



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *J. C. v. Canada Employment Insurance Commission*, 2018 SST 1061

Tribunal File Number: GE-18-2804

BETWEEN:

J. C.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Raelene R. Thomas

HEARD ON: November 13, 2018

DATE OF DECISION: November 29, 2018

DECISION

[1] The appeal is allowed. The Claimant was not engaged in teaching and the Commission incorrectly imposed a disentitlement from benefits on her.

OVERVIEW

[2] The Appellant (Claimant) is employed as an early childhood educator by the X Centre for Education (a school board). She was laid off for a shortage of work in December 2017, March 2018 and June 2018. The Claimant established a renewal claim for employment insurance benefits (EI benefits) effective July 1, 2018. The Respondent, the Canada Employment Insurance Commission (Commission), disentitled the Claimant from receiving EI benefits in March 2018 and June 2018 because it determined she was employed in teaching. The Claimant requested a reconsideration of the Commission's decision on the July 2018 claim and the Commission upheld its initial decision. The Claimant appeals to the Social Security Tribunal (Tribunal).

PRELIMINARY MATTERS

[3] The Commission submitted that the only issue before the Tribunal was its decision that the Claimant is not entitled to benefits during the summer non-teaching period. The Commission denied the Claimant's claim for EI benefits in December 2017, due to insufficient insurable hours of employment in the qualifying period. The Commission denied one week of the Claimant's March 2018 claim for EI benefits due to no benefits being payable during a non-teaching period and the other week because she was working a full work week. There is no evidence on file to the effect that the Claimant requested a reconsideration of either of the December or March decisions. However, when issuing its decision on the Claimant's request for reconsideration of her July 2018 claim for EI benefits, the Commission used the information that was previously obtained and wrote to the Claimant that it maintained its decision of April 5, 2018, and stated the issue as "Teaching."

[4] At the hearing, the Claimant stated that she was appealing the decision made on her March 2018 claim and the July 2018 claim. The Tribunal advised the Claimant that it only has jurisdiction to decide appeals of the Commission's reconsideration decisions. There was no

evidence of a request for reconsideration of the Commission's decision on the March 2018 claim in the appeal docket. The Claimant agreed that the Tribunal could ask the Commission to provide the Claimant's request for reconsideration of the March 2018 decision and if there was no request made then the Tribunal's jurisdiction would be limited to deciding her appeal of the Commission's decision on her July 2018 claim. If there was a request for reconsideration of the March 2018 decision the hearing would be reconvened. The Commission has advised the Tribunal that it did not receive a reconsideration request from the Claimant for the March 2018 decision and that the July 16, 2018, reconsideration decision should not have said the Commission's decision dated April 5, 2018. As a result, the Tribunal's jurisdiction is limited to the Claimant's appeal of the Commission's decision on her July 2018 claim.

ISSUES

Issue 1: Was the Claimant employed in teaching?

Issue 2: If so, is the Claimant entitled to receive benefits during the non-teaching period?

ANALYSIS

[5] For the purposes of the *Employment Insurance Regulations* (Regulations) "teaching" means the occupation of teaching in a pre-elementary, an elementary or a secondary school, including technical or vocation school (subsection 33(1), Regulations).

[6] Teachers are not entitled to receive employment insurance benefits other than pregnancy or parental benefits during the summer, winter, and spring non-teaching periods unless they meet certain conditions (subsection 33(1), Regulations). The purpose of the employment insurance scheme is to pay benefits to those who are "truly unemployed" and seeking work. Teachers are not "truly unemployed" during school breaks, and so they are not entitled to benefits (*Oliver v. Canada (Attorney General)*, 2003 FCA 98).

[7] In cases of genuine unemployment during the non-teaching periods, teachers may receive employment insurance benefits during school breaks if they meet one of the following conditions: the contract for teaching employment has terminated; the employment in teaching

was on a casual or substitute basis; or, the claimant qualifies to receive benefits on the basis of hours accumulated in an occupation other than teaching (subsection 33(2), Regulations).

[8] The onus is on the Claimant to prove she is entitled to benefits (section 49(1), Employment Insurance Act (Act); *Falardeau* A-396-85).

Issue 1: Was the Claimant employed in teaching?

[9] No, the Tribunal finds the Claimant was not employed in teaching within the meaning of the Regulations.

[10] The Commission submitted the Claimant was employed in teaching because she was teaching pre-elementary in a school that is run by the Provincial Government and is under a school board. She has an ongoing contract and is the lead in the class; she is instructing the class. The Claimant follows the Department of Education's Early Learning Curriculum in the same way a licensed pre-school would and is fully in charge of the class. Although the Claimant does not hold a teaching license, there is no requirement in the legislation that states that she must hold a license to be considered as teaching. In response to additional documentation provided by the Claimant after the hearing, the Commission submitted the Claimant's employer can only determine if she can be defined as a teacher according to the Education Act of her province and cannot determine if the Claimant meets the definition of a teacher under the Employment Insurance Regulations. The Commission submitted a teacher, as defined in the Regulations, means the occupation of teaching in a pre-elementary, an elementary or a secondary school, including a technical or vocational school.

[11] The Claimant submitted that she was not a teacher. The Claimant testified that her contract of employment is not similar to the contract for teachers employed by the school board. Her contract is for 10 months not 12 like teachers. She is paid an hourly wage not a salary like teachers. She is laid off and issued a Record of Employment (ROE) and does not receive salary at each period when the school is closed whereas teachers continue to receive salary during those times. She is paid for seven hours a day and has a one-half hour unpaid lunch break whereas teachers are paid for the full day. She is not a member of any union and cannot be a member of the teachers' union as she is not a teacher.

[12] The Claimant testified that she does not report to the principal in the school where she works. She reports to the Manager, Pre-Primary and Early Years Program who is employed by the school board. She does not conduct assessments of children's progress nor does she have the authority to recommend if the children in her care should advance to the next level.

[13] The Claimant testified that the Pre-Primary Program (Program) began in September 2017 and she was among the first employees hired to staff it. The Program does not fall under the provincial school system. The Program is offered free of charge and is located in school facilities to make it accessible for children. The children do not use the school's facilities and do not have access to the school playground, cafeteria or use the bus services. The children are not required to attend the program every day. They can come to the program as often or a little as the parents set the children's hours for attendance in any particular day. Parents are not required to advise if their children will not be attending on any given day. Children are limited to one year's participation in the program. The Claimant testified that children do not "finish" the program and do not have to go to school at the end the Program. Parents can chose to have their children remain at home following the one year spent in the Program.

[14] The Claimant testified that there is no curriculum for the Program that she is required to deliver or use to assess the children. There is a Nova Scotia Early Learning Curriculum Framework used by the private day cares and the Program. There are areas to guide the development of children such as wellbeing, language, identity, relationships. There are no subjects taught. The program is play based. The room in which the program is offered does not have any desks, instead there are mats where the children play, a water table, painting area, art work area, etc. As the lead early childhood educator she would decide what books to use, toys to use and the arrangement of furniture in the room to establish an environment.

[15] The Claimant testified that children enter the provincial school system in Grade Primary, where children who reach the age of five years by December 31 in the year are enrolled in the preceding September. The Program is available to children prior to grade primary.

[16] The Claimant testified that there are three levels of early childhood educator with the level dependent upon the amount of post-secondary education obtained. As a lead she is required to have an undergraduate degree in child studies. That is different from a teacher who is

required to have a four year undergraduate degree and a teaching degree. The Claimant testified that teachers are not hired to teach in the Program.

[17] The Claimant testified that the Program is not offered when the school is closed. The Program starts one day ahead of when students enrolled in the school start their school year. On days when teachers are present in the school for professional development but their students are not present the Program continues to be offered and available. The Claimant testified that in rural communities there were very few daycares but there was always a school available for the early childhood learning environment.

[18] The Tribunal notes the Commission submitted that “the employer stated that the Claimant was a permanent teacher.” The Tribunal has reviewed the Supplementary Record of Claim of the Commission’s interview with the Manager, Pre-primary Program, and there is no evidence the manager made this statement. Instead, the record shows the manager as stating “this client does not have a teaching contract and she was hired as a permanent employee.” The manager confirmed that the Claimant was an early childhood educator, that the Program was voluntary and not a mandatory part of the province’s education system. The Claimant was contributing to the provincial pension plan, was accumulating paid sick leave that could be carried forward, but was not accumulating seniority the way that a teacher would. The manager is recorded as telling the Commission the Claimant is hired as a permanent employee and is laid off during the non-teaching period and will be recalled unless the Program ends. The Claimant followed the Department of Education’s Early Learning Curriculum which is the same as a licensed pre-school would follow, and is mostly play based. The Claimant does not instruct, does not develop lesson plans, does not give homework, does not evaluate students and does not issue report cards. The manager stated the Program is not considered part of the school and the students attending are not registered in the school and the principal of the school has no authority and is not involved in the Program.

[19] The Tribunal finds, on a balance of probabilities, that there is no evidence the Claimant’s duties involve any teaching or teaching related duties and obligations. To determine whether a claimant is engaged in teaching the Tribunal may undertake a principled analysis of the underlying factors, such as whether the individual held teaching certificates, belongs to a

professional body that regulates teachers or whether she exercises the core responsibilities of a teacher (Canadian Umpire Benefits (CUB) 76308).

[20] The Claimant is employed as an early childhood educator. She is required to have an undergraduate degree in childhood studies which is not similar to a teaching degree. She is not required to teach subjects but rather to guide the development of the children in her care. There is no assessment of children, she does not recommend the children advance to another grade or start attending the provincial school system, the children's attendance in the Program is not required as hours of participation are determined by the child's parents. She does not report to the school principal but reports to a manager employed by the school board. She is employed by a school board. However, her employment by a school board is not determinative of the issue as school boards employ a number of non-teaching staff. The Program is offered to children prior to their attending Grade Primary but enrolment in Grade Primary is not conditional on completing the Program nor is there any recommendation from the Claimant regarding a child's suitability to attend Grade Primary. That her work is undertaken within a school premises is not sufficient to establish that she is teaching, within the meaning given to that term by the Regulations. In light of the foregoing evidence, the Tribunal finds, on a balance of probabilities, that the Claimant is not employed in teaching. Accordingly, the Claimant is entitled to EI benefits when she is laid off from her employment.

Issue 2: If so, is the Claimant entitled to receive benefits during the non-teaching period?

[21] Having determined the Claimant was not engaged in teaching within the meaning of the Regulations, the Tribunal does not need to decide this issue.

CONCLUSION

[22] The appeal is allowed.

Raelene R. Thomas
Member, General Division - Employment Insurance Section

HEARD ON:	November 13, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	J. C., Appellant