[TRANSLATION]

Citation: *MT v Canada Employment Insurance Commission*, 2021 SST 322

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	M. T.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (419735) dated April 22, 2021 (issued by Service Canada)

Tribunal member:	Charline Bourque
Type of hearing:	Teleconference
Hearing date:	May 26, 2021
Hearing participant:	Appellant
Decision date:	June 14, 2021
File number:	GE-21-722

Canada

Decision

[1] The appeal is allowed. I am of the view that the Appellant meets the exception under section 33(2)(b) because he was employed on a casual or substitute basis during his qualifying period.

Overview

[2] The Appellant is a teacher. He is on leave without pay from his main employer. During this leave without pay, he had a job as an on-call substitute, then a tutoring job. He accumulated enough hours of insurable employment to be entitled to Employment Insurance (EI) benefits with these new jobs.

[3] However, because of the employment relationship with his main employer, from which he is on leave without pay, the Commission determined that the Appellant was not entitled to benefits during the non-teaching periods—that is, from March 1, 2021, to March 5, 2021, and from June 28, 2021, to September 3, 2021.

[4] The Appellant disagrees with that decision. He says he is entitled to receive benefits because of his substitute and tutoring jobs. He is not a teacher because he was a substitute then a tutor and should therefore be entitled to receive benefits during the non-teaching periods.

Issue

[5] I have to determine whether the Appellant is entitled to receive EI benefits during a non-teaching period.

[6] To make this finding, I must answer the following questions:

a) Has the Appellant's employment contract ended?

b) Was the Appellant employed on a casual or substitute basis?

c) Did the Appellant have a job other than teaching that could entitle him to receive benefits?

Analysis

Issue: Is the Appellant entitled to receive EI benefits during a non-teaching period?

[7] A teacher who is employed in teaching for any part of their qualifying period is not entitled to receive benefits for any week of unemployment that falls in any non-teaching period.

[8] There are three different exceptions to this rule:

a) The contract of employment for teaching has terminated.

b) The employment in teaching was on a casual or substitute basis.

c) The claimant qualifies to receive benefits in respect of employment in an occupation other than teaching.[1]

[9] Teaching is defined as "the occupation of teaching in a pre-elementary, an elementary or a secondary school, including a technical or vocational school. (*enseignement*)."[2]

– Has the Appellant's employment contract ended?

[10] Parliament's intention with respect to section 33 of the *Employment Insurance Regulations* (Regulations) is based, among other things, on the premise that, unless there has been a genuine severance of the continuity of a teacher's employment, they will not be entitled to benefits for the non-teaching period.[3]

[11] The Appellant explains that he is on leave without pay from his teaching job at X (English-language school board) but worked as a substitute, then as a tutor, at X (French-language school board).

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[1] See section 33(2) of the *Employment Insurance Regulations* (Regulations).
[2] See section 33(1) of the Regulations.
[3] See *Oliver et al*, 2003 FCA 98; *Stone*, 2006 FCA 27; *Bazinet et al*, 2006 FCA 174; and *Robin*, 2006 FCA 175.

[12] The Appellant confirms that his employment relationship with the English-language school board has not ended. His leave without pay ends in August 2021, and he should then return to his position.

[13] The Commission is of the view that the Appellant has not shown that his employment contract for teaching ended on June 18, 2020, because he is supposed to return to the job after the non-teaching period and after his leave without pay authorized by his employer X. He signed a teaching contract with the same school board after the non-teaching period from June 28, 2021, to September 5, 2021, because the Appellant is going to return to teach under the same conditions, in his permanent position, just as before his authorized leave.

[14] I note that no party questions the fact that the Appellant's employment contract with the English-language school board has not ended.

[15] The Appellant has an employment relationship with the English-language school board, and it has not ended. The Appellant has an employment contract with his employer, the English-language school board.

– **Was the Appellant employed on a casual or substitute basis?**

[16] 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.'"[4]

[17] Therefore, the exception under section 33(2)(b) of the Regulations emphasizes the performance of the employment and not the status of the teacher who holds it. Employment that was performed in a continuous and determined way cannot be considered employment on a casual or substitute basis. Teachers who enter into

[4] See *Canada (Attorney General) v Blanchet*, 2007 FCA 377.

temporary contracts for regular teaching during the school year no longer meet the definition of “casual” or “substitute” teaching.[5]

[18] The Appellant applied for EI benefits when his previous claim ended. This claim therefore started on February 14, 2021. During his qualifying period, the Appellant had two jobs. He says he was a substitute from September to December 2020, then a tutor from January to present.

[19] The qualifying period is generally the 52-week period immediately before the beginning of a benefit period or the period that begins the first day of an immediately preceding benefit period.[6]

[20] For its part, the Commission considers that the Appellant was employed for a part-time teaching contract from September 8, 2020, to December 17, 2020, and from January 6, 2021, to February 26, 2021. The employer confirmed that the Appellant [translation] “teaches tutoring,” in a school in a continuous way three days a week, and he does this until the end of the school year. The Commission submits that the Claimant’s employment from September 8, 2020, to February 26, 2021, was sufficiently regular, continuous, and predetermined and that, for that reason, it does not meet the definition of casual or substitute teaching.

[21] I note that I must focus on the period ending on February 13, 2021, since the Appellant established his claim for benefits on that date.

[22] Additionally, I consider that section 33(2) of the Regulations sets out the general rule that a claimant who was employed in teaching for any part of their qualifying period is not entitled to receive benefits.

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[5] See *Arkinstall*, 2009 FCA 313; and *Blanchet*, 2007 FCA 377.
[6] See section 8 of the *Employment Insurance Act*.

Substitute job from September to December 2020

[23] According to the Record of Employment, the Appellant worked from September 8, 2020, to December 17, 2020, as a substitute. He performed 208 hours of insurable employment.[7]

[24] The employer confirms that the Appellant is a substitute teacher on call only. He does not have a contract, and they call him if they need substitutes.[8]

[25] I am of the view that, for the period from September to December 2020, the Appellant was a substitute, on call. The employer confirms that it called the Appellant based on its substitute needs. So, I am of the view that the Appellant was considered a teacher on a casual or substitute basis during this period.

Tutoring job from January to February 13, 2021

[26] According to the Record of Employment, the Appellant worked from January 6, 2021, to February 26, 2021, as a substitute.[9] However, only the period until February 13, 2021, is at issue, since the Appellant established his claim for benefits from February 14. The Appellant therefore worked approximately 123 hours of insurable employment until February 13, 2021[10]—that is, during his qualifying period.

[27] The Appellant explained that his role had changed as of January 2021. The Appellant explained that he was not performing the duties of a teacher, but those of a tutor. He explained that he did two to three days of tutoring at the school. His role consisted of taking students who were struggling out of their classrooms to help them understand specific concepts depending on the needs of the student. Therefore, he was not a teacher. He also said that he was not tied to a contract and repeated that his duties were not those of a teacher.

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[7] See the Record of Employment (GD3-30).
[8] See the supplementary information from the employer to the Commission (GD3-34).
[9] See the Record of Employment (GD3-32).
[10] The Record of Employment indicates a total of 172 hours of insurable employment until February 26, 2021.

[28] The employer confirms that the Appellant is a substitute. It says that the Appellant works in a tutoring program three days a week. He is still considered a substitute, but the budget allowed it to hire the Appellant in this tutoring position, likely until the end of the school year in June 2021.[11]

[29] I am of the view that the Appellant's tutoring job does not meet the criteria of employment on a casual or substitute basis. The Appellant knew he was working as a tutor three days a week. Even though he did not have a contract with the employer, the employment was performed in a continuous and determined way.[12]

Is being employed in teaching on a substitute basis for part of the year enough to meet the exception under section 33(2)(b)?

[30] In this regard, I refer to the detailed analysis of this Tribunal's Appeal Division on this issue:[13]

> As cited above, s. 33(2) of the Regulations stipulates that a claimant "who was employed in teaching for any part of the claimant's qualifying period" cannot receive regular benefits during non-teaching periods, with three exceptions. The second of these exceptions arises where the claimant's "employment in teaching was on a casual or substitute basis."
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> This raises the question of whether it is sufficient, for the purposes of s. 33(2)(*b*), for the worker to have taught on a substitute basis for only a small portion of the school year. […]
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> Subsection 33(2) applies to a claimant who was employed in teaching for any part of the qualifying period (typically the preceding 52-week period).This is the first inquiry that must be made and, in the instant case, it is uncontroversial that the Appellant was employed in teaching for part of her qualifying period; specifically, she was employed in teaching under contracts of employment from September 8, 2015 to April 28, 2016 and from May 2, 2016 to June 24, 2016. In my view, it flows from this initial inquiry that a claimant's "employment in teaching," in s. 33(2)(*b*), refers to this same period of teaching, i.e. to his or her

[11] See the supplementary information from the employer to the Commission (GD3-43).
[12] See *Arkinstall v Canada (AG)*, 2009 FCA 313; and *Canada (AG) v Blanchet*, 2007 FCA 377.
[13] See *KC v Canada Employment Insurance Commission*, 2018 SST 787.

> employment in teaching during the qualifying period, and not to certain components thereof.
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> Had Parliament's intention been to allow an exception to disentitlement if a claimant's teaching in the past year included only a certain portion of casual or substitute teaching, s. 33(2)(*b*) could easily have been qualified to apply, for example, if "any" or "some" of the claimant's employment in teaching was on a casual or substitute basis, or if the claimant's employment in teaching was on a casual or substitute basis "at the interruption of earnings." In the absence of such qualification, I find that s. 33(2)(*b*) requires consideration of the claimant's employment in teaching as a whole during the qualifying period. It would, in my view, produce an absurd result if the type of teaching in a single week or two of the school year dictated that teacher's entitlement or disentitlement to benefits during non-teaching periods. As such, I interpret s. 33(2)(*b*) to provide an exception to disentitlement when the claimant's employment in teaching during the qualifying period is predominantly or entirely on a casual or substitute basis. […]
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> In the instant case, the Appellant's "employment in teaching" refers to her employment in teaching between September 2015 and June 2016, as a whole. The Appellant's eight-month period of regular teaching was followed by less than two months of employment on a substitute basis (during which she accepted permanent employment for the following year). Considering the Appellant's teaching roles during the qualifying period as a whole, and given that the substitute teaching was a minor component, I find that her "employment in teaching" during the qualifying period cannot be characterized as being on a casual or substitute basis. In these circumstances, the Appellant cannot benefit from the exception to disentitlement in s. 33(2)(*b*).[14]

[31] I am of the view that the Appellant's situation is the opposite of the situation described above, since the Appellant worked more hours of insurable employment in a substitute job until December 2020 than he did in the "regular" job he had for five weeks before establishing his claim for benefits.

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[14] See *KC v Canada Employment Insurance Commission*, 2018 SST 787.

[32] As mentioned, the Record of Employment shows that he performed 208 hours of insurable employment in his substitute job, whereas he performed around 123 hours of insurable employment as a tutor.

[33] Therefore, I am of the view that the Appellant was employed mainly on a casual or substitute basis during his qualifying period. In these circumstances, I am of the view that the Appellant can take advantage of the exception to the disentitlement under section 33(2)(b).

– **Did the Appellant have a job other than teaching that could entitle him to receive benefits?**

[34] The Appellant submits that his tutoring role is not that of a teacher.

[35] The Commission submits that there was no evidence that the Claimant was entitled to benefits in a job other than teaching.

[36] Teaching is defined as "the occupation of teaching in a pre-elementary, an elementary or a secondary school, including a technical or vocational school. (*enseignement*)."[15]

[37] I disagree with the Appellant on this issue. I am of the view that the tutoring role is a job in teaching. The Appellant confirms that he works with struggling students to help them with specific subjects. I find that, even though the Appellant is not responsible for a class, he teaches students who are struggling and plays a role similar to that of a teacher.

[38] I find that the substitute job and the tutoring job were in teaching, since the Appellant performed educational duties similar to those of a teacher.

[15] See section 33(1) of the Regulations; and *Canada (Attorney General) v Lafrenière*, 2013 FCA 175.

Does the Appellant meet one of the exceptions to be entitled to benefits during the non-teaching periods?

[39] Yes. I am of the view that the Appellant meets the exception under section 33(2)(b) because he was employedon a casual or substitute basis during most of his insurable hours of employment during his qualifying period.

[40] For this reason, I find that the Appellant is therefore entitled to receive EI benefits during the non-teaching periods from March 1, 2021, to March 5, 2021, and from June 28, 2021, to September 3, 2021.

Conclusion

[41] The appeal is allowed.

Charline Bourque

Member, General Division – Employment Insurance Section