



Citation: *AA v Canada Employment Insurance Commission*, 2022 SST 1757

**Social Security Tribunal of Canada
General Division – Employment Insurance Section**

Decision

Appellant: A. A.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (464202) dated April 27, 2022 (issued by Service Canada)

Tribunal member: Raelene R. Thomas

Type of hearing: Videoconference

Hearing date: November 16, 2022

Hearing participant: Appellant

Decision date: November 30, 2022

File number: GE-22-2508

Decision

[1] The appeal is allowed. The Tribunal agrees with the Claimant.¹

[2] The Claimant was employed in an adult education centre. Adult education centres are excluded *Employment Insurance Regulations*.² This means that the Claimant is not considered to be a teacher within the meaning of the EI regulations and is not disentitled from receiving EI benefits during the non-teaching breaks.

[3] The Claimant was not working full working weeks for some of the weeks in the period from January 3, 2022 to March 11, 2022 and from March 21, 2022 to June 30, 2022. This means he might be eligible for EI benefits in some of those weeks as long as he meets the other requirements to receive EI benefits.

Overview

[4] The Claimant is employed as an English as a Second Language (ESL) instructor in an Adult and Continuing Education Centre. He had a placement to teach ESL for three hours on two nights a week from September 21, 2021 to June 2022. He was also available for and called in to replace full-time ESL teachers who were absent from work. The Claimant was laid off due to shortage of work during the December 2021 and March 2022 breaks and applied for EI benefits.

[5] The Commission decided the Claimant was a teacher and could not be paid EI benefits during the non-teaching breaks. It also decided the Claimant was not unemployed because he was employed as a supply teacher under contract for the school year and could not be paid EI benefits from September 9, 2021 to June 30, 2022. Because of this the Claimant could not be paid EI benefits for the periods from January 3, 2022 to March 11, 2022 and from March 21, 2022 to June 30, 2022

[6] The Claimant disagrees with the Commission. He says that he was not a full-time teacher. He had a part-time assignment to teach ESL two evenings a week. This

¹ In this decision the Appellant is called the Claimant and the Respondent is called the Commission.

² See section 33(1) of the EI Regulations.

assignment depended upon the number of students who enrolled in and attended class. Any additional hours he worked were as a casual teacher and the most he would be called to work would be for one to two weeks of work at a time. If he was not called he did not work.

Issue

[7] Was the Claimant employed in teaching as defined by the EI regulations?

[8] If so, is the Claimant entitled to EI benefits during a non-teaching period?

[9] Was the Claimant not unemployed from January 3, 2022 to March 11, 2022 and from March 21, 2022 to June 30, 2022?

Analysis

[10] To decide if the Claimant is entitled to EI benefits during a non-teaching period I must first decide if the Claimant was employed in teaching within the meaning of the EI Regulations.

[11] The law says “teaching” means the occupation of teaching in a pre-elementary, an elementary or a secondary school, including technical or vocation school.³

[12] Teachers are not entitled to receive EI benefits other than pregnancy or parental benefits during the summer, winter, and spring non-teaching periods unless they meet certain conditions.⁴ The purpose of the employment insurance scheme is to pay benefits to those who are “truly unemployed” and seeking work. Teachers are not “truly unemployed” during school breaks, and so they are not entitled to benefits.⁵

[13] In cases of genuine unemployment during the non-teaching periods, teachers may receive employment insurance benefits during school breaks if they meet one of the following conditions: the contract for teaching employment has terminated; the

³ EI Regulations, subsection 33(1)

⁴ EI Regulations, subsection 33(1)

⁵ *Oliver v. Canada (Attorney General)*, 2003 FCA 98. This is how I refer to decisions of the court that apply to the circumstances of this appeal.

employment in teaching was on a casual or substitute basis; or, the claimant qualifies to receive benefits on the basis of hours of insurable employment accumulated in an occupation other than teaching.⁶

[14] The onus is on the Claimant to prove he is entitled to benefits.⁷

Issue 1: Was the Claimant employed in teaching?

[15] No, I find the Claimant was not employed in teaching within the meaning of the EI Regulations.

[16] The Commission says that 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.

[17] The appeal file has a letter dated September 17, 2021 from the school district to the Claimant. The letter serves to confirm his “assignment for evening classes for the September 2021 to June 2022 year as a 0.20 CLB 3+ Instructor, commencing on Tuesday September 1, 2021.” The letter says the classes are virtual on Tuesday and Thursday and that “continued employment during this time will be based on sufficient and regular enrollment.”

[18] The Claimant testified he was employed by the [name] Adult and Continuing Education Centre (the Centre). The Centre is owned and operated by a school district that operates in two cities. The Centre is funded by the provincial government. The Centre provides ESL training to adults so that they may survive in the community and find work.

[19] The Claimant said he was teaching ESL to adult learners who ranged in age from 30 to 65 years. He said the learners are at various levels. His evening teaching was enrollment based. If there were no students he would have no work. The Claimant said

⁶ EI Regulations, subsection 33(2).

⁷ Employment Insurance Act (EI Act), section 49(1); *Falardeau A-396-85*.

there is no degree or diploma awarded from these studies nor is there a graduation from these studies.

[20] The Claimant explained that “CLB” means Canadian Language Benchmark which is a federal government classification for ESL. He does not know what the 0.20 refers to. He was expected to teach for three hours a week on two evenings a week.

[21] The Claimant testified he was also casual a call-in instructor for ESL at the same Centre. He said a “supply teacher” meant that he had to be available for work when he was called. He would be called in to work during the daytime hours to replace an ESL teacher who was off on sick leave or absent for other reasons. He did not teach any other subjects. He did not work every day. On occasion he worked less than a full day.

[22] The Claimant testified he heard about EI benefits from his co-workers. His co-workers were working full-time, six hours a day, five days a week. They told the Claimant they were getting EI benefits during the December and March breaks. They encouraged him to apply for EI benefits. The Claimant submitted that he does not have a contract with the school board. He had a teaching assignment for one ESL class to instruct two nights a week. The remainder of the work he got with the Centre was as a casual call-in to replace other ESL teachers.

[23] The Claimant testified he does not have any group insurance benefits with his employment at the Centre. He does not pay into a pension. He does not accrue any seniority. He is not paid during the December or March breaks and he is not paid over the summer break. The Claimant was hired to teach ESL during summer school for the Centre when he replaced a teacher who was off due to illness. He is a member of the Ontario Secondary School Teachers’ Federation (OSSTF).

[24] I note that the Commission made no submissions on whether the Claimant was a “teacher” as defined by the EI Regulations but has simply assumed this to be the case. The Claimant took no position on this point, arguing instead that he is a casual call-in teacher who is only paid when he works and that he is the same as his full-time co-workers who have received EI benefits.

[25] The definition of “teaching” for the purpose of section 33 of the EI Regulations is limited to duties performed in the educational institutions listed in the regulation which are “a pre-elementary, an elementary, or a secondary school, including a technical or vocational school.”⁸

[26] In *Canada (Attorney General) v. Lafrenière*, 2013 FCA 175, (*Lafrenière*) the Federal Court of Appeal determined that the Board of Referees and the Umpire erred in not considering whether the claimant was engaged in teaching in one of the institutions mentioned in the EI Regulations.⁹ In *Lafrenière*, the Court noted the Commission contended that the claimant was subject to section 33 of the EI regulations. “However,” the Court said, “for this to be true, a teacher must be employed in that capacity in one of the educational institutions mentioned in that provision.”¹⁰

[27] The Court said by choosing to include “technical or vocational school” within “secondary school,” section 33 of the EI Regulations provides a meaning of “secondary school” that goes beyond its regular meaning. The Court determined that an adult education or training centre is not a secondary school (some overlap in training notwithstanding). It said adult education is a separate concept from vocational and technical and that adult training centres would need to be explicitly included in the list of educational institutions for the regulation to apply.¹¹

[28] I accept the Claimant’s testimony that he was employed in an adult and continuing education centre to teach ESL to adults. This is also supported in his application for EI benefits which lists his job title as “English as a second language teacher (except elementary, high school or university)(4021).”

[29] I also accept the Claimant’s evidence that the adults he taught ranged in age from 30 to 65 years. These adult learners were at various levels and would not graduate or receive a diploma or degree once they completed their learning. That the Centre was owned and operated by a school board is not determinative of the matter.

⁸ *Canada (Attorney General) v. Lafrenière*, 2013 FCA 175

⁹ *Canada (Attorney General) v. Lafrenière*, 2013 FCA 175, paragraph 8.

¹⁰ *Canada (Attorney General) v. Lafrenière*, 2013 FCA 175, paragraph 20

¹¹ *Canada (Attorney General) v. Lafrenière*, 2013 FCA 175

The position title his employer chose to record on the ROEs is also not determinative of the matter.

[30] The evidence tells me the Claimant was employed in an adult education centre. I am bound to respect the Court's finding in *Lafrenière* that, for section 33 of the EI Regulations to apply, a claimant must be teaching in one of the types of institutions listed. The Claimant was teaching in an adult education centre which the court has said is not a secondary school. This means the Claimant was not employed in teaching in a pre-elementary, an elementary or a secondary school, including a technical or vocational school. As a result, while the Claimant was employed by a school board and the nature of the services he provided were instructional he is not a "teacher" within the meaning of section 33 of the EI Regulations because he was not teaching in one of the listed types of educational institutions. Accordingly, I find that section 33 does not apply to the Claimants and the Claimant is not disentitled from receiving EI benefits during the non-teaching breaks.

Issue 2: If so, is the Claimant entitled to receive benefits during the non-teaching period?

[31] Having determined the Claimant was not engaged in teaching within the meaning of the EI Regulations, I do not need to decide this issue.

Issue 3: Was the Claimant not unemployed from January 3, 2022 to March 11, 2022 and from March 21, 2022 to June 30, 2022?

[32] Subject to other provisions in the EI Act, EI benefits are payable to a claimant for each week of unemployment that falls in a benefit period.¹²

[33] The law says that a week of unemployment for a claimant is a week in which the Claimant does not work a full working week.¹³ And, a full working week is defined as

¹² See section 9 of the EI Act. A benefit period is usually the 52 week period after you apply for EI benefits (section 10, EI Act).

¹³ See section 11(1) of the EI Act

the number of hours, days or shifts normally worked in a calendar week by persons in the Claimant's grade, class of shift at his worksite.¹⁴

[34] The Commission's reconsideration decision was issued on April 27, 2022. It said that since the Claimant was under contract for the supply teacher position from September 9, 2021 to June 30, 2022, he was considered not unemployed for the whole period.

[35] The Commission says that the Claimant told a Service Canada officer he was working full time from September 9, 2021 to December 16, 2021 and then again from January 3, 2022. It says the Records of Employment (ROEs) support that the Claimant was working full weeks. Therefore, the Commission says, the Claimant was considered to be working full weeks and is not considered to be unemployed during the teaching periods.

[36] It said for the March break non-teaching period, it can be concluded the Claimant was not working full work weeks. The Commission submitted that there were two distinct periods when the Claimant was not unemployed.¹⁵ Therefore, the Commission suggested modifying the disentitlement [for not being unemployed] to be from January 3, 2022 to March 11, 2022 and from March 21, 2022 to June 30, 2022.

[37] I note that the Claimant applied for EI benefits on December 20, 2021.

[38] There are 10 ROEs in the appeal file. Information from the two ROEs covering the period January 3, 2022 to June 30, 2022 follows.

[39] From January 3, 2022 to March 10, 2022 the Claimant was employed by the school board that operated the Centre for 379 hours as a "SupplyOSSTF." He was paid bi-weekly, his earnings were the same for four pay periods, variable for two pay periods and totaled \$13,253.42. The ROE was issued due to Shortage of Work / End of contract or season. The comments section says "March break for Job SupplyOSSTF."

¹⁴ See section 31 of the EI Regulations.

¹⁵ The Commission's submissions are in GD4 and are dated August 4, 2022.

[40] From March 21, 2022 to June 29, 2022 the Claimant was employed by the school board that operated the Centre for 278 hours as a "SupplyOSSTF." He was paid bi-weekly, his earnings were variable and totaled \$10,234.13. The ROE was issued due to Shortage of Work / End of contract or season.

[41] The Claimant testified that full time teachers at the Centre worked 6 hours a day, 5 days a week for a total of 30 hours a week. As a result, I find that a full working week for the Claimant would be 6 hours a day, 5 days a week for a total of 30 hours a week.

[42] The Claimant testified that he had an assignment to teach ESL for 3 hours on two nights a week. The work from this assignment depended on the enrollment.

[43] The Claimant testified that he was a casual call-in teacher at the Centre. He would be called in to replace teachers who were off work. He said that he may be asked to work for part of a day, a full day, a week or two weeks at most. There were weeks and days that he did not work because he was not called. And, he said, there were some days that he worked less than 6 hours.

[44] The Claimant testified that he told a Service Canada officer that he was working full-time because at the time of the conversation for the most part he was getting called to work full time replacing two teachers who were on sick leave. This conversation took place on April 27, 2022. But, the Claimant testified, in April, May and June of 2022, a teacher he had been replacing returned to work gradually on an ease back so he only filled in for the time the teacher was not at work. The Claimant testified that there were some days when he did not work and some days when he worked less than 6 hours a day.

[45] The ROEs show the Claimant was paid varying amounts for each bi-weekly pay period. This evidence tells me the Claimant was not working full working weeks for every week from January 3, 2022 to March 11, 2022 and from March 21, 2022 to June 30, 2022.

[46] That the Claimant's employer classified him as a SupplyOSSTF is not determinative of whether he was working full working weeks. What is determinative of the issue is the number of hours, days and shifts the Claimant worked in a week.

[47] Based on the evidence in the appeal file and the Claimant's testimony, I find that the Claimant was not working full working weeks for some of the weeks in the periods from January 3, 2022 to March 11, 2022 and from March 21, 2022 to June 30, 2022.

[48] This means the Claimant might be entitled to some EI benefits during those weeks provided he meets the other requirements for receiving benefits. I encourage the Commission to contact the Claimant, immediately upon receipt of this decision, to determine his eligibility for benefits during these weeks.

Conclusion

[49] The appeal is allowed

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