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

Citation: *K. L. v. Canada Employment Insurance Commission*, 2018 SST 1117

Tribunal File Number: AD-18-375

BETWEEN:

K. L.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: October 30, 2018

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] The Appellant, K. L. (Claimant), worked as a substitute teacher for one school board until November 2016 and then worked as an long-term occasional (LTO) teacher for a different board (the Board). Before her contract terminated in the spring of 2017, she secured a permanent position with the Board to begin in the fall of 2017. When she applied for Employment Insurance benefits for the period between the spring and the fall, the Respondent, the Canada Employment Insurance Commission (Commission), found that she was not entitled to benefits because her contract of employment with the Board had not been terminated. The Claimant requested a reconsideration of this decision, but the Commission maintained its initial decision. Her appeal to the General Division of the Social Security Tribunal was dismissed, and she now appeals to the Appeal Division.

[3] The Appeal is allowed. The General Division found that the Claimant's contract had not terminated; this finding was made without regard for the evidence that the Claimant would not be paid during the non-teaching period.

ISSUES

[4] Was the General Division's finding (that the Claimant's contract of employment had not terminated) made in a perverse or capricious manner because the General Division relied on the Claimant's ability to carry forward seniority and pension contributions?

[5] Was the General Division's finding (that the Claimant's contract of employment had not terminated) made without regard for the material before it, including:

a) evidence of the contract length;
b) evidence of the pattern of employment; and
c) evidence that the Claimant was not compensated for non-teaching periods?

ANALYSIS

Standard of Review

[6] The grounds of appeal set out in s. 58(1) of the *Department of Employment and Social Development Act* (DESD Act) are similar to the usual grounds for judicial review in the Courts, suggesting that the same kind of standards of review analysis might also be applicable at the Appeal Division.

[7] However, I do not consider the application of standards of review to be necessary or helpful. Administrative appeals of Employment Insurance decisions are governed by the DESD Act. The DESD Act does not provide that a review should be conducted in accordance with the standards of review. The Federal Court of Appeal, in *Canada (Citizenship and Immigration) v. Huruglica*,[1] is of the view that standards of review should be applied only if the enabling statute provides for their application. It stated that the principles that guide the role of courts on judicial review of administrative decisions have no application in a multilevel administrative framework.

[8] *Canada (Attorney General) v. Jean*[2] concerned a judicial review of a decision of the Appeal Division. The Federal Court of Appeal was not required to rule on the applicability of standards of review, but it acknowledged in its reasons that administrative appeal tribunals do not have the review and superintending powers that are exercised by the Federal Court and the Federal Court of Appeal, where the standards of review are applied. The Court also observed that the Appeal Division has as much expertise as the General Division and is, therefore, not required to show deference.

[9] While certain other decisions of the Federal Court of Appeal appear to approve of the application of the standards of review,[3] I am nonetheless persuaded by the reasoning of the Court in *Huruglica* and *Jean*. I will therefore consider this appeal by referring to the grounds of appeal set out in the DESD Act only.

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[1] *Canada (Citizenship and Immigration) v. Huruglica*, 2016 FCA 93.
[2] *Canada (Attorney General) v. Jean*, 2015 FCA 242.
[3] See, for example, *Hurtubise v. Canada (Attorney General)*, 2016 FCA 147 and *Thibodeau v. Canada (Attorney General*), 2015 FCA 167.

General Principles

[10] The Appeal Division's task is more restricted than that of the General Division. The General Division is required to consider and weigh the evidence that is before it and to make findings of fact. In doing so, the General Division applies the law to the facts and reaches conclusions on the substantive issues raised by the appeal.

[11] However, the Appeal Division may intervene in a General Division decision only if it can find that the General Division has made one of the errors described by the "grounds of appeal" in s. 58(1) of the DESD Act.

[12] The only grounds of appeal are described below:

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.

Issue 1: Was the General Division's finding (that the Claimant's contract of employment had not terminated) made in a perverse or capricious manner because it relied on the Claimant's ability to carry forward seniority and pension contributions?

[13] The General Division decided that there had been no veritable break in the continuity of the Claimant's employment because the Board offered the Claimant employment for the following fall and the Claimant accepted the offer before she completed her teaching contract in the spring. In addition, the General Division found that she would be able to carry forward her teaching seniority and her pension plan contributions to her employment in the fall.[4]

[14] There was evidence supporting each of the factors on which the General Division relied, and the Claimant has not argued that the General Division misunderstood that evidence.

[4] General Division decision at para. 32.

However, I am concerned about the relevance of the Claimant's ability to carry forward her seniority and pension contributions.

[15] The General Division did not have evidence before it on which it could determine how the ability to carry over seniority or pension contributions is relevant to the question of whether the Claimant's contract of employment had terminated. There was no evidence before the General Division that a termination of the Claimant's contract would mean that she could **not** have maintained her seniority if she was subsequently hired by the same Board or that she could **not** have kept her contributions in the pension (or maintained the credit towards service represented by those contributions), if she was not hired by the Board again or as a teacher at a different school board in Ontario, or even if she never taught again.

[16] If the termination of the Claimant's employment contract means that the Claimant could not maintain her seniority or carry over her pension contributions to when she eventually returns to teaching, then these facts would be relevant to the General Division's determination. On the other hand, if the Board were to terminate her contract but she found that she could still carry over her seniority and pension contributions to a future teaching position, then her ability to carry forward seniority or pension contributions in this instance says nothing about whether her contract with Board was or was not terminated.

[17] Based on the evidence that was before the General Division, I am not satisfied that the simple fact that her seniority or her pension contributions could be "carried forward" was relevant to the General Division's determination that her contract of employment had not terminated.

[18] The General Division's finding that the Claimant's contract had not terminated was made in a perverse or capricious manner because the General Division relied on these two facts without establishing their relevance. This is an error under s. 58(1)(*c*) of the DESD Act.

Issue 2: Was the General Division's finding (that the Claimant's contract of employment had not terminated) made without regard for the material before it?

[19] The Claimant argues that the General Division failed to consider all of her circumstances, including the fact that she was not compensated over the summer, when it found that her teaching contract had not terminated.

[20] In its written submissions, the Commission cites *Simpson v. Canada (Attorney General)*[5] for the proposition that the General Division does not need to refer to all of the evidence. It also argues that the General Division needed only to be satisfied that there was a "veritable break in the continuity" of the Claimant's teaching employment—a concept derived from *Oliver v. Canada (Attorney General)*.[6] According to the Commission, the General Division's failure to itemize each point in *Stone v. Canada (Attorney General)*[7] does not negate the evidence to support the finding that there was no veritable break. In its oral submissions, the Commission argued to the effect that a "veritable break in employment" supersedes the various considerations set out in *Stone* and that it may be established irrespective of those considerations.

[21] I agree with the Commission that the General Division was not required to itemize the considerations from *Stone* or to address each consideration. *Stone* says as much:

> Several cautionary notes must be sounded about this list of considerations. First, it is not exhaustive. Moreover, not every one of the factors on it will provide insight into every case. Indeed, the courts must be extremely sensitive to the factual background underlying every paragraph 33(2)(*a*) case. These factors are not to be weighed mechanistically. It is entirely inappropriate to simply count the number of factors suggesting a finding of contract termination and the number militating against that conclusion and then endorse the conclusion favoured by the greater number of factors. Instead, to determine whether a teaching contract has terminated within the meaning of paragraph 33(2)(*a*), all of the circumstances of every case must be examined in light of the purpose of the regulation.[8]

I accept that the General Division did not err in law by failing to apply a *Stone* "test." *Stone* did not create a test; it suggested factors that should be considered relevant to the question—where

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[5] *Simpson v. Canada (Attorney General)*, 2012 FCA 82.
[6] *Oliver v. Canada (Attorney General)*, 2003 FCA 98.
[7] *Stone v. Canada (Attorney General)*, 2006 FCA 27.
[8] Ibid. at para. 43

they exist. However, it is apparent that at least three of the *Stone* considerations "provide insight" into this particular case and that they were ignored in the General Division analysis.

[22] First, the General Division does not mention the contract length. The Claimant had worked for the employer for a single school term only (about five months) before being offered a permanent contract for the following fall. There was no series of contracts to support an interpretation that they were one indefinite contract, collectively.

[23] Second, the General Division did not consider how the Claimant's circumstances aligned with the customs and practices of the teaching field, and more particularly; with the pattern of employment of teaching. While *Stone* noted that teaching is typically characterized by a break in July and August and a return to work in September, such a pattern had not been established in the Claimant's work history. The Claimant had worked for another school board as a substitute and casual teacher until the previous December and had remained on the roster of that school board while she took a leave of absence to accept a single LTO contract with her present Board. As it happened, by the end of her LTO contract, the Board offered her two concurrent part-time positions at different schools in the fall, but there is no suggestion that this was characteristic of the relationship between the Claimant and the Board, or that the Claimant had expected this as a matter of course. This was the first instance of the Claimant returning to teaching after a non-teaching period under the same employer.

[24] Furthermore, while the Claimants two teaching positions in the fall were both with the Board, they differed in other respects. Her original LTO contract with the Board was full-time with a single school. It had a specified termination date, and it did not provide either benefits or salary during, or for, the summer months. Under her new teaching contract in the fall, the Claimant could not use the sick days she had accrued under the LTO contract (GD3-26). Her new contract meant working at two part-time positions at two schools that were different from the school in which she had been working under the LTO contract. Most significantly, her new position with the Board was a permanent position, which meant that it had an indefinite term and that the Claimant would be entitled to compensation and benefits over non-teaching periods.

[25] In my view, the first instance of moving from one type of temporary contract with particular terms to a full-time employment contract with materially different terms cannot be said to have established a pattern. The General Division did not take this into account.

[26] Third, the General Division did not consider the lack of non-teaching period compensation. Unchallenged documentary and testimonial evidence suggested that the Claimant's salary as a LTO-contract teacher did not incorporate compensation for the non-teaching period and that the Claimant was not entitled to, and did not receive, either medical or dental benefits (GD3-32) or salary during the summer non-teaching period (GD3-29 and GD2-3).

[27] With particular reference to the non-teaching compensation consideration, I note that *Stone* viewed this consideration as "one of the purposes" of the *Employment Insurance Regulations* (Regulations) governing compensation for teachers:

> I have no doubt that the prevention of double dipping is one of the purposes of paragraph 33(2)(*a*) of the Regulations. The regulatory scheme affirms this position. The only other reference to contract termination in the Regulations links the notion of an earnings interruption with that of contract termination.[9]

[28] *Stone* is hardly an outlier in considering evidence relating to compensation for a non-teaching period to be significant.[10] *Bishop v. Canada (Employment Insurance Commission)*,[11] *Oliver*, and *Canada (Attorney General) v. Partridge* [12] also note that avoiding double compensation for teachers during their non-teaching periods is at least part of the policy justification for restricting benefits during non-teaching periods. In my view, *Simpson* does not excuse a tribunal's failure to take evidence that is of this significance into account in its analysis. The fact that the Claimant received no pay or benefits during, or for, the non-teaching period means that her circumstances are not the kind of circumstances that are targeted by at least one purpose (and perhaps the principle purpose) of s. 33(2) of the Regulations.

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[9] Supra note 7, at para. 31
[10] *Supra* note 7, at para. 66.
[11] *Bishop v. Canada (Employment Insurance Commission)*, 2002 FCA 276.
[12] *Canada (Attorney General) v. Partridge*, A-704-97.

[29] Furthermore, the Commission's position that it is unnecessary to take the *Stone* considerations into account if a veritable break in employment is found is hard to reconcile with the *Stone* decision itself. *Stone* actually constructed the list of considerations as an aide to be used to determine whether that veritable break exists.[13] Therefore, any of the *Stone* considerations that can be supported by evidence would be relevant to finding a "veritable break" and must be taken into account. If we take *Simpson* to mean that we must always presume a tribunal to have considered significant evidence that is directly relevant to the issue before it when it is not apparent that it factored into the tribunal's analysis, then it is difficult to imagine under what circumstances we could find that a tribunal ignored evidence or gave inadequate reasons.

[30] As noted above, the General Division placed weight on the Claimant's ability to carry over pension contributions and seniority without evidence that these factors were relevant to whether the Claimant had a continuing relationship with the Board. It also failed to analyze the evidence that the employer did not compensate the Claimant in or for the non-teaching period, that her work history with the Board was relatively short, and that she had not established a pattern of employment with the Board. Therefore, I find that 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, under s. 58(1)(*c*) of the DESD Act.

CONCLUSION

[31] The appeal is allowed.

REMEDY

[32] Section 59 of the DESD Act allows me to dismiss the appeal, give the decision that the General Division should have given, refer the matter back to the General Division for reconsideration, or confirm, rescind, or vary the General Division decision. In my view, the record is complete, and I may make the decision that the General Division should have made.

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[13] Supra note 7, at paras. 28 and 42.

[33] The appropriate test for determining whether a claimant's contract for teaching has terminated under s. 33(2)(*a*) of the Regulations has to do with whether there has been a "veritable break in the continuity of a teacher's employment," as articulated in *Oliver*[14]. In determining whether such a break has occurred, it is appropriate to look at the *Stone* considerations that may be relevant as well as any other considerations which may be relevant.

[34] The most significant consideration to support the General Division finding that there had not been a "veritable break" is that the Claimant entered into a contract of employment for teaching in the fall—before she completed her contract in the spring. In fact, this is the entire case for the continuity of her contract. As I outlined above, I do not accept that the relevance of her ability to carry over pension contributions or seniority has been established.

[35] In support of the finding that there was a break in the continuity of the Claimant's contract, I have considered the following points:

- The Claimant was not paid and did not otherwise receive any compensation or benefit over the non-teaching period between contracts;
- At the end of her contract in the spring, the Claimant had been teaching for the Board only for a single school term;
- The Claimant's contract before the non-teaching period was a temporary contract with a fixed term and termination date;
- The LTO contract was not one contract in a series of contracts with the employer, and the Claimant had not established any pattern of completing a contract and then, at the end of the non-teaching period, taking up a new one;
- The terms of the permanent teaching contract in the fall were materially different from the terms of her LTO contract regarding its permanence and security, benefits, and the manner and timing of compensation. The new teaching contract also contemplates two part-time positions at different schools, as opposed to one full-time position at a single school; and
- The Claimant had not expected that she would be offered a permanent contract for the fall until she had nearly completed her LTO contract. She had taken leave from

[14] Supra note 6, para. 27

her previous school board for whom she had worked as a casual/substitute teacher, in order to accept the LTO contract with the Board, and the Claimant maintained that status so that she could potentially return to work for the previous board at the end of the her LTO contract.

[36] As noted in *Stone*, the relevant question is whether the contract of employment terminated, not whether there was some kind of continuing relationship.[15] While the offer and acceptance of a teaching position for the fall is clear evidence of a continuing relationship between the Claimant and the Board, the Claimant has established to my satisfaction, and on a balance of probabilities, that her *contract of employment* for the Board terminated in the spring. The Claimant entered into a new contract for employment in the fall on substantially different terms in letter and spirit, and in its effect. Furthermore, the policy justification for s. 33(2) of the Regulations, that benefits should not be paid to teachers for periods in which they are already compensated, is not applicable to these circumstances.

[37] I find that the Claimant is not disentitled to benefits during the non-teaching summer break of 2017, by reason of s. 33(2) of the Regulations.

Stephen Bergen
Member, Appeal Division

HEARD ON:	October 18, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	K. L., Appellant S. Prud'homme, Representative for the Respondent

[15] *Stone v. Canada (Attorney General)*, 2006 FCA 27, at paras. 106 and 107.