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

Citation : *R. F. v Canada Employment Insurance Commission*, 2019 SST 1046

Tribunal File Number: AD-19-432

BETWEEN:

R. F.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

DATE OF DECISION: September 19, 2019

Canada

DECISION AND REASONS

DECISION

[1] The Tribunal dismisses the appeal.

OVERVIEW

[2] The Appellant, R. F. (Claimant), worked as a teacher during the 2017/2018 school year and started a Long-Term Occasional teaching contract on December 8, 2017, to cover the position of a teacher who was on a leave of absence. The Claimant applied for benefits for the winter break non-teaching period from December 25, 2017, to January 5, 2018. The Canada Employment Insurance Commission determined that benefits could not be paid to the Claimant because he did not meet any of the conditions needed for teachers to receive employment insurance benefits during the non-teaching period. The Claimant requested a reconsideration and the Commission maintained its initial decision. The Claimant appealed the reconsideration decision to the General Division of the Tribunal.

[3] The General Division found that the Claimant's teaching contract did not terminate and that his employment in teaching was not on a casual or substitute basis. It also found that he did not qualify to receive benefits with hours from employment other than teaching. The General Division concluded that the Claimant did not meet any of the exceptions of section 33(2) of the *Employment Insurance Regulations* (EI Regulations).

[4] The Claimant was granted leave to appeal. He submits that the General Division erred in fact and in law. More precisely, the Claimant argues that the General Division did not take into consideration that he was appointed for an indeterminate term and that the employer classified his position as a substitute teaching position. He submits that his role was not at all predetermined and it was not known to be continuous at the time he applied for benefits.

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

[6] The Tribunal dismisses the Claimant's appeal.

ISSUES

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

ANALYSIS

Appeal Division's mandate

[7] 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*, the mandate of the Appeal Division is conferred to it by sections 55 to 69 of that Act.[1]

[8] 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]

[9] 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 no 1: Did the General Division err in law in its interpretation of section 33(2) (b) of the EI Regulations?

[10] The Claimant puts forward that the General Division erred because he is not a full time teacher but a "Long term occasional teacher" and works under contracts with school boards. He is paid "per day" and his salary is based on the number of days he actually works. Therefore, he is not paid during non-teaching periods. His employment is on a casual or substitute basis. His contract can be terminated on any given day the full time

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

teacher decides to return to work. Therefore, he submits that his employment was not held in a "continuous and pre-determined way"

[11] The only issue before the General Division was concerning the period of disentitlement from December 25, 2017, to January 5, 2018.

[12] The undisputed evidence shows that the Claimant accepted a long-term occasional assignment as of December 8, 2017, "not to exceed the end of the school year, or upon the return of the regular teacher whichever occurs first."[3] The Claimant's last day of work was December 22, 2017, and he returned after the holidays on January 8, 2018, until the end of the school year.

[13] The Federal Court of Appeal has confirmed that casual or 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.[4] The exception of section 33(2) (b) emphasizes the performance of the employment and not the status of the teacher who holds it.[5]

[14] Furthermore, the Federal Court of Appeal has established that a full time teaching contract for an extended period of time cannot not be considered "casual" or "substitute" within the meaning of section 33(2)(b) of the EI Regulations.[6]

[15] The Tribunal understands that there was a precarious aspect to the Claimant's term of employment since he could be laid-off at any given time should the teacher he was replacing elect to return to work before the end of the school year. However, the fact remains that the Claimant had a full time long-term assignment during the qualifying period and the evidence does not show that his assignment was terminated in December 2017.

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[3] GD2-8.
[4] *Arkinstall v Canada (Attorney General)*, 2009 FCA 313, *Canada (Attorney General) v Blanchet*, 2007 FCA 377.
[5] *Canada v Blanchet, ibid*.
[6] *Arkinstall v Canada (Attorney General)*, supra.

[16] The employer also issued a Record of Employment stating that the date of return was January 8, 2018. The Claimant did in fact returned to work on January 8, 2018, until the end of the school year. Therefore, his employment was held in a "continuous and pre-determined way" and not on a casual or substitute basis within the meaning of section 33(2) (b) of the EI Regulations.

[17] The Tribunal finds that the evidence before the General Division shows that the Claimant was bound by a contract during the holiday period in question and his employment as a teacher was exercised in a continuous and predetermined way and not on an occasional or substitute basis within the meaning of paragraph 33(2)(b) of the EI Regulations.

[18] Therefore, the General Division did not err with regard to the interpretation and scope of paragraph 33(2) (b) of the EI Regulations.

Issue no 2: Did the General Division err in law in its interpretation of section 33(2) (a) of the EI Regulations?

[19] As far as section 33(2) (a) of the EI Regulations is concerned, the Federal Court of Appeal as repeated on numerous occasions the applicable legal test: Is there a clear break in the continuity of the claimant's employment, so that the latter has become unemployed?

[20] The Appellant relies heavily on the fact that he was not paid during the non-teaching period.

[21] It is true that if a claimant is not paid by an employer, it may mean that the claimant's contract has been terminated. However, this does not mean that non-payment alone suffices to conclude that a contract has been terminated. The Federal Court of Appeal has repeatedly held that, even if a claimant was not paid, their contract was not

thereby terminated and, therefore, the claimant was not entitled to receive Employment Insurance benefits.[7]

[22] The Tribunal finds that the evidence before the General Division does not show a veritable break in employment in the continuity of the Claimant's employment as a teacher on December 22, 2017. The evidence does not support that his contract was terminated in December 2017. The employer also issued a record of employment stating that the date of return was January 8, 2018. The Claimant did in fact returned to work on January 8, 2018, until the end of the school year.[8]

[23] Therefore, the General Division did not err with regard to the interpretation and scope of section 33(2) (a) of the EI Regulations.

CONCLUSION

[24] The appeal is dismissed.

Pierre Lafontaine
Member, Appeal Division

HEARD ON:	September 12, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	R. F., Appellant

[7] *Canada (Attorney General) v Donachey*, A-411-96, *Canada (Attorney General) v St-Coeur*, A-80-95, *Canada (Attorney General) v Taylor*, A-681-90.
[8] *Oliver v Canada (Attorney General)*, 2003 FCA 98, *Stone v Canada (Attorney General)*, 2006 FCA 27.