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

Citation: *K. C. v. Canada Employment Insurance Commission,* 2017 SSTADEI 399

Tribunal File Number: AD-17-278

BETWEEN:

K. C.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Shirley Netten

Date of Decision: November 17, 2017

Canada

REASONS AND DECISION

OVERVIEW

[1] The Respondent, the Canada Employment Insurance Commission, determined both initially and on reconsideration that the Applicant, a teacher, was not entitled to benefits under the *Employment Insurance Act* (Act) during the summer non-teaching period in 2016. The General Division of the Social Security Tribunal of Canada (Tribunal) dismissed the Applicant's appeal on February 20, 2017. The Applicant now seeks leave to appeal the General Division decision to the Tribunal's Appeal Division.

[2] The following facts were established through written and oral evidence:

- The Applicant was employed by the Brandon School Division (Division) as a full-time limited-term teacher, from September 8, 2015 to April 28, 2016. By the terms of contract (which did not cover a full year of teaching), she was not entitled to an accumulation of unused sick leave and seniority, nor was her contract automatically renewable. She was not entitled to be paid her salary over 12 months since she did not work the full school year; it appears, however, that she was paid a supplemental wage in the final four weeks of her contract.

- At the conclusion of the limited-term contract, the Applicant was employed by the Division as a substitute teacher. In this capacity, the Applicant was not replacing a single teacher in a single position; rather, she was "on-call" and she worked at different schools in the Division, being called in to work at 7 a.m. when needed. She was paid lower wages as a substitute teacher, and she did not receive health coverage or paid sick leave. She ultimately worked the approximate equivalent of four days a week, on average, between May 2 and June 24, 2016.

- On June 7, 2016, the Applicant accepted an offer of a permanent teaching position with the Division (at a different school from the limited-term engagement), effective September 6, 2016. She reported that her pay would begin on September 30, 2016. The Division had agreed to carry over her unused sick days from the limited-term

engagement, on a discretionary basis. Her pension contributions were maintained through an entity separate from the Division.

[3] Information does not appear to have been provided with respect to the length of the Applicant's employment record as a teacher. The collective agreement is not in the appeal file before the General Division.

[4] On June 24, 2016, the Applicant claimed Employment Insurance (EI) regular benefits. It is uncontroversial in this matter that the Applicant was employed in teaching during her qualifying period (i.e. during the 52 weeks prior to June 19, 2016), and that she sought benefits for a non-teaching period (i.e. the summer of 2016). In these circumstances, the *Employment Insurance Regulations* (Regulations) restrict entitlement to regular benefits:

> 33(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 section 22, 23, 23.1 or 23.2 of the Act, for any week of unemployment that falls in any non-teaching period of the claimant unless
>
> (a) the claimant's contract of employment for teaching has terminated;
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> (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 in an occupation other than teaching.

[5] The Applicant has argued both that her contract of employment had terminated and that she had been employed on a casual and substitute basis; there has been no suggestion in this case that she was employed in an occupation other than teaching. In dismissing the appeal, the General Division concluded that the condition of s. 33(2)(*a*) was not met, and that the condition of s. 33(2)(*b*) was not met.

LEAVE TO APPEAL

[6] An appeal to the Appeal Division is not automatic, but rather "may only be brought if leave to appeal is granted": s. 56(1) of the *Department of Employment and Social Development*

Act (DESDA). The leave to appeal proceeding is thus a preliminary step to an appeal on the merits. As set out in s. 58(2) of the DESDA, leave to appeal is refused "if the Appeal Division is satisfied that the appeal has no reasonable chance of success." A reasonable chance of success means having some arguable ground upon which the proposed appeal may succeed: *Osaj v.Canada (Attorney General)*, 2016 FC 115; *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41. The Applicant does not have to prove the case at the leave stage.

[7] In her submissions requesting leave to appeal, the Applicant states (among other things) that her "substitute teaching was on-call, never predetermined, and not continuous in any way."

[8] One of the grounds of appeal to the Appeal Division is that "the General Division erred in law in making its decision, whether or not the error appears on the face of the record" (s. 58(1)(*b*) of the DESDA). A determination as to whether the Applicant's employment in teaching was on a casual or substitute basis, within the meaning of s. 33(2)(*b*) of the Regulations, is a conclusion of law drawn from the facts.

[9] The General Division found that the Applicant had not met the definition of "casual" or "substitute" on the basis that she had entered into a substitute teaching contract after her term contract and had accumulated hours equivalent to approximately four days a week; the General Division further characterized this as work "on a regular basis." The decision summarized the jurisprudence by stating the following:

> A teacher's employment is not on a casual or substitute basis if the evidence shows that the teacher is employed in any kind of regular, continuous or pre-determined manner or if he or she enters into a temporary contract, replacing others [*sic*] teacher [*sic*] on a full-time or part-time basis.

[10] The Federal Court of Appeal has repeatedly stated that employment that is exercised in a "continuous and predetermined way" does not constitute teaching on a casual or substitute basis (for example, *Dupuis-Johnson v. Canada (Employment and Immigration Commission)*, 1996 CanLII 12471 (FCA); *Canada (Attorney General) v. Blanchet*, 2007 FCA 377; *Arkinstall v. Canada (Attorney General)*, 2009 FCA 313). Moreover, "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’” (*Stephens v. Canada (Minister of Human Resources Development)*, 2003 FCA 477).

[11] I agree with the Applicant that the General Division may have erred in law, in possibly broadening the test for casual or substitute teaching (not met if employed “in any kind of regular, continuous or pre-determined manner”) and/or in its characterization of her May/June 2016 teaching in relation to this test.

[12] The impact of the alternative conclusion (that the Applicant was engaged in casual or substitute teaching in May and June 2016, but not during the rest of her qualifying period), on entitlement to benefits, is not entirely clear. The jurisprudence, to my knowledge, does not address whether the exception in s. 33(2)(*b*) will apply if an individual had a brief period of substitute teaching prior to claiming EI benefits, while otherwise teaching (not on a casual or substitute basis) during the balance of the qualifying period. Consequently, I expect to also receive submissions from the parties on this aspect of the appeal. In any case, the Applicant has raised an arguable ground upon which the proposed appeal may succeed and, accordingly, leave to appeal is granted.

[13] Having found that there is an arguable case with respect to the conclusion that the Applicant was not teaching on a casual or substitute basis, I need not consider any other arguments made by the Applicant at this time. The DESDA does not require that individual reasons for appeal be considered and accepted or rejected; s. 58(3) directs the Appeal Division to either grant or refuse leave to appeal. However, I note that the Applicant has also reiterated that her contract of employment had been terminated in April 2016, triggering the exception under s. 33(2)(*a*) of the Regulations, and I invite the parties to provide submissions on any potential error of law in this respect as well. In particular, and in consideration of the Applicant’s representative’s comments at the hearing before the General Division, I would appreciate receiving submissions that address the treatment under s. 33(2) of a limited-term teaching contract that concludes prior to June (for example, in November, January or April), both in and of itself, and followed by a period of casual or substitute teaching. I would also appreciate receiving submissions that address the significance, if any, of supplemental earnings paid at the conclusion of the Applicant’s limited-term teaching contract, and the significance, if any, of the school year beginning on July 1 rather than on September 6, 2016.

DISPOSITION

[14] The application for leave to appeal is granted.

[15] This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

Shirley Netten
Member, Appeal Division