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

Citation: *Canada Employment Insurance Commission v K. K.*, 2019 SST 547

Tribunal File Number: AD-19-44

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

K. K.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Pierre Lafontaine

DATE OF DECISION: June 4, 2019

Canada

DECISION AND REASONS

DECISION

[1] The Tribunal allows the Commission's appeal.

OVERVIEW

[2] The Respondent, K. K. (Claimant), was employed as a substitute teacher at the beginning of the 2017-2018 school year. Effective October 13, 2017, she was employed in a 50% term teaching contract wherein she worked two full days and one half day each week, which ended on June 28, 2018. She also continued to substitute teach on a call-in as needed basis. She later accepted a new 35% teaching contract July 5, 2018 for the school year starting September 7, 2018.

[3] The Appellant, the Canada Employment Insurance Commission (Commission), concluded that the Claimant was employed in teaching and was not entitled to employment insurance benefits during the summer break non-teaching period. Consequently, the Commission imposed a disentitlement from July 2, 2018 to September 6, 2018.

[4] The General Division concluded that the Claimant had not shown that her teaching employment contract has terminated at the end of the 2017-2018 school year as required by paragraph 33(2) (a) of the *Employment Insurance Regulations* (EI Regulations). It however concluded that the Claimant was employed on a casual or substitute basis at the end of the 2017-2018 school year as per section 33(2) (b) of the EI Regulations.

[5] The Commission was granted leave to appeal to the Appeal Division. The Commission submits that the General Division erred in law because the Federal court of appeal has confirmed that substitute teachers who enter into temporary contracts for regular teaching during the school year no longer meet the definition of "casual" or "substitute" within the meaning of section 33(2) (b) of the EI Regulations, even if they retain their casual/substitute status with the school board.

[6] The Tribunal must decide whether the General Division erred in law in its interpretation of section 33(2) (b) of the EI Regulations.

[7] The Tribunal allows the Commission's appeal.

ISSUE

Did the General Division err in law in its interpretation of section 33(2) (b) of the EI Regulations?

ANALYSIS

Appeal Division's mandate

[8] The Federal Court of Appeal has determined that when the Appeal Division hears appeals pursuant to subsection 58(1) of the *Department of Employment and Social Development Act* (DESD Act), the mandate of the Appeal Division is conferred to it by sections 55 to 69 of that Act.[1]

[9] The Appeal Division acts as an administrative appeal tribunal for decisions rendered by the General Division and does not exercise a superintending power similar to that exercised by a higher court.[2]

[10] Therefore, unless the General Division failed to observe a principle of natural justice, erred in law, 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, the Tribunal must dismiss the appeal.

Issue: Did the General Division err in law in its interpretation of section 33(2) (b) of the EI Regulations?

[11] The only issue before the Appeal Division is whether the General Division erred in law in its interpretation of section 33(2)(b) of the EI Regulations when it determined

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[1] *Canada (Attorney General) v Jean*, 2015 FCA 242; *Maunder v Canada (Attorney General)*, 2015 FCA 274.
[2] *Idem*.

that the Claimant was employed on a casual or substitute basis. There is no evidence before the General Division showing that paragraph 33(2) (c) might apply. As far as paragraph 33(2) (a) is concerned, the General Division concluded that there was no break in employment as defined by case law.

[12] The facts are not in dispute. The Claimant was employed as a substitute teacher at the beginning of the 2017-2018, school year. Effective October 13, 2017, she was employed in a 50% term teaching contract wherein she worked two full days and one half day each week. The 50% term teaching contract ended on June 28, 2018. She also continued to substitute teach on a call-in as needed basis during the entire school year. She therefore had 84 "term" days and 83.9 "substitute" days of employment. She later accepted a new 35% teaching contract July 5, 2018, for the new school year starting September 7, 2018.

[13] The General Division found that the Claimant was predominantly engaged in substitute teaching during the qualifying period as that employment spanned the entire school year. As a result, the General Division concluded that the Claimant was employed on a casual or substitute basis at the end of the 2017-2018 school year as per section 33(2) (b) of the EI Regulations.

[14] The Commission submits that the General Division erred in law because the Federal court of appeal has confirmed that substitute teachers who enter into temporary contracts for regular teaching during the school year no longer meet the definition of "casual" or "substitute" within the meaning of section 33(2) (b) of the EI Regulations, even if they retain their casual/substitute status with the school board.

[15] With great respect, the General Division decision must be set aside. The Tribunal will render the decision that should have been rendered pursuant to section 59(1) of the DESD Act.

[16] Under section 33(2) of the EI Regulations, a teacher who holds employment in teaching during part of his or her qualifying period is not entitled to receive any benefits

for the weeks of unemployment, which are included in any non-teaching period. The expression "any non-teaching period" includes the summer holidays.

[17] Section 33(2) of the EI Regulations contains three exceptions to this disentitlement. These are three distinct exceptions and not one exception with three conditions to be met for it to apply. Therefore, these paragraphs do not apply cumulatively, but rather separately and independently of each other.

[18] One of these exceptions is contained in section 33(2) (b) of the EI Regulations which applies to teachers that are employed on a casual or substitute basis.

[19] The terms "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"[3]

[20] In the *Blanchet* case[4], the Federal court of appeal held that the benefit of the exception is not obtained through the teacher's status with the school board, but through the employment held during the qualifying period. The Court stated:

> "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)."

[21] Ms. Blanchet had signed a part-time teaching contract for 8.7% of a regular full-time teaching assignment. At the same time, from August 23, 2002, to June 27, 2003, she had another part-time teaching contract, also for 8.7% of a regular full-time teaching assignment. According to her testimony, her income varied from $15,000 to $17,000 per

[3] *Canada (Attorney General) v Blanchet*, 2007 FCA 377.
[4] *Idem.*

year, $4,500 of which came from these two contracts. The balance was earned from her substitute teaching.

[22] Although the evidence clearly showed that Ms. Blanchet's employment in teaching during the qualifying period was predominantly on a casual or substitute basis, the Federal court of appeal nonetheless concluded that she did not meet the conditions of the exception under paragraph 33(2)(b) of the EI Regulations.

[23] The Federal court of appeal has clearly established that teachers who enter into temporary contracts for regular teaching during the school year no longer meet the definition of "casual" or "substitute" teaching within the meaning of paragraph 33(2)(b) of the EI Regulations.

[24] Applying these principles to the present case, the Tribunal can only come to the conclusion that the Claimant's employment as a teacher was not on an occasional or substitute basis within the meaning of paragraph 33(2)(b) of the EI Regulations. She had a substitute teacher status but, during the qualifying period, was called up and entered into a contract to hold employment not on a casual or substitute basis but on a regular part-time basis.

[25] Therefore, the General Division erred in the present case with regard to the interpretation and scope of paragraph 33(2) (b) of the EI Regulations.

[26] For the above-mentioned reasons, the Commission's appeal is allowed.

CONCLUSION

[27] The Tribunal allows the Commission's appeal.

Pierre Lafontaine
Member, Appeal Division

HEARD ON:	May 23, 2019

METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	Rachel Paquette, representative of the Appellant K. K., Respondent