Citation: ***Canada Employment Insurance Commission v. P. B.*****, 2015 SSTAD 1337**

Date: November 19, 2015

File number: AD-14-453

APPEAL DIVISION

Between:

Canada Employment Insurance Commission

Appellant

and

P. B.

Respondent

Decision by: Pierre Lafontaine, Member, Appeal Division

Heard by Teleconference on November 17, 2015

REASONS AND DECISION

DECISION

[1] The appeal is granted, the decision of the General Division dated July 24, 2014, is rescinded and the appeal of the Respondent before the General Division is dismissed.

INTRODUCTION

[2] On July 24, 2014, the General Division of the Tribunal determined that:

> - The Respondent met the exception set out in paragraph 33(2)(a) of the *Employment Insurance Regulations* (the "*Regulations*"), and therefore was entitled to benefits for her weeks of unemployment between June 29, 2012 and September 3, 2012.

[3] The Appellant requested leave to appeal to the Appeal Division on September 11, 2014. Leave to appeal was granted by the Appeal Division on March 11, 2015.

TYPE OF HEARING

[4] The Tribunal held a telephone hearing for the following reasons:

- The complexity of the issue(s) under appeal.
- The fact that the credibility of the parties is not anticipated being a prevailing issue.
- The information in the file, including the need for additional information.
- The requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness, and natural justice permit.

[5] The Appellant was represented at the hearing by Rachel Paquette. The Respondent was also present.

THE LAW

[6] Subsection 58(1) of the *Department of Employment and Social Development Act* (the "*DESD Act"*) states that the only grounds of appeal are the following:

a. the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

b. the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or

c. The General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

ISSUE

[7] The Tribunal must decide if the General Division erred in fact and in law when it concluded that the Respondent had met the exception set out in subsection 33(2)(a) of the *Regulations*, and therefore was entitled to benefits for her weeks of unemployment between June 29, 2012 and September 3, 2012.

ARGUMENTS

[8] The Appellant submits the following arguments in support of the appeal:

- The General Division correctly determined the Respondent was not employed in teaching on a casual or substitute basis in her qualifying period and that she had no employment other than teaching. As such it was correctly determined she did not meet the exemption to disentitlement criteria under sections 33(2)(b) or 33(2)(c) of the *Regulations*;

- The General Division erred when it decided that the end date of the Respondent's contract on June 29, 2012 was determinative of a contract termination within the meaning of section 33(2)(a) if the *Regulations*, that there was a veritable severance in the employer/employee relationship and that the Respondent did not have a 'non-teaching period' as she was not employed under a full term contract;

- The Federal Court of Appeal has ruled that the fact that an interval may exist between two contracts, during which the teacher is not under contract, does not mean that there has been a genuine severance of the relationship between the teacher and her employer;

- In the present case, the Respondent and her employer confirmed that although there was no entitlement to health benefits or wages from July 1, 2012 to September 3, 2012, the Respondent did carry over seniority, sick leave credits and pension contributions;

- The Respondent did not sign her contract until September 3, 2012 however she received a verbal offer to continue in the same position prior to June 29, 2012;

- Furthermore, subsection 33(1) defines the non-teaching period as the period that occurs annually, at a regular or irregular interval, during which no work is performed by a significant number of people, engaged in teaching and is not defined by the dates of a teacher's contract;

- A proper application of the facts of this case to the legislation and jurisprudence leads to the reasonable conclusion that the Respondent was not entitled to benefits during the summer non-teaching period because she did not meet any of the exceptions under s. 33(2) of the *Regulations*.

[9] The Respondent submitted the following arguments against the appeal:

- Her contract ended on June 29, 2012 and she accepted the offer of the Eastern School District only in September 2012;
- She was looking actively for work during the relevant summer period;
- She received absolutely no salary during the summer period in question;
- The decision of the General Division is well founded in fact and in law.

STANDARD OF REVIEW

[10] The Appellant submits that the applicable standard of review for mixed questions of fact and law is reasonableness – *Chaulk v. Canada (AG)*, 2012 FCA 190. The Respondent did not make any representations regarding the applicable standard of review.

[11] The Tribunal acknowledges that the Federal Court of Appeal determined that the standard of review applicable to a decision of a board of referees (now the General Division) or an Umpire (now the Appeal Division) regarding questions of law is the standard of correctness - *Martens c. Canada* (*AG)*, 2008 FCA 240 and that the standard of review applicable to questions of fact and law is reasonableness - *Chaulk v. Canada (AG)*, 2012 FCA 190, *Canada (PG) v. Hallée*, 2008 FCA 159.

ANALYSIS

[12] Subsection 33(2) of the *Regulations* prohibits a claimant, who was employed in teaching during her qualifying period, from receiving employment insurance benefits for any week of unemployment that falls in any non-teaching period.

[13] Therefore, the General Division had to determine if the Respondent met one of the three criteria set out in subsection 33(2) of the *Regulations*. The General Division correctly determined from the evidence that the exceptions under subsections 33(2)(b) and 33(2)(c) did not apply to the Respondent.

[14] The Respondent submitted to the General Division that she qualifies for benefits under subsection 33(2)(a) of the *Regulations* because she became unemployed after her fixed term contract from September 1, 2011 to June 29, 2012, terminated on June 29, 2012, and remained unemployed until September 4, 2012.

[15] The Federal Court of Appeal as repeated on numerous occasions the applicable legal test of subsection 33(2)(a) of the *Regulations*: Is there a clear break in the continuity of the claimant's employment, so that the latter has become unemployed?

[16] It is not enough to look, as the General Division did in this case, at the beginning and ending dates of the contracts in order to determine whether a claimant's contract of employment in teaching has terminated within the meaning of subsection 33(2)(a) of the *Regulations*. The fact there may be an interval between two contracts during which time the teacher was not under contract does not mean that there has been a genuine termination of the relationship between the teacher and his or her employer - *Bazinet v. Canada (AG)*, 2006 FCA 174.

[17] Furthermore, while it is true that the absence of remuneration from the employer might be a sign that the contract of employment ended, the absence of remuneration in itself does not mean that the contract has ended. The Federal Court of Appeal has on numerous occasions determined that even in the absence of remuneration, the contract of employment had not ended and the claimant was not entitled to benefits - See for example : *Canada (AG) v. Donachey*, A-411-96; *Canada (AG) v. St-Coeur*, A-80-95; *Canada (AG) c. Taylor*, A-681-90.

[18] The Federal Court of Appeal has also determined that in cases where teachers contracts terminate at the end of June and they are rehired for the following school year, they are not entitled to employment insurance for the months of July and August - See *Bishop v. Canada (Employment Insurance Commission)* (2002), 292 N.R. 158 (F.C.A.); *Canada (Attorney General) v. Partridge* (1999), 245 N.R. 163 (F.C.A.); *Gauthier v. Canada (Employment and Immigration Commission)*, [1995] F.C.J. No. 1350 (C.A.) (QL); and *Canada (Attorney General) v. Hann*, [1997] F.C.J. No. 974 (C.A.) (QL).

[19] In view of the instructions of the Federal Court of Appeal, did the General Division err when it concluded that there had been a genuine termination of the relationship between the Respondent and her employer?

[20] In the present case, the evidence shows that the Respondent worked in a fixed term position during the 2011-2012 school year while covering a teacher's sabbatical. An offer to continue to teach the same position for the period September 4 to November 16, 2012 was made to her on June 21, 2012 prior to the end of her previous contract. The Respondent and the employer confirmed that although there was no entitlement to health benefits or wages from July 1, 2012 to September 3, 2012, the Respondent did carry over seniority, sick leave credits and pension contributions. She also had been employed by the Eastern School District since 2009 and did in fact return in September 2012.

[21] The Tribunal finds that the General Division could not reasonably conclude from the evidence before it that there was a clear break in the continuity of the Respondent's employment. The General Division also erred in law when it relied on the decision *Ying v. Canada (AG)*, A-101-98, in support of its decision, considering the subsequent jurisprudence from the Federal Court of Appeal - *Bazinet v. Canada (AG)*, 2006 FCA 174.

[22] For the above mentioned reasons, the Tribunal is justified to intervene and finds that the Respondent was not entitled to benefits during the summer non-teaching period because she did not meet any of the exceptions under subsection 33(2) of the *Regulations*.

CONCLUSION

[23] The appeal is granted, the decision of the General Division dated July 24, 2014, is rescinded and the appeal of the Respondent before the General Division is dismissed.

Pierre Lafontaine
Member, Appeal Division