Citation: *MA v Canada Employment Insurance Commission*, 2021 SST 390

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

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

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (423747) dated May 14, 2021 (issued by Service Canada)

Tribunal member:	Raelene R. Thomas
Type of hearing:	Teleconference
Hearing date:	June 14, 2021
Hearing participant:	Appellant
Decision date:	June 23, 2021
File number:	GE-21-877

Decision

[1] The appeal is dismissed. This means M. A., the Claimant, is not entitled to be paid employment insurance (EI) regular benefits during the non-teaching period from December 21, 2020, to January 1, 2021.

Overview

[2] The Claimant was employed as a long term occasional (LTO) teacher when she applied for EI benefits during the Christmas break. She returned to work after the Christmas break to the same position she held prior to the break. The Commission initially paid the Claimant EI benefits for the two weeks she was off work. It later decided that because the Claimant was employed in teaching she was not entitled to employment insurance during the Christmas 2020 and Spring 2021 breaks. This created an overpayment of EI benefits that the Claimant must repay.

[3] The Claimant does not agree with the Commission's decision. She says that she was employed as a casual substitute in a position held by another teacher who could return to work at any time. She did not have a continuing contract and she was not paid over the Christmas break.

Issue

[4] Was the Claimant's teaching contract terminated at the time she wanted to get EI benefits?

Matter I must consider first

[5] At the hearing, the Claimant stated that she was appealing the disentitlement of EI benefits for the period December 21, 2020 to January 1, 2021. She was not appealing the disentitlement of EI benefits for the period April 12, 2021 to April 16, 2021. In light of the Claimant's statements at the hearing, my decision will be limited to the Commission's decision to not pay the Claimant EI benefits during the Christmas 2020 break.

Analysis

[6] It is undisputed that the Claimant was employed in teaching. She testified that she was a teacher and the Record of Employment (ROE) issued by her employer said her occupation was an LTO Elementary Teacher. I see no evidence to dispute this and I accept as fact that the Claimant was employed in teaching, and is a teacher within the meaning of the *Employment Insurance Regulations.*

[7] The general rule is that teachers[1] cannot be paid EI benefits during any non-teaching period of the year.[2] Non-teaching periods are those periods that occur annually when most people employed in teaching do not work.[3] These periods include the summer break, semester breaks, etc.[4] Although teachers are not working during a non-teaching period, they are not considered to be unemployed during these periods.[5] Not working is different from being unemployed.[6]

[8] There are a few exceptions to this general rule.[7] One exception says that claimants whose teaching contract[8] has terminated are not disentitled from being paid benefits.[9] Another exception says that claimants whose employment was on a casual or substitute basis are not disentitled from being paid benefits.[10] Claimants who teach can qualify to receive benefits from another employment. The Claimant has to prove that it is more likely than not[11] that any one of the exceptions applies to her.[12]

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[1] Subsection 33(2) of the *Employment Insurance Regulations* refers to a "claimant who was employed in teaching"; subsection 33(1) of the Regulations defines "teaching" as "the occupation of teaching in a pre-elementary, an elementary or a secondary school, including a technical or vocational school."
[2] Section 33 of the *Employment Insurance Regulations*.
[3] Subsection 33(1) of the *Employment Insurance Regulations*.
[4] *Canada (Attorney General) v Blanchet*, 2007 FCA 377. This is how I refer to decisions of the courts that apply to this appeal.
[5] *Bazinet v Canada (Attorney General)*, 2006 FCA 174.
[6] *Bazinet v Canada (Attorney General)*, 2006 FCA 174.
[7] Subsection 33(2) of the *Employment Insurance Regulations*.
[8] Specifically, subsection 33(2) of the *Employment Insurance Regulations* asks whether the Claimant's "contract of employment for teaching" has terminated.
[9] Paragraph 33(2)(a) of the *Employment Insurance Regulations*.
[10] Paragraph 33(2)(b) of the *Employment Insurance Regulations*
[11] The Claimant has to prove this on a balance of probabilities which means it is more likely than not.
[12] *Stone v Canada (Attorney General)*, 2006 FCA 27.

Termination of contract

[9] I have to look at more than just the beginning and end dates of a contract to decide whether the Claimant's teaching contract terminated.[13] The fact that the Claimant was not being paid during the period in question is not itself enough for me to find that the contract terminated.[14] I have to look at all of the circumstances of the Claimant's employment. These circumstance include things like the length of the non-teaching period, the customs and practices of the teaching field, whether the Claimant received compensation during the non-teaching period, the terms of the written contract, if any, the employer's method of recalling the Claimant, the ROE, any outward recognition by the employer, and, the understanding between the Claimant and the employer and their conduct.

[10] The Claimant has to show that there was a clear break in the continuity of her employment.[15] There has to be a genuine severance of the relationship between the employer and the Claimant.[16]

[11] The Claimant said that the confusion with her employment from September 2020 began with her application for EI benefits in June 2020. In June 2020, she was on extended leave from another larger school board and was substitute teaching with a regional school board. She had an offer to return to the larger school board in September 2020. She had not yet accepted the offer when she applied for EI benefits in June 2020. The Claimant was waiting to see if the regional school board would offer her a position in September 2020. The regional school board did make an offer of an LTO position for September 2020, which the Claimant accepted.

[12] I do not think that the offer of employment from the larger school board is relevant to the issue before me. The issue before me relates to the Claimant's request for EI benefits from December 21, 2020 to January 1, 2021. That period falls after the Claimant returned to work in September 2020 with the smaller regional board. It is the

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[13] *Bazinet v Canada (Attorney General)*, 2006 FCA 174.
[14] *Stone v Canada (Attorney General),* 2006 FCA 27.
[15] *Bazinet v Canada (Attorney General)*, 2006 FCA 174.
[16] *Bazinet v Canada (Attorney General)*, 2006 FCA 174.

type of employment with the regional board or whether the Claimant experienced a break in that employment over the Christmas break that is relevant to this issue.

[13] I also do not think that the Claimant's acceptance of a contract / permanent .6 position on January 6, 2021, is determinative of the issue before me. The Claimant testified that she was encouraged to apply for positions while she was working as an LTO. The Claimant testified that she returned to the LTO after the Christmas break. On January 6, 2021, she applied for a part-time contract (permanent) position. She was successful getting that position and was offered a start date of January 13, 2021. The Claimant's last day of work in the LTO position was January 12, 2021. She started in the .6 contract / permanent position on January 13, 2021. As noted above, the issue before me is whether the Claimant is entitled to benefits from December 21, 2020 to January 1, 2021. The offer and acceptance of the .6 contract / permanent position occurred after the period the Claimant is seeking to claim EI benefits. This means that the .6 position did not exist for the Claimant when she stopped working on December 18, 2020, and cannot be viewed as a continuing contract from that date.

[14] The Claimant was hired as an LTO in September 2020 to replace a teacher who was on leave. The terms of the collective agreement governing her employment state that a teaching assignment that is greater than 11 consecutive days is converted to an LTO position. The end date for her employment was unknown or "not to exceed the last day of the school year." As an LTO she was given a seniority number. When LTO positions became available she would be considered. Once she accepted the .6 contract / permanent position she was placed on a different seniority list with a different number. The Claimant could not say what would happen to her pension contributions had she completed the LTO position and not accepted the .6 contract / permanent position. Over the Christmas break, the Claimant said that her membership in the group insurance plans continued. The ROE issued by the employer indicated the Claimant's last day of work was December 18, 2020 and that the expected date of recall was January 4, 2021. The ROE was issued due to a shortage of work / end of contract season. The Claimant testified that she did not receive a notice of layoff when she finished work on December 18, 2020.

[15] I find that the Claimant did not experience a clear break in her employment on December 18, 2020. It is true that she was not paid over the Christmas break. But that is not determinative of the issue. The Claimant was hired to replace a teacher who was on leave. The end of her employment was stated as unknown or no later than the last day of school. The last day of school would occur in June after the Christmas break. The employer indicated on the ROE that the Claimant would be recalled to work on January 4, 2021. She did return to work on that date to the same LTO position she held previously. There was no interruption in her participation in the group insurance plans over the Christmas break. This evidence tells me the Claimant did not experience a break in her employment on December 18, 2020. As a result, I find the exemption does not apply to the Claimant's circumstances.

Teaching on a casual or substitute basis

[16] Teaching on a casual or substitute basis has been interpreted by the Tribunal's Appeal Division to mean that the employment in teaching during the qualifying period must have been "predominantly or entirely" on a casual or substitute basis for the exception to apply.[17] While I am not bound by Appeal Division decisions, I agree with this interpretation and will apply it to the Claimant's circumstances.

[17] When determining whether the Claimant's employment as a teacher was on a casual or substitute basis it is necessary to consider the nature of the employment itself rather than simply the Claimant's status with the school board. A teacher who works in a continuous and pre-determined teaching role is not a casual or a substitute teacher.[18]

[18] The Claimant testified that in late July / early August she accepted an LTO position with the regional school board to start in September 2020. She stayed in that position until she accepted a .6 contract position with the same school board. The terms of the Claimant's collective agreement state that a contract position is a permanent position. The Claimant says that as an LTO she was replacing a contract/permanent teacher who was on leave but could return at any time. She worked

[17] *K.C. v. Canada Employment Insurance Commission*, AD-17-278
[18] *Dupuis-Johnson v. Canada (Canada Employment and Immigration Commission)*, A-511-95

a full teaching day from Monday to Friday. The Claimant said that she was not paid during the Christmas break. Had she continued in the LTO position she would not have been paid during the Spring break or over the summer break.

[19] The Claimant argued the LTO position is not permanent, instead it is casual or substitute teaching. She could be removed from the LTO position with a day's notice when the other teacher returned to work. As such, she says she was a substitute / casual teacher who satisfies an exemption to rule that teachers cannot be paid during the non-teaching period.

[20] The Claimant testified that she was hired as an LTO working full teaching days Monday to Friday. She was replacing another teacher who was on leave. It is true that the LTO position could end with a day's notice if the teacher who held the position were to return to work. But, the lack of specified end date in the LTO position does not negate the fact that the Claimant's employment was sufficiently regular, continuous and pre-determined. As a result, I find that the Claimant has not proven that she was employed on a casual or substitute basis. Accordingly, the Claimant has not proven that she meets this exception.

Hours from employment other than teaching

[21] The Claimant confirmed that she did not work in any employment other than teaching. I see no evidence to contradict this. Accordingly, the Claimant has not proven that she meets this exception.

Other Matters

[22] The Claimant submitted that the retroactive disentitlement to EI benefits should not be applied and she should not be required to pay back the EI benefits she received. She said that when she applied for EI benefits in June 2020 she was placed on EI ERB. She was told by a Service Canada agent to continue completing claim reports until she obtained a full-time job. The Claimant said that she completed the teaching questionnaire correctly. The fact that the disentitlement for teaching was not placed on

her file when her EI claim was converted from EI ERB to regular EI benefits should not result in her having to repay benefits.

[23] The Claimant testified that repaying the EI benefits was causing her and her family financial distress. She likened the Commission request for payment of the EI benefits to requesting the return of a piece of cake that has been eaten. The Claimant felt that waiting four months to request the return of the EI benefits was too long.

[24] The Federal Court of Appeal has found that Commission agents have no power to amend the law, so any interpretation they make of the law does not, by itself, have the force of law.[19] This means that even where the Commission or its agents provide incorrect information, what matters is what is written in the *Employment Insurance Act* and the *Employment Insurance Regulations*, and whether the Claimant's circumstances comply with those provisions.

[25] The law does limit the length of time a Commission may go back to review a Claimant's claim for EI benefits. Generally, the Commission may review claim up to 36 months after EI benefits were paid.[20] Where the Commission believes there may have been a misrepresentation that resulted in EI benefits being paid (which is not the case here) the Commission may review a claim after 72 months.[21] The appeal file shows the Commission contacted the Claimant on April 22, 2021, to discuss the December 2020 claim. This means the Commission acted within the time limits permitted by the law for the review of claims.

[26] I am sympathetic to the Claimant's circumstances but, as tempting as it may be in such cases (and this may well be one), I am not permitted to re-write legislation or to interpret it in a manner that is contrary to its plain meaning.[22] I must follow the law and render decisions based on the relevant legislation and precedents set by the courts.

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[19] *Granger v. Employment and Immigration Commission*, A-684-85
[20] Section 52(1), *Employment Insurance Act*.
[21] Section 52(5), *Employment Insurance Act*.
[22] *Canada (Attorney General) v. Knee*, 2011 FCA 301.

[27] Nothing in my decision prevents the Claimant from asking the Commission to write-off the debt created by the overpayment. If the Claimant is not satisfied with the Commission's response, she may appeal to the Federal Court of Appeal.

Conclusion

[28] As stated above there are three exceptions specified in the *Employment Insurance Regulations* that allow teachers to receive EI benefits during the non-teaching period. The Claimant's circumstances do not fall within any of the three exceptions. As a result, I find that the Claimant is not entitled to receive EI benefits during the non-teaching period.

[29] The appeal is dismissed.

Raelene R. Thomas
Member, General Division – Employment Insurance Section