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

Citation: *W. Z. v. Canada Employment Insurance Commission,* 2017 SSTGDEI 58

Tribunal File Number: GE-16-3917

BETWEEN:

W. Z.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Lilian Klein

HEARD ON: March 21, 2017

DATE OF DECISION: April 26, 2017

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Appellant did not attend the hearing. Her husband, H. J., attended as her authorized representative (Representative).

An Interpreter attended the hearing at the request of the Representative.

The Respondent did not attend the hearing, but provided submissions.

INTRODUCTION

[1] The Appellant is appealing the reconsideration decision by the Respondent, in which it determined that she was not entitled to receive employment insurance benefits during a non-teaching period.

[2] Following the end of the school term on June 30, 2016, the Appellant applied for regular benefits, and a benefit period was established, effective July 3, 2016.

[3] On June 23, 2016, she had accepted a new contract for the following school year, with the fall term beginning in September 2016.

[4] The Respondent determined that the Appellant was employed in teaching, and was not entitled to employment insurance benefits during the "non-teaching" period of July and August 2016. The Respondent therefore imposed a disentitlement, pursuant to subsection 33(2) of the *Employment Insurance Regulations* (Regulations).

[5] The Appellant requested a reconsideration of this decision on August 30, 2016. During an interview with the Respondent, and by correspondence dated September 26, 2016, she was informed that the original decision was maintained.

[6] The Appellant filed an appeal to the Social Security Tribunal, dated October 10, 2016.

[7] The hearing was held by teleconference for the following reasons:

a) The fact that the Appellant was to be the only party in attendance.

b) The information in the file, including the need for additional information.

c) The form of hearing respects the requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

[8] The Appellant did not attend the hearing since she was out of Canada at the time, but she had authorized her husband to act as her Representative. The Tribunal offered an adjournment, explaining that he would not be able to give evidence, but only to make submissions based on the evidence already on file. He accepted the limitations of his role and declined an adjournment.

[9] The Representative had requested an interpreter because of recent surgery that he believed might interfere with his pronunciation and, therefore, his ability to make himself understood. The Interpreter attended the hearing, but her services were not required, although the Tribunal periodically verified with the Representative that he fully understood the proceedings, and was confident that he had been able to make his submissions clearly.

ISSUE

[10] The Tribunal must determine whether the Appellant, who is employed in the teaching profession, is entitled to regular benefits during a non-teaching period.

EVIDENCE

[11] On July 11, 2016, the Appellant applied for regular employment insurance benefits, and a benefit period was established, effective July 3, 2016 (GD3-3 to GD3-16).

[12] In support of her claim, she submitted a Record of Employment (ROE) from a private school, dated July 11, 2016. The ROE indicated in box 18 that it had been issued due to “End of Contract,” with the notation that she would be rejoining the school in September 2016 (GD3-17 to GD3-18).

[13] On June 23, 2016, the Appellant had accepted a new contract for the following school year, dated June 20, 2016, with a specified start date of August 29, 2016. She did not submit the

contract as evidence, but according to her application for benefits, as found at GD3-8, it was a written contract.

[14] On August 8, 2016, the Respondent contacted the school's director to confirm the nature of the Appellant's duties, and to enquire whether she was covered by school's health plan during the period between her two teaching positions. The school verified that this coverage was in place, with the school covering 50% of the premium, and confirmed that she would be returning as a teacher in September 2016 (GD3-19).

[15] The Respondent subsequently determined that the Appellant was employed in teaching, and was not entitled to employment insurance benefits during the "non-teaching" period of July and August 2016. It therefore imposed a disentitlement from July 4, 2016, to August 26, 2016, pursuant to subsection 33(2) of the Regulations. By correspondence dated August 8, 2016, the Respondent informed the Appellant of this decision (GD3-20 to GD2-21).

[16] The Appellant filed a reconsideration request on August 30, 2016, stating that she worked without a contract from August 31, 2015, until June 30, 2016, and was therefore unemployed once the school term ended, with no earnings until her new contract began on August 29, 2016 (GD3-21 to GD3-24). Her reasons are outlined further in the Submissions section below.

[17] On September 26, 2016, a telephone interview took place between the Respondent and the Appellant as part of the reconsideration process, and she argued that the jurisprudence supports her position.

[18] During this interview, she confirmed that she had taught continuously throughout the 2015/2016 school year, receiving health benefits that continued during the summer break, with the cost of the premiums split 50/50 between her and the school (GD3-26).

[19] She first stated that she had not signed the new contract prior to June 30, 2016, and then conceded that she had accepted the contract on June 23, 2016, as noted on her application for benefits (GD3-8). She was advised that for the purpose of employment insurance benefits, a teaching contract can be either verbal or written (GD3-26).

[20] The Appellant was informed at the end of the telephone interview that there was no absolute termination of her contract prior to the “non-teaching” period, and she did not meet any of the conditions for relief from disentitlement pursuant to Section 33 of the Regulations. She responded that she did not agree, and the Respondent advised her of her right to appeal to the Social Security Tribunal (GD3-26).

[21] By correspondence dated September 26, 2016, the Respondent sent the Appellant written confirmation of the reconsideration decision (GD3-27 to GD3-28).

[22] The Appellant filed an appeal of this decision, dated October 10, 2016, which was received by the Tribunal on October 13, 2016 (GD2-1 to GD2-6).

SUBMISSIONS

[23] The Appellant made the following submissions:

a) She worked at a private school without a contract from August 31, 2015, to June 30, 2016, and was only paid for the days that she worked. She worked 10 months in total, and only received payments for those months, not for a 12-month period. Her new contract would only give her remuneration starting from August 29, 2016.

b) She was unemployed once the summer term ended, and did not have earnings during July and August 2016, because although she searched for work, it was difficult to find a job in the teaching profession during the summer months.

c) She met the exceptions in paragraphs 33(1)(a) and (b) of the Act

d) She should be entitled to benefits, because in CUB 63254, the claimant was allowed benefits after the summer term ended.

e) Her situation was “analogous to the situation of an employee awaiting a recall,” because, as in CUB 70576, she “did not have a resumption of earnings until she started working under her new contract.”

f) The fact that she had continuous medical insurance during July and August, partly paid for by her employer, should be "of no consequence since many occupations continue benefits of that nature upon termination of employment," as found in CUB 49720. Furthermore, these policies had to be for a 12-month period, since she would not have been able to purchase a two-month policy just to cover the summer months.

g) The decision which the Respondent cited in its submissions—*Dupuis v. Canada* 2015 FCA 228—did not apply to her, because in that case the claimant's contract included the summer months, while hers did not.

[24] The Respondent made the following submissions:

a) The jurisprudence supports its decision, as in *Dupuis v. Canada*, 2015 FCA 228, and also in *Oliver et al v. Attorney General of Canada*, 2003 FCA 98; *Stone v. Attorney General of Canada*, 2006 FCA 27; and *Attorney General of Canada v. Robin*, 2006 FCA 175.

b) The Appellant was employed in teaching, and was not entitled to regular benefits during the non-teaching period of July and August 2016, because she did not meet any of the exemptions in subsection 33(2) of the Regulations.

c) There was no severance of her employment relationship with the school, since she accepted a new contract before the end of the school term, and was linked to her employer through a health plan that continued to provide coverage during the summer vacation.

ANALYSIS

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

[26] According to the Federal Court of Appeal, the legal test to determine if the Appellant was entitled to regular benefits during a non-teaching period is whether there was a "veritable break in the continuity of her employment" (Mr. Justice Rothstein in *Oliver, supra*; see also *Bazinet v. Attorney General of Canada*, 2006 FCA 174; *Stone, supra*; *Robin*, *supra*). It is a "fundamental premise" that unless there is this genuine break, "the teacher will not be entitled to benefits for the non-teaching period."

[27] The Federal Court of Appeal has found that where there is continuity of employment, payment of benefits during the "non-teaching" period would, borrowing the words of Chief Justice J.A. Décary in *Attorney General of Canada v. Partridge*, A-704-97, effectively allow a claimant "to be doubly compensated for that period of time." This is also known as "double dipping" (*Attorney General of Canada v. Lafrenière,* 2013 FCA 175).

[28] The burden of proof in this appeal, on the standard of a balance of probabilities, is on the Appellant (*Stone, supra*). She must prove that there was a break in the continuity of her employment, in order to support her claim that the contract was terminated, and that she should be paid benefits for what she considers to be a period of unemployment during the school's summer vacation.

[29] The first step in applying this test is to determine whether the Appellant had employment in "teaching," pursuant to subsection 33(1) of the Regulations. "Teaching" is defined in the Regulations as "the occupation of teaching in a pre-elementary, an elementary or a secondary school, including a technical or vocational school." The Appellant was employed as a kindergarten teacher, and therefore the Tribunal finds that she was employed in "teaching", as per the Regulations.

[30] The Appellant emphasized in her submissions that she worked in a private school. However, the legislation does not differentiate between a private and a public school, and the fact that she had a teaching contract with a private school does not, therefore, make any difference for the application of section 33 of the Regulations.

[31] The next step is to consider whether the Appellant was applying for benefits during a "non-teaching period." This period is defined in subsection 33(1) of the Regulations as "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."

[32] A "non-teaching" period thus covers not only the summer vacation, but also the Christmas and Easter holidays, as noted in *Dupuis-Johnson v. Canada (Canada Employment and Immigration Commission)*, [1996] F.C.J. No. 816 (F.C.A.); *Attorney General of Canada v. St-Cœur*, A-80-95. In the case currently under appeal, the Appellant is appealing her disentitlement to benefits for the period between the end of the school year in June 2016, and

the beginning of the following school year, starting with the fall term in September 2016. The Tribunal finds, therefore, that the Appellant was applying for regular benefits during a "non-teaching period."

[33] These non-teaching periods, as found in *Stone, supra,* are an "authentic refection of the employment reality," and consistent with the "norms" of a profession that includes both teaching and non-teaching periods throughout the entire year. Any assessment of a teacher's employment must therefore be based on the twelve-month school year, given that a teaching position is in reality for twelve months, even though the teacher performs no work during these non-teaching periods. Even if the dates in a teacher's contract only cover a ten-month period, and the salary is paid out over ten months rather than twelve, the case law has determined that the Tribunal must take into account evidence on both the teaching and the non-teaching periods.

[34] In order for the Appellant to be entitled to benefits during a non-teaching period, she would have to demonstrate that one of the following conditions in subsection 33(2) of the Regulations applied to her. She would have to show that her "contract of employment for teaching has terminated", as in paragraph 33(2)(*a*), or that her employment in teaching "was on a casual or substitute basis," as in 33(2)(b), or that she "qualifies to receive benefits in respect of employment in an occupation other than teaching," as per 33(2)(c). These are three distinct exceptions, separate and independent from each other (*Attorney General v. Blanchet et al. 2007 FCA 377*).

[35] When considering the nature of the Appellant's employment, the Tribunal notes her submission that she never had a contract for the 2015/2016 school year, and was only paid for the hours she worked, so her job was not a permanent position that could be considered to have ended at the close of the school year. Her Representative stated that she was paid for eight hours a day times the number of weeks during the 10-month teaching period, portraying her remuneration as an hourly wage for the type of transient position that might be envisaged in 33(2)(b). He argued at the hearing that "[t]he key is here how to determine if the contract was really permanent, [and] how to determine if the employee was really an employee."

[36] However, based on the evidence, the Tribunal finds that the Appellant did work as an employee throughout the teaching months, performing her duties on a regular and continuous

basis, and not in an inconsistent or intermittent fashion. The case law holds that when employment as a teacher is exercised in this type of continuous and predetermined way, it cannot be considered "occasional or substitute" teaching within the meaning of this paragraph (*St- Coeur*, *supra*; *Dupuis-Johnson, supra*; *Arkinstall v. Attorney General of Canada,* 2009 FCA 313). She does not, therefore, meet the exception in paragraph 33(2)(b) of the Regulations.

[37] As well, as found in *Blanchet, supra*, it is "the performance of the employment and not the status of the teacher who holds it" that is the determining factor for the 33(2)(b) exception. Even if the Appellant had no written contract, for the purpose of employment insurance—as noted by the Respondent—a teaching contract can be either verbal or written. Whatever the Appellant's formal status at the school, and however she described herself, she performed the duties of a teacher throughout the 2015/2016 school year. There was, at the very least, an implicit employment contract that determined her duties, rate of pay and health benefits. As the Respondent argues, the fact that these benefits covered the non-teaching period in the summer— and would roll over seamlessly for the following year—is an indicator of a continuing relationship between her and the school. These were not the hallmarks of "casual or substitute" employment within the meaning of 33(2)(b).

[38] The Appellant did not qualify for the exception under paragraph 33(2)(c) either, since she had no employment in another occupation. This is not in dispute.

[39] With respect to the exception in paragraph 33(2)(a), the Representative submitted that when her teaching position ended at the close of the summer term, she was unemployed during July and August 2016, until her employment began again under a new and separate teaching contract for the following school year. She received no remuneration during that summer break, and therefore should, he argued, be entitled to regular benefits.

[40] In order to assess whether there is any probative value to this argument, the Tribunal has applied the legal test set out in the case law cited above, to determine whether there was a "veritable break" in her employment over the non-teaching period in July and August 2016.

[41] When weighing the evidence on this key point, it is not enough, as noted above, to look at the beginning and end dates of her two teaching positions, to determine whether her first

period of employment was terminated at the end of the school year. All the circumstances must be considered to be able to conclude whether there was what Mr. Justice Létourneau, concurring in *Oliver, supra,* called a "clear break in the continuity of employment." As he put it, "the exemption [in paragraph 33(2)(a) of the Regulations] provides relief to those teachers who are, in the true sense of the word "unemployed", a term which is not synonymous with "not working."

[42] The Tribunal finds that the Appellant did not demonstrate that there had been a "clear break" in the continuity of her employment, or a genuine severance in the employer-employee relationship. Even if there had been an interval between her two teaching contracts, it would not necessarily have demonstrated that there was a termination of that relationship *(Bazinet, supra; Robin, supra),* but in her case, there was no interval at all. As in *Bishop v. Canada*, 2002 FCA 276, she "had already been hired for the second school year before the first school year had been completed."

[43] As well, her ROE, dated July 8, 2016, specifically stated "End of contract– rejoin in September 2016," which was an unequivocal confirmation of the continuity of her employment, and the ongoing nature of the employer-employee relationship.

[44] The Representative argued that the Appellant fulfilled the requirement to look for work, thereby demonstrating that she was truly unemployed during the summer break, but there is no evidence on the docket of any serious job search. As found in CUB14215, and affirmed by the Federal Court in *Attorney General of Canada v. Cornelissen-O'Neill*, A-652-93, "teachers are not entitled to collect benefits during the summer months while waiting for the beginning of the new school year unless they are genuinely in the labour market during that period of time."

[45] As discussed in *Stone, supra*, a teacher who genuinely believed her contract had been terminated at the end of a school year would have applied to other schools, but the Representative only mentioned the Appellant's attempts to find work for the summer months, not for the next school year. The Tribunal notes that she was able to focus solely on these two months, because she was secure in the knowledge that her return to her teaching position was guaranteed, thus demonstrating that her bond with her employer had not been severed.

[46] The Tribunal also takes note of the Representative's argument that she was thorough in her job search, but ultimately unsuccessful, because it was hard to get a teaching job during the vacation. Again, this would be consistent with the norms of the teaching profession since, as in *Stone, supra*, the summer break is known to be a non-teaching period.

[47] The Tribunal does not agree with the Appellant's argument that the Respondent improperly used the jurisprudence in *Dupuis, supra*, to support its decision. The circumstances in *Dupuis* are similar to her situation, apart from the fact that the teacher in that case signed the new contract a few days after the end of the school year, instead of a few days beforehand, as the Appellant did.

[48] The Representative argued that in *Dupuis*, the contract came into effect retroactively on the July 1st, whereas the Appellant's new contract gave a later start date, towards the end of August. However, the case law has found that, according to the provincial legislation governing education, when one school year ends on June 30th, the next one is generally assumed to begin as of July 1st. Moreover, *Dupuis* confirms the principle firmly established in the jurisprudence, which the Respondent correctly cited, that there is no severance of the employment relationship if the teacher has already secured a new teaching contract for the following year.

[49] Similarly, the Tribunal does not agree with the Appellant's arguments that CUB 49720, CUB 63254, and CUB 70576 support her appeal.

[50] To counter the Respondent's finding that the employer's continuing provision of health benefits throughout the summer showed "continuity of employment" (*Oliver, supra*), the Appellant cited a statement in CUB 49720 that "the continuation of health benefits was of no consequence since many occupations continue benefits of that nature upon termination of employment." However, the Tribunal finds that this CUB is not applicable to the Appellant's circumstances, since she has not submitted any evidence—such as a written notice of termination—that she was indeed terminated at the end of the school year, and termination was a basic premise in the situation envisaged in this CUB. Also, the notion of a "termination" with continuing benefits does not support her arguments elsewhere that she was merely a casual worker without a contract, who was paid piecemeal for the hours she worked.

[51] Moreover, while her ROE verifies the end of the very contract that she denied having, it also confirms that she was returning for the next school year, which would not be the case with a genuine termination.

[52] Furthermore, the fact that Appellant received these benefits during the summer break was just one factor in the Respondent’s investigation of all the circumstances of her employment, not the sole determinative issue, and the Tribunal finds that it is appropriate to give evidentiary weight to this factor.

[53] Regarding CUB 63254, the Appellant noted that a claimant in what she considered to be an analogous situation was allowed benefits. However, in that case, benefits were only allowed up to the date that the teacher received and accepted a new contract, which was several weeks after the end of the school year. The Appellant, on the other hand, accepted her new contract even before the previous school year had ended.

[54] The Representative wished to put most weight on CUB 70576 to support this appeal, but in that case, the school year ended without any offer of a new contract, and the teacher looked for and found other employment during those weeks when she was genuinely without a job, and had not yet been offered a contract for the next school year. In contrast, the Appellant was not, as she argued, in the situation of “an employee awaiting a recall with a recall date being fixed by a new agreement”. She had already secured a new contractual agreement before the school year ended.

[55] To sum up, based on the evidence on the docket, and taking into consideration the law and jurisprudence relating to teachers, the Tribunal finds that the Appellant failed to meet the legal test of demonstrating that there was a genuine severance of her relationship with her employer.

[56] The Tribunal agrees with the Respondent that there was continuity in the Appellant’s employment as a teacher between one school year and the next. Moreover, it finds that she did not meet any of the exceptions set down in subsection 33(2) of the Regulations.

[57] The Tribunal finds, therefore, that the Respondent was correct in determining that the Appellant was not entitled to employment insurance benefits during the non-teaching period of

the 2016 summer break, and in imposing a disentitlement from July 4, 2016, to August 26, 2016, pursuant to subsection 33(2) of the Regulations.

CONCLUSION

[58] The appeal is dismissed.

Lilian Klein

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.