



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *L. H. v Canada Employment Insurance Commission*, 2019 SST 1317

Tribunal File Number: GE-19-3366

BETWEEN:

L. H.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Candace R. Salmon

HEARD ON: October 9, 2019

DATE OF DECISION: October 11, 2019

DECISION

[1] The appeal is allowed. I find the Claimant is not a teacher within the meaning of the *Employment Insurance Regulations* and is not disentitled from receiving employment insurance benefits in accordance with subsection 33(2) of the *Employment Insurance Regulations*.

OVERVIEW

[2] The Claimant was employed as an early childhood educator (ECE) by a Nova Scotia school board. The Claimant was laid off in March 2019, and is laid off from her employment without pay for all holiday periods. The reason for separation is coded on the Record of Employment as “shortage of work.” The Claimant established an initial claim for employment insurance (EI) benefits effective March 10, 2019. The Canada Employment Insurance Commission (Commission) disentitled the Claimant from using the hours of insurable employment accumulated as an ECE in calculating her benefit period and rate because it determined she was employed in teaching and was not entitled to benefits in a non-teaching period. The Commission upheld its decision after reconsideration. The Claimant appeals the decision to the Social Security Tribunal (Tribunal).

ISSUE

[3] Was the Claimant employed in teaching?

ANALYSIS

[4] A teacher is someone who is employed in the occupation of teaching in a pre-elementary, an elementary or a secondary school, including technical or vocational school.¹

[5] Teachers are not entitled to receive EI benefits, other than special benefits, during the summer, winter, and spring non-teaching periods unless they meet certain conditions.² The purpose

¹ *Employment Insurance Regulations*, section 33(1)

² *Employment Insurance Regulations*, section 33(2)

of the EI scheme is to pay benefits to those who are “truly unemployed” and seeking work. Teachers are not “truly unemployed” during school breaks, so they are not entitled to benefits.³

[6] In cases of genuine unemployment during non-teaching periods, teachers may receive EI benefits 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.⁴

[7] The Claimant has the burden of demonstrating that she meets the requirements for receiving EI benefits and that no circumstances exist that will disentitle or disqualify her from receiving benefits.⁵

[8] I find the Claimant was not employed in teaching, within the meaning of the *Employment Insurance Regulations*.

[9] The Claimant worked as an ECE in Nova Scotia. She was laid off from her employment on March 15, 2019, for the March break holiday period. She submitted, on the initial claim for EI benefits form, that in the previous two years she had taught part of a school curriculum but stated at the hearing that she is not a teacher and that her certification and duties as an ECE are separate and distinct from teachers. She added in testimony that the entry on the initial claim form was an error, and happened because the Service Canada agent assisting her with making a claim believed it was the correct selection in her situation.

[10] The Claimant spoke to a Commission agent on May 8, 2019, and stated she works full-time as an ECE in the pre-primary program with a Nova Scotia school board. She stated that her work occurs in a school building, and she is the lead ECE in the classroom. At the hearing, the Claimant explained that the ratio is one ECE per 10 children, so because she only had eight children enrolled, she was the only ECE aside from a short period where another ECE was assigned to her

³ *Oliver v. Canada (Attorney General)*, 2003 FCA 98

⁴ *Employment Insurance Regulations*, section 33(2)

⁵ *Employment Insurance Act*, section 49(1); *Canada (Attorney General) v. Falardeau*, A-396-85

class to address the special needs of a child. She also stated she is not in a union, has pension and sick leave credits that carry forward, and is enrolled in the employer's dental plan.

[11] The Claimant also stated to the Commission that she follows the Nova Scotia Department of Education Early Learning Curriculum Framework. At the hearing, the Claimant specified that this Framework is not the same as a teaching curriculum because it is a guideline for play based learning, not a document with specific topics to cover and outcomes to meet.

[12] On May 8, 2019, the Claimant stated to the Commission that she had a definite return to work date when she was laid off. At the hearing, the Claimant stated that she usually knows when, or if, she will be recalled, but said that if there are not enough children registered for the pre-primary program she would not be recalled. I note that on the initial claim form, the Claimant stated she had a permanent contract for an indefinite period. At the hearing, the Claimant stated that this was also the selection of the Service Canada employee, who assisted her in completing her application form for EI benefits, and did not reflect the fact that she had a 10- month verbal employment agreement with her employer and no guarantee of recall.

[13] On May 8, 2019, the Commission made a finding that the Claimant could not be paid EI benefits because no benefits can be paid to teachers during non-teaching periods. The Claimant requested reconsideration of this decision, stating she follows a framework guideline, not a curriculum, is not part of the teacher's union, does not have a teaching degree, and works in a daycare-like environment with no desks, grading, outcomes, or lesson plans.

[14] The Commission spoke to the Claimant on August 29, 2019. The Claimant confirmed that she is a lead ECE, in a full-time position, working 40 hours per week but is not paid for non-teaching periods. The Claimant stated she does not have teaching credentials and does not receive the pay of a teacher. She also stated she has a definite recall date after each non-teaching period, and that her position is permanent and ongoing. The Claimant stated that she does not grade students, as it is a play-based program but added that she does follow a government curriculum.

[15] The Commission issued a reconsideration decision on August 29, 2019, upholding its previous decision to find the Claimant was disentitled from receiving EI benefits during a non-teaching period.

[16] The Claimant filed a Notice of Appeal with this Tribunal on September 25, 2019. The Claimant stated she disagreed with being classified as a teacher because she is an educator for pre-primary children, tasked with organizing play-based learning activities and has no outcomes to reach, nor does she assign any grades or assess the children's performance. On October 7, 2019, the Claimant added letters from the provincial Executive Director of Early Childhood Development, Ms. Janet Lynn Huntington, and the Supervisor of the Pre-Primary program in her school district, to her appeal file.

[17] A copy of the Claimant's job description is included in the file. The job description states the Claimant, as lead ECE, will be responsible to create and maintain an engaging learning environment based on the children's knowledge and interests. It further states that the learning environment will be one in which children are encouraged to explore and create new knowledge through their experiences and social interactions with others. The responsibilities of the position are also listed, and describe a position that encourages a child's development through loosely structured activities and play, based on the child's direction.

[18] The letter from Ms. Huntington can be summarized as being in support of the Claimant. Ms. Huntington confirms the Claimant is an ECE and not a teacher. She writes that the Nova Scotia pre-primary program is an early learning program for four year old children, and is free, child-centred, and play based. The program is non-compulsory, and is staffed by ECE's. Ms. Huntington states that all ECEs, regardless of whether they are employed in licenced child care centres or the pre-primary program, follow the Nova Scotia Early Learning Curriculum Framework, which provides guidelines for behaviour and actions of ECE's as they implement a play based program. She states that although the word "curriculum" is in the title, the framework is neither subject matter nor outcome based like traditional school curricula and the ECEs do not teach children. She stated ECE's are not engaged by the school board to be teachers, and added that the pre-primary program is held in school facilities because the infrastructure already exists and is cost effective. Additionally, Ms. Huntington states that being in a school building helps families with the transition of going to school when it is time for the children to go to public school, but states there is no formal association between the pre-primary program and the public education system. She notes that the pre-primary program children do not have access to school resources, like guidance counsellors and speech language pathology.

[19] Ms. Huntington includes provincial legislation to show that ECEs do not fall within the meaning of the word “teacher” in that context. I have not included those references because I am tasked with adjudicating the *Employment Insurance Act* and its related regulations, and while I note that the Claimant is clearly not a teacher within the meaning of the provincial legislation, that is not the legislation I am enabled to consider.

[20] The letter from the Claimant’s Supervisor of Pre-Primary education states the Claimant’s job is “vastly different” from that of a teacher, beginning with a difference in credentials. The supervisor states that while teachers deliver a curriculum and assess learning outcomes, as well as conduct assessments, ECE’s set up learning environments where children are encouraged to play and explore, creating new knowledge through their experiences and social interactions. She added that ECE’s interact with children guided by a provincial framework, but stated there are no prescribed learning outcomes.

[21] At the hearing, the Claimant stated that she works in a learning environment, not a classroom, and reiterated that she is an educator who works in a play-based setting and does not teach anything. She stated that her supervisor is at the schoolboard, and she does not report to anyone at the school and has no connection to the school. She also added that she has a washroom in her learning environment, and helps children with personal care such as toileting, which teachers are not allowed to do. The Claimant noted that on her Record of Employment, it specifically states that she is employed by a school board and that she is part of the employee group identified as “NON TEACHERS” in box 4 of the document.

[22] The Commission submits to the Tribunal that the issue before me is that the Claimant is considered a teacher under the *Employment Insurance Act* and *Employment Insurance Regulations*. While the Commission submits this as fact, I disagree.

[23] The Commission maintains that the Claimant meets the definition of a teacher as she is teaching pre-elementary in a school that is run by a provincial government and is under a school board. It submits she has an ongoing contract and is the lead in the class. It adds that she is instructing the class and followed 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. The Claimant testified

that while there is a provincial framework used by the program, it is play based and there is no curriculum in terms of subjects or teaching.

[24] I find the Claimant's role as ECE is to facilitate play and care for children, within the confines of a play based childcare program. It is incorrect to describe the program as including a curriculum or lesson plan. The Commission stated that 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. While I agree with this submission, on the balance of probabilities, the Claimant is not a teacher. I further find that the Claimant did not have a guaranteed recall to the employment because the employment is dependent upon children enrolling in the program.

[25] I find, on a balance of probabilities, that the Claimant has proven she was not engaged in teaching while employed as an ECE. While the role works in a school environment, the job itself is not substantially similar to that of teacher, and is much closer to the work done by an educational assistant in the public school system.

[26] As I have already determined that the Claimant was not employed in teaching, so is not impacted by the *Employment Insurance Regulations* related to additional conditions and terms in relation to teachers,⁶ I will not review the Commission's submissions based on subsection 33(2) of these *Regulations*. As the Claimant was not a teacher, these *Regulations* by definition cannot apply.

[27] Ms. Huntington noted in her letter that the Commission has recently decided that some ECEs do not qualify for EI benefits because they are teachers. The *Employment Insurance Regulations* define teaching as meaning someone who is employed in the "occupation of teaching." It is unfortunate that the definition contains the word it seeks to define, but I find the *Employment Insurance Regulations* intend to require teachers to be teaching something. An ECE unquestionably has a very different job from a teacher. Aside from the differences in credentials and pay, ECE's work to engage children in development, whether it be social, emotional, cognitive, or physical. They prepare activities and unstructured play, with no required outcomes or assessment of the children. They are not engaged in instructing children, but work to engage

⁶ Subsection 33 of the *Employment Insurance Regulations* specifically relates to teachers. As I have found the Claimant was not a teacher, this section does not apply to her.

children and stimulate their development. For these reasons and those above, I find the Claimant was not engaged in teaching while employed as an ECE and should not be disentitled from EI benefits for this reason.

CONCLUSION

[28] The appeal is allowed. I find the Claimant is not a teacher within the meaning of the *Employment Insurance Regulations* and is not disentitled from receiving employment insurance benefits in accordance with subsection 33(2) of the *Employment Insurance Regulations*.

Candace R. Salmon
Member, General Division - Employment Insurance Section

HEARD ON:	October 9, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	L. H., Appellant