, 2016, with the subject line "M. P.'s Contract" (the Appellant), it states that [translation] "*the above-mentioned person should be awarded a teaching contract for the 2016-2017 school year... The period covered by the contract would be from August 15, 2016, to December 23, 2016.*" This document was sent by M. L. (Director) to the school board's human resources. (GD3-24)

[16] On August 16, 2016, the employer confirmed the following (GD3-25 to 26):

a) Contracts for the following school year are awarded based on the callback list. To be placed on the callback list, a teacher must have taught at least 216 hours per year for two consecutive years. The Appellant is on the callback list.

b) The summer break is between June 17, 2016, and August 12, 2016.

c) Remaining sickness credits are paid at the end of the contract.

d) Pension contributions are accumulated with every contract.

e) Regarding group insurance, teachers whose contracts end in May or June are covered until August 31, 2016. Premiums for the summer non-teaching period are paid by the teachers. The premium is deducted at the end of the contract and what is missing will be deducted upon return to work, otherwise a bill will be sent to the home.

[17] The employer also sent a document entitled [translation] "*Additional details regarding the callback list for adult vocational training June 30, 2016.*" It is also noted that among the names on the list, those highlighted in yellow were awarded a contract. The Appellant's name is highlighted in yellow for a full contract from August 15, 2016, to December 23, 2016. It is also noted that the Appellant has more than 12 years of experience at the school board. Furthermore, for the 2015-2016 school year, the Appellant had 720 teaching hours. (GD3-27-GD-28)

[18] On August 18, 2016, the Appellant confirmed that she was on a callback list, established by date hired, and that she was second on the list. It is possible that she may not get the contract offered to her on June 29, 2016, if the person she is replacing returns to their position. There is no guarantee. The Appellant said that even though her name is on the callback list, she is not guaranteed a contract. A lot can happen between now and the beginning of the school year, for example, if enrolment is low, the contract might not be concluded. The contract in question is a full workload but for only half a year, from August 15, 2016, to December 23, 2016. For the 2015-2016 school year, she had also started with a half-contract but there had been some changes and she ended the year with a full contract. However, a person who is below her on the callback list cannot go ahead of her; the position must be offered to her first. The Commission informed the Appellant verbally that the initial decision had been upheld. (GD3-29)

[19] On September 14, 2016, the Commission upheld the July 19, 2016, decision. (GD3-31 to GD3-32).

[20] On September 9, 2016, the Appellant appealed the Commission's reconsideration decision to the Tribunal. The Appellant submits that the note dated June 29, 2016, is not a contract. It is rather a working document that allows human resources to anticipate needs for 2016-2017. Furthermore, the note that the Commission had based its decision on was not addressed to her personally and it is written at the bottom of the note [translation] "*The hours*

*indicated are provisional and may be modified based on the number of enrolments and withdrawals from courses.*" (GD2-1 to GD2-9).

[21] During the hearing, the Appellant repeated essentially the same grounds expressed during the administrative review and she confirmed having signed a formal teaching contract on September 21, 2016, which is retroactive to August 15, 2016. She also added the following:

a) Her wage-loss insurance did not continue after June 16, 2016, even though she was still on sick leave after that date.

b) The Commission did not appear to interpret the provisions of the Act consistently, because she had been in the same situation the previous year and she had been entitled to benefits.

**Evidence at the Hearing**

[22] To follow up on the Tribunal's request, on March 8, 2017, the Appellant provided a copy of her teaching contract signed on September 21, 2016. The contract was from August 15, 2016, to December 23, 2016. (GD6-1 to GD6-3)

[23] At the Tribunal's request, the Commission provided details on the Appellant's June 2015 claim for benefits. The Commission checked her Employment Insurance claim for 2015, which she filed on June 8, 2015. Unlike this year where the Appellant indicated in the "Information on the Job Title" section, that she worked as a high school teacher (GD3-6), in the claim filed on June 8, 2015, for the same section, the Appellant indicated that she was a nurse-teacher. As a result, the questionnaire for teachers (GD3-7 to GD3-8) was not presented to the Appellant at that time. Subsequently, based on the information in the file, the Employment Insurance claim was finalized in an automated manner. In other words, it was not assessed by an agent. Therefore, her status was never clarified so that she could receive Employment Insurance benefits for the summer of 2015. (GD8-1 to GD8-4)

**SUBMISSIONS**

[24] The Appellant argues that based on the *Digest of Benefit Entitlement Principles* on the Commission's website, Chapter 14 – Section 3, entitled "Contract termination," indicates the following: *"The **first factor** relates to whether the teacher has, before the end of the current contract, entered into a new contract or come to a verbal agreement to return to teaching at the end of the non-teaching period. If there is no new contract or verbal agreement to return to teaching, then we must conclude that there is an absolute break in the teacher's employment at the end of the current contract. The claimant will then be entitled to benefits from the day following the last day under contract."* In the Appellant's case, when she filed her claim for benefits on June 19, 2016, she did not have a new contract or a verbal offer of a contract.

[25] Her group insurance continued, but it is under the collective agreement. Also, premiums are paid by the teachers and not the employers. This is proof that there was no continuity of her contract because, based on the *Digest of Benefit Entitlement Principles, "For some teachers, medical and dental benefits are offered through agreements made through their union and paid by employees or the union after termination. These benefits, on their own, do not equate to linkages. However, if medical or dental benefits are continued through the employer, then these equate to linkages."*

[26] The Appellant maintains that she signed a contract on September 21, 2016, and that it was retroactive to August 15, 2016. There was therefore a break in the employment relationship on June 16, 2016, and she is entitled to receive benefits because she was unemployed during the summer non-teaching period.

[27] The Commission argued that the Appellant had failed to demonstrate that her contract of employment for teaching had terminated on June 16, 2016, and that she would not return to work for her employer following the non-teaching period. She had entered into another contract with the same school board on June 29, 2016 (GD3-24), during the non-teaching period from June 17, 2016, to August 12, 2016, and the offer she received was based on her seniority within the school board. (GD3-27 to GD3-28) The Commission maintains that the employment relationship continued when the Appellant entered into an agreement with her employer for the

next teaching period. Therefore, the Appellant does not meet the exception in paragraph 33(2)(*a*) of the Regulations.

**ANALYSIS**

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

[29] First, in its analysis, the Tribunal will consider the Appellant's contract after the hearing, because this item of evidence contains information that is likely to influence the Tribunal's decision. Furthermore, this document was produced following the Tribunal's request during the hearing. *(McEwing v. Canada (Attorney General),* 2013 FC 183.)

[30] Subsection 33(1) of the Regulations defines a teacher as someone who is teaching in a pre-elementary, an elementary or a secondary school, including a technical or vocational school. The Tribunal finds that in this case, the Appellant is a teacher who holds employment in teaching within the meaning of subsection 33(1) of the Regulations. Indeed, the evidence in the file shows that the Appellant worked for the X School Board, where she teaches high school.

[31] The Tribunal also finds that the Appellant had applied for benefits during a 'non-teaching period' pursuant to subsection 33(1) of the Regulations because "*the period occurs annually at regular intervals during which no work is performed by a significant number of people employed in teaching.*" In this case, the Appellant appealed the decision that declared her disentitled to benefits during the non-teaching period from June to August 2016.

[32] As defined in subsection 33(1) of the Regulations, a teacher is not entitled to receive benefits, other than those provided for in sections 22, 23, 23.1, 23.2 of the Act, during the non-teaching period, unless one of the exempting conditions set out in subsection 33(2) of the Regulations is met.

[33] Subsection 33(2) of the Regulations defines three exemptions to teachers' disentitlement to benefits:

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.

[34] The Tribunal must determine whether the Appellant meets the exemptions set out in subsection 33(2) of the Regulations. The Court confirmed that Parliament's intention with regard to section 33 of the Regulations is founded, among other things, on the premise that unless a veritable break has occurred in the continuity of a teacher's employment, the teacher will not be entitled to benefits for the non-teaching period (***Oliver et al*, 2003 FCA 98*, Stone*, 2006 FCA 27*, Robin*, 2006 FCA 175**).

[35] Section 33 applies to teachers who file a claim for sickness benefits, despite the fact that they could otherwise be eligible, that they could receive sickness benefits during the teaching period, and that payment during non-teaching periods would not constitute a second source of income for the claimant ("double dipping"). The tribunals have observed that this result could be regrettable for claimants, but that pursuing benefits or making them payable during non-teaching periods would require an amendment to the Act. (*Taylor* [1991] FCJ No. 508 (QL), *St-Coeur* [1996] FCJ No. 514 (FCA)).

[36] The onus is on the Appellant to prove, on a balance of probabilities, that her employment contract in teaching had ended and that there was a veritable break in the employment relationship when she stopped working on June 16, 2016, pursuant to paragraph 33(2)(*a*) of the Regulations. (*Stone* 2006 FCA 27).

[37] The Court has consistently held in its rulings that, when their contracts finish at the end of June and they are rehired for the following school year, teachers are not entitled to Employment Insurance during the non-teaching period, because there is no veritable break in employment. (*Bishop v. Canada (Employment Insurance Commission)*, 2002 FCA 276; *Canada (Attorney General) v. Partridge* (1999), 245 N.R. 163 (F.C.A.); *Gauthier v. Canada (Employment and Immigration Commission)*, [1995] F.C.A. No. 1350 (C.A.); and *Canada (Attorney General) v. Hann*, [1997] F.C.J. No. 1641 (C.A.).

[38] According to the uncontested facts, the Appellant was employed by the school board as of December 2, 2012. For the 2015-2016 school year, she had a contract from August 15, 2015, to June 16, 2016. The Appellant worked only part of her contract from March 11 to June 16, 2016, due to illness, based on her last Record of Employment, which indicates that her contract ended due to illness. The Appellant filed a claim for sickness benefits because she was no longer entitled to the insurance plan offered by her employer after her contract ended.

[39] In this case, the Tribunal finds that the Appellant's employment contract in teaching ended on June 16, 2016. There was a veritable break in the Appellant's employment and she does qualify to receive Employment Insurance benefits during the non-teaching period.

[40] In *Stone* (2006 FCA 27), the Court stated nine factors to "be taken into account to determine whether there was a veritable break in the continuity of the employment" for the purpose of paragraph 33(2)(*a*) of the Regulations. The nine factors to be taken into account are the following: the length of the employment record; the customs and practices of the teaching field in issue; the receipt of compensation during the non-teaching period; the terms of the written employment contract, if any; the employer's method of recalling the claimant; the record of employment form completed by the employer; other evidence of outward recognition by the employer; and the understanding between the claimant and the employer and the respective duration of the non-teaching period.

[41] The Court states that this list is not exhaustive, that the factors must not be weighed mechanistically, and that all of the circumstances of every case must be examined.

[42] Relying on jurisprudence, the Tribunal will analyze the following factors: 1) the receipt of compensation during the non-teaching period, and 2) the terms of the written employment contract.

### 1) Receipt of compensation during the non-teaching period

[43] The Appellant argues that her contract ended while she was on sick leave. When her contract ended on June 16, 2016, her wage-loss benefits ended on that same date. Thus, she received no remuneration during the non-teaching period.

[44] The purpose of paragraph 33(2)(*a*) of the Regulations is to prevent teachers from being paid from two different sources for the same role ("double dipping"). (*Lafrenière* 2013 FCA 175, *Stone* 2006 FCA 27)

[45] In the Appellant's case, she had a contract of employment in teaching until June 16, 2016. As of June 17, 2016, and during the month of July and the first half of August, she had no contract with the school board and thus received no remuneration for those months. The Tribunal finds that this constitutes one of many indications that there was a veritable break in the employment relationship.

[46] Although the Appellant was not paid during the non-teaching period, jurisprudence teaches that employer non-payment is not the only factor to be considered when deciding whether a claimant's situation falls within paragraph 33(2)(*a*) of the Regulations. The Court has repeatedly held that, even if a claimant was not paid, their contract was not thereby terminated and, therefore, the claimant was not entitled to receive benefits. (*Canada (Attorney General) v. Donachey*, [1997] F.C.J. No. 579 (C.A.); *Canada (Attorney General) v. St-Coeur*, [1996] F.C.J. No. 514 (C.A.); *Canada (Attorney General) v. Taylor*, [1991] F.C.J. No. 508.

[47] The Tribunal therefore considered the fact that the Appellant had benefitted from group insurance during the non-teaching period.

[48] The careful consideration of evidence in this regard shows that the premiums associated with group insurance coverage were paid by the Appellant, and not the employer, during the non-teaching period. This coverage is provided for in the collective agreement and is linked to the previous year's contract, regardless of any future employment contract.

[49] The Tribunal finds that this reinforces the fact that there was a break in the employment relationship, because the maintenance of group insurance does not constitute any guarantee of employment for the 2016-2017 school year.

**2) Terms of the written contract: Was a contract actually concluded on June 29, 2016?**

[50] The Commission maintains that the employment relationship continued when the Appellant entered into an agreement with her employer for the next teaching period. The Commission's finding is based on the document entitled note/contract that the director sent to the school board's human resources. That same note/contract was sent to the Appellant on June 29, 2016. The Tribunal is of the opinion that the document dated June 29, 2016, does not constitute a *bona fide* offer of employment.

[51] Indeed, it says that the note/contract is addressed to [translation] "*Mr. J. C., Human Resources Services*," the subject line reads "*M. P.'s Contract...*" and it states the following "*the above-mentioned person **should** be given a teaching contract for 2016-2017... The period covered by the contract **would** be from August 15, 2016, to December 23, 2016... 336 hours in total*." The following is written in bold at the very end of the note/contract: "***The hours indicated are provisional and may be modified based on the number of enrolments and withdrawals from courses.***"

[52] The Tribunal finds that although the word contract is indicated on the note, the document dated June 29, 2016, is not a contract, but rather it is suggestive of the fact that the parties are faced with a condition precedent. This is demonstrated by the fact that the note states that "*The hours indicated are provisional and may be modified based on the number of enrolments and withdrawals from courses.*" The use of words like "*... **should** be given a contract... the contract **would** be from August 15, 2016, to December 23, 2016,*" also demonstrates the fact that this note/contract was conditional upon another event.

[53] Indeed, according to the Appellant, a few months before the end of the each school year, management draws up its forecast for enrolment for the following year in order to determine its staffing needs. It is then submitted to human resources services, which is responsible for contacting teachers to let them know that they may be able to return to work for the next school year.

[54] The Tribunal finds that this condition precedent delayed the creation of a legal relationship between the parties by delaying the formation of the contract. In other words, when the Appellant received the note/contract on June 29, 2016, there were no contractual rights or contractual obligations between the Appellant and the school board during the non-teaching period.

[55] The Appellant testified that in receiving the note/contract, she hoped to be able to return to her work as a teacher in the fall of 2016, but she knew that even though she received the note/contract, the school board could decide, for a number of reasons, not to offer her a job and she would be unable to use the note/contract to assert her right to fulfil the contract. Thus, the note/contract that she received on June 29, 2016, does not constitute a contract regarding her future employment.

[56] Based on the evidence in the file, the actual employment contract was concluded on September 21, 2016, once the school board was able to confirm it had the number of enrolments required to hire the Appellant.

[57] Taking all of the above into consideration, the Tribunal finds that the note/contract dated June 29, 2016, does not constitute a contract. Thus, when she received the note/contract, the Appellant had no guarantee of employment for the 2016-2017 school year. The Appellant's contract had ended on June 16, 2016, and therefore there was a veritable break in the employment relationship.

[58] In addition, although the Appellant benefitted from group insurance coverage during the non-teaching period, this coverage does not constitute a guarantee of future employment because the premiums were paid by the Appellant during the non-teaching period. Finally, the Appellant was not paid by the school board during the non-teaching period.

**CONCLUSION**

[59] The Tribunal finds that the Appellant showed that her contract of employment for teaching ended on June 16, 2016, at which time there was a veritable break in the continuity of employment.

[60] Given the break in the employment relationship, the Tribunal finds that the Appellant was truly unemployed from June 17, 2016, to August 14, 2016, her new contract being retroactive to August 15, 2016.

[61] The appeal is allowed.

Bernadette Syverin,
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.