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

Citation: *K. C. v. Canada Employment Insurance Commission*, 2018 SST 787

Tribunal File Number: AD-17-278

BETWEEN:

K. C.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Shirley Netten

DATE OF DECISION: August 8, 2018

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] As set out in my decision granting leave to appeal, the following are the basic facts in this appeal:

- The Appellant, K. C., was employed by the X 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; however, she was paid a supplemental wage in the final four weeks of her contract.

- At the conclusion of the limited-term contract, the Appellant was employed by the Division as a substitute teacher. In this capacity, the Appellant 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 Appellant 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] The Appellant claimed Employment Insurance benefits on June 24, 2016, for the summer non-teaching period. The *Employment Insurance Regulations* (Regulations), made under the

Employment Insurance Act (Act), preclude teachers' entitlement to regular benefits during non-teaching periods, with certain exceptions:

> 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
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> (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
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> (c) the claimant qualifies to receive benefits in respect of employment in an occupation other than teaching.

[4] The Respondent, the Canada Employment Insurance Commission, determined that the Appellant was not entitled to receive benefits and, on appeal, the General Division confirmed that the exceptions in s. 33(2)(*a*) and (*b*) did not apply. Leave to appeal the General Division decision was granted on the basis of a possible error of law, in relation to the test for casual or substitute teaching. The relevant ground of appeal, found in s. 58(1)(*b*) of the *Department of Employment and Social Development Act* (DESDA), is that "the General Division erred in law in making its decision, whether or not the error appears on the face of the record."

ANALYSIS

Did the General Division err in law with respect to employment on a substitute basis?

[5] The Federal Court of Appeal first interpreted the concept of teaching "on a casual or substitute basis" (then found in s. 46.1(1) of the Regulations) in *Dupuis-Johnson v. Canada (Employment and Immigration Commission)*, 1996 CanLII 12471 (FCA). The court concluded that the applicant teachers, who taught under fixed-term contracts during the school year, were not teaching on an occasional or substitute basis because their employment "was of course exercised in a continuous and predetermined way and not on an occasional or substitute basis." Subsequently, in *Stephens v. Canada (Minister of Human Resources and Development)*, 2003

FCA 477, the Federal Court of Appeal referred a matter back to the Umpire to determine whether, on the facts, the applicant's employment was on a casual or substitute basis. The court did not make the determination itself, but noted both that "it is theoretically 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'" and that "the mere existence of a term teaching contract covering a particular period does not necessarily deprive a person of the benefit of paragraph 33(2)(b)."

[6] The Federal Court of Appeal's analysis in *Canada (Attorney General) v. Blanchet*, 2007 FCA 377 expanded upon this discussion:

> [38] The exception at the end of paragraph 33(2)(b) emphasizes the performance of the employment and not the status of the teacher who holds it. 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'".
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> …
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> [42] […] The definition of "suppléance" at page 1020 of this dictionary refers to [translation] "the state of being a substitute". "Suppléant" is defined by reference to a person who replaces someone in his or her duties without becoming the incumbent of that position. Finally, the verb "suppléer" means to replace someone in his or her duties.
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> [43] At page 3 of Chapter 14 of the 2007 version of the Digest, it is specified that for the purposes of the Regulation, "casual teaching means irregular, occasional or on-call teaching". For these purposes, "on a substitute basis" refers to "a person who is available on call or used to

> perform the duties of another teacher, temporarily, during leaves of absence, holidays or illness": *ibid.*
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> [44] I agree that these terms must be given the usual dictionary meaning and not a literary, philosophical or figurative meaning. However, the analysis does not stop there. The contract signed by the teacher must be studied to determine whether or not employment is held on such a basis within the meaning of paragraph 33(2)(b). This brings me to the application of this analysis to the facts of this case.
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> [46] The respondents held their employment under contracts for part-time or per-lesson teaching or both […]
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> [47] Under the agreement between the Comité patronal de négociation pour les commissions francophones (management negotiating committee for French-language school boards) and the Centrale de l'enseignement du Québec (Quebec association of teachers' unions) on behalf of the teachers' unions it represents, a school board is required to offer [translation] "a part-time contract to the substitute teacher it hires to replace a full-time or part-time teacher when it is has been determined beforehand that this teacher will be absent for more than two (2) consecutive months": see clause 5-1.11 of the agreement.
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> [48] This is precisely the situation in this case. In these circumstances, I do not believe that it could be said that the employment was held on a casual or substitute basis. To cite Marceau J.A. in *Dupuis-Johnson, supra*, at paragraph 8, the respondents were bound by a contract during the holiday periods in question and "their employment as teachers, temporary and precarious as their contracts were [for the periods in question] was of course exercised in a continuous and predetermined way and not on an occasional or substitute basis within the meaning of paragraph 33(2)(b)".

[7] More recently, the Federal Court of Appeal dismissed applications for judicial review of Umpire decisions that had concluded that the applicants were "employed in a continuous and pre-determined way which could not be considered casual or substitute teaching" (*Arkinstall v. Canada (Attorney General)*, 2009 FCA 313).

[8] In the instant case, the General Division found that the Appellant had not met the definition of "casual" or "substitute" because she had obtained work on a regular basis and had a continuing employment relationship:

> [36] The Tribunal finds the evidence cannot support that the Appellant meets the definition of "casual" or "substitute" as the record of employment indicates that the Appellant, immediately following her term contract that ended April 28, 2016, entered into a substitute contract that began on May 2, 2016 until the end of the school year, and accumulated 291 hour [*sic*] of insurable employment which would equate to approximately 4 days a week for the entire period.
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> [37] The Tribunal finds from the Appellant's oral evidence that although she was classified as a substitute teacher, she did obtain work on a regular basis as she had specialized skills in music and French. The Appellant also provided in her oral testimony that the principal of her school was required to make special arrangements in order to obtain a substitute teaching contract so she could continue working until the end of June 2016. Subsequently during this period the Appellant was offered and accepted a full time permanent teaching contract on June 16, 2016 for the following school year.
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> [38] The Tribunal finds that the status of a teacher in the eyes of the School Board or pursuant to a collective agreement is not relevant. 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 teacher on a full-time or part-time basis. In this case, there was a continuing employment relationship between the claimant and the School Board during the relevant period. *[Emphasis added]*

[9] The underlined assertion, using the disjunctive "or", is in my estimation an inaccurate and over-broad description of the legal test established in the jurisprudence. "Any kind" of regular employment is not necessarily employment that is "sufficiently regular," and the employment must be "continuous and predetermined" rather than on a substitute basis. While both tests are used in the jurisprudence, "sufficiently regular" and "continuous and predetermined" are, in my view, two sides of the same coin; employment as a substitute teacher that is sporadic or unpredictable, rather than continuous and predetermined, will not be sufficiently regular. In addition, the General Division conflated the notion of continuous

employment through consecutive contracts (relevant to whether there has been a termination of employment, under s. 33(2)(*a*) with the notion of continuous employment within a substitute teaching contract (relevant to the characterization of the nature of the employment, under s. 33(2)(*b*)).

[10] By applying the wrong legal test to the undisputed facts, the General Division erred in law and mischaracterized the Appellant's employment from April to June 2016. Despite this error, however, I find that the result of the appeal was ultimately correct. I note that, pursuant to s. 59 of the DESDA, I have the authority to dismiss the appeal, give the decision that the General Division should have given, refer the matter back to the General Division, or confirm, rescind or vary the decision. There are no substantial deficiencies in the evidentiary record in this matter, and consequently there is no need to refer this matter back to the General Division.

The Appellant's employment in May and June 2016

[11] I do not agree with the Respondent's submission that the Appellant's employment could not be described as casual or substitute teaching because of her ongoing relationship with the Division. Emphasizing the performance of the Appellant's employment in May and June 2016 (as instructed in *Blanchet*), it is readily apparent that the Appellant met the ordinary definition of substitute teaching, in that she was available on call and she served as a temporary replacement teacher in different schools, performing the duties of absent teachers, without becoming the incumbent of any position. While the Appellant worked more often than not during the contract period, her employment for this period was not predetermined: she was not hired to replace a specific teacher for a defined period of time; she was called in to work in the early mornings; she did not know from one day to the next whether and where she would be teaching; and she did not work every day, nor on a predictable schedule, during the contract period. This would appear to be exactly what is meant by employment in teaching on a substitute basis; it is hard to imagine what kind of employment would meet the test, if not the Appellant's employment in May and June 2016. I conclude that the Appellant's employment in May and June 2016 is best characterized as teaching on a substitute basis, within the meaning of s. 33(2)(*b*) of the Regulations.

The Appellant's employment from September 2015 to April 2016

[12] The Appellant was employed on a full-time, fixed-term contract from September to April. Despite the able submissions of the Appellant's representative, this was neither casual nor substitute employment within the meaning established by the Federal Court of Appeal, as discussed above: the worker was engaged to replace a teacher in a fixed-term, full-time position, and her employment during this period was both continuous and predetermined. Although CUB 23306 (provided by the Appellant's representative) determined that a 3-month teaching contract was casual employment, this 1994 decision has effectively been superseded by *Dupuis-Johnson* and *Blanchet*.

Was the Appellant's "employment in teaching" on a casual or substitute basis, such that the exception in s. 33(2)(*b*) applied?

[13] As cited above, s. 33(2) of the Regulations stipulates that a claimant "who was employed in teaching for any part of the claimant's qualifying period" cannot receive regular benefits during non-teaching periods, with three exceptions. The second of these exceptions arises where the claimant's "employment in teaching was on a casual or substitute basis."

[14] This raises the question of whether it is sufficient, for the purposes of s. 33(2)(*b*), for the worker to have taught on a substitute basis for only a small portion of the school year. This determination cannot hinge upon continuity of employment, as the Respondent submitted, because the exception found in s. 33(2)(*b*) is independent of the exception found in s. 33(2)(*a*). While the Appellant's representative argued that substitute teaching for any length of time can trigger the s. 33(2)(*b*) exception, my interpretation of the regulatory provisions suggests otherwise.

[15] Subsection 33(2) applies to a claimant who was employed in teaching for any part of the qualifying period (typically the preceding 52-week period[1]). This is the first inquiry that must be made and, in the instant case, it is uncontroversial that the Appellant was employed in teaching for part of her qualifying period; specifically, she was employed in teaching under contracts of

[1] The qualifying period may be shorter in certain circumstances, and extended in other circumstances. See s. 8 of the Act.

employment from September 8, 2015 to April 28, 2016 and from May 2, 2016 to June 24, 2016. In my view, it flows from this initial inquiry that a claimant's "employment in teaching," in s. 33(2)(*b*), refers to this same period of teaching, i.e. to his or her employment in teaching during the qualifying period, and not to certain components thereof.

[16] Had Parliament's intention been to allow an exception to disentitlement if a claimant's teaching in the past year included only a certain portion of casual or substitute teaching, s. 33(2)(*b*) could easily have been qualified to apply, for example, if "any" or "some" of the claimant's employment in teaching was on a casual or substitute basis, or if the claimant's employment in teaching was on a casual or substitute basis "at the interruption of earnings." In the absence of such qualification, I find that s. 33(2)(*b*) requires consideration of the claimant's employment in teaching as a whole during the qualifying period. It would, in my view, produce an absurd result if the type of teaching in a single week or two of the school year dictated that teacher's entitlement or disentitlement to benefits during non-teaching periods. As such, I interpret s. 33(2)(*b*) to provide an exception to disentitlement when the claimant's employment in teaching during the qualifying period is predominantly or entirely on a casual or substitute basis.

[17] Although not directly addressed in the jurisprudence, this interpretation is consistent with the conclusions made in appeals where a claimant has had a mix of teaching employment during the qualifying period:

- In *Blanchet*, the fact that the claimants worked as substitute teachers in addition to their part-time or per-lesson contracts did not permit the application of s. 33(2)(*b*). When discussing the scope of s. 33(2)(*b*), Létourneau J.A. stated that the benefit of the exception is obtained through the "employment held during the qualifying period."

- In CUB 72175A, the s. 33(2)(*b*) exception did not apply to a claimant who taught on a regular part-time contract from October to June and on-call from September to November and March to April.

- In CUB 80691, the s. 33(2)(*b*) exception did not apply to a claimant who taught on a part-time contract from September to February and on-call from February to June.

[18] In the instant case, the Appellant's "employment in teaching" refers to her employment in teaching between September 2015 and June 2016, as a whole. The Appellant's eight-month period of regular teaching was followed by less than two months of employment on a substitute basis (during which she accepted permanent employment for the following year). Considering the Appellant's teaching roles during the qualifying period as a whole, and given that the substitute teaching was a minor component, I find that her "employment in teaching" during the qualifying period cannot be characterized as being on a casual or substitute basis. In these circumstances, the Appellant cannot benefit from the exception to disentitlement in s. 33(2)(*b*).

Did the General Division err with respect to the exception for contract termination, under s. 33(2)(*a*)?

[19] As for the separate question of whether the Appellant could escape disentitlement because her contract of employment for teaching had terminated, I see no reviewable error in the General Division's decision that the condition of s. 33(2)(*a*) had not been met. There has been no suggestion that the General Division misunderstood the facts, in particular that the Appellant had two distinct contracts during the school year and had signed a new contract for the following year, prior to the completion of the second contract. The General Division reviewed the jurisprudence and applied the test of whether there had been "a veritable break in the continuity of a teacher's employment"[2] to the facts of this appeal, finding that the Appellant had not suffered a genuine severance of the employer/employee relationship.[3] I do not find that the General Division erred in law in this aspect of the decision.

CONCLUSION

[20] In the result, there is no reviewable error with respect to the s. 33(2)(*a*) exception to disentitlement and, although the General Division erred in its conclusion that the Appellant's employment in May/June 2016 was not on a casual or substitute basis, I have determined that the s. 33(2)(*b*) exception to disentitlement does not apply to the Appellant's situation. Accordingly,

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[2] *Oliver v. Canada (Attorney General)*, [2003] 4 FCR 47

[3] Relying largely upon *Canada (Attorney General) v. Robin*, 2006 FCA 175, and *Dupuis v. Canada (Attorney General)* 2015 FCA 228

the disentitlement to regular benefits during the 2016 summer non-teaching period remains in place, and the appeal is dismissed.

Shirley Netten
Member, Appeal Division

HEARD ON:	April 9, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	K. C., Appellant N. Kerr, Representative for the Appellant M. Vens, Representative for the Respondent