Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

[TRANSLATION]

Citation: *L. S. v. Canada Employment Insurance Commission*, 2016 SSTADEI 84

Tribunal File Number: AD-15-200

BETWEEN:

L. S.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

HEARD ON: February 9, 2016

DATE OF DECISION: February 12, 2016

Canada

REASONS AND DECISION

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] On March 7, 2015, the Tribunal's General Division found that:

- As a teacher, the Appellant was not entitled to receive Employment Insurance benefits during a non-teaching period under section 33 of the *Employment Insurance Regulations* (Regulations).

[3] The Appellant requested leave to appeal before the Appeal Division on April 17, 2015. Leave to appeal was granted by the Appeal Division on June 19, 2015.

TYPE OF HEARING

[4] The Tribunal determined that the appeal would be heard via teleconference for the following reasons:

- The complexity of the issue or issues;
- The fact that the parties' credibility would probably not be a prevailing issue;
- The information on file, including the need for additional information;
- The need to proceed as informally and quickly as possible in accordance with the criteria in the Social Security Tribunal's rules relating to the circumstances and considerations of fairness and natural justice.

[5] The Appellant did not attend the hearing, but was represented by Sameh Hanna. The Respondent was represented by Julie Meilleur.

THE LAW

[6] Under subsection 58(1) of the *Department of Employment and Social Development Act*, the following are the only grounds of appeal:

> (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 or order, whether or not the error appears on the face of the record; or
>
> (c) The General Division based its decision or order 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] Did the General Division err in fact or in law by finding that, as a teacher, the Appellant was not entitled to receive regular Employment Insurance benefits under section 33 of the Regulations?

SUBMISSIONS

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

- She did not receive any wages for the months of July and August and she was available to work during this period.
- Her employment contract ended on June 30, 2014.
- On June 1, 2014, she accepted a verbal offer to teach during the 2014-2015 school year.
- She has worked for the same school board for several years.
- There was a veritable break in the continuity of her employment. The continuity of a job implies continuous employment and a continuous wage.

- Humanity and justice should be given priority over a strict application of the law.

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

- The General Division's decision is not based on an error of law or of fact and it did not exceed or refuse to exercise its jurisdiction.

- In this case, the facts on file show that the Appellant worked as a teacher for the Marguerite-Bourgeoys school board for several years, that she had acquired seniority over the years, that she benefits from group insurance and contributes to her pension during school holidays, and that she had accepted a contract for the upcoming year.

- Recent and relevant case law can be found in *Stone* (A-367-04), *Bazinet et al* (A-172-05), and *Robin* (A-261-05).

- Both the jurisprudence of the Federal Court of Appeal and Parliament's intent are based on a fundamental premise: "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."

- To establish that a veritable break in the continuity of the employment has occurred, one must examine all the circumstances of each case.

- The Appeal Division does not have the authority to retry a case or to substitute its discretionary power for that of the General Division. The Appeal Division's authority is limited by subsection 58(1) of the *Department of Employment and Social Development Act*. Unless the General Division failed to observe a principle of natural justice, erred in law, or 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, and the decision is unreasonable, the Tribunal must dismiss the appeal.

STANDARDS OF REVIEW

[10] The Appellant made no submissions concerning the applicable standard of review.

[11] The Respondent submits that the legal standard of review applicable to a decision of a Board of Referees (now the General Division) or an Umpire (now the Appeal Division) on questions of law is correctness - *Martens v. Canada (A.G.)*, 2008 FCA 240.The standard of review applicable to questions of mixed fact and law is reasonableness - *Canada (A.G.) v. Hallée*, 2008 FCA 159.

[12] Although the term "appeal" is used in section 113 of the Act (formerly section 115 of the Act) to describe the procedure introduced before the Appeal Division, the Appeal Division's authority is essentially identical to that previously granted to the Umpires and that which is granted to the Federal Court of Appeal by section 28 of the *Federal Courts Act*. The proceeding is therefore not an appeal in the usual sense of the word, but rather a circumscribed review - *Canada (A.G.) v. Merrigan*, 2004 FCA 253.

[13] The Tribunal is of the opinion that the Appeal Division should provide a degree of deference to the General Division's decisions that is consistent with the degree of deference provided to the decisions of the former Board of Referees being appealed before the Employment Insurance Umpire.

[14] The Federal Court of Appeal determined that that the applicable standard of review for a decision of a Board of Referees (now the General Division) and an Umpire (now the Appeal Division) on questions of law is correctness and that the applicable standard of review for questions of mixed fact and law is reasonableness - *Martens v. Canada (A.G.)*, 2008 FCA 240, *Canada (A.G.) v. Hallée*, 2008 FCA 159.

ANALYSIS

[15] Given that the Appellant held a teaching position for a portion of her qualifying period, and that she was therefore ineligible for benefits, the General Division had to consider if one of the exceptions set out in subsection 33(2) of the Regulations applied to the Appellant's situation.

[14] The Federal Court of Appeal has repeatedly stated the applicable legal standard: 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 - *Oliver v. Canada (A.G.)*, 2003 FCA 98.

[17] A reading of the General Division's decision shows that it had raised the question as to whether there had been a veritable break in the continuity of the Appellant's employment that resulted in her unemployment within the meaning of the case law.

[18] The Tribunal is of the opinion that the General Division correctly took into account both the jurisprudence of the Federal Court of Appeal and the legislative intent behind section 33 of the Regulations.

[19] The Federal Court of Appeal has upheld the principle that the exception listed in paragraph 33(2)(*a*) of the Regulations is meant to benefit teachers that had a veritable severance in the employer/employee relationship at the end of the teaching period. Teachers who had their contracts renewed before the end of their teaching contracts, or shortly afterwards, for the new school year were not unemployed and had continued employment, despite the gap between contracts. The legislative intent behind section 33 of the Regulations is based on the clear premise that, unless there was a veritable break in a teacher's employment, a teacher would not be entitled to benefits during school breaks - *Oliver et al v. Canada (A.G.)*, 2003 FCA 98; *Stone v. Canada (A.G.)*, 2006 FCA, 27; *Canada (A.G.) v. Robin*, 2006 FCA 175.

[20] The Appellant based her arguments largely on the fact that she was not paid during the non-teaching period. It is true that if a claimant is not paid by an employer, it may mean that the claimant's contract has been terminated. However, this does not mean that non-payment alone suffices to conclude that a contract has been terminated.

[21] The Court has repeatedly held that, even if a claimant was not paid, their contract was not thereby terminated and, therefore, the claimant was not entitled to receive Employment Insurance benefits. See, for example, the following decisions: *Canada (A.G.)*

v. Donachey, A-411-96; *Canada (A.G.) v. St-Coeur*, A-80-95; and *Canada (A.G.) v. Taylor*, A-681-90.

[22] Given that the Appellant has been working for the same school board for several years; that she worked as a teacher from August 23, 2013, to June 30, 2014; that, on June 1, 2014, she accepted a verbal offer to teach during the 2014-2015 school year; that she has seniority and has continuously contributed to her pension over the years, the Tribunal cannot see how the General Division could have correctly found that there had been a break in the employment relationship between the Appellant and the School Board.

[23] The Tribunal therefore finds that the evidence submitted does not support the grounds of appeal argued by the Appellant. The General Division's decision is based on the evidence before it and is consistent with the legislative provisions and case law.

[24] There is no reason for the Tribunal to intervene.

CONCLUSION

[25] The appeal is dismissed.

Pierre Lafontaine
Member, Appeal Division