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

Citation: *RF v Canada Employment Insurance Commission*, 2019 SST 1745

Tribunal File Number: GE-19-1266

BETWEEN:

R. F.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Alison Kennedy

HEARD ON: May 14, 2019

DATE OF DECISION: May 15, 2019

Canada

DECISION

[1] The appeal is dismissed. I find that the Claimant is not entitled to benefits during the winter non-teaching period because his contract for teaching did not terminate, his employment was not on a casual or substitute basis, and he did not have any hours from employment other than teaching.

OVERVIEW

[2] The Claimant worked as a teacher during the 2017/2018 school year and started a Long-Term Occasional teaching contract on December 8, 2017 to cover the position of a teacher who was on a leave of absence. The Claimant applied for benefits for the winter break non-teaching period from December 25, 2017 to January 5, 2018. The Canada Employment Insurance Commission determined that EI benefits could not be paid to the Claimant because he did not meet any of the conditions needed for teachers to receive employment insurance benefits during the non-teaching period. The Appellant requested a reconsideration and the Commission maintained its initial decision. The Appellant appealed to the Tribunal.

ISSUE

Is the Claimant entitled to receive benefits during the winter break of the 2017-2018 school year?

ANALYSIS

[3] Teachers are generally not entitled to receive employment insurance benefits during the summer, winter, and spring non-teaching periods. The purpose of the employment insurance scheme is to pay benefits to those who are "truly unemployed." Given that teachers are not "truly unemployed" during school breaks, they are subsequently not entitled to benefits (*Oliver v. Canada (Attorney General)*, 2003 FCA 98).

[4] However, in some cases teachers may be genuinely unemployed during the non-teaching periods. As such, teachers may receive employment insurance benefits during school breaks if they meet one of the following conditions listed in subsection 33(2) of the *Employment Insurance Regulations*:

1. Their contract for teaching employment has terminated;

2. Their employment in teaching was on a casual or substitute basis; or

3. The claimant qualifies to receive benefits on the basis of hours accumulated in an occupation other than teaching.

Is the Claimant entitled to receive benefits during the winter break of the 2017-2018 school year?

[5] I find that the Appellant does not meet any of the exceptions set out in the EI Regulations and that he is not entitled to receive benefits during the winter non-teaching period.

Did his contract for teaching terminate?

[6] When considering whether the Claimant's teaching contract terminated, I must determine whether there was a genuine severance of the employment relationship between the Appellant and his employer and whether the Appellant was truly unemployed during the winter and spring breaks (*Stone v. Canada (Attorney General)*, 2006 FCA 27).

[7] The Claimant was issued a Record of Employment that indicated his last day paid was December 22, 2017. However, the Appellant had started a Long-Term Occasional teaching contract on December 8, 2017, and the contract did not end on December 22, 2017. Instead, the Appellant returned to the same teaching assignment after the winter break. While the Claimant stated in the hearing that he was not sure if he was going to be returning to his position after the winter break, I note that the ROE stated that the Claimant's expected date of recall was January 8, 2018.

[8] The Claimant testified that he was covering for a teacher on a leave of absence. He testified that the teacher he was covering for could have come back into her position and bumped him from the position if she returned from her leave at any time before the end of the school year. The Claimant testified that if the teacher had returned to her position, his LTO contract or appointment would have been finished and he would have gone back to accepting calls as a substitute teacher when they were offered, as before. The Claimant stated that he was not actually expecting to return to work at the end of the winter break, as the teacher he was covering

for had previously taken a similar period of leave and came back after about 10 days. As such, the Claimant stated that he expected he would receive a call telling him that he was no longer needed after the winter break. The Claimant also notes that he did not receive any salary over the winter break, and that he was not covered by his employer's benefit plan at that time.

[9] Based on the Claimant's testimony, I accept that he did not receive a salary during the winter break period and that he was not covered by the employer's benefit plan. I also accept the Claimant's evidence that the returning teacher could have bumped him from the position if she had returned to work. While I acknowledge this risk, I find that, with the exception of this possibility, both the employer (as noted in the ROE) and the Claimant had an expectation that he would return to the same teaching job after the winter break. I also note that the evidence before me is that the Claimant's seniority and pension carried forward from one teaching period to the next.

[10] Considering that the employer and the Claimant had the understanding that he would return to the same teaching role after the winter break – as he did – and that his seniority and pension carried forward from one teaching period to the next, I cannot find that he was truly unemployed during the winter break and that there was a veritable break in his employment from the period before the winter break to the period after his winter break. As such, I find that his contract for teaching did not terminate.

Was his employment in teaching on a casual or substitute basis?

[11] When considering whether teaching employment was on a casual or substitute basis, I must consider the nature of the teaching employment itself rather than the teacher's status with the school board. The terms "casual" or "substitute" should be given their ordinary meaning and should not be interpreted in a complex or philosophical way (*Canada (Attorney General) v. Blanchet*, 2007 FCA 377). A teacher who works in a continuous and predetermined teaching role is not a casual or substitute teacher (*Dupuis-Johnson v. Canada (Canada Employment and Immigration Commission)*, A-511-95).

[12] The Claimant was teaching in an elementary school classroom, and was replacing a teacher who was on a leave of absence. He testified that he accepted the contract position (or

appointment) starting December 8, 2017 for the rest of the school year. The Claimant also noted that the teacher could have returned to work and bumped him out of the position at any time. The Claimant also argues that the employer classified his position as one of substitute teaching, and that the evidence before the Tribunal suggests that he was a substitute teacher at this time.

[13] I accept the Claimant's evidence that both his and his employer's characterization of his as a supply teacher may be relevant in this instance, although it is not determinative of whether he was employed on a casual or substitute basis. In similar circumstances, the Federal Court of Appeal held in *Stephens v. Canada (Minister of Human Resources and Development Canada)*, 2003 FCA 477 that:

> the characterization of a teaching arrangement as "supply teaching" is relevant, but not necessarily determinative. It is theoretically possible that a teacher may have a period of employment as a supply teacher that is sufficiently regular that it cannot be said to be "employment on a casual or substitute basis." However, the mere existence of a term teaching contract covering a particular period does not necessarily deprive a person of the benefit of paragraph 33(2)(b) for that period.

[14] Furthermore, the Court has also held in *Blanchet v. Canada (Attorney General)*, 2007 FCA 377, that paragraph 33(2)(b) emphasizes the performance of the employment and not the status of the teacher who holds it. *Blanchet* also notes that a teacher may have substitute teacher status but, during the qualifying period, may enter into a contract to hold employment on a regular full-time or part-time basis. In these cases, the Court states that even if teachers retain their status as substitutes under the collective agreement and the teachers' union, they are not a substitute for the purposes of the part-time employment they contracted. Consequently, the Court held that in such a case, the teacher does not meet the conditions of the exception under paragraph 33(2)(b).

[15] I find that these decisions are helpful in the circumstances at hand. As noted earlier, I acknowledge that the Appellant was at risk of being bumped from the position if the incumbent teacher returned to work prior to the end of the school year. However, I also note that the Appellant worked in the same classroom from December 8, 2017 throughout the rest of the school year. Given that he was under contract, or appointment, to work in the same classroom

with the same students from December 8, 2017 for the rest of the school year, I find that the Claimant had a general expectation of working in the same role, in the same classroom, with the same students from day-to-day throughout the school year starting from December 8, 2017. I find that this expectation of regular employment means that the Claimant's employment was not held on a casual or substitute basis, but rather was continuous and predetermined. As such, I find that the Appellant's employment in teaching during the 2017/2018 school year cannot truly be considered as casual or substitute, despite the employer's and the Claimant's characterization of it as such.

Does he qualify to receive benefits with hours from employment other than teaching?

[16] The Claimant is not disputing the Commission's determination that he did not have hours from work other than teaching. He did not submit any ROEs from other employers and he did not state that he had any other employment other than teaching. As a result, I find that the Appellant did not qualify to receive benefits with hours from employment other than teaching.

Is the Claimant entitled to benefits during the 2017/2018 winter break?

[17] I have found that the Appellant's contract for teaching did not terminate during the winter break, that his employment was not on a casual or substitute basis, and that he did not qualify to receive benefits with hours from employment other than teaching.

[18] While I am sympathetic to the Claimant's circumstances, particularly the fact that he did not receive any salary during the winter break, and also his statement that his colleagues in similar circumstances have received benefits. However, I can only consider the Claimant's own circumstances and how they relate to the test laid out in the Regulations. Unfortunately, when applying the facts of this case to the relevant law, I find that the Appellant does not meet any of the exceptions set out in the EI Regulations and he is consequently not entitled to receive benefits during the winter non-teaching period.

CONCLUSION

[19] The appeal is dismissed. I find that the Claimant is not entitled to benefits during the winter non-teaching period because his contract for teaching did not terminate, his employment was not on a casual or substitute basis, and he did not have any hours from employment other than teaching.

Alison Kennedy
Member, General Division - Employment Insurance Section

HEARD ON:	May 14, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	R. F., Appellant