Date: 20060124

Dockets: A-367-04
A-368-04

Citation: 2006 FCA 27

CORAM: **DÉCARY J.A.**
SEXTON J.A.
EVANS J.A.

BETWEEN:

SHEILA STONE

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard at Toronto, Ontario, on December 13, 2005.

Judgment delivered at Ottawa, Ontario, on January 24, 2006.

REASONS FOR JUDGMENT BY:	SEXTON J.A.
CONCURRED IN BY:	DÉCARY J.A.
DISSENTING REASONS BY:	EVANS J.A.

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REASONS FOR JUDGMENT

SEXTON J.A.

[1] This is an application for judicial review of two May 21, 2004 decisions of the Umpire, both of which denied the applicant, Sheila Stone, employment insurance benefits ("EI benefits"). Since at least 1995, the applicant has worked as a teacher for the Or Haemet Sephardic School ("the employer") from September until June of each year. She sought to collect EI benefits for the months of July and August 2001 and 2002 the summer recess periods, when she was not teaching. The Board of Referees (the "Board") denied her those benefits for the months of July and August 2001, but a differently constituted panel granted them to her for those months of 2002. The Umpire upheld the former decision and overturned the latter one on the basis that the applicant was not entitled to

EI benefits during her "non-teaching period," pursuant to subsection 33(2) of the *Employment Insurance Regulations* (the "Regulations").

[2] In this court, the applicant argues that she falls under an exception to subsection 33(2) that allows teachers whose contracts have terminated to receive EI benefits during their non-teaching periods. That exception appears in section 33 of the Regulations. In 2001 and 2002, the relevant provisions of that section read:

33. (1) The definitions in this subsection apply in this section.	33. (1) Les définitions qui suivent s'appliquent au présent article.
"non-teaching period" means the period that occurs annually at regular or irregular intervals during which no work is performed by a significant number of people employed in teaching. (période de congé)	« enseignement » La profession d'enseignant dans une école maternelle, primaire, intermédiaire ou secondaire, y compris une école de formation technique ou professionnelle. (teaching)
"teaching" means the occupation of teaching in a pre-elementary, an elementary or a secondary school, including a technical or vocational school. (enseignement)	« période de congé » La période qui survient annuellement, à des intervalles réguliers ou irréguliers, durant laquelle aucun travail n'est exécuté par un nombre important de personnes exerçant un emploi dans l'enseignement. (non-teaching period)
(2) A claimant who was employed in teaching for any part of the claimant's qualifying period is not entitled to receive benefits, other than those payable under sections 22 and 23 of the Act, for any week of unemployment that falls in any non-teaching period of the claimant unless	(2) Le prestataire qui exerçait un emploi dans l'enseignement pendant une partie de sa période de référence n'est pas admissible au bénéfice des prestations -- sauf celles prévues aux articles 22 et 23 de la Loi -- pour les semaines de chômage comprises dans toute période de congé de celui-ci, sauf si, selon le cas :
(*a*) the claimant's contract of employment for teaching has terminated;	*a*) son contrat de travail dans l'enseignement a pris fin;
(*b*) the claimant's employment in teaching was on a casual or substitute	*b*) son emploi dans l'enseignement était exercé sur une base occasionnelle

basis; or	ou de suppléance;
(*c*) the claimant qualifies to receive benefits in respect of employment in an occupation other than teaching.	*c*) il remplit les conditions requises pour recevoir des prestations à l'égard d'un emploi dans une profession autre que l'enseignement.
…	…

[3] The related regulation-making power is currently set out in paragraph 54(*j*) of the *Employment Insurance Act*, which reads:

Regulations	Règlements
54. The Commission may, with the approval of the Governor in Council, make regulations	54. La Commission peut, avec l'agrément du gouverneur en conseil, prendre des règlements :
…	…
(*j*) prohibiting the payment of benefits, in whole or in part, and restricting the amount of benefits payable, in relation to persons or to groups or classes of persons who work or have worked for any part of a year in an industry or occupation in which, in the opinion of the Commission, there is a period that occurs annually, at regular or irregular intervals, during which no work is performed by a significant number of persons engaged in that industry or occupation, for any or all weeks in that period;	*j*) interdisant le paiement de prestations, en tout ou en partie, et restreignant le montant des prestations payables pour les personnes, les groupes ou les catégories de personnes qui travaillent ou ont travaillé pendant une fraction quelconque d'une année dans le cadre d'une industrie ou d'une occupation dans laquelle, de l'avis de la Commission, il y a une période qui survient annuellement à des intervalles réguliers ou irréguliers durant laquelle aucun travail n'est exécuté, par un nombre important de personnes, à l'égard d'une semaine quelconque ou de toutes les semaines comprises dans cette période;
…	…

I. FACTUAL BACKGROUND

[4] The Or Haemet Sephardic School is a non-unionized and privately funded institution. It first employed the applicant in approximately 1995. Since then, she has taught kindergarten there from September until June of each year.

[5] At the conclusion of each school year, the employer would inform the applicant that it was pleased with her teaching and that if enrolment and funding for the age group she taught were sufficient, she would be contacted in August and work at the school again come the fall. The employer did this so that the applicant could remain available to return to the school. Indeed, there is no evidence that the applicant ever sought alternative employment, the term of which would carry into the autumn. In fact, it does not appear that the applicant has ever worked for any employer but the Or Haemet Sephardic School over the past ten years.

[6] Although the applicant received no compensation from the Or Haemet Sephardic School during July and August, every summer she would apply for EI benefits. She was granted these benefits for the months of July and August of the years 1996, 1997, 1998, 1999 and 2000. However, Human Resources Development Canada ("HRDC") denied her EI benefits for the period July 1 to August 30, 2001. The Board upheld this decision, as did the Umpire whose decision is under review in this case. Likewise, HRDC refused the applicant EI benefits for the period July 1 to August 30, 2002. However, the Board reversed this decision. The Umpire, on the other hand, overturned the Board. In these reasons, I review these two decisions of the Umpire.

II. ADJUDICATIVE HISTORY

1) THE FINDINGS OF THE BOARD

[7] The first Board unanimously held that the applicant had failed to prove that she was entitled to EI benefits for July and August 2001. It rested its conclusion on the fact that she had worked for her employer for ten years and a relationship existed between them.

[8] With respect to July and August 2002, the second Board found that since the applicant did not have continuity of employment with the employer, her contract of employment had terminated and she was entitled to EI benefits. First, the Board observed that she did not have a contract or promise of a contract or any linkages with her employer because she received no payments from her employer after the termination of her contract at the end of June. Next, it commented that *Ying v. Canada*, CUB 40255 concerned "circumstances not unlike this case." Without further explanation, the Board concluded with the observation that in *Ying*, it was determined that the claimant could not have been said to have a contract of employment operating in the non-teaching period.

2) THE FINDINGS OF THE UMPIRE WITH RESPECT TO THE 2001 AND 2002 EI BENEFIT CLAIMS

[9] The Umpire relied on, *inter alia*, *Oliver v. Canada (Attorney General)*, 2003 FCA 98 ["*Oliver*"] for the proposition that "unless there is a veritable break in the continuity of a teacher's employment, the teacher will not be entitled to EI benefits for the non-teaching period." After considering all of the evidence, the Umpire found that the applicant had been employed from year to year and there was no interruption in that employment. She did not satisfy the requirement of a veritable break in employment after the end of the school year.

III. STANDARDS OF REVIEW

1) INTRODUCTION

[10] "In every case where a statute delegates power to an administrative decision-maker, the

reviewing judge must begin by determining the standard of review on the pragmatic and functional approach." *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19 at para. 21. In this case, one administrative decision maker, the Umpire, reviewed a decision of another administrative tribunal, the Board. Therefore, this court must determine whether the Umpire applied the correct standard of review to the Board's decision. *Meechan v. Canada (Attorney General)*, 2003 FCA 368 at para. 11. If the Umpire chose the right standard, this court must determine the standard applicable to the Umpire's decision and review it on that basis.

[11] In the pragmatic and functional approach, four factors are considered to determine the appropriate standard of review. They are the nature of the question under review law, fact or mixed law and fact the expertise of the decision maker relative to that of the reviewer; the statutory mechanism of review; and the purposes of the legislation and the particular provision.

2) THE UMPIRE'S REVIEW OF THE BOARD DECISIONS

[12] The Umpire did not explicitly address the question of the standard of review. However, he seemed to rely on a correctness standard. For instance, he undertook a fresh analysis of the case. Had he been applying a standard of reasonableness *simpliciter* or patent unreasonableness, he would not have asked himself what the correct decision would have been, but only parsed the Board's reasons. See generally *Law Society of New Brunswick v. Ryan*, 2003 SCC 20 at paras. 51 and 54. Moreover, when he considered the Board's decision with respect to the 2001 EI benefits, he observed that the Board was "correct in law" in finding that there was still a continuing relationship between the applicant and the employer.

[13] The Umpire was right to hold the Board decisions to a standard of correctness. Admittedly,

at first glance, the first factor in the pragmatic and functional analysis suggests that some deference was due to the Board decisions. After all, the nature of the question appears to be mixed law and fact. A paragraph 33(2)(*a*) determination involves the application of a legal standard "terminated" to the facts of the applicant's case. See also *Gauthier v. Canada (Employment and Immigration Commission)*, [1995] F.C.J. No. 1350 (C.A.).

[14] However, in *Housen v. Nikolaisen*, 2002 SCC 33 at para. 27, the Supreme Court of Canada, invoking *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 at para. 39, explained how an error on a question of mixed law and fact can amount to a pure error of law subject to a correctness standard:

> …if a decision-maker says that the correct test requires him or her to consider A, B, C, and D, but in fact the decision-maker considers only A, B, and C, then the outcome is as if he or she had applied a law that required consideration of only A, B, and C. If the correct test requires him or her to consider D as well, then the decision-maker has in effect applied the wrong law, and so has made an error of law.

In short, "Mischaracterizing the proper legal test results in the application of the correctness standard." *Baker Petrolite Corp. v. Canwell Enviro-Industries Ltd.*, 2002 FCA 158 at para. 52.

[15] The next factor in the pragmatic and functional analysis focuses on the administrative decision-maker's expertise. The Board is not an expert on the central question in this case—the correct legal approach to use to determine whether a teaching contract has terminated within the meaning of paragraph 33(2)(*a*) of the Regulations. According to *Budhai v. Canada (Attorney General)*, 2002 FCA 298 at para. 42:

> . . . the general legal expertise of umpires, as well as their knowledge of employment insurance legislation, indicate that their interpretation of the relevant statutory provisions should prevail over that of a board of referees, an adjudicative body that does not necessarily include a lawyer and sits only part-time.

Indeed, in commenting on the relative expertise of the Umpire in comparison with the Board, the

Supreme Court of Canada has observed that the legislature intended "to give the power to

interpret law to the umpire and not the Board of Referees." *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22 at para. 21.

[16] The *Employment Insurance Act* provides further evidence that the legislature did not intend that deference be shown to Board answers to legal questions. It provides for appeals as of right from Board decisions evincing an error of law, "whether or not the error appears on the face of the record." *Employment Insurance Act*, section 115.

[17] The final factor in the pragmatic and functional analysis focuses on the purposes of the legislation and the particular provision. To be sure, the employment insurance ("EI") scheme is aimed at inexpensive and expeditious decision-making. However, that does not necessarily tip the balance of the pragmatic and functional factors in favour of a deferential standard of review. After all, administrative tribunals are usually set up to promote inexpensive and expeditious decision-making. That type of decision-making does not "loom so unusually large in this scheme as to trump . . . even though employment insurance claimants are often of modest means." See generally *Canada (Attorney General) v. Sveinson*, 2001 FCA 315 at para. 15.

[18] After reviewing the four relevant factors, it is my conclusion that Board answers to questions of law are reviewable on a correctness standard. See also *Canada (Attorney General) v. Kos*, 2005 FCA 319 at para. 5; *Meechan v. Canada (Attorney General)*, 2003 FCA 368 at para.

16; *Budhai v. Canada (Attorney General)*, 2002 FCA 298 at para. 48. The Umpire rightly applied a

correctness standard to the Board decisions that he reviewed.

3) THIS COURT'S REVIEW OF THE UMPIRE'S DECISIONS

[19] In my view, the Umpire in the decisions below formulated the correct legal test. Therefore, the task of this court is to review the Umpire's application of that legal standard to the facts of the case. The nature of the question is thus one of mixed law and fact. This factor in the pragmatic and functional analysis indicates that some deference should be shown to the Umpire's findings.

[20] The factor of relative expertise, on the other hand, points to the opposite conclusion. In *Canada (Attorney General) v. Sveinson*, 2001 FCA 315 at paras. 16 and 17, this court commented on the legal expertise of Umpires relative to that of the courts:

> ¶ 16 . . . the decision-makers [the Umpires], judges of either the Trial Division of this Court, or other courts, do not bring to the task of interpreting the legislation an expertise superior to, or a perspective different from that of this Court. They are performing an adjudicative function no different in nature from that of this or of any other court: determining the legal rights of the parties on the basis of umpires' interpretation of detailed and complex legislation and its application to the facts of individual cases.
>
> ¶ 17 True, umpires may render more decisions on the legislation than members of this Court, but that is an insufficient basis for deference, especially since some members of this Court, when members of the Trial Division, may well have become familiar with employment insurance legislation. Further, judges are assigned *ad hoc* to sit as umpires in employment insurance cases, and, if they are serving judges, these assignments are simply part of their regular judicial duties. Hence, judicial deference to umpires' decisions cannot be justified on the ground of their unique expertise.

[21] However, the third factor in the pragmatic and functional analysis—that of a statutory right of appeal—again suggests that this court owes some deference to the Umpire's conclusions. Section 118 of the *Employment Insurance Act* is a privative clause:

Decision final	Décision definitive
118. The decision of the umpire on an appeal is final and, except for judicial review under the *Federal Courts Act*, is not subject to appeal to or review by any court.	118. La décision du juge-arbitre sur un appel est définitive et sans appel; elle peut cependant faire l'objet d'une demande de contrôle judiciaire aux termes de la Loi sur les Cours fédérales.

[22] As I discussed above, the final factor in the pragmatic and functional analysis—that of legislative purpose, and in particular inexpensive and expeditious decision-making—also favours a deferential standard.

[23] In conclusion, then, three of the four factors in the pragmatic and functional analysis indicate that this court should be wary of interfering with Umpire findings of mixed law and fact. Adopting a standard of reasonableness *simpliciter* when reviewing an Umpire's answer to a question of mixed law and fact is consistent with the prior jurisprudence of this court. See *e.g. Canada (Attorney General) v. Peace*, 2004 FCA 56 at para. 19 (citing *Budhai v. Canada (Attorney General)*, 2002 FCA 298; *Canada (Attorney General) v. Sacrey*, 2003 FCA 377); *Meechan v. Canada (Attorney General)*, 2003 FCA 368 at para. 16). In my view, it cannot be said that the Umpire's decisions were unreasonable.

IV. ANALYSIS

1) THE LAW

a) WHAT APPROACH IS USED TO DETERMINE WHETHER A TEACHING CONTRACT HAS TERMINATED?

i) THE LAW AND THE UMPIRE'S DECISION

[24] The fundamental legal issue in this case is the meaning of the words "the claimant's contract of employment for teaching has terminated" or, in French, "son contract de travail dans l'enseignement a pris fin." In my view, these phrases are intended to mean the same thing. Most recently, Létourneau J.A., in very thoughtful reasoning, has equated the words in issue with the absence of "continuity of employment." *Oliver* at para. 19. "[U]nless there is a veritable break in the continuity of a teacher's employment, the teacher will not be entitled to benefits for the non-teaching period." *Ibid*. at para. 27.

[25] In the decision below, the Umpire correctly pinpointed this as the applicable legal standard. The central question to which the Umpire directed his attention was whether the non-teaching period represented a veritable break in the claimant's employment:

> I have considered the arguments of the claimant and I have considered the jurisprudence. It is my view that the decision of the majority in the *Giammattei* case and the *Oliver* case is determinative of the issue. At par. 27 it is stated: 'Both [the line of jurisprudence in this Court and the legislative intent behind section 33] are based on the clear premise that, unless there is a veritable break in the continuity of a teacher's employment, the teacher will not be entitled to benefits for the non-teaching period. It is important that this fundamental premise be strongly underlined here because of the numerous claims that are pending on this issue and which deserve clarity from this Court on this matter.'
>
> Having considered the evidence before the Board of Referees, I am satisfied that it has been shown that this claimant has been employed from year to year and there is no interruption in her employment. I do not believe that because she works in a private school it makes any difference as the legislation does not differentiate between a private school and a public school. It also does not make any statement concerning the annual pay being spread over 12 months or ten months. The jurisprudence places a burden on the teacher to show on the balance of probabilities that they will not be returning to their job following the non-teaching period [sic.].

> That, in my opinion, would satisfy the requirement that there be a veritable break in employment after the end of the school year. [emphasis added]

Thus, the Umpire correctly excerpted the passage from *Oliver* that articulates the governing legal standard in paragraph 33(2)(*a*) cases. Moreover, he stated that, in light of all of the evidence, there had been "no interruption" in the claimant's employment. While the Umpire also considered whether it is more likely than not that the claimant would be returning to her job following the non-teaching period, it is clear that he did not view this question as the determinative inquiry. Instead, *in this particular case*, the answer to it assisted him in disposing of the key issue of whether there was a veritable break in the continuity of the applicant's employment. Indeed, in conclusion, he even reiterated that "the requirement" is "that there be a veritable break in employment." Ultimately, in my view, the Umpire's analysis was governed by the correct legal test.

[26] That the likelihood of the claimant's returning to her position was only one factor in the Umpire's analysis is evident from his statement that he considered all of the evidence before the Board. Indeed, the Umpire was right to take all of the facts of the case into account. This approach is well grounded in the jurisprudence, which emphasizes the factually-intensive nature of paragraph 33(2)(*a*) determinations. In *Oliver* at paras. 17 and 18, for instance, Létourneau J.A. upheld the decision of the Umpire, who was of the view that:

> . . . a determination of whether a teacher fell or not within the scope of the exemption was not a determination which could be based solely on a purported date of termination stated in a contract. All the circumstances in a particular case had to be examined in light of the purpose and intention of the legislative scheme. [emphasis added]

The Umpire was right to reproduce this passage in his decision.

[27] Indeed, were I to express any concerns about the Umpire's reasons, I might highlight the

way in which he addressed the evidence. Certainly, he "considered the arguments of the claimant." He also "considered the evidence before the Board of Referees." Furthermore, he referred to the fact that the applicant's annual compensation was spread over only ten months. It might have been preferable to specify what pieces of evidence led him to conclude that the applicant's contract had not terminated.

ii) RELEVANT CONSIDERATIONS

[28] Conceivably, more often than not, certain factors will assist the courts in determining whether there was a veritable break in the continuity of the claimant's employment. The comments in *Oliver* suggest that in constructing such a list, the court should look to "the purpose and intention of the legislative scheme." *Oliver* at para. 17.

[29] There is no question that the legislative scheme is a useful guide. However, since *Oliver* was decided, Binnie J., writing for the majority of the Supreme Court of Canada in *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, 2005 SCC 26, has reviewed the proper approach to regulatory interpretation. In construing the regulation in that case, he drew on five sources. They were the mischief sought to be cured by the regulation, the regulatory scheme, the grammatical and ordinary sense of the words of the regulation, the regulation-making power of the Act pursuant to which the regulation was enacted and the general context of the regulation. See *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, 2005 SCC 26 at paras. 37-68. For Binnie J., the general context included the purpose of the related legislation and the Regulatory Impact Analysis Statement accompanying the regulation. *Ibid.* at paras. 45 and 46. In my view, Binnie J.'s five interpretive aids also assist in constructing a list of the types of facts that are legally relevant to a finding of whether a contract of employment for teaching has terminated within the meaning of paragraph 33(2)(*a*) of the

Regulations.

[30] I begin, then, with the mischief sought to be cured by paragraph 33(2)(*a*). The purpose of the regulation has been considered in previous decisions of this court. In *Canada (Attorney General) v. Donachey*, [1997] F.C.J. No. 579 (C.A.) at para. 5, it was said that:

> . . . The purpose of par. 46.1(2)(*a*) is clearly to avoid "double dipping," as was indicated in the passage from Stone J.A. [writing in *Re Attorney General of Canada and Taylor* (1991), 81 D.L.R. (4th) 679 at 687] quoted above. Desjardins J.A. put it this way in *St. Coeur* [*Attorney General of Canada v. St. Coeur*, [1996] F.C.J. No. 514 (C.A.)]:
>
> > The object of section 46.1 of the Regulations is to prevent teachers, whose salary is spread over a twelve-month period but who do not provide services every day, from being able to receive monies which come from two separate sources but which fulfil the same role.
>
> …

[31] I have no doubt that the prevention of double dipping is one of the purposes of paragraph 33(2)(*a*) of the Regulations. The regulatory scheme affirms this position. The only other reference to contract termination in the Regulations links the notion of an earnings interruption with that of contract termination. According to subparagraph 14(5)(*b*)(i) of the Regulations:

Interruption of Earnings	Arrêt de rémunération
…	[…]
(5) An interruption of earnings in respect of an insured person occurs	5) Un arrêt de rémunération se produit :
…	[…]
(*b*) in the case of an insured person who is employed under a contract of employment and whose earnings from that employment consist mainly of commissions, when	*b*) dans le cas d'un assuré employé aux termes d'un contrat de travail et dont la rémunération provenant de cet emploi est constituée principalement de commissions :
(i) the insured person's contract of employment is terminated, or	(i) soit lorsque son contrat de travail prend

fin,

… […]

[32] With the greatest of respect, though, I am reluctant to conclude that double dipping is the only mischief at which the regulator was aiming with this provision. The grammatical and ordinary sense of the words of paragraph 33(2)(*a*) indicates that it is intended to combat more than this abuse of the EI scheme. After all, "The paragraph does not provide that a teacher whose services and remuneration have temporarily ceased is eligible for benefits notwithstanding that the contract of employment continues to subsist." *Canada (Attorney General) v. Taylor*, [1991] F.C.J. No. 508 (C.A.).

[33] Indeed, I believe that the Umpire whose decision this court upheld in *Oliver* correctly articulated the purpose of paragraph 33(2)(*a*). In *Oliver* at para. 16, Létourneau J.A. reproduced the following comments of that Umpire:

> The intention of Parliament is to pay employment insurance benefits to those individuals who, through no fault of their own, are truly unemployed and who are seriously engaged in an earnest effort to find work. Teachers are not considered unemployed during the annual non-teaching periods and they are therefore not entitled to benefits, unless they meet one of the following three criteria set out in regulation 33(2):
>
> > a. the claimant's contract of employment for teaching has terminated;
> >
> > b. the claimant's employment in teaching was on a casual or substitute basis; or
> >
> > c. the claimant qualifies to receive benefits in respect of employment other than teaching.
>
> Parliament's intention, together with the object of the legislation and its scheme, leads me to the conclusion that the exemption provided for in Regulation 33(2)(a) is meant to provide relief to those teachers whose contracts terminate on June 30th and who, as a result, suffer a genuine severance of the employer and employee relationship. In other words, the exemption provides relief to those teachers who are, in the true sense of the word "unemployed", a term which is not synonymous with "not working".
>
> …

[emphasis added]

Although the *Oliver* Umpire referred to Parliament's intention and the purpose of the legislation, in my view, the underlined passages above describe the objectives of paragraph 33(2)(*a*) of the Regulations.

[34] The regulation-making power of the Act, the grammatical and ordinary sense of the words of the regulation and the general context confirm that the comments in *Oliver* accurately describe the mischief targeted by paragraph 33(2)(*a*).

[35] The provision in issue is traceable to a similarly-worded, 1983 amendment to section 46.1 of the *Unemployment Insurance Regulations*. It was enacted pursuant to paragraph 58(*h.1*) of the *Unemployment Insurance Act*. That paragraph reads:

Regulations	Règlements
58. The Commission may, with the approval of the Governor in Council, make regulations	La Commission peut, avec l'agrément du gouverneur en conseil, prendre des règlements :
…	[…]
(*h.1*) prohibiting the payment of benefit, in whole or in part, and restricting the amount of benefit payable, in relation to persons or to groups or classes of persons who work or have worked for any part of a year in an industry or occupation in which, in the opinion of the Commission, there is a period that occurs annually, at regular or irregular intervals, during which no work is performed by a significant number of persons engaged in that industry or occupation, for any or all weeks in that period;	*h.1)* interdisant le paiement de prestations, en tout ou en partie, et restreignant le montant des prestations payables pour les personnes, les groupes ou les catégories de personnes qui travaillent ou ont travaillé pendant une fraction quelconque d'une année dans le cadre d'une industrie ou d'une occupation dans laquelle, de l'avis de la Commission, il y a une période qui survient annuellement à des intervalles réguliers ou irréguliers durant laquelle aucun travail n'est exécuté, par un nombre important de personnes, à l'égard d'une semaine quelconque ou de toutes les semaines comprises dans cette période;
…	

[…]

[36] In the current *Employment Insurance Act*, the equivalent provision states:

Regulations	Règlements
54. The Commission may, with the approval of the Governor in Council, make regulations	La Commission peut, avec l'agrément du gouverneur en conseil, prendre des règlements :
…	[…]
(*j*) prohibiting the payment of benefits, in whole or in part, and restricting the amount of benefits payable, in relation to persons or to groups or classes of persons who work or have worked for any part of a year in an industry or occupation in which, in the opinion of the Commission, there is a period that occurs annually, at regular or irregular intervals, during which no work is performed by a significant number of persons engaged in that industry or occupation, for any or all weeks in that period;	*j)* interdisant le paiement de prestations, en tout ou en partie, et restreignant le montant des prestations payables pour les personnes, les groupes ou les catégories de personnes qui travaillent ou ont travaillé pendant une fraction quelconque d'une année dans le cadre d'une industrie ou d'une occupation dans laquelle, de l'avis de la Commission, il y a une période qui survient annuellement à des intervalles réguliers ou irréguliers durant laquelle aucun travail n'est exécuté, par un nombre important de personnes, à l'égard d'une semaine quelconque ou de toutes les semaines comprises dans cette période;
…	[…]

[37] Paragraph 58(*h.1*) of the *Unemployment Insurance Act* and paragraph 54(*j*) of the *Employment Insurance Act* highlight that, in certain industries and occupations, there are periods "during which no work is performed." They thus support the position in *Oliver* that the word "unemployed" cannot be equated with the phrase "not working" or, to paraphrase paragraph 58(*h.1*), "not performing work."

[38] Likewise, the plain wording of section 33 acknowledges that teaching is an industry in which *de facto* contractual relationships are based on a twelve-month period, even though,

predictably, no work will be performed during some period of the year. According to subsection 33(1):

33. (1) The definitions in this subsection apply in this section.	33. (1) Les définitions qui suivent s'appliquent au présent article.
"non-teaching period" means the period that occurs annually at regular or irregular intervals during which no work is performed by a significant number of people employed in teaching. (période de congé)	« période de congé » La période qui survient annuellement, à des intervalles réguliers ou irréguliers, durant laquelle aucun travail n'est exécuté par un nombre important de personnes exerçant un emploi dans l'enseignement. (non-teaching period)

In short, the regulation-making power of the Act and the language of section 33 affirm that paragraph 33(2)(*a*) is intended to combat the mischief of teachers collecting EI benefits when they cannot be said to be truly unemployed, but nevertheless are not performing work during the non-teaching period.

[39] The Explanatory Note that accompanied the 1983 amendment to section 46.1 of the *Unemployment Insurance Regulations* also indicates that paragraph 33(2)(*a*) is intended to prevent the collection of benefits by teachers in permanent positions during the non-teaching period. It stated:

> This amendment prohibits the payment of benefits, other than maternity benefits, to teachers, during their annual non-teaching period unless their contract has been terminated, their employment was on a casual or substitute basis or they qualified to receive benefits on the basis of other employment. When a teacher does qualify for benefits on the basis of other employment, benefits are payable only on the basis of the other employment.

[40] The notion that paragraph 33(2)(*a*) of the Regulations is intended to ensure that only "truly unemployed" teachers are entitled to EI benefits is not inconsistent with the purpose of the *Employment Insurance Act*. In *Reference re Employment Insurance Act (Can.), ss. 22 and 23*, 2005

SCC 56 at para. 18, the Supreme Court of Canada reviewed the jurisprudence on the object of the legislation:

> . . . In *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22 at p. 41, La Forest J., quoting the words of Lacombe J., who was on the panel of the Federal Court of Appeal in that case, described the purpose of the *Unemployment Act, 1971*, which seems no different from the purpose of the current Act, as follows:
>
> > ... to create a social insurance plan to compensate unemployed workers for loss of income from their employment and to provide them with economic and social security for a time, thus assisting them in returning to the labour market.
>
> In *Williams v. Canada*, [1992] 1 S.C.R. 877, Gonthier J. added that the purpose behind unemployment insurance benefits:
>
> > ... looks to the past, present and future. Benefits are contingent on qualifying employment in the past. They are meant to provide income and security for the present, in lieu of the employment income which has been lost. However, the benefits also look to the future, enabling the recipient to find a new job without hardship and with a sense of security. (at p. 895)
> >
> > [emphasis added]

The majority in *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22 at para. 55 also warned that:

> One must not . . . lose sight of the fact that the overall objective of this particular Act is to provide a temporary sanctuary for those wishing to remain in the active labour force, but who are unable for the moment, to find employment.
>
> [emphasis added]

[41] Finally, the *Oliver* view of the purpose of paragraph 33(2)(*a*) accords with the *Digest of Entitlement Principles* (the "*Digest*"). The *Digest* is a reference tool that contains the principles applied by HRDC when deciding EI benefit claims. According to "Chapter 14 – Teachers," "14.5.0 – Availability":

> Claimants engaged in the occupation of teaching, like any other claimants, must prove they are capable of and available for work and unable to obtain suitable employment for any working day of a benefit period. . . .
>
> . . . teachers need to demonstrate that, during the non-teaching period, they are willing and able to accept immediately any offer of suitable employment and that no restrictions exist that would limit their employment opportunities.
>
> The concept of a reasonable period of time to find teaching employment will not be applied during the non-teaching periods. The availability of the claimant must be supported by actions and evidence as would be required of any claimant. A teacher

> must, during the non-teaching periods, seek work in other occupations in which there is employment opportunities if there are little or no teaching opportunities during the non-teaching period [sic.].
>
> [internal citations omitted]

The "truly unemployed" will be able "to demonstrate that, during the non-teaching period, they are . . . able to accept immediately any offer of suitable employment and that no restrictions exist that would limit their employment opportunities." The requirement of seeking "work in other occupations in which there is employment opportunities if there are little or no teaching opportunities during the non-teaching period [sic.]" is also revealing. As was suggested in *Oliver*, teachers whose contracts have terminated, and who are thus entitled to EI benefits, must be "seriously engaged in an earnest effort to find work."

[42] In light of this understanding of the purpose of paragraph 33(2)(*a*), logic suggests the types of considerations that should be considered relevant to determining whether there had been a veritable break in the continuity of the applicant's employment. It is only reasonable that, when determining whether a case falls within the purview of paragraph 33(2)(*a*) of the Regulations, it may be helpful to take into account factors such as:

i. The length of the employment record;

ii. The duration of the non-teaching period;

iii. The customs and practices of the teaching field in issue;

iv. The receipt of compensation during the non-teaching period;

v. The terms of the written employment contract, if any;

vi. The employer's method of recalling the claimant;

vii. The record of employment form completed by the employer;

viii. Other evidence of outward recognition by the employer; and

ix. The understanding between the claimant and the employer and the respective conduct of each.

[43] Several cautionary notes must be sounded about this list of considerations. First, it is not exhaustive. Moreover, not every one of the factors on it will provide insight into every case. Indeed, the courts must be extremely sensitive to the factual background underlying every paragraph 33(2)(*a*) case. These factors are not to be weighed mechanistically. It is entirely inappropriate to simply count the number of factors suggesting a finding of contract termination and the number militating against that conclusion and then endorse the conclusion favoured by the greater number of factors. Instead, to determine whether a teaching contract has terminated within the meaning of paragraph 33(2)(*a*), all of the circumstances of every case must be examined in light of the purpose of the regulation.

iii) RELATED JURISPRUDENCE

[44] In considering the light that these factors shed on particular paragraph 33(2)(*a*) cases, it may be beneficial to examine two lines of jurisprudence, both of which deal with wrongful dismissal claims. The first line, the "contract-term cases," considers whether the contract in issue was of a fixed or an indefinite duration. The second line deals with paragraph 240(1)(*a*) of the *Canada Labour Code* (the "Code"), which only allows individuals who have completed "twelve consecutive months of continuous employment" to complain to an inspector about their allegedly unjust dismissals.

[45] In the contract-term cases, the courts consider whether the contract in issue is of an indefinite or fixed term to calculate the appropriate amount of damages owing to the terminated

claimant by the employer. An employee who had worked under an indefinite contract is entitled to damages for reasonable notice. On the other hand, an employee who had been dismissed before her fixed-term contract had expired is only entitled to damages for breach of contract. A fixed-term employee whose contract was not renewed at the conclusion of its term is not entitled to any damages because the employment simply ceased in accordance with the terms of the contract.

[46] The approach that courts have taken to delineating the boundaries between fixed and indefinite term contracts is of interest in the present context. After all, the issue in the contract-term cases is very similar to that in this one. This applicant is essentially alleging that she had a fixed-term contract that terminated at the end of the school year. According to her, at the beginning of each school year, she would start work under a new fixed-term contract. It may be, though, that she actually worked under one contract of an indefinite duration while employed at the Or Haemet Sephardic School.

[47] The second line of authorities that may assist in determining whether a case is caught by paragraph 33(2)(*a*) addresses paragraph 240(1)(*a*) of the Code. It reads:

Complaint to inspector for unjust dismissal	Plainte
240. (1) Subject to subsections (2) and 242(3.1), any person	240. (1) Sous réserve des paragraphes (2) et 242(3.1), toute personne qui se croit injustement congédiée peut déposer une plainte écrite auprès d'un inspecteur si :
(*a*) who has completed twelve consecutive months of continuous employment by an employer, and	*a*) d'une part, elle travaille sans interruption depuis au moins douze mois pour le même employeur;
(*b*) who is not a member of a group of employees subject to a collective agreement,	*b*) d'autre part, elle ne fait pas partie d'un groupe d'employés régis par une convention collective.

> may make a complaint in writing to an inspector if the employee has been dismissed and considers the dismissal to be unjust.

[48] To determine whether a seasonally-employed claimant has completed twelve consecutive months of "continuous employment," this court has focused not on whether work was actually performed for at least twelve months, but on whether there was "continuity of employment" and "a continuous employment relationship" over that period. *Beothuk Data Systems Ltd., Seawatch Division v. Dean*, [1998] 1 F.C. 433 (C.A.) ["*Beothuk*"] at paras. 46, 50 and 28. Similarly, the Umpire in *Oliver* rightly recognized that the term "unemployed" "is not synonymous with 'not working'." *Oliver* at para. 16. Moreover, in *Oliver* at para. 19, Létourneau J.A. suggested that the touchstone of paragraph 33(2)(*a*) of the Regulations is "continuity of employment." Furthermore, in describing the decision of the Umpire that he was upholding, Létourneau J.A. highlighted that Umpire's observation that there had been "no severance of the relationship of employer and employee." *Ibid.* at para. 16. The *Oliver* Umpire's exact words were "a genuine severance of the employer and employee relationship." *Ibid.* Likewise, Malone J.A., in dissent, referred to "a continuing employment relationship." *Oliver* at para. 44. These phrases certainly echo those employed in *Beothuk*.

[49] Thus, in both paragraph 240(1)(*a*) and paragraph 33(2)(*a*) cases, the central question is whether there was a continuous employment relationship between the claimant and the employer. Had the claimant's contract of employment terminated, there would be no continuity of employment. See also *Beothuk* at para. 49. Accordingly, the way the courts have applied paragraph 240(1)(*a*) to seasonal workers may illuminate whether a teaching contract has terminated within the

meaning of paragraph 33(2)(*a*).

b) WHO BEARS THE BURDEN OF PROOF?

[50] In the decision below, the Umpire was correct in placing the persuasive burden on the applicant. After all, it is the claimant who is alleging that the contract has terminated and who is seeking benefits. It is not unfair to impose this legal burden, as the claimant will presumably have knowledge of the factual background of the employment relationship. See generally *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54 at para. 63. For that reason, the claimant is in a better position than is the respondent to put forward evidence as to whether, on the non-criminal standard of a balance of probabilities, there was a veritable break in the continuity of the claimant's employment.

2) APPLICATION

a) DID THE BOARD ERR IN LAW IN GRANTING THE APPLICANT'S 2002 CLAIM FOR EI BENEFITS?

[51] The Board appeared to rest its grant of 2002 EI benefits to the applicant, solely on the basis that the applicant was not receiving any form of compensation from her employer after the end of June. The full text of its reasons is reproduced below:

> In the claimant's case, she does not have a contract or promise of a contract or any linkages as she is paid no benefits whatsoever, after the termination of her contract.
>
> In *Ying v. Canada*, CUB 40255, Mr. Justice Strayer for the majority, in circumstances not unlike this case before the Board, concluded that the claimant could not have been said to have a contract of employment operating in the period June 30 to August 26 (non teaching).
>
> The Board finds that the claimant did not have continuity of employment with the Or Haemet Sephardic School. [emphasis added]

[52] It seems to me that the Board viewed *Ying v. Canada (Attorney General)*, [1998] F.C.J. No.

1615 (C.A.) ["*Ying*"] as standing for the proposition that the employer's non-payment is a sufficient condition for a finding of contract termination. With all due respect, this was an error of law. According to the majority in *Ying* at para. 1:

> . . . We agree with the findings of the Board of Referees that there was no continuity of employment here. We find that the facts indicate that there was a termination of the claimant's term contract of employment on June 30, 1996 and her next contract of employment did not begin until August 26, 1996. The evidence also indicates that she was not contractually entitled to any pay in respect of this period. [emphasis added]

In determining whether Ying's contract had terminated, the majority did not just consider the fact that the claimant was not contractually entitled to any pay in respect of the non-teaching period. After all, only after it had already concluded that "the facts indicate[d] that there was a termination of the claimant's term contract of employment" did it mention that "The evidence also indicate[d] that she was not contractually entitled to any pay in respect of this period [emphasis added]." In other words, the absence of employer compensation during the non-teaching period was not the majority's only consideration, but simply an additional factor in its analysis.

[53] To be sure, the court in *Bishop v. Canada (Employment Insurance Commission)*, 2002 FCA 276 ["*Bishop*"] at para. 5 commented:

> In *Ying* the teacher in question did not receive hold back pay throughout the summer whereas in the case before us Bishop did receive pay. The decision in *Ying* appears to have turned on the fact that Ying was not contractually entitled to any pay during the summer period.

This remark was not intended to indicate that employer non-payments are the *only* relevant factor in assessing whether a claimant's situation is caught by paragraph 33(2)(*a*) of the Regulations. Instead, the court was merely noting that in *Ying*, this consideration tipped the balance in the claimant's favour. That the *Bishop* court recognized that other facts were also relevant in *Ying* is clear in *Bishop* at para. 9, where the court distinguished *Ying* from the case before it on other grounds:

> Further, in *Ying*, it appears there was an interval of time between the claimant's successive contracts whereas in the present case there was no such interval because Bishop had already been hired for the second school year before the first school year had been completed.

[54] I admit, the fact that a claimant is not being compensated by the employer may indicate that the claimant's contract has terminated. It does not follow, however, that non-payment alone suffices for a finding of contract termination. Indeed, on several occasions, this court has found that, although the claimants were not being remunerated, their contracts were nevertheless not terminated and therefore they were not entitled to EI benefits. See *e.g. Canada (Attorney General) v. Donachey*, [1997] F.C.J. No. 579 (C.A.); *Canada (Attorney General) v. St-Coeur*, [1996] F.C.J. No. 514 (C.A.); *Canada (Attorney General) v. Taylor*, [1991] F.C.J. No. 508 (C.A.).

[55] Even if the Board invoked *Ying* because it believed that other facets of that decision spoke to the proper disposition of the case before it, there is a significant difference between *Ying* and this case that seems to have been disregarded by the Board. The claimant in *Ying* had completed one contract and signed another one for the following school year. This appears to have occurred only once in the claimant's time with the employer. In this case, on the other hand, the applicant has been with the same employer for at least a decade. Because the Board failed to acknowledge this crucial distinction between *Ying* and the case at bar, I have no alternative but to conclude that the Board failed to take a relevant consideration into account in its 2002 decision. The Board was legally required to consider all of the circumstances of the case. However, unlike the Umpire in the decision below, it failed to do so.

[56] In 2001, the Board may have considered all the facts. Unfortunately, its reasons in this regard are not entirely revealing:

> The Board finds that the appellant has failed to prove that, as a teacher, she was entitled to receive benefits for the non-teaching period. The Board found so because the appellant has worked for the employer for the last 10 years and that there is a relationship that exists between them.

[57] The Umpire, however, correctly took into account all of the evidence. Unfortunately, in so doing, he neglected to state which pieces of it he regarded as determinative. Therefore, I will explain the significance of the length of the applicant's employment record with the Or Haemet Sephardic School and review the other factors that justified the Umpire's conclusion that her case was not caught by paragraph 33(2)(*a*) of the Regulations.

b) IN LIGHT OF ALL THE CIRCUMSTANCES, WAS IT UNREASONABLE FOR UMPIRE TO FIND THAT THE APPLICANT WAS NOT ENTITLED TO EI BENEFITS FOR THE MONTHS OF JULY AND AUGUST 2001 AND 2002?

i) EMPLOYMENT RECORD LENGTH

[58] As the Board indicated in its 2001 decision, the applicant's decade-long employment record with the Or Haemet Sephardic School is a significant factor in this case.

[59] Indeed, the contract-term jurisprudence has acknowledged that well-established, lengthy employment records such as that in this case call for strict scrutiny by the courts. In *Ceccol v. Ontario Gymnastic Federation*, [2001] O.J. No. 3488 (C.A.) ["*Ceccol*"], for instance, the Ontario Court of Appeal held that a series of one-year contracts that, at first glance, arguably appeared to be of a fixed term, were actually of an indefinite one. In *Ceccol* at para. 26, the court observed:

> It seems to me that a court should be particularly vigilant when an employee works for several years under a series of allegedly fixed-term contracts. Employers should not be able to evade the traditional protections of the *ESA* [*Employment Standards Act*] and the common law by resorting to the label of 'fixed-term contract' when the underlying reality of the employment relationship is something quite different, namely, continuous service by the employee for many years coupled with verbal representations and conduct on the part of the employer that clearly signal an indefinite-term relationship. [emphasis added]

[60] While all courts should heed this warning, those hearing paragraph 33(2)(*a*) cases should pay particular attention to it. After all, in unjust dismissal cases, such as *Ceccol*, the claimant's and the employer's interests are opposed to each other. Generally, in these cases, to further her damage claim, the claimant will put forward evidence suggesting that the contract is one of indefinite duration. The employer, in opposition, will attempt to limit the quantum of damages that it may owe the claimant by arguing that the contract in issue is of a fixed term. This adversarial context facilitates judicial fact-finding. The court benefits from the presentation of two very different perspectives by parties who are extremely knowledgeable about the factual matrix underlying the case.

[61] Of course, paragraph 33(2)(*a*) cases also involve clashing points of view those of the claimant and the government. However, the interests of the actors with the most direct and intimate knowledge of the employment record in issue may be aligned. Potentially, both the EI claimant and the employer prefer the court to view the contract in issue as terminated at the conclusion of each academic year. Clearly, this is an attractive outcome for the claimant, since the claimant will then be entitled to EI benefits. Meanwhile, this result enables the employer to subsidize its labour costs with EI benefits. Thus, the duration of the employment record, as a factor that is relatively easy to verify, is an extremely significant one in paragraph 33(2)(*a*) analyses. In this case, the considerable length of the employment record supports the Umpire's finding that the applicant's contract had not terminated.

ii) DURATION OF NON-TEACHING PERIOD

[62] The regulation-making power of the Act, in conjunction with subsection 33(1) of the Regulations, recognizes that a teaching position is, in reality, for twelve months, even though the

teacher performs no work during the non-teaching periods that fall within the school year. Therefore, even if the term of a teacher's contract is only ten months in length, in considering whether the claimant is entitled to EI benefits, the court must take into account evidence pertaining to the teaching and non-teaching periods. In other words, an assessment of the continuity of employment must be based on the twelve-month school year.

[63] The fact that, each year, the applicant did no work at Or Haemet Sephardic School during July and August is thus another piece of evidence favouring the Umpire's conclusion that her case does not fall under the auspices of paragraph 33(2)(*a*). Two months is not an extensive period of non-work. In *Beothuk*, for instance, this court stated that it was not unreasonable to find that the continuity of the employment relationship had not been severed by a series of annual layoffs, even though each of them was nine months in length. *Beothuk* at para. 48. The applicant's two-month long, non-teaching periods can hardly be said to undermine the Umpire's conclusion that her contract had not terminated, particularly when they are examined against the backdrop of industry norms.

iii) CUSTOMS AND PRACTICES OF THE TEACHING FIELD

[64] Teaching is defined in subsection 33(1) of the Regulations as "the occupation of teaching in a pre-elementary, an elementary or a secondary school, including a technical or vocational school." The type of occupation and, more particularly, the pattern of employment in it, is another important factor in paragraph 33(2)(*a*) analyses. See also *Oliver* at para. 16.

[65] In this case, the applicant is an elementary school teacher. These types of teachers typically do not work during July and August. They go back to work in September, when the school year

begins anew. Indeed, this pattern of employment has characterized the applicant's work for the past ten years. This factor supports the Umpire's conclusion that the applicant's contract had not terminated.

iv) NON-TEACHING PERIOD COMPENSATION

[66] The Umpire acknowledged that the applicant received no explicit pay or benefits from her employer during the non-teaching period. This is a significant piece of evidence, since the jurisprudence on paragraph 33(2)(*a*) and the regulatory scheme both indicate that one of the EI abuses that paragraph 33(2)(*a*) is intended to combat is that of double dipping.

[67] That said, in a 2001 letter of which the Umpire took note, the employer stated:

> 8. There is no seniority scale with the respect to compensation and rather it is generally speaking a matter that is unilaterally determined by the school though teachers that taught the previous year are given a four percent increase [sic.]. [emphasis added]

This increase in pay at the conclusion of every non-teaching period should be borne in mind when reflecting on the significance of the applicant's contention that she was not explicitly compensated over the summer months.

v) TERMS OF WRITTEN EMPLOYMENT CONTRACT

[68] In this instance, the applicant worked under an oral contract. The evidentiary record does not contain any written documents, addressed to the applicant, detailing this contract. Therefore, this factor is not apparently relevant to this case.

[69] Still, I would like to note that a written contract of employment may provide evidence that speaks to the continuity of an employment relationship. In considering such a contract, the court should recall the rebuttable presumption in favour of termination only on reasonable notice. In *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986 at para. 20, the Supreme Court of Canada quoted approvingly from authorities endorsing an interpretive presumption in favour of indefinite-term contracts:

> This is the approach taken by Freedland, *supra* [M.R. Freedland, *The Contract of Employment* (Oxford: Clarendon Press, 1976)], who states that, "the pattern of contract now generally accepted and applied by the courts in the absence of evidence to the contrary is one of employment for an indefinite period terminable by either party upon reasonable notice, but only upon reasonable notice" (p. 153). The same approach was adopted by the Ontario Court of Appeal in *Prozak v. Bell Telephone Co. of Canada* (1984), 46 O.R. (2d) 385. Writing for the court, Goodman J.A. noted at p. 399 that, "if a contract of employment makes no express or specifically implied provision for its duration or termination, there is likely to be implied at common law a presumption that the contract is for an indefinite period and terminable by a reasonable notice given by either party . . .". Basically, this is also the approach taken by I. Christie, in *Employment Law in Canada* (1980), at p. 347. [emphasis added]

vi) RECALL METHOD

[70] Every summer, in the middle of August, the applicant would be contacted by letter and called back to work. This informal method of recall supports the Umpire's view that the applicant's teaching contract never terminated.

[71] In the unjust dismissal context, similarly casual recall methods have been taken as indicative of an indefinite as opposed to a fixed-term contract. In *Jordison v. Caledonian Curling Co-operative Ltd.*, 2000 SKQB 55 at para. 19 citing *Gray v. Manvers (Township)*, [1992] O.J. No. 2898 (Ont. Gen. Div.), the court observed that "where an employee is recalled to work by an informal phone call or visit which is intended to establish the exact date that work will recommence rather than if work will be offered, it is likely that the employment is for an indefinite term." On the other

hand, if the employee must re-apply or go through the hiring process anew each season, the employment is likely for a fixed term. *Jordison v. Caledonian Curling Co-operative Ltd*., 2000 SKQB 55 at para. 19 citing *Hildebrandt v. Wakaw Lake Regional Park Authority et al.* (1999), 175 Sask. R. 207 (Q.B.) and *Ross v. N.M. Paterson & Sons Ltd*., [1996] O.J. No. 1194 (Ont. Ct. (Gen. Div.)); appeal allowed on the length of notice only, [1998] O.J. No. 3358 (C.A.).

vii) THE RECORD OF EMPLOYMENT FORM

[72] The Record of Employment (the "ROE") is a document prepared by the employer for the government. The latter uses it to determine whether a claimant qualifies for EI benefits, the benefit rate and the duration of the claim. The ROE also plays an important role in controlling the misuse of EI funds. Given the importance of this document in the EI scheme, the information contained in it likely provided the Umpire who noted the ROEs at the outset of his reasons with key evidence of the nature of the employer's relationship with the applicant.

[73] Between 1996 and 2001, the applicant's ROEs were strikingly similar. After the applicant was denied EI benefits in 2001, however, two notable changes were made to her 2002 ROE. The first concerns the question "expected date of recall." The employer can answer it by ticking the box "unknown" or that of "not returning." After six consecutive years of ticking "unknown," in 2002 the employer either ticked neither option or that of "not returning." The second noteworthy change involved the question "reason for issuing this ROE." On the claimant's first six ROEs, the employer answered by writing an "A," which is code for "shortage of work." In 2002, the employer filled in a "K," which stands for "other." An employer who enters "K" must then explain the meaning of "other." In 2002, the employer wrote "End of school year."

[74] The contract-term jurisprudence assists in attributing legal significance to these entries. In *Saunders v. Fredericton Golf & Curling Club Inc*. (1994), 151 N.B.R. (2d) 184 (N.B.C.A.), Hoyt C.J.N.B., for the majority, held that where the reason for the layoff is a shortage of work and the expected date of recall is marked "unknown" rather than "not returning," the ROE is an indication that the employment contract is for an indefinite term. See also *Hildebrandt v. Wakaw Lake Regional Park Authority et al*. (1999), 175 Sask. R. 207 (Q.B.) at para. 29. After all, an "unknown" expected date of recall "can only indicate that it is expected that the employee will be returning at some time." *Ross v. N.M. Paterson & Sons Ltd*., [1996] O.J. No. 1194 (Ont. Ct. (Gen. Div.)) at para. 26; appeal allowed on the length of notice only, [1998] O.J. No. 3358 (C.A.). In short, this factor sustains the Umpire's view that the applicant's contract had not terminated.

viii) OTHER EVIDENCE OF THE EMPLOYER'S OUTWARD RECOGNITION

[75] The evidentiary record in this case contains two, 2001 letters from the applicant's employer that must have been of interest to the Umpire. The first is a "To Whom It May Concern" letter. The second is an unaddressed letter headed simply "Re: Sheila Stone."

[76] The first letter states, "due to a shortage of work the employment of Sheila Stone was terminated on June 22, 2001." This reference to "shortage of work" echoes question number 16 on the "Application for Unemployment Benefits" that the applicant completed in 2001 and 2002. That question asks, "Why are you no longer working?" The first box that the claimant has the option of ticking appears beside the words "Shortage of work." In her 2001 and 2002 applications, the applicant ticked this box.

[77] The appearance of this phrase in the "To Whom It May Concern" letter also brings to mind to the comments in *Bishop* at para. 10, wherein it was noted:

> Bishop further argued he became unemployed as a result of a shortage of work. In fact he was not short of work. He was employed up to the end of the school year in June of 1999. There was no work for teachers during the summer months.

[78] Indeed, caution should be exercised in relying on documents such as the "To Whom It May Concern" letter. In *Oliver* at para. 16, Létourneau J.A. reproduced the following comments of the Umpire whose decision he affirmed:

> No great weight can be given to the formal contractual descriptions of the nature of the employment relationship given to it by the signatories. How the parties define their relationship in the express terms of the contract may be self-serving or, as here, may be decreed by provincial legislation. The sole reason the date of termination is June 30th is because section 79 of the *Alberta School Act* mandates that it be so. However, that date is not an authentic reflection of the employment reality of these claimants. And it is that reality which must be considered when interpreting the *Employment Insurance Act* and *Regulations*. [emphasis added]

In the final analysis, therefore, it may be that not much weight should be accorded to the employer's representations in this case.

[79] In part, the "Re: Sheila Stone" letter from the employer reads:

> 2. Sheila Stone/other teachers were under oral contract from September 5, 2000 to June 22, 2001 and were not unionized. Her oral contract terminated on June 22, 2001. She was not guaranteed employment for the following year as employment is reassessed according to student reenrollment.
>
> 3. In order to ensure that teachers that the school would like to hire for the following school year are advised of the school's intent so that they can be available if they so choose the teacher/Sheila Stone is advised of the school's intention to enter into an oral contract for the upcoming following school year. This offer is conditional upon funding and enrolment for the appropriate age group and it is understood and agreed that if there is not sufficient funding and or enrolment there will not be a teaching position available. Mrs. Stone received a letter from the school dated August 15, 2001 informing her of a meeting regarding next year's preparations scheduled for August 29, 2001.

[80] At first glance, this letter suggests that the applicant's contract had terminated in June. Her

offer of new employment for September of the following year was contingent on the Or Haemet Sephardic School receiving funding and on a sufficient number of students in the age group that the applicant taught enrolling in the school.

[81] However, the contract-term jurisprudence sheds further light on the legal significance of this type of conditional offer. At issue in the unjust dismissal case of *MacDonald v. Dykeview Farms Ltd.*, [1998] N.S.J. No. 594 (N.S. Sup. Ct.) ["*MacDonald*"] was whether the claimant, a grading and packaging line worker, had been working under a fixed-term or indefinite-term contract. When she was first hired, the claimant was told that she would work on the grading line until the produce ran out likely in October or November. In fact, her term ended on October 22. The court found that her initial hiring was for a term position that terminated not on a fixed date but on a fixed event the end of production. When the claimant's contract term ended, she was told she would be called the next July *if her services were required*. No explicit promises or undertakings were made to the effect that she would be called the next July. Nonetheless, a pattern was established over the next eight years. Every July, the claimant awaited a call. Every July, she was called back to work.

[82] The employment pattern in *MacDonald* essentially repeated recalls conditional on sufficient work is strikingly similar to that in this case. At para. 11, the *MacDonald* court observed:

> Alone, that ["the continuous call-back each year for eight years straight and Ms. MacDonald's faithful return to work each time"] does not conclusively establish a promise of call-back subject to notice, but it is conduct on the part of both parties strongly suggestive of a substantial evolution beyond the initial term contract. Automatic call-back was the predominate factor in *Gray v. Corporation of the Township of Manvers* (1992), 93 C.L.L.C. 14, 023 (O.C.J.).

[83] Indeed, the Umpire was correct to consider the "Re: Sheila Stone" letter in light of all of the other facts of the case.

ix) THE CLAIMANT AND THE EMPLOYER'S UNDERSTANDING AND CONDUCT

[84] In previous paragraph 33(2)(*a*) cases, this court has considered whether the employer and the employee treated the contract as subsisting in determining whether it has terminated. See *e.g. Canada (Attorney General) v. Taylor*, [1991] F.C.J. No. 508 (C.A.).

[85] It was not disputed that, when the applicant's contract expired, both the employer and the applicant expected that she would return to the Or Haemet Sephardic School in the fall. Indeed, neither of the parties acted as if the applicant were unemployed during the non-teaching period.

[86] Take, for instance, the employer's mid-August letter to the applicant, "informing her of a meeting regarding next year's preparations scheduled for August 29, 2001." If the applicant's contract had actually been terminated, the employer would have been concerned about whether she was available to attend such a meeting and to return to work for it. In this light, simply sending her a letter containing the details about an upcoming meeting seems, at the very least, presumptuous. Personally, I would have thought that the employer would have "asked" the applicant about whether she could attend the meeting, as opposed to just "informing" her about it. Apparently, though, the employer was confident that she would not be working elsewhere come the end of August.

[87] The applicant's conduct also suggests that she believed that she would be employed by the Or Haemet Sephardic School in the fall. Admittedly, she claimed in her affidavit that she sought employment "during July and August." This kind of brief statement of availability may be taken at face value and regarded as sufficient proof of availability "for the first weeks of unemployment, provided that no restrictions appear to be connected with one's declared willingness to accept work or one's employability within the labour market." *Digest*, "Chapter 10 – Availability for Work,"

"10.2.0 – Proof." Here, though, the applicant's "unemployment" persisted not for two weeks, but for two months. Clearly, then, more evidence was required to substantiate the applicant's alleged availability for work. However, during her decade-long tenure with the Or Haemet Sephardic School, the applicant never worked for another employer. Furthermore, no covering letters of inquiry, résumés, employer references or completed job applications appear in the record. There is not even a job search summary listing potential employers contacted by the applicant during the summer. Given this evidence or lack thereof it was completely open to the Umpire to conclude that the applicant did not actively seek work during the summer, and therefore did not behave as if her contract had terminated.

[88] Even if the applicant did seek work, the evidence indicates that she restricted her searches to summer employment opportunities that would allow her to return to work at the Or Haemet Sephardic School in the fall. Nothing in the record including the applicant's affidavit indicates that the applicant ever sought or would have been willing to accept work for a term extending beyond July and August. One would expect that a teacher who genuinely believed that her contract had been terminated would make applications to other schools for a job commencing in September. The lack of any such evidence is a very strong indicator that the teacher did not really believe that the contract had terminated. That said, the absence of such evidence in this case is unsurprising. After all, the employer even admits in its "Re: Sheila Stone" letter that it advised the applicant of its intention to have her return to work in September *so* that she could "be available" to do so. Indeed, she was available and did return to it every autumn.

[89] In conclusion, the employer's and the applicant's conduct suggests that they had an agreement that, subject to funding and enrolment, the applicant would return to work at the Or

Haemet Sephardic School every September. Indeed, if funding and enrolment were sufficient, yet the employer refused to allow the applicant to return to work in September, I believe that she might well have a claim for breach of contract. There was, after all, a mutual understanding that she would return to the Or Haemet Sephardic School in these circumstances. As a result, over the summer, she did not look for other work to perform during the school year. Thus, she may have forgone a year of employment and its accompanying remuneration. There was no concession by the respondent that the parties had no contractual rights against and owed no contractual duties to each other. In summary, this factor also supports the Umpire's finding that the applicant's contract had not terminated.

V. CONCLUSIONS

[90] Once the Umpire considered all of the facts of the applicant's case, it was obviously reasonable for him to conclude that the applicant's relationship with the employer was never severed. At most, only two of the eight considerations that are clearly relevant in this instance suggest that the applicant's contract had terminated. They are the lack of explicit compensation during the non-teaching period and the evidence of the employer's outward recognition. As I explained in discussing these factors, the Umpire was right not to accord them much weight.

[91] In short, it was entirely reasonable for the Umpire, after examining the evidence, to find that the applicant failed to establish on a balance of probabilities that there had been a veritable break in the continuity of her employment. It does not seem as if her contract had terminated within the meaning of paragraph 33(2)(*a*) of the Regulations. Her case is also not caught by any of the other exceptions to the general ban on non-teaching period EI collection in subsection 33(2) of the Regulations. Thus, I cannot find that the Umpire's conclusion that the applicant was not entitled to

EI benefits was unreasonable.

[92] This and previous decisions of this court are entirely faithful to the plain meaning of the regulation, as well as its general context, the regulation-making power of the *Employment Insurance Act* and the regulatory scheme.

[93] These applications for judicial review should be dismissed with one set of costs. A set of these reasons shall be filed in each of Court Files A-367-04 and A-368-04.

"J. Edgar Sexton"
J.A.

"I agree
Robert Décary J.A.".

EVANS J.A. (DISSENTING REASONS)

[94] With all respect to the learned and extensive reasons of my colleague, Sexton J.A., I would allow the applications and remit the matter to be re-determined on the basis that subsection 33(2) of the *Employment Insurance Regulations* does not preclude Ms Stone from receiving employment insurance benefits for the months of July and August 2001 and 2002.

[95] In my view, the reasons of the Umpire do not provide a rational basis for rejecting, on the record before him, Ms Stone's contention that her contract of employment with Or Haemet terminated towards the end of June. The facts of this case are materially different from the relevant precedents from this Court.

[96] The evidence of Ms Stone and Mr Laufer, the school administrator, was that, like other teachers at Or Haemet, Ms Stone was employed under a 10-month contract. This evidence was not contradicted or challenged by the Minister, who also agreed that, from the end of June until she was re-hired in August for the upcoming school year, Ms Stone had no contract of employment with Or Haemet. In other words, the parties had no contractual rights against and owed no contractual duties to each other during July and August with respect to her employment for teaching.

[97] Counsel for the Minister conceded that the mutual expectation and understanding that Ms Stone would probably resume teaching in September had not ripened into an implied contract regarding her future employment. Until she accepted the offer in August, Ms Stone was free to take another job without informing Or Haemet, and the school could decide, for any reason, not to offer her employment, again without the need for notice.

[98] Counsel for the Minister also agreed that Or Haemet did not in any way remunerate or pay benefits to Ms Stone for the months of July and August. The 4% increase she was offered as a returning teacher was a recognition of her experience and, perhaps, her remaining available to teach at Or Haemet. Her receipt of employment insurance benefits for July and August would not constitute "double dipping".

[99] No doubt, the record compiled in the appeal to the Board of Referees could have been stronger. For example, there was no evidence comparing Ms Stone's salary with that of teachers who are paid for 12 months, and Mr Laufer might have been called as a witness and questioned about Or Haemet's contractual arrangements with its teachers. It would be open to the Commission to conduct further inquiries in the future if Ms Stone continues to claim benefits for the summer non-teaching months.

[100] However, there is no suggestion here of a sham and, like this Court, the Umpire had to take the record as he found it. To conclude on these facts, as the Umpire did, that Ms Stone had not established that her "contract of employment for teaching" had "terminated" is counterintuitive at best, and imposes a not insignificant explanatory burden on the decision-maker.

[101] I agree with my colleague that the issue in dispute in this case concerns the Umpire's application of paragraph 33(2)(*a*) of the Regulations to the facts as found, and that the relevant standard of review is reasonableness *simpliciter*.

[102] When a court conducts a judicial review of a decision of an administrative tribunal in order to determine its reasonableness, the review should focus on the tribunal's reasons. In *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20, Iabcobucci J. said:

> [48] Where the pragmatic and functional approach leads to the conclusion that the appropriate standard is reasonableness *simpliciter*, a court must not interfere unless the party seeking review has positively shown that the decision was unreasonable (see *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748).
>
> > An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard most look to see whether any reasons support it. [Emphasis added].
>
> [49] This signals that the reasonableness standard requires a reviewing court to stay close to the reasons given by the tribunal and "look to see" whether any of those reasons adequately support the decision.
>
> …
>
> [54] How will a reviewing court know whether a decision is reasonable given that it may not first inquire into its correctness? The answer is that a reviewing court must look to the reasons given by the tribunal.
>
> [55] A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing examination, then the decision will not be unreasonable and a reviewing court must not interfere.

[103] The question is, therefore, whether the Umpire's reasons for decision, read in their entirety, contain a "line of analysis" that "stands up to a somewhat probing examination". After referring to the test propounded by Létourneau J.A. in *Oliver* (is there "a veritable break in employment"?), the Umpire explained his decision as follows:

> Having considered the evidence before the Board of Referees, I am satisfied that it has been shown that this claimant has been employed from year to year and there is no interruption in her employment. I do not believe that because she works in a private school it makes any difference as the legislation does not differentiate between a private school and a public school. It also does not make any statement concerning the annual pay being spread over 12 months or ten months. The jurisprudence places a burden on the teacher to show on the balance of probabilities that they will not be returning to their job following the non-teaching period. That,

> in my opinion, would satisfy the requirement that there be a veritable break in employment after the end of the school year. [emphasis added]

[104] I would make the following observations on this passage. First, a boiler plate reference to "having considered the evidence before the Board of Referees" does not pass muster as an adequate explanation when the situation is novel and the evidence is more favourable to the claimant than that in all previous cases dealing with the issue in dispute.

[105] Second, the underlined sentences in the above passage suggest that if Ms Stone had proved that she was unlikely to be re-hired, her claim could have succeeded and that, since she did not, her claim fails. If the Umpire intended to narrow the focus of the inquiry in this way, he erred in law by failing to take into account all the considerations relevant to deciding whether Ms Stone's contract of employment terminated in June.

[106] Third, the Umpire stated that the Board was correct in law to conclude that there was "a continuing relationship" between the parties. In my respectful view, this is not the question. No doubt there was some kind of continuing relationship between Ms Stone and Or Haemet. She has, after all, taught at Or Haemet every year since 1995.

[107] However, for present purposes, the relevant question is whether Ms Stone's contract of employment "terminated" at the end of June. In my respectful view, a somewhat probing examination does not yield a rational basis for the decision, and authorises the Court to set it aside, and to remit it to the Umpire for re-determination.

[108] On an application for judicial review, it is not normally appropriate for a reviewing court to determine how the tribunal should have answered the question in dispute if it had applied the correct

legal test. However, because Umpires must normally determine claims on the basis of the evidential record before the Board of Referees, it is open to the Court to consider the reasonableness of the Umpire's determination and, when appropriate, to decide the substantive issue.

[109] In my view, it was clearly wrong for the Umpire in this case to have concluded on the record before him that Ms Stone had not established that her contract of employment for teaching terminated in June 2001 and 2002. She had a contract of employment for teaching up to the last week of June. In July and the first half of August she had no contract at all with Or Haemet, and received no remuneration for these months. Giving the words of the Regulation their ordinary meaning, how can it be said on these facts that she has not proved that her contact of employment for teaching had terminated?

[110] The Umpire relied heavily on para. 27 of the reasons in *Oliver*, where Létourneau J.A. reformulated the statutory test by asking whether there was "a veritable break in the continuity" of the teacher's employment. However, it is important to note the factual background against which Létourneau J.A. so stated the relevant test and concluded (at para. 16) that there was no evidence in *Oliver* to support the conclusion that the applicants' contracts of employment had terminated:

> They all had continuing contracts of teaching for the following school year. They suffered no loss of income. They received medical and other employment benefits during the summer non-teaching months. In short, the wages and benefits paid to them were the same as those paid to any permanent teacher. … Like their fellow teachers, the only reason these claimants were not working was because there were no teaching duties to perform during the non-teaching summer months.

[111] These are not our facts. Unlike most of the teachers in *Oliver*, Ms Stone had no contract of employment for September until well after her previous 10-month contract had expired. She was not paid for July and August and received no benefits. She was not a "double dipper".

[112] When the legislator expresses its intention in relatively clear words in a provision of a complex social benefit programme, courts should be reluctant to stray far from the statutory language. Subsection 33(2) constitutes a discrete regime within the overall employment insurance scheme to deal with the difficult problem raised by the particular position of teachers. An attempt to avoid a result that may lead to possibly unintended results (such as, in this case, the provision of an indirect subsidy to a private school) may give rise to other problematic and unforeseen consequences.

[113] I can well understand why this Court has consistently taken the position that teachers who are remunerated for non-teaching months, especially if they already have a contract to teach starting in September, cannot claim employment insurance benefits for July and August. They have suffered no loss of income through unemployment, a necessary condition for eligibility for employment insurance benefits.

[114] However, I can identify no policy underlying the scheme in general, or section 33(2) in particular, that would be infringed by a decision that Ms Stone is eligible for benefits during the temporary and regular periods of unemployment periods that she has accepted since she started teaching at Or Haemet.

[115] Indeed, it is not manifestly inconsistent with section 33(2) to conclude that Ms Stone is eligible for benefits during July and August. By providing that a teacher cannot claim for employment insurance benefits “for any week of unemployment that falls in any non-teaching period of the claimant”, subsection 33(2) contemplates that a teacher who is not working in those

months (because there is no teaching to do) may be unemployed. However, benefits can only be claimed by teachers for these months if they establish that they fall within one of the listed exceptions.

[116] In any event, the Government can always amend the Regulations to rectify results that it regards as unintended by the scheme or liable to open the proverbial flood gates. In my view, this is preferable to straining statutory language to avoid the rather clear terms in which paragraph 33(2)(*a*) is couched.

[117] For these reasons, I would grant the applications for judicial review with costs, set aside the decisions of the Umpire, and remit the matter to the Chief Umpire or his delegate on the basis that subsection 33(2) does not preclude Ms Stone from receiving employment insurance benefits for July and August 2001 and 2002.

"John M. Evans"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	A-367-04 and A-368-04
STYLE OF CAUSE:	Sheila Stone v. AGC
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	December 13, 2005
REASONS FOR :	SEXTON J.A.
CONCURRED IN BY:	DÉCARY J.A.
DISSENTING REASON BY:	EVANS J.A.
DATED:	January 24, 2006

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