Date: 20071128

Dockets: A-103-06
A-104-06
A-110-06
A-111-06

Citation: 2007 FCA 377

CORAM: **LÉTOURNEAU J.A.**
NOËL J.A.
TRUDEL J.A.

BETWEEN:

A-103-06

THE ATTORNEY GENERAL OF CANADA

Applicant

and

MARTHA BLANCHET

Respondent

- -

A-104-06

THE ATTORNEY GENERAL OF CANADA

Applicant

and

MARTHA BLANCHET

Respondent

- -

A-110-06

THE ATTORNEY GENERAL OF CANADA

Applicant

and

JULIE BERNIER

Respondent

- -

A-111-06

THE ATTORNEY GENERAL OF CANADA

Applicant

and

ISABELLE PELLETIER

Respondent

Hearing held at Québec, Quebec, on October 31, 2007.

Judgment delivered at Québec, Quebec, on November 28, 2007.

REASONS FOR JUDGMENT BY: LÉTOURNEAU J.A.

CONCURRED IN BY: NOËL J.A.
TRUDEL J.A.

Date: 20071128

Dockets: A-103-06
A-104-06
A-110-06
A-111-06

Citation: 2007 FCA 377

CORAM: LÉTOURNEAU J.A.
NOËL J.A.
TRUDEL J.A.

BETWEEN:

A-103-06

THE ATTORNEY GENERAL OF CANADA

Applicant

and

MARTHA BLANCHET

Respondent

- -

A-104-06

THE ATTORNEY GENERAL OF CANADA

Applicant

and

MARTHA BLANCHET

Respondent

- -

A-110-06

THE ATTORNEY GENERAL OF CANADA

Applicant

and

JULIE BERNIER

Respondent

- -

A-111-06

THE ATTORNEY GENERAL OF CANADA

Applicant

and

ISABELLE PELLETIER

Respondent

REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

Issues

[1] Was the Umpire right in upholding the decision of the Board of Referees in CUBs 65235, 65192, 65193 and 65255? In doing so, the Umpire concluded that the respondents were entitled to employment insurance benefits during non-teaching periods under the exception in paragraph 33(2)(*b*) of the *Employment Insurance Regulations,* SOR/96-332 (Regulations). This paragraph reads as follows:

33. (2) A claimant who was employed in teaching for any part of the claimant's qualifying period is not entitled to receive benefits, other than those payable under section 22, 23 or 23.1 of the Act, for any week of unemployment that falls in any non-teaching period of the claimant unless	**33.** (2) Le prestataire qui exerçait un emploi dans l'enseignement pendant une partie de sa période de référence n'est pas admissible au bénéfice des prestations — sauf celles prévues aux articles 22, 23 ou 23.1 de la Loi — pour les semaines de chômage comprises dans toute période de congé de celui-ci, sauf si, selon le cas :
(*a*) the claimant's contract of employment for teaching has terminated;	*a*) son contrat de travail dans l'enseignement a pris fin;
(*b*) the claimant's employment in teaching was on a casual or substitute basis; or	*b*) son emploi dans l'enseignement était exercé sur une base occasionnelle ou de

	suppléance;
(*c*) the claimant qualifies to receive benefits in respect of employment in an occupation other than teaching.	*c*) il remplit les conditions requises pour recevoir des prestations à l'égard d'un emploi dans une profession autre que l'enseignement.

[2] As in all cases of this type, this issue also raises the related question of the standard of review the Umpire must apply to the decision of the Board of Referees, as well as the standard applicable to the Umpire's decision, which is submitted to us for judicial review.

[3] The respondents claimed their right to receive benefits, alleging that their employment in the field of teaching was held on a casual or substitute basis. Their claim is based on paragraph 33(2)*b*) of the Regulations.

[4] The issue of entitlement to benefits in these cases is common to all the respondents, even though the periods and amounts in issue vary from one file to another. The facts alleged by the applicant are not contested, except insofar as counsel for the respondents insisted on clarifying certain points in each file.

Parties' submissions concerning applicable standard of review

[5] Counsel for the applicant submits that the error at the heart of the Umpire's decision is one of law, because it is based on his and the Board of Referees' misinterpretation of the following terms in paragraphs 33(2)(*a*) and (*b*) of the Regulations: "the claimant's contract of employment for

teaching has terminated" and "the claimant's employment in teaching was on a casual or substitute basis". In the view of counsel for the applicant, the applicable standard of review is correctness. She referred the Court to the following judgments: *Stone v. Canada (Attorney General)*, 2006 FCA 27 (F.C.A.); *Bazinet et al. v. Canada (Attorney General)*, 2006 FCA 174 (F.C.A.); and *Canada (Attorney General) v. Robin*, 2006 FCA 175 (F.C.A.).

[6] Counsel for the respondents relies on the judgement of this Court in *Stephens v. Canada (Minister of Human Resources Development)*, 2003 FCA 477, to conclude that the applicability of paragraph 33(2)(*b*) is mainly a question of fact subject to the standard of patent unreasonableness: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, at paragraph 25.

[7] However, he acknowledges that the standard of correctness applies to the issue of whether or not paragraph 33(2)(*b*) may apply even if a contract has not terminated, because this is a question of law.

<u>Parites' submissions concerning entitlement to benefits</u>

[8] According to counsel for the applicant, the respondents are not entitled to receive benefits, because none of the three conditions in subsection 33(2) of the Regulations has been met.

[9] First of all, there has been no break in the continuity of employment, as was the case in *Bazinet*, *supra*, in which this concept was recently reiterated. Accordingly, they could not claim

benefits, since the terms "any non-teaching period" in subsection 33(2) of the Regulations cover not only summer holidays but also Christmas and Easter holidays and semester breaks: see *Dupuis-Johnson v. Canada (Canada Employment and Immigration Commission)*, [1996] F.C.J. No. 816 (F.C.A.); *Attorney General of Canada v. St-Cœur*, A-80-95, April 17, 1996.

[10] Secondly, the respondents did not hold their employment on a casual or substitute basis, but rather on a regular, part-time basis.

[11] Finally, with regard to the third exception in subsection 33(2), counsel for the applicant notes that there is nothing in the record showing that the respondents met the conditions for receiving benefits because they held employment in an occupation other than teaching.

[12] Counsel for the respondents submits that the three conditions in subsection 33(2) are independent of each other. Only one condition has to be met to benefit from the exception to disentitlement and qualify for benefits: see *Oliver v. Canada (Attorney General)*, 2003 FCA 98, at paragraph 16 (F.C.A.). He argues that the exception in paragraph 33(2)(*b*) should apply to his clients, based on the ordinary and grammatical sense of the words "casual" and "substitute".

[13] He also relies on the interpretation given by the Minister of Human Resources Development to these terms in the2005 edition of the *Digest of Benefit Entitlement Principles* (Digest). He cites the following excerpt from chapter 14, entitled "Teachers":

14.3.2 The Second Exception: Casual or Substitute

If the disentitlement has not been relieved under the first exception, we must look to the requirements of the second exception to see if relief is possible. This provision provides that benefit is not payable “unless his employment in teaching was on a casual or substitute basis”. The relief is based on the nature of the claimant's teaching employment in the qualifying period, that is, casual or substitute teaching. It does not apply if the teacher was neither substitute nor casual.

The words “casual” or “substitute” must be given their dictionary meaning that may differ from particular definitions found in provincial legislation or labour agreements.

“On a casual basis” refers to teaching for a short period of time and for a limited, intermittent and temporary purpose. For the purpose of the Regulation it can be said that casual teaching means irregular, occasional or incidental teaching. If the employment involves filling an unexpected or temporary absence for a short period, and if the employment can be cancelled at any time, it is of a casual nature.

“On a substitute basis” means the replacement of a teacher who is away. There are no limits placed on the length of time that a teacher can replace another without losing her or his status as a substitute. The School Board may fill a lengthy vacancy, on a substitute basis, with the same teacher year after year or with different teachers.

It may happen that a teacher under a leave of absence has both regular teaching and casual or substitute teaching in the qualifying period. A teacher whose employment in teaching was on a casual or substitute basis for most of the employment in teaching during the qualifying period may qualify, notwithstanding the fact that there was full-time teaching in the qualifying period.

Standard of review applicable by Umpire in case at bar

[14] In my opinion, the definition of the three exceptions mentioned in subsection 33(2) of the Regulations and the determination of the scope of their application raise questions of law.

[15] For example, determining that a "contract has terminated" on June 29, 2006, may be a mere question of fact. However, determining that a "contract has terminated" on June 29, 2006, within the meaning of paragraph 33(2)(*a*) of the Regulations involves a determination of the legal meaning that this provision attributes to or confers on these terms. In such a case, the scope of the legal test must be determined and then applied to the facts of the case. Mischaracterizing this legal test is an error of law: see *Stone v. Canada*, *supra*, at paragraph 14.

[16] The application of the proper legal test to the facts and circumstances of the case involves a question of mixed fact and law: *ibid*, at paragraph 13. The standard of review applicable by the Umpire to this issue is unreasonableness: *Budhai v. Canada (Attorney General)*, 2002 FCA 298 (F.C.A.).

[17] The same reasoning applies to the interpretation of paragraph 33(2)(*b*) of the Regulations. The meaning to be given to the words "casual" and "substitute" for the purposes of this paragraph involves a question of law; its subsequent application to the facts of this case involves a question of mixed fact and law.

[18] In this case, the Umpire concluded on the basis of *Stephens*, *supra*, that the applicability of paragraph 33(2)(*b*) was mainly a question of fact. With respect, I am of the opinion that he erred concerning the nature of the issue and, consequently, concerning the applicable standard of review.

[19] It is true that in a short oral judgment delivered from the bench, our colleague Madam Justice Sharlow accepted the Crown's position according to which the matter of the applicability of paragraph 33(2)(*b*) was mainly a question of fact. However, this statement was made in a very specific context in which there were no findings of fact sufficiently that were sufficiently clear "to enable the correct application of paragraph 33(2)(b) to be determined". In other words, in this specific case, it was impossible to apply paragraph 33(2)(*b*) to the facts, given the lack of any findings of fact. It was in this specific and narrow sense and context that it was stated that the applicability of the provision involved mainly a question of fact, which is not the case here.

[20] Therefore, our role involves applying the proper standard of administrative review which the Umpire should have applied to the analysis of the decision of the Board of Referees: *Q. v. College of Physicians and Surgeons*, [2003] 1 S.C.R. 226, at paragraph 43.

Analysis of decisions of Board of Referees and Umpire

[21] Before undertaking an analysis of the decision of the Board of Referees, it will be necessary to briefly refer to the specific facts of each file.

A-103-06 and A-104-06: *Martha Blanchet*

[22] According to the Board of Referees, in A-103-06, Ms. Blanchet 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 year, $4,500 of which came from these two contracts. The balance was earned from her substitute teaching.

[23] Ms. Blanchet is claiming benefits for the Christmas holidays (December 22, 2003, to January 2, 2004) and spring break (March 1, 2004, to March 5, 2005): see Applicant's Record, at pages 19, 20 and 66 to 70.

[24] In A-104-06, the period of employment was from August 29, 2001, to June 21, 2002. This was a per-lesson contract under the terms of which Ms. Blanchet was to teach a maximum of 432 minutes per cycle of a full-time teacher at the elementary level.

[25] She claims benefits for part of the Christmas break (December 22, 2002, to December 28, 2002).

A-110-06: *Julie Bernier*

[26] Ms. Bernier worked as a teacher for the Navigateurs school board from August 15, 2002, to June 27, 2003; for the Découvreurs school board from October 25, 2002, to June 12, 2003; and for the Capitale school board from October 29, 2002, to June 19, 2003.

[27] In addition, she was hired by the Navigateurs school board from August 23, 2002, to June 27, 2003. She was required to teach 22.22% of a regular full-time teaching assignment.

[28] For the year 2003–2004, Ms. Bernier entered into a contract with the Navigateurs school board under the terms of which she would teach 44.44% of a regular full-time teaching assignment from August 26, 2003, to June 29, 2004.

A-111-06: *Isabelle Pelletier*

[29] Ms. Pelletier had a benefit period established for her, effective June 29, 2003. In support of her claim for benefits, Ms. Pelletier submitted two records of employment.

[30] The first of these records concerns employment in a field other than teaching. From August 4 to October 23, 2002, the respondent accumulated 315 hours of insurable employment.

[31] The second record of employment shows that the respondent held employment as a teacher at the Découvreurs school board. This employment lasted from September 12, 2002, to June 23, 2003.

[32] During her qualifying period, the respondent also signed a part-time teaching contract with the same school board. From February 10 to June 26, 2003, she taught under this contract for 100% of a full-time teaching assignment.

[33] For the 2003–2004 school year, the respondent was offered new part-time teaching assignments. From September 2, 2003, to January 23, 2004, she taught 20.43% of the teaching time of the person she replaced. From January 26 to June 28, 2004, she took on 100% of the workload of another teacher she replaced.

[34] The respondent claimed benefits from December 22, 2003, to January 2, 2004.

Interpretation and scope of subsection 33(2) and paragraph 33(*2*)(*b*) of the Regulations

[35] Under subsection 33(2), 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. As our Court has already decided, the expression "any non-teaching period" is not restricted to the summer holidays. It includes any breaks during the school year, such as Christmas, Easter and semester breaks: see *Dupuis-Johnson v. Canada (Employment and Immigration Commission)* and *Attorney General of Canada v. St-Cœur*, *supra*.

[36] However, subsection 33(2) also 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. In *Oliver v. Canada (Attorney General)*, *supra*, at paragraph 16 of this judgment, our Court upheld the position taken by the Umpire on this issue.

[37] In fact, the use of the word “or” in English at the end of paragraph 33(2)(*b*) and the drafting technique used in the French version of this paragraph show that these paragraphs do not apply cumulatively, but rather separately and independently of each other.

[38] The exception at the end of paragraph 33(2)(*b*) emphasizes the performance of the employment and not the status of the teacher who holds it. 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*). As was stated by our colleague Madam Justice Sharlow at paragraph 2 of *Stephens v. Canada (Minister of Human Resources Development)*, *supra*, it is possible “that a teacher may have a period of employment as a supply teacher that is sufficiently regular that it cannot be said to be ‘employment on a casual or substitute basis’”.

[39] However, in spite of a commendable effort to clarify the matter of entitlement to benefits during non-teaching periods, the 2005 version of the Digest, to which the respondents refer, contained some ambiguities. They result from the emphasis put on the teacher’s substitute status, such that the Digest could lead one to believe that, for the purposes of the exception, the teacher’s status prevails over the employment held.

[40] Some corrections were made to the 2007 version of the Digest, but I am not satisfied that the new edition has met the objective of clarifying this point. For example, at paragraph 14.3.2, entitled *Teaching on a Casual or Substitute Basis*, the Digest defines the concept of substitute teaching. However, at page 3 of Chapter 14, it repeats the following excerpt found in the 2005 version, which still seems to emphasize the status of the teacher:

> There are no limits placed on the length of time that a teacher can replace another without losing her or his status as a substitute. The School Board may fill a lengthy vacancy, on a substitute basis, with the same teacher year after year, or with various teachers.

[Emphasis added]

Again, 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. If employment is held on a casual or substitute basis, the exception may be invoked regardless of whether or not the teacher loses or maintains his or her substitute status.

[41] The Regulations do not define the terms "casual or substitute basis". The respondents submit that these terms must be given the ordinary and grammatical sense specified in the dictionary.

[42] At page 746, the 2007 edition of the *Petit Larousse*, defines the word "occaisonnel" (casual) as follows:

> [TRANSLATION] Happening or occurring occasionally, by chance; accidental, irregular.

The definition of "suppléance" at page 1020 of this dictionary refers to [TRANSLATION] "the state of being a substitute". "Suppléant" is defined by reference to a person who replaces someone in his or her duties without becoming the incumbent of that position. Finally, the verb "suppléer" means to replace someone in his or her duties.

[43] At page 3 of Chapter 14 of the 2007 version of the Digest, it is specified that for the purposes of the Regulation, "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": *ibid.*

[44] I agree that these terms must be given the usual dictionary meaning and not a literary, philosophical or figurative meaning. However, the analysis does not stop there. The contract signed by the teacher must be studied to determine whether or not employment is held on such a basis within the meaning of paragraph 33(2)(*b*). This brings me to the application of this analysis to the facts of this case.

Application of paragraph 33(2)(*b*) to facts of case at bar

[45] The respondents are not claiming the exceptions under paragraphs 33(2)(*a*) and 33(2)(*c*) of the Regulations. There is no evidence showing that paragraph 33(2)(*c*) might apply. As far as

paragraph 33(2)(*a*) is concerned, I agree with counsel for the applicant that there was no break in employment as defined by case law: see *Bazinet*, *supra*.

[46] The respondents held their employment under contracts for part-time or per-lesson teaching or both: see contracts in Applicant's Record in A-103-06, at pages 19 and 20; in Applicant's Record in A-104-06, at page 19; in Applicant's Record in A-110-06, at pages 23 to 31, 40 and 43; and in Applicant's Record in A-111-06, at pages 16 and 25 to 28.

[47] Under the agreement between the Comité patronal de négociation pour les commissions francophones (management negotiating committee for French-language school boards) and the Centrale de l'enseignement du Québec (Quebec association of teachers' unions) on behalf of the teachers' unions it represents, a school board is required to offer [TRANSLATION] "a part-time contract to the substitute teacher it hires to replace a full-time or part-time teacher when it is has been determined beforehand that this teacher will be absent for more than two (2) consecutive months": see clause 5-1.11 of the agreement.

[48] This is precisely the situation in this case. In these circumstances, I do not believe that it could be said that the employment was held on a casual or substitute basis. To cite Marceau J.A. in *Dupuis-Johnson*, *supra*, at paragraph 8, the respondents were bound by a contract during the holiday periods in question and "their employment as teachers, temporary and precarious as their contracts were [for the periods in question] was of course exercised in a continuous and

predetermined way and not on an occasional or substitute basis within the meaning of paragraph 33(2)(*b*)".

[49] In my opinion, the Board of Referees erred with regard to the interpretation and scope of paragraph 33(2)(*b*) of the Regulations. The Umpire should have intervened to correct this error of law and apply the proper interpretation of paragraph 33(2)(*b*) to the facts of the case. If he had done so, he could only have concluded that the Commission's appeal had to be allowed.

Conclusion

[50] For these reasons, I would allow the applications for judicial review in A-103-06, A-104-06, A-110-06 and A-111-06 with costs, but I would limit the costs for the hearing to a single set of costs, as the four files were heard jointly. I would set aside the decision of the Umpire in each of the files and refer the matters back to the Chief Umpire or to an Umpire designated by him for redetermination on the basis that the Commission's appeal must be upheld in each of the files and that each of the respondents has failed to establish that she could qualify for the exception under paragraph 33(2)(*b*) of the Regulations, since her employment was not held on a casual or substitute basis.

[51] A copy of these reasons will be filed in each of the files in support of the judgment rendered therein.

"Gilles Létourneau"
J.A.

"I concur
Marc Noël J.A."

"I concur
Johanne Trudel J.A."

Certified true translation
Michael Palles

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKETS:	A-103-06, A-104-06, A-110-06 and A-111-06
STYLE OF CAUSE:	THE ATTORNEY GENERAL OF CANADA v. MARTHA BLANCHET *et al.*
PLACE OF HEARING:	Québec City, Quebec
DATE OF HEARING:	October 31, 2007
REASONS FOR JUDGMENT BY:	LÉTOURNEAU J.A.
CONCURRED IN BY:	NOËL J.A. TRUDEL J.A.
DATED:	November 28, 2007

APPEARANCES:

Carole Bureau Chantale Labonté	FOR THE APPLICANT
Gaétan Guérard	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE APPLICANT
SEDR-CSQ Charny, Quebec	FOR THE RESPONDENTS