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

Citation: *Canada Employment Insurance Commission v M. E.*, 2020 SST 434

Tribunal File Number: AD-20-103

BETWEEN:

**Canada Employment Insurance Commission**

Appellant

and

**M. E.**

Respondent

---

# SOCIAL SECURITY TRIBUNAL DECISION

## Appeal Division

---

DECISION BY: Stephen Bergen

DATE OF DECISION: May 22, 2020

Canada

## DECISION AND REASONS

### DECISION

[1] The appeal is allowed. The General Division made an error of law. I have corrected the error to make the decision the General Division should have made. The Claimant is not entitled to benefits during the 2019 summer non-teaching period.

### OVERVIEW

[2] The Appellant, M. E. (Claimant), is a teacher. He applied for benefits after he completed a teaching term at the end of June 2019. The Respondent, the Canada Employment Insurance Commission (Commission), found that he was not entitled to benefits during the summer non-teaching period. It did not accept that the Claimant's teaching contract had terminated or that he was a casual or substitute teacher, and it maintained its decision after the Claimant asked it to reconsider.

[3] The Claimant appealed to the General Division of the Social Security Tribunal, which allowed his appeal. The General Division found that the Claimant was predominantly a casual or substitute teacher and that he should not be disentitled to benefits during the non-teaching period from July 3, 2019 to September 2, 2019. The Commission now appeals to the Appeal Division.

[4] The Commission's appeal is allowed. I have found that the General Division made an error in how it reached its decision and made the decision that the General Division should have made. The Claimant was not a casual or substitute teacher for the purpose of entitlement to benefits during the 2019 summer non-teaching period.

### PRELIMINARY ISSUES

[5] The General Division found that the Claimant's contract of employment continued from the end of his LTO contract on June 28, 2019, to his acceptance of a full-time permanent teaching contract with the same employer on July 3, 2019. Neither the Commission nor the Claimant suggested that the General Division made an error in finding that his contract of

employment had not terminated.[1] Neither party raised the issue at the Appeal Division and I will not be considering it.

## WHAT GROUNDS CAN I CONSIDER FOR THE APPEAL?

[6] "Grounds of appeal" are the reasons for the appeal. To allow the appeal, I must find that the General Division made one of these types of errors:[2]

1. The General Division hearing process was not fair in some way.
2. The General Division did not decide an issue that it should have decided. Or, it decided something it did not have the power to decide.
3. The General Division based its decision on an important error of fact.
4. The General Division made an error of law when making its decision.

## ISSUE

[7] Did the General Division make an error of law by:

a) failing to apply the correct legal test to determine if the Claimant was a casual or substitute teacher, or;
b) failing to provide adequate reasons for its decision?

## ANALYSIS

### Legal test for casual or substitute teaching

[8] The Commission challenged the General Division decision on the basis that the General Division weighed the hours of regular teaching under the LTO contact against the Claimant's other hours of teaching as a supply teacher. According to the Commission, it was an error of law for the General Division to have found the Claimant to be a casual or substituted teacher based on a finding that her employment was "predominantly" casual or substitute teaching. This

[1] One of the other exceptions under section 33(2)(a) of the *Employment Insurance Regulations* (Regulations).
[2] This is a plain-language version of the three grounds. The full text is in section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).

argument assumes that the Claimant's employment under the part-time LTO may not be considered casual or substitute employment.

[9] The Claimant argued that the General Division was correct when it found that the casual or substitute exemption should apply to him. The Claimant takes the position that all of his teaching in the qualifying period was on a casual or substitute basis, even his teaching under the part-time LTO contract. If the Claimant is correct, it would not matter how much of his teaching was under the LTO contract and how much of the teaching was other casual or supply work.

[10] The *Employment Insurance Regulations* (Regulations) state that teachers are not entitled to be paid benefits during their non-teaching periods.[3] However, the Regulations also offer some exceptions to that general rule, including an exception for teachers whose contracts of employment are held on a "casual or substitute basis".[4] Neither the *Employment Insurance Act* (EI Act) nor the Regulations define the term, "casual or substitute basis".

[11] However, the Federal Court of Appeal provides some direction. In *Dupuis-Johnson v. Canada (Employment and Immigration Commission),*[5] the Federal Court of Appeal said casual or substitute teaching is teaching employment that is <u>not</u> exercised in a "continuous and predetermined way". In other words, teaching will be considered to be casual or substitute unless it is <u>both</u> continuous and predetermined. This interpretation was applied in *Arkinstall v Canada (Attorney General).*[6] *Stephens v. Canada (Minister of Human Resources Development)*[7] said that supply teaching is not necessarily employment on a casual or substitute basis. A period of supply teaching that is "sufficiently regular" will not be held to be causal/substitute teaching. *Canada (Attorney General) v. Blanchet*[8] appears to have approved of the test used in both *Dupuis-Johnson* and in *Stephens.*

[3] Section 33(2) of the Regulations.
[4] Section 33(2)(b) of the Regulations.
[5] *Dupuis-Johnson v. Canada (Employment and Immigration Commission)* A-511-95.
[6] *Arkinstall v Canada (Attorney General),* 2009 FCA 313.
[7] *Stephens v. Canada (Minister of Human Resources Development), 2003 FCA 174.*
[8] *Canada (Attorney General) v. Blanchet* 2007 FCA 377. Note: *Blanchet* has several claimant and only one of the claimants in that appeal was named "Blanchet".

[12] The General Division supported its decision that the regulatory exemption should apply with a finding that the Claimant's employment was "predominantly" casual. In doing so, it followed *K.C. v. Canada Employment Insurance Commission*[9] (KC) a decision of the Appeal Division. In KC, the Appeal Division had rejected the notion that a claimant must have been a casual or substitute teacher exclusively for the qualifying period. The Appeal Division found that the claimant was not a casual or substitute teacher because she was not *predominantly* or entirely a casual or substitute teacher.

[13] The Commission suggests that the General Division misapplied the law. It contends that a claimant must work *solely* on a casual on call, occasional, or supply basis to be exempt as a "casual or substitute teacher under the Regulations. It also argues that a teacher who works as a substitute and also works under a part-time contract cannot be considered a casual or substitute teacher.

[14] If the Commission's position is that a claimant may only fall within the exception if the claimant's only teaching employment is casual or substitute over his or her entire qualifying period, I do not agree.

[15] However, I do agree that the General Division made an error of law. I find that the General Division failed to apply the correct legal test. Alternatively, it supported its decision with inadequate reasons so that it is impossible to tell if it applied the correct legal test.

[16] The General Division based its decision on an analysis of the proportion of casual/substitute teaching to other teaching. However, the General Division failed to analyze whether any of the Claimant's teaching employment actually qualified as casual/substitute teaching. The courts have said that determining whether teaching is casual or substitute depends on whether the teaching is found to be "sufficiently regular"[10] or "continuous and predetermined."[11] The Appeal Division in KC had accepted these tests as two sides of the same coin. It said that employment that is sporadic or unpredictable, rather than continuous and predetermined, would not be "sufficiently regular" and would therefore be casual or substitute

---

[9] *K.C. v. Canada Employment Insurance Commission*, 2018 SST 787.
[10] *Stephens*, *supra* note 7.
[11] *Dupuis-Johnson*, A-511-95/A-512-95; *Arkinstall*, *supra* note 6.

teaching.[12] KC first considered whether the Claimant's employment met the test for casual or substitute teaching during different periods and under different contracts, before assessing whether her teaching was predominantly casual or substitute over her qualifying period.

[17] The General Division did not cite or apply either of the legal tests. It did not determine whether the Claimant's part-time LTO contract was for casual or substitute teaching, or whether his supply teaching was casual or substitute. Instead, the General Division assumed that the part-time LTO contract work was not casual or substitute without analyzing the evidence or applying the legal test. It likewise assumed that the supply teaching was casual or substitute, despite the caution from *Stephens,* that not all supply teaching will qualify. The General Division's entire analysis was devoted to identifying the relative proportion of teaching that was under one or the other arrangement.

[18] I have found that the General Division made an error of law. That means I must consider the appropriate remedy.

## REMEDY

### Nature of remedy

[19] I have the authority to change the General Division decision or make the decision that the General Division should have made.[13] I could also send the matter back to the General Division to reconsider its decision.

[20] I accept that the General Division has already considered all the issues raised by this case and that I can make the decision based on the evidence that was before the General Division. I will make the decision that the General Division should have made.

### New decision

[21] I will determine whether the Claimant qualifies for the casual/substitute exception based on his teaching employment in the period between January 8, 2019, and June 29, 2019. This is the only period within the Claimant's qualifying period for which there is evidence of his

[12] *K.C., supra* note 9, para 9.
[13] My authority is set out in sections 59(1) and 64(1) of the DESD Act.

teaching employment. The record of employment on the file[14] states that his first day of work was on January 8, 2019, and the Claimant states that he began his LTO contract in early February 2019. The Claimant denied that there was any other record of employment in the one-year period prior to his application for benefits. He said that all of his occasional hours with the School Board would have been included with his contract work.[15] The Claimant never spoke of whether he worked as a casual or substitute teacher for any other portion of his qualifying period, or how much he worked.

[22] The General Division found that the Claimant should be considered a casual/substitute teacher because his teaching employment was predominantly casual or substitute. The Commission relied on the *Blanchet* decision to argue that it was an error of law for the General Division to base its decision on the *predominant* teaching employment. The Commission argues that *Blanchet* established a principle that a claimant cannot be considered a casual or substitute teacher if the claimant also holds some form of term contract for teaching. In *Blanchet*, some of the teacher claimants held their employment under contracts for both part-time teaching and per-lesson teaching. The Court did not accept that the claimant teachers in that case were casual or substitute teachers within the meaning of the EI Act.

[23] However, *Blanchet* did not decide as it did because the claimants could not be casual or substitute teachers if they worked under part-time teaching contracts in addition to their casual/substitute arrangement. *Blanchet* found that the part-time contract was not casual or substitute because the teaching employment was exercised in a continuous and predetermined way. It interpreted the nature of the part-time contract using an agreement between the school boards and the teachers' union. The employer knew that the regular teacher would be away for at least a certain period. This meant that the employer was obligated to offer part-time contracts to the replacement teachers to comply with its agreement with the teachers' union. Therefore, the part-time contracts were not casual or substitute teaching, despite what the Court called the "temporary and precarious" nature of the teaching contracts.[16]

---

[14] GD3-17
[15] Audio record of General Division hearing, timestamp:00:11:50
[16] *Blanchet, supra* note 8, at para 48.

[24] *Blanchet* does not mean that it is never possible for teachers to qualify for the casual/substitute exception if they also hold part-time term contracts. It simply affirms the principle from *Stephens* that it is the actual terms of the teacher's employment, and not the label or status attached to that employment relationship, that determines whether the teacher may be found to be teaching on a casual/substitute basis.

*The non-LTO supply teaching*

[25] I accept that the Claimant's non-LTO supply teaching was not predetermined. This means that I accept that his teaching employment as a supply teacher was on a casual or substitute basis. The Claimant testified that the "other two thirds of [his] time would have been spent doing supply work and covering other classes if [he] was lucky enough to secure it."[17]

*The LTO contract*

[26] The Claimant argued before the Appeal Division that his LTO contract would have been terminated by the return of the regular teacher, and that the regular teacher could return any time. In other words, he considers that his part-time LTO contract was casual/substitute teaching employment because it was not predetermined.

[27] I find that the Claimant's employment was continuous from February 2019. He testified that the LTO contract began in early February 2019,[18] and that it ran through to the end of the term. He said that he consistently taught one class, every school day for the full semester. This amounted to one hour and fifteen minutes of instruction each day, plus preparation and marking time.[19]

[28] I also find that the Claimant's employment under the LTO contract was exercised in a predetermined manner. The Claimant testified that his workload did not vary under the LTO contract, and he agreed with the General Division that he was not on-call for the LTO contract.[20] The Claimant did not tell the General Division that he could be relieved of his LTO teaching

[17] Audio record of General Division hearing, timestamp 00:13:00.
[18] Audio record of General Division hearing, timestamp 00:16:25
[19] Audio record of General Division hearing, timestamp 00:12:40
[20] Audio record of General Division hearing, timestamp 00:13:50

position at any time. He said only that the term "LTO" was a term used to describe any occasional teaching contract over two weeks.[21] The Claimant did not provide the Commission or the General Division with a copy of his LTO contract or any other documentation that suggested that his LTO employment could have terminated at any time due to circumstances beyond his control.

[29] The Claimant's employment under the LTO contract was exercised in both a continuous and a predetermined manner. Therefore, I find that it does not meet the definition of casual or substitute teaching for the purpose of benefit entitlement during the Claimant's non-teaching period in the summer of 2019.

*The overall nature of the Claimant's teaching*

[30] The General Division concluded that the Claimant met the casual or substitute teacher exception because he worked predominantly as a supply teacher. To reach this conclusion, the General Division compared the number of teaching hours that the Claimant accumulated in his qualifying period by picking up supply teaching, to the number of hours he accumulated under the part-time LTO contract.

[31] By the General Division member's calculation, there were 444 casual or substitute hours within the Claimant's qualifying period. The General Division compared this number to the 260 hours it found he would have worked under the part-time LTO contract. Having done so, it applied the Appeal Division in KC,[22] and concluded that the Claimant's employment was predominantly casual or substitute.

[32] KC dispensed with the notion that a teacher might be considered a substitute if that teacher was a substitute for any portion of his or her qualifying period, however small.[23] It interpreted the Regulations to "provide an exception to disentitlement where a claimant's employment in teaching during the qualifying period is *predominantly* on a casual or substitute basis."

---

[21] Audio record of General Division hearing, timestamp 00:07:20
[22] *K.C., supra* note 9.
[23] *Ibid*, at para 16.

[33] The Appeal Division in KC stated that its interpretation was consistent with conclusions made in other appeals such as *Blanchet*, where the claimants had held a mix of teaching employment during the qualifying period.[24] According to *Blanchet*, a claimant who has taken on part-time regular teaching is not a casual or substitute teacher, even where the teacher retains his or her status as a substitute teacher.[25]

[34] The facts in *Blanchet* were different from those of KC. The claimant teachers in *KC* did not work as substitutes *at the same time* that they worked under contracts of regular employment. However, the facts in *Blanchet* are similar to the facts in this case. Like the claimants in *Blanchet*, the Claimant held both regular and substitute employment during almost the entire period for which there is evidence.

[35] However, the facts in this appeal resemble those in *Blanchet* more than KC. In KC, the claimant had worked as a regular teacher for eight months *followed by* less than two months on a substitute basis. These teaching periods were apparently successive. In other words, the claimant in KC did not work as a substitute at the same time that she also held some other regular teaching contract. In this case, the Claimant was employed as a substitute from January 2019 until June 2019 and he held a part-time LTO contract for virtually the same period, from February to the end of June 2019.

[36] *Blanchet* was primarily concerned with the question of how it should classify the part-time contracts of the teacher claimants. It is not clear that the Court in *Blanchet* actually turned its mind to whether it could only find a claimant's employment to be casual/substitute where it was *entirely* casual or substitute. Or whether it considered the alternatives: Could a claimant, who was teaching on a casual or substitute basis for *most* of the qualifying period, benefit from the casual/substitute exception? Could a claimant, who was working on a casual or substitute basis most of the time, still benefit from the exception if he or she was teaching under a regular contract *at the same time?* The *Blanchet* decision does not reveal whether the Court wrestled with these questions.

---

[24] *K.C.*, supra note 9 at para 17.
[25] *Blanchet, supra* note 8, at para 38.

[37] Even so, I cannot ignore the fact that *Blanchet* found that the claimant teachers in that appeal did not meet the casual or substitute exception. I am unable to distinguish the material circumstances of the claimant teachers in *Blanchet* from the circumstances of the Claimant in this appeal. Like the Claimant in this appeal, the claimants in *Blanchet* taught as casual/substitute teachers *at the same time* as they held the part-time contracts that the Court considered to be regular employment. Like the Claimant's mix of casual and substitute teaching, the mix of casual and substitute teaching for at least one of the teacher claimants in the appeal (the one named Blanchet) was mostly comprised of casual/substitute teaching (by earnings).

[38] When *Blanchet* found that the claimants' part-time contracts were not casual/substitute, this necessarily meant that the claimants would have always held some part of their teaching on a regular basis. This is true, even though the majority of the claimants' teaching at any given time would likely have been casual or substitute teaching. The Court in *Blanchet* could not have decided that the exception for casual or substitute teachers did not apply to the claimants, unless it also accepted that holding part-time regular employment at the same time as casual/substitute employment meant that the claimants did not qualify for the casual/substitute exception.

[39] This leads me to conclude that a claimant cannot be a casual or substitute teacher for the purposes of section 33(2)(b) of the Regulations if the claimant is employed as a casual/substitute teacher at the same time that he or she holds other regular teaching employment. By regular teaching employment, I mean teaching employment that is both continuous and predetermined.

[40] I accept that the Claimant had casual or substitute work in addition to his regular teaching employment under LTO contract. I also accept that he likely had more hours of casual or substitute work in his qualifying period than he was getting under the LTO contract. However, the Claimant held the LTO contract for almost the entire time that he was able to establish his hours of substitute teaching. I cannot characterize the Claimant's teaching employment as a whole as being on a casual or substitute basis.

[41] The Claimant is not a casual/substitute teacher for the purpose of the exception at section 33 (entitled to benefits during the non-teaching period that includes the summer of 2019.

**CONCLUSION**

[42] The appeal is allowed. I have made the decision the General Division should have made. The Claimant is not entitled to benefits during the non-teaching period that includes the summer of 2019.

Stephen Bergen
Member, Appeal Division

| | |
|---|---|
| HEARD ON: | May 5, 2020 |
| METHOD OF PROCEEDING: | Teleconference |
| APPEARANCES: | Anik Dumoulin, Representative for the Appellant, the Canada Employment Insurance Commission<br><br>M. E., Respondent |