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

[TRANSLATION]

Citation: *Canada Employment Insurance Commission v. L. D.*, 2016 SSTADEI 511

Tribunal File Number: AD-16-473

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

L. D.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Pierre Lafontaine

HEARD ON: September 22, 2016

DATE OF DECISION: October 17, 2016

Canada

REASONS AND DECISION

DECISION

[1] The appeal is allowed, the decision rendered by the General Division on March 9, 2016, is rescinded, and the appeal of the Respondent before the General Division is dismissed.

INTRODUCTION

[2] On March 9, 2016, the Tribunal's General Division found that:

- As a teacher, the Appellant was not subject to section 33 of the *Employment Insurance Regulations* (Regulations) during the non-teaching periods of December 21, 2014, to January 3, 2015, and March 1, 2015, to March 7, 2015.

[3] On March 29, 2016, the Appellant filed an application for leave to appeal before the Appeal Division. Leave to appeal was granted on April 11, 2016.

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 parties' credibility was not a key issue;
- The cost-effectiveness and expediency of the hearing choice;
- The need to proceed as informally and quickly as possible while complying with the rules of natural justice.

[5] The Appellant was represented by Julie Meilleur. The Respondent was also present.

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, 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 issue is as follows:

- Did the General Division err in finding that, as a teacher, the Appellant was not subject to the disentitlement stipulated by section 33 of the Regulations during the non-teaching periods of December 21, 2014, to January 3, 2015, and March 1, 2015, to March 7, 2015?

SUBMISSIONS

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

- The General Division erred in fact and in law when it found that the Respondent was entitled to receive benefits during the non-teaching periods of December 21, 2014, to January 3, 2015, and March 1, 2015, to March 7, 2015.

- Subsection 33(2) of the Regulations stipulates that a teacher is not entitled to receive benefits (other than maternity, parental, and compassionate care benefits) during a non-teaching period unless they meet the exempting conditions set out in this subsection.

- The Respondent did not meet the exception set out in paragraph 33(2)(*a*) of the Regulations for the non-teaching periods of December 21, 2014, to January 3, 2015, and March 1, 2015, to March 7, 2015. She had accepted a teaching contract effective August 29, 2014, to June 30, 2015; there was no break in this contract during the periods at issue.

- The Respondent did not meet the exception set out in paragraph 33(2)(*b*) of the Regulations because the evidence on file shows that throughout the 2014-2015 school year, she had a continuing 20% contract. The Federal Court of Appeal has stated that teachers employed on a continual basis and for a predetermined term cannot be considered casuals or substitutes. Thus, the Respondent's employment was on neither a casual nor substitute basis, but rather on a regular, part-time basis.

- Although, in her qualifying period, the Respondent was employed in a field other than teaching, she still does not meet the exception set out in paragraph 33(2)(*c*) of the Regulations because she had not accumulated enough hours of insurable employment at that job to establish a benefit period.

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

- The General Division did not err either in fact or in law and it properly exercised its jurisdiction.

- At the end of September, the school board had offered her a 20% contract when she agreed to replace a teacher for one day a week as of the start of the school year.

- She signed this contract at the end of September. It states that she is replacing a teacher and that the contract can be terminated at any time the teacher decides to come back. Clearly, this is not a part-time position.

- This was not a [translation] "recurring" or renewable contract. This contract could not have been [translation] "continuing" as alleged by the Appellant given that there was a gap between December 21, 2014, and January 3, 2015. Furthermore, the school board did not pay her during this period.

- It's not possible to [translation] "make ends meet" on a one-day-a-week salary for a job when the job is not part time.

- She is entitled to benefits because she was searching for work and was not employed during this period.

- She did not receive a salary during the non-teaching periods. During those periods, she received a certain amount that had been deducted from her pay from September to December.

- The Appellant does not have the right to discriminate. She respectfully requests that the Social Security Tribunal to protect her rights—the same rights enjoyed by other Canadian citizens.

STANDARDS OF REVIEW

[10] The Appellant submits that the applicable standard of review for questions of law is correctness and the standard of review for questions of mixed fact and law is reasonableness - *Pathmanathan v. Office of the Umpire*, 2015 FCA 50.

[11] The Respondent made no submissions to the Tribunal concerning the standard of judicial review applicable to the General Division's decision.

[12] The Tribunal notes that the Federal Court of Appeal in the case of *Canada (AG) v. Jean*, 2015 FCA 242, indicates in paragraph 19 of its decision that when the Appeal Division "acts as an administrative appeal tribunal for decisions rendered by the General Division of the Social Security Tribunal, the Appeal Division does not exercise a superintending power similar to that exercised by a higher court".

[13] The Federal Court of Appeal further indicated that:

> Not only does the Appeal Division have as much expertise as the General Division of the Social Security Tribunal and thus is not required to show deference, but an administrative appeal tribunal also cannot exercise the review and superintending powers reserved for higher provincial courts or, in the case of "federal boards", for the Federal Court and the Federal Court of Appeal.

[14] The Federal Court of Appeal concludes by emphasizing that "[w]here it hears appeals pursuant to subsection 58(1) of the *Department of Employment and Social Development Act*, the mandate of the Appeal Division is conferred to it by sections 55 to 69 of that Act."

[15] The mandate of the Appeal Division of the Tribunal described in *Jean* was subsequently confirmed by the Federal Court of Appeal in *Maunder v. Canada (A.G.)*, 2015 FCA 274.

[16] Therefore, unless the General Division failed to observe a principle of natural justice, erred in law, 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, the Tribunal must dismiss the appeal.

ANALYSIS

[17] The Tribunal believes that the issue appealed in this case is subject to the exception set out in paragraph 33(2)(*b*) of the Regulations.

[18] As regards paragraph 33(2)(*a*), there was no break in employment within the meaning established by jurisprudence specifically because the Respondent returned to work after the non-teaching periods - *Oliver v. Canada (A.G)*, 2003 FCA 98. Moreover, the evidence before the General Division does not show that the Respondent met the exception set out in paragraph 33(2)(*c*) of the Regulations because she had not accumulated enough hours of insurable employment at that job to establish a benefit period.

[19] As noted by the Federal Court of Appeal in *Canada (A.G.) v. Blanchet*, 2007 FCA 377, the exception set out in paragraph 33(2)(*b*) of the Regulations places the emphasis on the performance of the employment rather than the status of the teacher who holds it. The Court stated the following:

> In other words, a teacher may, for example, have substitute teacher status but, during the qualifying period, be called up and enter into a contract to hold employment not on a casual or substitute basis but on a regular full-time or part-time basis. Even if the teacher retains his or her status as a substitute under the collective agreement governing the school board and the teachers' union, he or she is not a substitute teacher for the purposes of the part- time employment he or she contracted. In such a case, the teacher does not meet the conditions of the exception under paragraph 33(2)(*b*). As was stated by our colleague Madam Justice Sharlow at paragraph 2 of *Stephens v. Canada (Minister of Human Resources Development)*, supra, it is possible "that a teacher may have a period of employment as a supply teacher that is sufficiently regular that it cannot be said to be 'employment on a casual or substitute basis'".

[20] The General Division, in the Tribunal's opinion, misunderstood the interpretation and scope of paragraph 33(2)(*b*) of the Regulations. The Tribunal therefore has cause to intervene to remedy this error of law and apply the correct interpretation of paragraph 33(2)(*b*) to the facts in this case.

[21] The uncontested evidence before the General Division shows that the Respondent was bound by a 20% part-time teaching contract from August 29, 2014, to June 30, 2015. She was therefore under contract during the relevant non-teaching periods and her employment, which was continuous and for a predetermined time period, cannot be considered as being on a casual or substitute basis within the meaning of paragraph 33(2)(*b*) of the Regulations.

[22] In light of all the facts on file and the teachings of the Federal Court of Appeal, the Tribunal has no choice but to conclude that the Respondent does not meet the conditions of the exception set out in paragraph 33(2)(*b*) of the Regulations.

CONCLUSION

[23] The appeal is allowed, the decision rendered by the General Division on March 9, 2016, is rescinded, and the appeal of the Respondent before the General Division is dismissed.

Pierre Lafontaine

Member, Appeal Division