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

Citation: *R. D. v Canada Employment Insurance Commission*, 2020 SST 41

Tribunal File Number: AD-20-36

BETWEEN:

R. D.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Pierre Lafontaine

Date of Decision: January 22, 2020

Canada

DECISION AND REASONS

DECISION

[1] The Tribunal refuses leave to appeal.

OVERVIEW

[2] The Applicant, R. D. (Claimant), worked as a teacher during the 2018/2019 school year and was employed in a Long Term Occasional (LTO) assignment from September 2018 to December 2018 and February 11, 2019 to June 28, 2019. On July 4, 2019, the Claimant was offered another LTO assignment with a start date of September 3, 2019. The Claimant applied for benefits for the summer break non-teaching period.

[3] The Canada Employment Insurance Commission (Commission) determined that benefits could not be paid to the Claimant because she 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.

[4] The General Division found that the Claimant's teaching contract did not terminate and that her employment in teaching was not on a casual or substitute basis. It also found that she 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).

[5] The Claimant now seeks leave to appeal of the General Division's decision to the Appeal Division. In her application for leave to appeal, the Claimant argues that her teaching position was terminated on June 28, 2019. She submits that she is an occasional teacher and at no point was she guaranteed work in September. She puts forward that she is not a permanent teacher thus she does not get paid throughout the summer and does not have the same job security as a permanent teacher.

[6] The Tribunal must decide whether the Claimant raised some reviewable error of the General Division upon which the appeal might succeed.

[7] The Tribunal refuses leave to appeal because the Claimant's appeal has no reasonable chance of success.

ISSUE

[8] Does the Claimant raise some reviewable error of the General Division upon which the appeal might succeed?

ANALYSIS

[9] Section 58(1) of the *Department of Employment and Social Development Act* (DESD Act) specifies the only grounds of appeal of a General Division decision. These reviewable errors are that the General Division: failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction; it erred in law in making its decision, whether or not the error appears on the face of the record; or it based its decision on an erroneous finding of fact that it had made in a perverse or capricious manner or without regard for the material before it.

[10] An application for leave to appeal is a preliminary step to a hearing on the merits. It is an initial hurdle for the Claimant to meet, but it is lower than the one that must be met on the hearing of the appeal on the merits. At the leave to appeal stage, the Claimant does not have to prove her case but must establish that the appeal has a reasonable chance of success based on a reviewable error. In other words, that there is arguably some reviewable error upon which the appeal might succeed.

[11] Therefore, before leave can be granted, the Tribunal needs to be satisfied that the reasons for appeal fall within any of the above mentioned grounds of appeal and that at least one of the reasons has a reasonable chance of success.

[12] This means that the Tribunal must be in a position to determine, in accordance with subsection 58(1) of the DESD Act, whether there is a question of natural justice,

jurisdiction, law, or fact, the answer to which may lead to the setting aside of the General Division decision under review.

Issue: Does the Claimant raise some reviewable error of the General Division upon which the appeal might succeed?

Clear break in the continuity of the Claimant's employment

[13] The Claimant puts forward that her teaching position was terminated on June 28, 2019. She submits that she is an occasional or substitute teacher and at no point was she guaranteed work in September. She submits that her position can be terminated on any given day the full time teacher decides to return to work. She puts forward that she is not a permanent teacher thus she does not get paid throughout the summer and does not have the same job security as a permanent teacher.

[14] 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?

[15] A reading of the General Division's decision shows that it correctly raised the question as to whether there had been a veritable break in the continuity of the Claimant’s employment that resulted in her unemployment.

[16] The General Division took into account both the jurisprudence of the Federal Court of Appeal and the legislative intent behind section 33 of the EI Regulations.

[17] The Federal Court of Appeal has upheld the principle that the exception listed in section 33(2)(a) of the EI Regulations is meant to benefit teachers that go through a veritable severance in the employer/employee relationship at the end of the teaching period. Teachers who had their contracts renewed before the end of their teaching

contracts, or shortly afterwards, for the new school year were not unemployed and had continued employment, despite the gap between contracts.[1]

[18] The Federal Court of Appeal has also repeatedly held that even if a teacher is not paid during the non-teaching period, it is not sufficient by itself to conclude that a contract has terminated.

[19] The evidence before the General Division does not show a veritable break in the continuity of the Claimant's employment as a teacher on June 28, 2019. The Claimant worked as a teacher during the 2018/2019 school year and was employed in a LTO assignment from September 2018 to December 2018 and February 11, 2019 to June 28, 2019. On July 4, 2019, the Claimant was offered via email another LTO assignment with a start date of September 3, 2019, offer that she did not refuse. The Claimant confirmed her return in September in her application for benefits filed in July 2019. The Claimant did in fact start work on September 3, 2019, as stated in the offer email that was sent to her.[2]

[20] Therefore, the evidence does not support the Claimant's position that there was a clear break in the continuity of her employment pursuant to section 33(2) (a) of the EI Regulations.

Casual or substitute

[21] 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. The exception at the end of section 33(2) (b) emphasizes the performance of the employment and not the status of the teacher who holds it.

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[1] *Oliver et al v Canada (Attorney General)*, 2003 FCA 98; *Stone v Canada (Attorney General.)*, 2006 FCA, 27; *Canada (Attorney General) v Robin*, 2006 FCA 175.
[2] GD3-7, GD3-23, GD3-32.

[22] Although there was a precarious aspect to the Claimant's term of employment since she could be laid-off before at any given time should the teacher she was replacing elect to return to work, the evidence shows that the Claimant had a LTO assignment during the qualifying period and that her employment was not terminated on June 28, 2019. She continued another LTO assignment in September 2019.

[23] Therefore, the evidence does not support the Claimant's position that her employment was held on a casual or substitute basis within the meaning of section 33(2) (b) of the EI Regulations.

Other employment than teaching

[24] No evidence was presented to the General Division that would support a conclusion that the Claimant held another employment other than teaching that would qualify her to receive benefits under section 33(2) (c) of the EI Regulations.

CONCLUSION

[25] Upon review of the appeal file, the General Division decision, and the arguments in support of the application for leave to appeal, the Tribunal has no choice but to find that the appeal has no reasonable chance of success.

[26] The Tribunal refuses leaves to appeal.

Pierre Lafontaine
Member, Appeal Division

REPRESENTATIVE:	R. D., Self-represented