



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *Canada Employment Insurance Commission v J. M.*, 2019 SST 770

Tribunal File Number: AD-19-414

BETWEEN:

**Canada Employment Insurance Commission**

Appellant

and

**J. M.**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**Appeal Division**

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DECISION BY: Pierre Lafontaine

DATE OF DECISION: August 19, 2019

## DECISION AND REASONS

### DECISION

[1] The Tribunal allows the Commission's appeal.

### OVERVIEW

[2] The Respondent, J. M. (Claimant), who was employed in teaching, applied for employment insurance regular benefits for the non-teaching period of July 2, 2018 to August 31, 2018. The Appellant, the Canada Employment Insurance Commission (Commission), determined that the Claimant was not entitled to benefits during this period because she did not meet any of the exceptions in section 33 of the *Employment Insurance Regulations* (EI Regulations).

[3] The Claimant requested that the Commission reconsider its decision arguing that she met the first exception of section 33 of the EI Regulations. The Commission maintained its decision noting that the Claimant's contract of employment was not terminated on June 29, 2018, because she agreed, prior to its expiry, to another contract starting in September. The Claimant disagreed and appealed to the General Division of the Tribunal.

[4] The General Division found that the Claimant's contract of employment did not end on June 29, 2018. However, it found that the Claimant's employment during her qualifying period was predominantly on a casual or substitute basis and that she therefore met the exception of paragraph 33(2) (b) of the EI Regulations.

[5] The Commission was granted leave to appeal to the Appeal Division. The Commission submits that the General Division erred in law because the Federal court of appeal has confirmed that substitute teachers who enter into temporary contracts for regular teaching during the school year no longer meet the definition of "casual" or "substitute" within the meaning of section 33(2) (b) of the EI Regulations, even if they retain their casual/substitute status with the school board.

[6] The Tribunal must decide whether the General Division erred in law in its interpretation of section 33(2) (b) of the EI Regulations.

[7] The Tribunal allows the Commission's appeal.

## **ISSUE**

**Did the General Division err in law in its interpretation of section 33(2) (b) of the EI Regulations?**

## **ANALYSIS**

### **Appeal Division's mandate**

[8] The Federal Court of Appeal has determined that when the Appeal Division hears appeals pursuant to subsection 58(1) of the *Department of Employment and Social Development Act*, the mandate of the Appeal Division is conferred to it by sections 55 to 69 of that Act.<sup>1</sup>

[9] The Appeal Division acts as an administrative appeal tribunal for decisions rendered by the General Division and does not exercise a superintending power similar to that exercised by a higher court.<sup>2</sup>

[10] Therefore, unless the General Division failed to observe a principle of natural justice, erred in law, based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it, the Tribunal must dismiss the appeal.

**Issue: Did the General Division err in law in its interpretation of section 33(2) (b) of the EI Regulations?**

[11] The only issue before the Appeal Division is whether the General Division erred in law in its interpretation of section 33(2)(b) of the EI Regulations.

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<sup>1</sup> *Canada (Attorney General) v Jean*, 2015 FCA 242; *Maunder v Canada (Attorney General)*, 2015 FCA 274.

<sup>2</sup> *Idem*.

[12] The facts are not in dispute. The Claimant was employed as a substitute teacher at the beginning of the 2017-2018 school year. From September 2017 to March 26, 2018, she worked as a casual substitute teacher on short-term assignments of varying duration/days at different schools. The Claimant confirmed that from March 27, 2018, to June 29, 2018, she was employed every school day, covering for a specific teacher, on a regular, continuous and on predetermined basis at the same school.

[13] The General Division found that the Claimant was predominantly engaged in substitute teaching during the qualifying period. As a result, the General Division concluded that the Claimant was employed on a casual or substitute basis at the end of the 2017-2018 school year as per section 33(2) (b) of the EI Regulations.

[14] The Commission submits that the General Division erred in law because the Federal court of appeal has confirmed that substitute teachers who enter into temporary contracts for regular teaching during the school year no longer meet the definition of “casual” or “substitute” within the meaning of section 33(2) (b) of the EI Regulations, even if they retain their casual/substitute status with the school board.

[15] With great respect, the General Division decision must be set aside. The Tribunal will render the decision that should have been rendered pursuant to section 59(1) of the DESD Act.

[16] Under section 33(2) of the EI Regulations, a teacher who holds employment in teaching during part of his or her qualifying period is not entitled to receive any benefits for the weeks of unemployment, which are included in any non-teaching period. The expression “any non-teaching period” includes the summer holidays.

[17] Section 33(2) of the EI Regulations contains three exceptions to this general rule. These are three distinct exceptions and not one exception with three conditions to be met for it to apply. Therefore, these paragraphs do not apply cumulatively, but rather separately and independently of each other.

[18] One of these exceptions is contained in section 33(2) (b) of the EI Regulations which applies to teachers that are employed on a casual or substitute basis.

[19] The terms “casual teaching means irregular, occasional or on-call teaching”. For these purposes, “on a substitute basis” refers to “a person who is available on call or used to perform the duties of another teacher, temporarily, during leaves of absence, holidays or illness”<sup>3</sup>

[20] The General Division followed the interpretation of a previous decision by the Appeal Division that determined that section 33(2) (b) of the EI Regulations provides that an exception to disentitlement applies when a claimant’s employment in teaching during the qualifying period is predominantly or entirely on a casual or substitute basis.<sup>4</sup>

[21] Although I agree that section 33(2) (b) provides an exception to disentitlement when a claimant’s employment in teaching during the qualifying period is entirely on a casual or substitute basis, I disagree that the exception also applies when the employment in teaching is predominantly on a casual or substitute basis.<sup>5</sup>

[22] Section 33(2) of the EI Regulations clearly establishes the general rule that a claimant who is employed in teaching **for any part of the claimant’s qualifying period** is not entitled to receive benefits.

[23] Therefore, in order to apply the exception of section 33(2) (b) of the EI Regulations, the casual or substitute teacher has to meet the exception for any part of the qualifying period or else the teacher falls under the general rule and becomes subject to disentitlement. In other words, when a teacher’s employment is no longer on a casual or substitute basis for any part of the qualifying period, the exception no longer applies.

[24] I respectfully cannot follow the interpretation that the exception of section 33(2) (b) of the EI Regulations applies when the employment in teaching is predominantly on a casual or substitute basis. In order to do so, I would need to ignore the general rule established by section 33(2) of the EI Regulations that a claimant who is

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<sup>3</sup> *Canada (Attorney General) v Blanchet*, 2007 FCA 377.

<sup>4</sup> *K.C. v C.E.I.C.*, 2018 SST 787.

<sup>5</sup> *C.E.I.C. v K. K.*, 2019 SST 547.

employed in teaching for any part of the claimant's qualifying period is not entitled to receive benefits.

[25] This interpretation of section 33(2) (b) of the EI Regulations was confirmed on many occasions by the Federal Court of Appeal.<sup>6</sup>

[26] In the *Blanchet* case<sup>7</sup>, the Federal court of appeal held that the benefit of the exception is not obtained through the teacher's status with the school board, but through the employment held during the qualifying period. The Court stated:

“In other words, a teacher may, for example, have substitute teacher status but, during the qualifying period, be called up and enter into a contract to hold employment not on a casual or substitute basis but on a regular full-time or part-time basis. Even if the teacher retains his or her status as a substitute under the collective agreement governing the school board and the teachers' union, he or she is not a substitute teacher for the purposes of the part-time employment he or she contracted. In such a case, the teacher does not meet the conditions of the exception under paragraph 33(2) (b).”

[27] Ms. Blanchet had signed a part-time teaching contract for 8.7% of a regular full-time teaching assignment. At the same time, from August 23, 2002, to June 27, 2003, she had another part-time teaching contract, also for 8.7% of a regular full-time teaching assignment. According to her testimony, her income varied from \$15,000 to \$17,000 per year, \$4,500 of which came from these two contracts. The balance was earned from her substitute teaching.

[28] Although the evidence clearly showed that Ms. Blanchet's employment in teaching during the qualifying period was predominantly on a casual or substitute basis, the Federal court of appeal nonetheless concluded that she did not meet the conditions of the exception under paragraph 33(2)(b) of the EI Regulations.

[29] The Federal court of appeal has clearly established that teachers who enter into temporary contracts for regular teaching during the school year no longer meet the

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<sup>6</sup> *Arkininstall* A-26-09, *Blanchet* A-103-06; *Bernier* A-110-06; *Pelletier* A-111-06.

<sup>7</sup> *Blanchet* A-103-06.

definition of “casual” or “substitute” teaching within the meaning of paragraph 33(2)(b) of the EI Regulations.

[30] Applying these principles to the present case, the Tribunal can only come to the conclusion that the Claimant’s employment as a teacher was not on an occasional or substitute basis within the meaning of paragraph 33(2)(b) of the EI Regulations. She had a substitute teacher status but, during the qualifying period, was called up and entered into a contract to hold employment not on a casual or substitute basis but on a regular basis.

[31] Therefore, the General Division erred in the present case with regard to the interpretation and scope of paragraph 33(2) (b) of the EI Regulations.

[32] For the above-mentioned reasons, the Commission’s appeal is allowed.

**CONCLUSION**

[33] The Tribunal allows the Commission’s appeal.

Pierre Lafontaine  
Member, Appeal Division

HEARD ON:	August 15, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	Anick Dumoulin, representative of the Appellant  J. M., Respondent