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

Citation: *J. M. v. Canada Employment Insurance Commission*, 2018 SST 1023

Tribunal File Number: AD-18-476

BETWEEN:

J. M.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Janet Lew

Date of Decision: October 18, 2018

DECISION AND REASONS

DECISION

[1] The application for leave to appeal is refused.

OVERVIEW

[2] The Applicant, J. M. (Claimant), a teacher, held a temporary teaching contract from January 3, 2017 to June 30, 2017. He applied for Employment Insurance regular benefits in early July 2017. By then, he had received a verbal offer of employment for the next teaching period.

[3] On August 18, 2017, the Respondent, the Canada Employment Insurance Commission (Commission), wrote to the Claimant, advising that it was unable to pay him benefits (1) from September 5, 2017, because it considered that he was working full work weeks, and (2) from July 3, 2017 to September 4, 2017, from December 25, 2017 to January 5, 2018, and from March 19, 2018 to April 2, 2018, because no benefits could be paid to teachers during a non-teaching period. The Commission informed the Claimant that there were some exceptions to this rule: he could receive benefits if his service contract ended, if he was a substitute or casual teacher and had not signed another contract, or if he worked in an occupation other than teaching. However, the Commission determined that these conditions did not apply in his case.[1]

[4] The Commission also informed the Claimant that for him to receive benefits in the non-teaching period, his contract must have terminated and if he had another contract in place with the same school board, there "must be no linkages between the two contracts." The Commission determined that his new contract had "4 linkages," which it found proved that there was a continued relationship with his employer. The Commission did not consider it a true layoff. The Commission determined that he was therefore disentitled to receive benefits.

[5] The Claimant requested a reconsideration on the basis that his contract ended as of June 2017 and he did not have a permanent or continuous contract. He maintained that he had a temporary contract that started September 5, 2017. He explained that he would continue working

[1] Commission's letter dated August 18, 2017, at GD3-22 to GD3-23.

on a temporary basis or status until April 1, 2018. This meant he would not be paid for July, August and the first two weeks of September 2017.[2]

[6] In a letter dated October 30, 2017, the Commission notified the Claimant that it was maintaining its decision of August 18, 2017. It determined that he remained employed under a teaching contract for employment up to June 30, 2017, and then as of July 1, 2017 to June 30, 2018.[3] The Claimant appealed the Commission's reconsideration decision to the General Division.

[7] The General Division dismissed the appeal, having found that the Claimant had failed to prove that his teaching contract terminated "over the summer of 2017."

[8] The Claimant now seeks leave to appeal the General Division's decision. He claims that the General Division failed to observe a principle of natural justice and that it erred in law in making its decision, whether or not the error appears on the face of the record.

ISSUES

[9] The issues before me are as follows:

> Issue 1: Is there an arguable case that the General Division failed to observe a principle of natural justice?
>
> Issue 2: Is there an arguable case that the General Division erred in law in identifying or applying s. 33(1) of the *Employment Insurance Regulations*, whether or not the error appears on the face of the record?

ANALYSIS

[10] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) sets out the grounds of appeal as being limited to the following:

> (a) The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

[2] Request for Reconsideration, along with supporting documentation, at GD3-24 to GD3-39.
[3] Commission's reconsideration decision letter dated October 30, 2017, at GD3-49 to GD3-50.

(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.

[11] Before granting leave to appeal, I need to be satisfied that the reasons for appeal fall within the grounds of appeal set out under s. 58(1) of the DESDA and that the appeal has a reasonable chance of success. This is a relatively low bar. Claimants do not have to prove their case; they simply have to establish that the appeal has a reasonable chance of success based on a reviewable error. The Federal Court endorsed this approach in *Joseph v. Canada (Attorney General)*.[4]

Issue 1: Is there an arguable case that the General Division failed to observe a principle of natural justice?

[12] The Claimant submits that the General Division failed to observe a principle of natural justice. Natural justice is concerned with ensuring that an applicant has a fair opportunity to present his or her case and that the proceedings are fair and free of any bias. It relates to issues of procedural fairness before the General Division, rather than the impact of the General Division's decisions on an applicant. The Claimant's allegations do not address any issues of procedural fairness or of natural justice as they relate to the General Division. The Claimant has not pointed to or provided any evidence—nor do I see any evidence—to suggest that the General Division might have deprived him of an opportunity to fully and fairly present his case or that it exhibited any bias against him. As a result, I am not satisfied that the appeal has a reasonable chance of success on this ground.

[4] *Joseph v. Canada (Attorney General)*, 2017 FC 391.

Issue 2: Is there an arguable case that the General Division erred in law in identifying or applying s. 33(1) of the *Employment Insurance Regulations*, whether or not the error appears on the face of the record?

[13] The General Division referred to s. 33(1) of the *Employment Insurance Regulations*, which provides that a claimant who is employed in teaching for any part of their qualifying period is not entitled to receive benefits unless:

> (a) the claimant's contract of employment for teaching has terminated;
>
> (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.

[14] Paragraph 33(1)(*c*) of the *Employment Insurance Regulations*—whether the Claimant had accumulated hours from an occupation other than teaching—is irrelevant to this appeal.

[15] The Claimant denies that he was in a casual or a substitute teaching position. The Claimant states that s. 33(1)(*b*) of the *Employment Insurance Regulations*—whether his employment in teaching was on a casual or substitute basis—is inapplicable in his case.

[16] The Claimant is adamant that he was in a contractual position for half of the school year and that he was just beginning the process of attaining permanent certification, a fact, he argues, that the General Division overlooked. He argues that he falls within the first exception under s. 33(1)(*a*) of the *Employment Insurance Regulations*—that his teaching contract had terminated. He claims that the General Division mischaracterized the legal test under s. 33(1)(*a*) of the *Employment Insurance Regulations* and that it misapprehended the facts altogether.

[17] The Claimant maintains that although contractual positions can be extended upon mutual consent, they are not continuous in nature. He notes that there was no mutual consent to extend his contract; indeed, he had to reapply and compete for his position, and he was ineligible for deductions that would have allowed him to be paid over the summer. He argues that although the contract was signed as of July 1, the actual contract was effective starting September 2017. He argues that the General Division failed to recognize this distinction between permanent and contractual employees. He contends that if the General Division had appreciated that his teaching

contract was not continuous and was not permanent, that his contract for 2017/2018 became effective starting September 2017, and that he was ineligible for deductions, then it would have accepted that his contract for teaching had terminated on June 30, 2017.

[18] The General Division set out the legal test for termination of a teaching contract under s. 33(1)(*a*) of the *Employment Insurance Regulations* as being a "veritable break in the continuity of one's employment." This definition is consistent with the jurisprudence. The Federal Court of Appeal has consistently held that the test is whether there is a veritable break in the continuity of the applicant's employment.[5]

[19] In *Bazinet v. Canada (Attorney General)*, the Federal Court of Appeal held that it is "not enough simply […] to look at the beginning and ending dates of the contracts in order to determine whether a claimant's contract of employment has terminated." The Court cited *Oliver v. Canada (Attorney General)*, and found that it was also necessary to determine whether there was a clear cessation of the continuity of the claimant's employment.

[20] In *Stone v. Canada (Attorney General)*,[6] the Federal Court of Appeal set out a list of non-exhaustive factors that "should be considered relevant to determining whether there had been a veritable break in the continuity of the applicant's employment." These include:

i. the length of the employment record;

ii. the duration of the non-teaching period;

iii. the customs and practices of the teaching field in issue;

iv. the receipt of compensation during the non-teaching period;

v. the terms of the written employment contract, if any;

vi. the employer's method of recalling the claimant;

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[5] *Stone v. Canada (Attorney General)*, [2006] 4 FCR 120, 2006 FCA 27; *Oliver v. Canada (Attorney General)*, [2003] 4 FC 47, 2003 FCA 98; *Bazinet v. Canada (Attorney General)*, 2006 FCA 174; *Canada (Attorney General) v. Robin*, 2006 FCA 175.
[6] *Stone v. Canada (Attorney General)*, [2006] 4 FCR 120, 2006 FCA 27.

vii. the record of employment form completed by the employer;

viii. other evidence of outward recognition by the employer; and

ix. the understanding between the claimant and the employer and the respective conduct of each.

[21] In examining whether the Claimant's contract terminated, the General Division addressed some of these factors. It also noted the following: the employer's documents showed the dates of the new contract for the 2017/2018 school year were from July 1, 2017 to June 30, 2018; the contract for the 2017/2018 year was for the same school and the same teaching position; the Claimant's sick leave entitlement, pension credits, and seniority were carried over into the 2017/2018 school year; and the employer stated that the Claimant continued to be entitled to benefits over the summer of 2017.

[22] The General Division was also mindful that the Claimant had to pay his own medical services plan premiums for June and July 2017 before the employer started paying premiums in August 2017; that the Claimant did not receive any salary in summer 2017; that there was some documentation that showed the employer considered him a temporary employee until he received continuing status with his employer as of April 1, 2018; and finally, that the Claimant had to reapply for his position and was by no means guaranteed to be the successful candidate. The General Division accepted this evidence, although it did not make any particular findings about the Claimant's status between the summer 2017 and April 1, 2018. However, it determined that these factors alone were inconclusive and that it had to consider other factors as well in determining whether the Claimant's teaching contract had terminated on June 30, 2017.

[23] The General Division placed particular emphasis on the fact that the Claimant returned to the same teaching position at the same school at the beginning of the 2017/2018 school year; the fact that he was able to carry over his unused sick days, his seniority, and his pension credits; the fact that he continued to be covered by the employer's benefit plan over the summer; and most importantly, the Claimant's teaching contract ended on June 30, 2017, and the subsequent teaching contract started on July 1, 2017. The General Division found that these facts established

that the Claimant's relationship with his employer did not terminate and therefore, there was "no veritable break in the continuity of the [Claimant's] employment."

[24] In *Canada (Attorney General) v. Robin*, the claimant there was a part-time teacher from September 3, 2003 to June 23, 2004. She received an offer of employment for a full-time permanent position beginning on August 25, 2004. The Federal Court of Appeal found that Ms. Robin, like all the other teachers in that school board, did not have to work during July and August 2004. The Federal Court of Appeal was unable to find that there had been a severance in the employment relationship between Ms. Robin and the school board. The Court concluded that there was no interruption in the continuity of her employment with the school board and that Ms. Robin was therefore unable to benefit from the exception contained in s. 33(2)(*a*) of the *Employment Insurance Regulations*.

[25] There are some factual distinctions between the *Robin* case and the proceedings before me; notably, the Claimant's second contract was for a temporary position, rather than a permanent one. However, much like Ms. Robin's situation, the Claimant's new contract allegedly did not come into effect until several weeks after the first contract terminated on June 30, 2017. Nadon J.A. found that the umpire had erred by confining his assessment to this one factor, when his focus should have been on the issue of whether there had been a clear severance of the continuity of Ms. Robin's employment.

[26] The General Division properly identified the legal test under s. 33(1)(*a*) of the *Employment Insurance Regulations* at paragraphs 8, 13, and 22 of its decision. It stated that there had to be a veritable break in the continuity of the Claimant's employment. It is clear that the General Division appropriately considered the facts of the case, placing more weight on some of the evidence over others, in assessing whether there had been a veritable break—or, as Nadon J.A. put it in Robin—a "clear severance of the continuity" of the Claimant's employment.

[27] The General Division did not refer to the Record of Employment that the employer had prepared,[7] but the jurisprudence suggests that it would have supported the General Division's findings that the Claimant's contract had not terminated. The Record of Employment indicated an "unknown" expected date of recall. In *Stone*, the Federal Court of Appeal noted three

[7] Record of Employment, at GD3-17.

decisions where an "unknown" expected date of recall was seen as an indication that the employer expected the employee to be returning at some time. The Court wrote:

> In *Saunders v. Fredericton Golf & Curling Club Inc.*[8] where Hoyt C.J.N.B., for the majority, held that where the reason for the layoff is a shortage of work and the expected date of recall is marked "unknown" rather than "not returning," the ROE is an indication that the employment contract is for an indefinite term. See also *Hildebrandt*, at paragraph 29. After all, an "unknown" expected date of recall "can only indicate that it is expected that the employee will be returning at some time." *Ross*, at paragraph 26.[9]

[28] Given these considerations, I am not satisfied that the General Division erred in law in considering whether the Claimant fell into the exception under s. 33(1)(*a*) of the *Employment Insurance Regulations*.

[29] Finally, to the extent that the Appellant is seeking a reassessment on the issue of whether his teaching contract terminated, s. 58(1) of the DESDA has very limited grounds of appeal—the section does not provide for any reassessments on appeal.

CONCLUSION

[30] I am not satisfied that there is an arguable case that the General Division either failed to observe a principle of natural justice or that it erred in identifying and applying the legal test for termination of a teaching contract under s. 33(1)(*a*) of the *Employment Insurance Regulations*. Accordingly, the application for leave to appeal is refused.

Janet Lew
Member, Appeal Division

REPRESENTATIVE:	J. M., self-represented

[8] *Saunders v. Fredericton Golf & Curling Club Inc.* (1994), 151 N.B.R. (2d) 184 (C.A.).
[9] *Hildebrandt v. Wakaw Lake Regional Park Authority* (1999), 1999 CanLII 12447 (SK QB), 175 Sask. r. 207 (Q.B.) and *Ross v. N.M. Paterson & Sons Ltd.*, [1996] O.J. No. 1194 (Gen. Div.) (QL); appeal allowed on the length of notice only.