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

Citation: *RH v Canada Employment Insurance Commission*, 2021 SST 161

Tribunal File Number: AD-21-93

BETWEEN:

R. H.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

DATE OF DECISION: April 22, 2021

Canada

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Appellant (Claimant) worked as a teacher during the 2017/2018 school year. She applied for benefits during the summer non-teaching period from July 2, 2018, to August 31, 2018. The Respondent, the Canada Employment Insurance Commission (Commission), determined the Claimant could not receive benefits because she did not meet any of the conditions necessary for teachers to receive employment insurance benefits during the non-teaching period.

[3] The Claimant requested a reconsideration and the Commission maintained its initial decision. The Claimant appealed the reconsideration decision to the General Division.

[4] The General Division found that the Claimant's teaching contract was not terminated 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] Leave to appeal was granted to the Claimant. The Appeal Division found that the General Division had failed to consider the Claimant's evidence that her contract could have terminated at any time before the end of the term in June 2018. It allowed the Claimant's appeal for the non-teaching period from the end of June 2018 to the beginning of September 2018.

[6] The Commission requested judicial review of the Appeal Division decision. The Federal Court ruled that the Appeal Division erred when it concluded that the General Division had not considered the Claimant's evidence since it had specifically

acknowledged it. The Court set aside the decision and returned the matter to the Appeal Division for determination by a different member.

[7] I requested that the parties file further submissions following the Federal Court of Appeal decision. Both parties informed me that they had no further submissions and wanted a decision rendered on the record.

[8] I must decide whether the General Division erred in fact or in law in its interpretation of section 33(2) of the EI Regulations.

[9] I dismiss the Claimant's appeal.

ISSUES

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

ANALYSIS

Appeal Division's mandate

[10] 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]

[11] 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]

[12] 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

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

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 fact or in law in its interpretation of section 33(2) (b) of the EI Regulations?

[13] The Claimant puts forward that the General Division erred in fact or in law. She submits that her new current contract did not start until September 4, 2018, and that she did not receive any monies from that contract during the summer period. The Claimant puts forward that she did not work during the summer following a "shortage of work" regardless of what her employer stated on her record of employment. She further submits that she should be eligible to employment insurance benefits regardless of her occupation.

[14] The issue before the General Division concerned a disentitlement imposed pursuant to section 33(2) of the EI Regulations for the period of July 2, 2018 to September 3, 2018.

[15] Under section 33(2) of the EI Regulations, a teacher who holds employment in teaching during part of the 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 period.

[16] Section 33(2) of the EI Regulations contains three exceptions to this general rule. These are three distinct exceptions and not one exception with three conditions to be met for it to apply. The three exceptions are:

> (a) the claimant's contract of employment for teaching has terminated;
>
> (b) the claimant's employment in teaching was on a casual or substitute basis; or
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> (c) the claimant qualifies to receive benefits in respect of employment in an occupation other than teaching.

[17] The undisputed evidence before the General Division shows that the Claimant occupied the position of teacher during her qualifying period. She taught at X and X. She accepted a long-term occasional (LTO) assignment at X as of January 19, 2018, not to exceed the end of the school year. The Claimant's last day of work was June 29, 2018. Prior to the end of the school year, she received an offer from X for a full time permanent teaching position, which she accepted.

[18] 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.[3] The exception of section 33(2) (b) emphasizes the performance of the employment and not the status of the teacher who holds it.[4]

[19] 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.[5]

[20] I understand that there was a precarious aspect to the Claimant's term of employment at X. However, the evidence shows that the Claimant accepted a long-term assignment during her qualifying period. She agreed to a contract effective February 5, 2018, for the remaining five months of the school year. She completed the contract and her last day of work was June 29, 2018.

[21] The evidence clearly shows that her employment as a teacher was regular and exercised in a continuous and predetermined way and not on an occasional or substitute basis within the meaning of section 33(2)(b) of the EI Regulations.

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

[22] For the above-mentioned reasons, I find that the General Division did not err in fact or in law with regard to the interpretation and scope of section 33(2) (b) of the EI Regulations.

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

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

[24] The Claimant relies heavily on the fact that she did not receive any monies during the non-teaching period and that she did not work during the summer following a "shortage of work". She should therefore received benefits regardless of her occupation.

[25] The Federal Court of Appeal has 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.[6]

[26] A review 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.

[27] 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.[7]

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[6] *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.
[7] *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.

[28] The evidence before the General Division does not show a clear break in the continuity of the Claimant's employment as a teacher.

[29] The Claimant worked as a teacher during the 2017/2018 school year and accepted a LTO assignment from February 5, to June 29, 2018. On June 20, 2018, the Claimant received an offer from X for a full time permanent teaching position starting September 4, 2018, which she accepted. The Claimant confirmed her return for the new school year in her application for benefits filed in July 2018.

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

[31] For the above-mentioned reasons, I find that the General Division did not err in fact or in law with regard to the interpretation and scope of section 33(2) (a) of the EI Regulations.

Issue no 3: Did the General Division err in fact or in law in its interpretation of section 33(2) (c) of the EI Regulations?

[32] The Claimant confirmed during the General Division hearing that she did not accumulate any insurable hours in an occupation other than teaching to qualify to receive EI benefits.

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

CONCLUSION

[34] The appeal is dismissed.

Pierre Lafontaine
Member, Appeal Division

METHOD OF PROCEEDING:	On the Record
APPEARANCES:	R. H., Appellant Suzanne Prud'homme, representative for the Respondent