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

Citation: *R. H. v Canada Employment Insurance Commission*, 2019 SST 519

Tribunal File Number: AD-19-77

BETWEEN:

R. H.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: May 29, 2019

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

[2] I have made the decision the General Division should have made and I find the Claimant is not disentitled to benefits during the non-teaching period from the end of June 2018 to the beginning of September 2018.

OVERVIEW

[3] The Appellant, R. H. (Claimant), is a teacher who applied for Employment Insurance benefits during a non-teaching period. The Respondent, the Canada Employment Insurance Commission (Commission), denied her claim on the basis that teachers are not entitled to Employment Insurance benefits during their non-teaching periods, with limited exceptions. The Claimant's circumstances did not qualify for any of the exceptions.

[4] The Claimant requested a reconsideration, but the Commission maintained its original decision. Her appeal to the General Division of the Social Security Tribunal was dismissed, and she now appeals to the Appeal Division.

[5] The appeal is allowed. The General Division decision erred under section 58(1)(c) of the *Department of Employment and Social Development Act* (DESD Act) by finding that the Claimant's reaching contract had not terminated and that she was not a substitute teacher, in a manner that was perverse or capricious or without regard for the evidence before it

[6] I have made the decision that the General Division should have made and I find that the Claimant was predominantly employed as a substitute teacher in the school year preceding the non-teaching period, and she should not be disentitled from benefits during the non-teaching period from the end of June 2018 to the beginning of September 2018.

ISSUES

[7] Was the General Division finding that there was no veritable break in the continuity of the Claimant's employment perverse or capricious because it relied on the Claimant's ability to carry forward seniority from her .17 FTE position?

[8] Did the General Division find that the Claimant's contract had not terminated without regard for the Claimant's evidence, including her evidence of lack of compensation during the non-teaching period?

[9] Was the General Division finding that the Claimant was employed in a continuous and predetermined way during the 2017-2018 school year, made in a perverse or capricious manner or without regard for the material before it?

ANALYSIS

[10] 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 DESD Act.

[11] The only 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 before it.

Issue 1: Was the General Division finding that there was no veritable break in the continuity of the Claimant's employment perverse or capricious because it relied on the

Claimant's ability to carry forward seniority from her .17 FTE position?

[12] Section 33(1) of the *Employment Insurance Regulations* (Regulations) states that teachers are not entitled to benefits for weeks of unemployment that fall in the claimant teacher's non-teaching period except in certain circumstances. One of those circumstances is set out in section 33(1)(a), which is where the claimant's contract of employment for teaching had terminated. According to the Federal Court of Appeal in *Oliver v Canada (Attorney General of Canada),*[1][2] a teaching contract will not be considered to have terminated where there is no "no veritable break in the continuity" of the Claimant's employment.

[13] The General Division found that there had been "no veritable break in the continuity" of the Claimant's employment because the Claimant accepted a full-time contract for the following fall term before the June 29, 2018, end of the school year. To support this finding, it also relied on the fact that the Claimant could carry forward her seniority from the .17 FTE (proportion of a full-time employee) part-time teaching contract in order to have the seniority to later apply for the full-time position.

[14] The Commission argued in support of the General Division's decision that the General Division took into account that the Claimant had not been paid during the summer non-teaching period.[3] The Commission cited *Cote v. Canada (Department of Employment and Social Development)*[4] Attorney General), for the proposition that a veritable break is a break in the continuity of the employment relationship.

[15] The General Division appears to have accepted the Claimant's evidence as to the timing and nature of her various contractual arrangements with the school board (Board).[5] However, it took the language of the Board's offer letter to state that the Claimant transferred her .17 FTE contract to her full-time contract to start September 2018.[6] The Claimant was asked about this "transfer" and, in response, explained that she had needed to take the three-month .17 FTE

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[1] *Oliver v Canada (Attorney General of Canada),* 2003 FCA 98
[2] *Bazinet et al. v. Canada (Attorney General),* 2006 FCA 174
[3] General Division decision, para. 10
[4] *Cote v. Canada (Department of Employment and Social Development)* 2017 FCA 28
[5] General Division decision, para. 3
[6] General Division decision, paras. 2 and 6

contract from November to February, in order to have the seniority to apply for a permanent position in the next school year.[7] She agreed that could not have applied for the permanent job without first having accepted the .17 FTE contract.

[16] The General Division accepted and relied on the fact that the seniority the Claimant had accrued in her .17 FTE position carried forward to her full-time position with the same employer in the following school year. However, the General Division did not have evidence before it on which it could determine how the ability to carry over seniority or pension contributions would be relevant to the question of whether the Claimant's contract of employment had terminated. There was no evidence before the General Division that the Claimant would not have been able to maintain her seniority if she had not been hired into another position until some later school year such as 2019-2020, or that her teaching seniority would not be honoured at a different school board in the province.

[17] If the Claimant's .17 FTE contract terminated in February 2018 and the Claimant could not maintain her seniority if she were not to return to work for the Board in the fall of 2018, then these facts would be relevant to the General Division's determination. On the other hand, if the Claimant's .17 FTE contract terminated in February and her LTO contract terminated in June, yet 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 in this instance would say nothing about whether her contract with Board was or was not terminated.

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

[19] Therefore, 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 the fact that her seniority would carry over without establishing its relevance to the continuation of her employment contract. This is an error under s. 58(1)(c) of the DESD Act.

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[7] Audio recording of General Division hearing at timestamp 19:00

Issue 2: Did the General Division find that the Claimant's contract had not terminated without regard for the Claimant's evidence, including her evidence of lack of compensation during the non-teaching period?

[20] The only circumstances that the General Division considered in finding that the Claimant's contract had terminated were the Claimant's ability to carry her seniority forward from the .17 FTE position, and the fact that she accepted the offer of employment for the fall while she was still working under the LTO contract.

[21] The Commission cited *Côte v (Canada (Employment and Social Development)*[8] to suggest that the test was whether there was a break in the "continuity of the employment relationship", and implied that the General Division was satisfied on the facts that the test had been met, notwithstanding what it describes as the General Division's "brief analysis"[9].

[22] While I appreciate that *Côte* describes the veritable break as relating to the "employment relationship", the question is not whether a teacher has maintained a continuing relationship with the employer of any kind.[10] The question is whether the claimant had a continuing *contractual* relationship with the employer. Section 33(2) of the Regulations is directed to the situation where the "contract of employment" to be terminated. If the continuity of the contract is defined by the continuing "relationship" with the employer, that relationship can only be a relationship defined by contract. It would be absurd to understand this to mean that the termination of the contract requires a period in which there is no exchange of information or any other linkage or *relationship*, even a collegial or social relationship between a claimant and his or her past, current, or future employer.

[23] This interpretation is consistent with *Côte.* In *Côte, t*he claimant had asserted that her teaching contract had terminated because the government had legislated an end to one of her benefits. The facts in *Côte* did not require that it distinguish a break in the contractual relationship from a break in some other type of relationship with the employer. In my view, *Cote* distinguished between a break in the contractual employment relationship and a change in

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[8] *Côte v Canada (Canada (Employment and Social Development)* 2017 FCA 28
[9] AD3-4
[10] *Stone v Canada (Attorney General),* 2006 FCA 27 at par 107

circumstance that was out of the control of the contacting parties and which did not frustrate the essential purposes of the contract and was not so fundamental as to relieve the contracting parties from their fundamental obligations to each other.

[24] In this case, the General Division failed to consider several of the circumstances that are relevant to the determination of whether the Claimant's contract was terminated. To begin with, the General Division did not analyze the fact that the Claimant was neither paid by the Board during the non-teaching break, nor had she been paid any premium or supplemental wages during her prior teaching terms for the purpose of compensating her for the anticipated non-teaching period. I appreciate the Commission's position that the General Division recognized that the Appellant asserted that she was not paid for the non-teaching period.11 However, this was only noted after the General Division had already found that there was no veritable break, and it appears only as an apologetic preamble to its pronouncement that it "must apply the EI Regulations to the evidence." This does not convince me that the General Division deliberately excluded the Claimant's lack of compensation from its consideration, but I am satisfied that the this factor was not weighed by the General Division in its analysis.

[25] In *Stone v Canada (Attorney General)*[12], the Federal Court of Appeal itemized several factors that are relevant to the determination of whether a contract of employment for teaching has terminated. It identifies those factors after an initial discussion that focused on the relevance of whether a teacher is compensated for the non-teaching period. *Stone* referred to a number of other decisions that support the relevance and the significance of this particular factor, even referring to the fact that the "prevention of double dipping [i.e. being paid Employment Insurance benefits while also being compensated by the employer] is one of the purposes of paragraph 33(2)(a) of the Regulations.[13]

[26] There were other facts that the General Division ignored as well that were relevant to other factors identified by *Stone*. The decision in *Stone* provides a list of what it describes as "helpful" factors to determine whether a teaching contract has terminated:

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[11] General Division decision, para 10
[12] *Supra* note 10
[13] *Ibid*, para. 31

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;
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.

[27] The General Division did not consider the length of the employment record, although the Claimant's record with the Board was short. She only started with her first and probationary employment with the Board in November 2017, and she had never before been employed before and after the summer non-teaching period.

[28] In addition, 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 usual 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. According to the Claimant, she had worked for three months as a .17 FTE, and on an LTO contract at .667 FTE, subject to being relieved at any time by the return of the teacher for whom she was substituting. This history was supported by documentation from the employer[14] which also includes evidence of another LTO contract in late 2017.[15] As it happened, the Board offered the Claimant a full-time permanent position before the end of her .667 FTE LTO contract. This offer was at a different school and a different school level (elementary as opposed to high school) in the fall.

[29] The General Division did not consider whether the Claimant's return to teaching following a normal non-teaching period (the summer break between school years in this case)

[14] GD3-33-39
[15] GD3-36

was a characteristic of the relationship between the Claimant and the Board, or whether the Claimant had expected to be reemployed as a matter of course.

[30] The General Division erred under section 58(1)(c) of the DESD Act. The General Division failed to consider or analyze the evidence that the Claimant would not be compensated or receive benefits during her non-teaching period, or the other factors referenced above.

Issue 3: Was the General Division finding that the Claimant was employed in a continuous and predetermined way during the 2017-2018 school year, made in a perverse or capricious manner or without regard for the material before it?

[31] Another circumstance in which a teacher may still be entitled to claim benefits over a non-teaching period is described in section 33(1)(b) of the Regulations. This is where the claimant's employment in teaching was on a casual or substitute basis. In *Dupuis-Johnson v. Canada (Employment and Immigration Commission)*[16] the court said that a teacher who is "employed in a continuous and predetermined way", could not be considered to be a casual or substitute teacher.

[32] The General Division found that the Claimant's "two contracts [including both the .17 FTE from November to February and the .667 FTE LTO contract from February to June] were not both predetermined and continuous. It continued to state that "in other words" the LTO contracts did not involve "on-call" teaching where she would not know what class she would be teaching one day to the next." It appears that the General Division understood that "predetermined and continuous" was a term which was interchangeable or synonymous with "on-call". However, on-call is a term which is generally applied to casual teachers.[17] Substitute teaching may be on-call, but is not necessarily on-call.

[33] Regardless of whether the General Division misdirected itself on this point, there is no indication in the decision that the General Division took into account the Claimant's evidence

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[16] *Dupuis-Johnson v. Canada (Employment and Immigration Commission)* A-511-95

[17] See Digest of Benefit Entitlement Principles at https://www.canada.ca/en/employment-social-development/programs/ei/ei-list/reports/digest/chapter-14/disentitlement-relief.html#a14_3_2

that she considered the employment to be day-to-day, or that the teacher she was replacing could have returned from sick leave at any time, which would have terminated the Claimant's contract.

[34] This is a significant factor of relevance to the determination of whether the Claimant had been employed in a continuous and predetermined way. I find that the General Division erred under section 58(1)(c) of the DESD Act by failing to consider the Claimant's evidence that her LTO contract could have terminated at any time before the end of the term in June 2018.

CONCLUSION

[35] The Claimant has established grounds of appeal under section 58(1) of the DESD Act. This means that I must consider the appropriate remedy.

REMEDY

[36] I have the authority under section 59 of the DESD Act to give the decision that the General Division should have given, to refer the matter back to the General Division with or without directions, or to confirm, rescind or vary the General Division decision in whole or in part.

[37] I consider that the appeal record is complete and that I may therefore give the decision that the General Division should have given.

Termination of contract

[38] The most compelling evidence is that, before the Claimant had even completed her LTO contract, the Board offered the claimant a position following the summer non-teaching period.

[39] However, I also recognize the fact that the Board did not compensate the Claimant over the summer months whereas permanent teachers are compensated over non-teaching periods. As stated in *Stone*, one of the policy objectives of section 33(2) of the Regulations is to avoid double compensation.

[40] As I stated earlier, I do not accept that there is evidence to support the relevance of the Claimant's ability to "carry over" her seniority to the question of whether the Claimant's contract had terminated. The only other reason given by the General Division is that the Claimant

accepted the Board's offer of a permanent position before she had completed her LTO term contract. In light of the other evidence, I would not be able to find that the contract of employment had not terminated on this alone.

[41] By other evidence, I am referring to the evidence that the Claimant was not paid or entitled to certain benefits during the non-teaching period. I am also considering that the Claimant has not worked for the Board long enough to establish a pattern of the Claimant's re-employment or evidence of her expectation of employment following non-teaching periods. In addition, the LTO contract was significantly different in its terms from the contract starting in September 2018. Unlike the September contract, the Claimant's LTO was neither full-time, nor permanent, and the employer did not cover the cost of all her benefits. She was expected to move to a different school in September and to teach elementary school, rather than high school. All of these factors would help to support a finding that the Claimant's LTO teaching contract terminated in June 2018 and that she entered into a new contract in both substance and intent, for the fall.

[42] However, I must also consider the Claimant's .17 FTE status. I do not accept that the only significance of the .17 FTE position is that it allowed the Claimant to accrue some seniority in the period from November 2017 to February 2018. While the Claimant did not dispute that her seniority would carry over, she had emphasized that the seniority she accrued in that .17 FTE position was necessary to qualify her to apply for the apply for a permanent, full-time position, in the new school year.

[43] While it is true that the Claimant accrued seniority while she was a .17 FTE and that this seniority may have contributed to her success in obtaining the full-time permanent position, I find that the .17 FTE position was actually a permanent position and that the Claimant continued to be a .17 FTE permanent employee with the Board until she assumed the full-time position in September 2018.

[44] This finding is supported by the June 28, 2018, letter from the Board that confirmed the Claimant's acceptance of the full-time permanent position. The same letter is self-described as a "transfer confirmation" and it details a *change in assignment* effective September 1, 2018, from

the Claimant's .17 FTE position at [the high school in which she was originally offered the .17 FTE in November 2017][18], to the 1.0 FTE position at a different school with the Board.

[45] The Board's description in the letter must be considered together with the Memorandum of Settlement and attachments[19] (Agreement) which governed the Board's relationship with its teachers. The Claimant did not dispute the accuracy of any of these documents in her appeal to the General Division.

[46] According to the Agreement, all LTO's accrue seniority as do part-time teachers, and may bid on jobs according to that seniority. Therefore, there would be no special significance attached to the seniority that the Claimant accrued in her .17 FTE job, as compared to her .667 FTE job as a LTO, **except if** the .17 FTE job had been a part-time **permanent** job. According to the Agreement, the Board must offer permanent vacancies to part-time teachers *before* it can offer it to occasional teachers. If a permanent position is offered to occasional teachers, only occasional teachers that have competed one long-term assignment that is a minimum of 4 months may qualify.

[47] In other words, a three-month November to February .17 FTE position would have no priority over occasional applicants unless it was a permanent part-time position. However, if the .17 FTE had not been a permanent position (but was only three months as the Claimant testified), it could not have been of sufficient duration to qualify the Claimant to apply even if the competition for the permanent position was open up to occasional teachers. In that case, the Claimant would only had the opportunity to apply if no permanent teachers were interested, and she would have had to apply based on her five-month LTO assignment.

[48] The Claimant testified that her .17 FTE contract ended in February and she described herself as an LTO,[20] but if that .17 FTE was a three-month occasional contract, it would have been of no significance in terms of ability to apply. Yet the Claimant very clearly understood that her .17 FTE position was significant in her ability to apply for and obtain the full-time permanent position.

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[18] GD3-33
[19] GD3-43
[20] GD3-29

[49] In addition, the Claimant confirmed to the Commission that, in addition to her five-month LTO, she had a part-time (.17) **permanent** position.[21] I prefer this statement to her testimony that the .17 FTE position ran from November 2017 to February 2018 because it is consistent with the Board's letter that confirmed a transfer or change of assignment from .17 FTE to 1.0 FTE in relation to the permanent position in September 2018.

[50] . Having also considered the Claimant's testimony regarding how she needed seniority to qualify in connection with the terms of the Agreement, I find that the reason that the Claimant was able to apply and obtain the full-time permanent position that was offered to her in June 2018 was that the Board already considered her to be permanent. It gave her priority over other occasional teachers and any other permanent part-time teacher interested in the position that had less seniority.

[51] I accept that the position that started in September 2018 would involve a significant change in benefits and in the Claimant's ability to be compensated for non-teaching periods in the future. I also appreciate that the Claimant had only a short history with the Board and no pattern of recall had been established after non-teaching periods. On the basis of the Board's documents and statements, I also accept that the Claimant had accepted work under occasional contracts even though I have found that she had part-time permanent status.

[52] Nonetheless, it is my view that the essential contractual relationship with the Board was one of *permanent* employment, which was confirmed by an accepted offer of employment while the Claimant was still working for the Board. This contractual relationship extended across the summer non-teaching period, and I therefore conclude that there was no veritable break in the employment relationship. The Claimant's employment had not terminated and section 33(2) (a) of the Regulations does not operate to permit the Claimant to access benefits during the non-teaching period.

Casual or substitute teaching

[21] GD3-19

[53] As noted in *Canada (Attorney General) v. Blanchet,*[22] the Regulations do not define the terms "casual or substitute basis". *Blanchet* refers to *Dupuis-Johnson v. Canada (Employment and Immigration Commission)*[23] which would exclude employment that is exercised in a "continuous and predetermined way" from casual or substitute teaching. *Arkinstall v Canada (Attorney General)*[24] did not disturb a decision of the Umpire that the applicants were casual or substituted despite the fact that their terms had not ended. According to *Stephens v. Canada (Minister of Human Resources Development),*[25] "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) for that period."

[54] *Blanchet* referenced the Digest of Benefit Entitlement Principles[26] (Digest) and dictionary definitions but determined that it must have regard to the contract signed by the teacher. In that case, it was found that, despite the precarious nature of their contracts, the teachers were neither casual nor substitute. Blanchet states that the situation before it was "precisely" the same as the situation in *Dupuis Johnson* in which the contract required that the teachers be offered part-time contracts where it was determined beforehand that the teacher would be absent for more than two months.

[55] Neither the Agreement, nor any correspondence between the Board and the Claimant suggest that substitutes must be offered part-time contracts if the teacher absence is expected to be protracted, and there was no evidence in this case that the Board had made any determination as to the length of time the regular teacher was expected to be absent. The Claimant testified that she was basically a supply teacher under her LTO. She said that she taught two courses for a teacher that was on sick leave, and that she understood that the teacher could return from her sick leave any day. She therefore considered her LTO contract to be day-to-day. While the Claimant also had status as a .17 permanent teacher since her start with the Board in November 2017, her employment was predominantly as a substitute teacher under various contracts in the school year preceding the non-teaching period. Despite her .17 FTE status, the evidence was consistent that at least since February 2018, the Claimant was only receiving work under her five-month contract, which the Board

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[22] *Canada (Attorney General) v. Blanchet* 2007 FCA 377
[23] *Supra* note 15
[24] *Arkinstall v Canada (Attorney General),* 2009 FCA 313
[25] *Stephens v. Canada (Minister of Human Resources Development),* 2003 FCA 477
[26] *Supra* note 14

describe as working two LTO sections.[27] In fact, she had to confirm that she was unavailable to accept other work during that period. The Claimant also had another substitute position from October 2 to December 22, 2017, which is stated to be 1.0 FTE (and which would therefore exclude other teaching).[28]

[56] The Claimant meets the usual dictionary definition of "substitute" in that she is "taking the place or function of another".[29] The Digest is a statement of the Commission's policy and states that "Employment on a substitute basis occurs when a teacher replaces another teacher on a temporary basis, for instance during a leave of absence, vacations or illness."[30]

[57] I acknowledge that the Digest continues on to state that substitute teaching that becomes fixed or regular or subject to a temporary full time or part-time contract should no longer be considered to be substitute teaching. In this case, the Claimant's substitute teaching was subject to the terms of a temporary LTO contract.

[58] However, the Commission's policy is not binding on me. The Claimant's employment may have been continuous as it turned out, but I do not accept that it was predetermined, given the uncertainty of the regular teacher's return, and that her continued employment was contingent on the teacher's continued absence.

[59] I find that the Claimant was employed as a substitute and that she therefore meets the requirements of the exception at s. 33(1)(b) of the Regulations. Based on the application of section 33(1)(b), the Claimant is not disentitled to benefits during the non-teaching period from the end of June 2018 to the beginning of September 2018.

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[27] GD3-38
[28] GD3-36
[29] https://www.merriam-webster.com/dictionary/substitute
[30] https://www.canada.ca/en/employment-social-development/programs/ei/ei-list/reports/digest/chapter-14/disentitlement-relief.html#a14_3_2

Stephen Bergen
Member, Appeal Division

HEARD ON:	May 21, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	R. H., Appellant