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

Citation: *R. F. v Canada Employment Insurance Commission*, 2019 SST 59

Tribunal File Number: AD-18-570

BETWEEN:

R. F.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: January 28, 2019

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] The Appellant, R. F. (Claimant), has a history of working as a substitute teacher. He accepted a teaching appointment on December 8, 2017, and applied for Employment Insurance benefits during the Christmas break from December 25, 2017, to January 5, 2018. The Respondent, the Canada Employment Insurance Commission (Commission), denied his claim because benefits are not normally payable during the non-teaching period and it did not accept that any exception applied. The Claimant requested a reconsideration, but the Commission maintained its original decision. He next appealed to the General Division, which dismissed his appeal. His appeal now comes before the Appeal Division.

[3] The Claimant's appeal is allowed. The General Division found that the Claimant was not a substitute without regard for the manner in which the employer characterized the Claimant's appointment and for the fact that the Claimant was appointed only until the return of the teacher for whom he was substituting.

ISSUES

[4] Did the General Division err in law by failing to apply the judicial interpretation of the meaning of "casual or substitute basis"?

[5] Did the General Division fail to consider evidence that the Claimant's contract of employment could terminate at any time?

[6] Was it perverse or capricious for the General Division to take into consideration that the Claimant continued to work beyond the non-teaching period and for the duration of the school term?

[7] Did the General Division err by ignoring the Claimant's evidence that the Commission had approved his benefits in similar circumstances in the past or had approved the benefits of other teachers in similar circumstances?

ANALYSIS

[8] The Appeal Division may intervene in a decision of the General Division only if it can find that the General Division has made one of the types of errors described by the "grounds of appeal" in section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).

[9] The grounds of appeal are as follows:

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: Did the General Division err in law by failing to apply the judicial interpretation of the meaning of "casual or substitute basis"?

[10] The General Division found that the Claimant's teaching employment did not meet the definition of teaching "on a casual or substitute basis" because he worked full days and he replaced a full-time teacher under a long-term occasional contract.

[11] In *Arkinstall v Canada (Attorney General)*, the Federal Court of Appeal upheld a decision of the Umpire (under the previous appeal system) in which the Umpire reasoned that a teacher was not employed on a "casual or substitute" basis because his employment was exercised in a "continuous and pre-determined way."[1]

[1] *Arkinstall v Canada (Attorney General)*, 2009 FCA 313.

[12] In the leave to appeal decision, I accepted that there was an arguable case that the General Division erred in law by not applying the appropriate legal test based on *Arkinstall.* Although the interpretation of *Arkinstall* is arguable, I am not satisfied that *Arkinstall* actually held that an employment that is not exercised in a continuous and pre-determined way must *necessarily* be found to be casual or substitute employment.

[13] In *Canada (Attorney General) v Blanchet*,[2] the Federal Court of Appeal found that the meaning to be given to the words "casual" and "substitute" for the purposes of section 33(2)(b) of the *Employment Insurance Regulations* (Regulations) involves a question of law. At the same time, *Blanchet* did not develop or reference any legal test. Instead, *Blanchet* cited the 2007 edition of the *Digest of Benefit Entitlement Principles*, which states that "'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."[3] The Court said that it "agree[d] that these terms must be given the usual dictionary meaning and not a literary, philosophical or figurative meaning."

[14] Therefore, I am not satisfied that *Arkinstall* actually laid down a legal test or that the General Division was obliged to understand "teaching on a casual or substitute basis" in any legal or technical sense. I find that the General Division did not err in law under section 58(1)(b) of the DESD Act by failing to "follow" *Arkinstall* or other legal authorities when it found that the Claimant was not employed on a casual or substitute basis.

[15] I note that *Blanchet* also said that using a usual dictionary definition for casual or substitute should not be the end of the analysis. The definition must be applied to the particular facts. In other words, whether the Claimant's employment was on a casual or substitute basis depends on the particular facts.

[16] Since the application of settled law, which—in this case—is a plain reading of section 33(2)(b) of the Regulations, to the facts of the case is what is termed a "question of mixed fact and law," I do not have jurisdiction to consider it. As recently stated in *Quadir v.*

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[2] *Canada (Attorney General) v Blanchet*, 2007 FCA 377.
[3] *Ibid*. at para. 43

Canada (Attorney General)[4], the Appeal Division does not have jurisdiction to consider questions of mixed fact and law. Therefore, I cannot review the manner in which the General Division applied the law to the facts.

Issue 2: Did the General Division fail to consider evidence that the Claimant's contract of employment could terminate at any time?

[17] One of the Claimant's arguments was that he was employed to replace a teacher on an indeterminate basis. The employer confirmed that his employment was "to an unknown date."[5] His letter of appointment states that he is "substituting for: [a particular person]", and it states that the contract terminates at an "[u]nknown [t]ime."[6] The appointment letter also stated that the Claimant's term was "not to exceed the end of current school year, or upon the return of the regular teacher whichever occurs first."[7] The Claimant's school board wrote a letter on May 3, 2018, confirming that the claimant's long-term occasional appointment "may end in the days/weeks ahead."[8] The letter of appointment is also evidence that the Claimant's employer classified his appointment as "occasional" and characterized his role as a substitute for a particular teacher.

[18] The Claimant also argued to the Appeal Division that, before the Christmas school break, he did not know whether he would be returning to the classroom after Christmas because the teacher that he was substituting for could have returned to work at any time. There is no audio recording of the General Division hearing, so I am unable to determine whether the Claimant's argument restates evidence that the General Division considered or whether it is new evidence. However, other evidence on file supports the Claimant's argument that he was not guaranteed any number of days of work.

[19] In its analysis of whether the Claimant's employment was on a casual or substitute basis, the General Division considered only that he was replacing a full-time teacher and that he worked "full days" on a long-term occasional contract. The General Division did not analyze or even reference the evidence that the Claimant was entitled to work only until the teacher for

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[4] *Quadir v. Canada (Attorney General)2018 FCA 21.*
[5] GD3-19, GD3-24.
[6] GD2-8.
[7] GD2-8.
[8] GD2-9.

whom he substituted returned or that he was not guaranteed any certain term or employment or any number of hours or days of employment.

[20] Furthermore, the General Division did not consider the fact that the letter of appointment confirms that the employer considered the Claimant to have been appointed as a substitute teacher. Even though this is not a determinative factor, the Federal Court of Appeal in *Stephens v Canada (Minister of Human Resources and Development)*,[9] pointed out that "the characterization of a teaching arrangement as "supply teaching" is relevant.

[21] The General Division found that the claimant's employment was not on a casual or substitute basis without regard for the evidence that his appointment was for an indeterminate term and that the employer classified his position as a substitute teaching position. Therefore, the General Division made an error under section 58(1)(c) of the DESD Act: It based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the evidence before it.

Issue 3: Was it perverse or capricious for the General Division to take into consideration that the Claimant continued to work beyond the non-teaching period and for the duration of the school term?

[22] When the Commission made its original decision to deny the Claimant benefits during the non-teaching period, it did so on the basis of the information available to it at the time. For the purpose of section 33(2)(b) of the Regulations, the question was whether the Claimant was employed on an occasional or substitute basis during his qualifying period before the Christmas break, meaning before the non-teaching period between December 25, 2017, and January 5, 2018.

[23] The Claimant's substitute contract was made effective December 8, 2017, so he had been substituting for just over two weeks when the non-teaching period began. The Claimant argues that it would be unfair for the General Division to have based its decision on the fact that the teacher did not return to work between January 5, 2017 and the end of the school year on

[9] *Stephens v Canada (Minister of Human Resources and Development)*, 2003 FCA 477.

June 30, 2018, a fact which neither he nor his employer could have known when the Claimant accepted the appointment.

[24] I agree with the Claimant up to a point. Whether the Claimant's teaching employment was on a casual or substitute basis before the non-teaching period is not dependent on developments after the non-teaching period, except to the extent that the Claimant and his employer could have known or anticipated those developments before the school break. If it was understood before the break that the regular teacher could return to work at any time, then it should not be relevant—to the claim for benefits for that particular break—that she did not, as it turns out, actually return to work during the remainder of the school term.

[25] If the General Division found that the claimant was not a substitute teacher based on irrelevant evidence, then this could be considered a perverse or capricious finding or one made without regard for the material before the General Division. However, for this to be an error under section 58(1)(c) of the DESD Act, that irrelevant evidence would need to factor into the finding and the result. Nothing in the General Division's decision suggests to me that the General Division based its decision that the Claimant was not employed on a casual or substitute basis on the evidence of how long the regular teacher was away after the non-teaching period and therefore, I do not find that the General Division erred under section 58(1)(c) of the DESD Act

[26] However, the Claimant had also argued that his contract of teaching had terminated and that the exemption in section 32(2)(a) of the Regulations should apply, because he could not know if the regular teacher would return to work immediately after the Christmas break. I accept that the General Division considered developments after the non-teaching period to determine that the contract of employment had not terminated. I do not accept that it was improper for the General Division to do so.

[27] The determination that a contract has terminated is necessarily also a determination that it is not continuing (and the determination that a contract is continuing is necessarily a determination that it has not terminated). Determining whether the employment for teaching has terminated (or whether the non-teaching period is instead only a pause in the employment relationship) necessarily requires a comparison of the employment relationship between a

claimant and an employer before the non-teaching period with the relationship after the non-teaching period.

[28] When the General Division discussed the events after the non-teaching period,[10] the General Division was observing only that the Claimant continued teaching after the non-teaching period under the same appointment as before the non-teaching period. I am not persuaded that this evidence was irrelevant or that its consideration resulted in any unfairness to the Claimant.

[29] The General Division's consideration of this evidence for the purpose of determining that the Claimant's employment for teaching had not terminated is not an error under section 58(1)(c) of the DESD Act. Neither is it a failure to observe a principle of natural justice under section 58(1)(a), as the Claimant seemed to suggest.

Issue 4: Did the General Division err by ignoring the Claimant's evidence that the Commission had approved his benefits in similar circumstances in the past or had approved the benefits of other teachers in similar circumstances?

[30] The General Division was correct to discount this evidence. I appreciate the Claimant's concern that decisions ought to be consistent, but the General Division's role is to apply the law to the facts before it and to make a decision specific to the facts before it. While the General Division is bound to follow decisions of higher courts, such as the Federal Court and the Federal Court of Appeal (just as I am), it is not required to follow other decisions of the General Division, or to review the facts and determinations in other decisions of the Commission.

[31] The General Division made no error under section 58(1) of the DESD Act by failing to consider the Claimant's evidence about decisions on similar claims.

CONCLUSION

[32] The appeal is allowed.

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[10]General Division decision, para 7.

REMEDY

[33] The record is not complete. An audio recording of the General Division hearing is not available, and I therefore do not have all of the evidence that was available to the General Division. I cannot make the decision that the General Division would have made.

[34] Therefore, I am returning the matter to the General Division for reconsideration in accordance with my authority under section 59 of the DESD Act.

Stephen Bergen
Member, Appeal Division

HEARD ON:	January 15, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	R. F., Appellant