Federal Court of Appeal  Cour d'appel fédérale

Date: 20130704

Docket: A-437-12

Citation: 2013 FCA 175

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

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

SUZANNE LAFRENIÈRE

Respondent

Heard at Montréal, Quebec, on May 30, 2013.

Judgment delivered at Ottawa, Ontario, on July 4, 2013.

REASONS FOR JUDGMENT BY: TRUDEL J.A.

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

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REASONS FOR JUDGMENT

TRUDEL J.A.

Background and decisions below

[1] The Attorney General of Canada, on behalf of the Employment Insurance Commission (the Commission), brought an application for judicial review of a decision of an umpire (CUB 79630) upholding the decision of a board of referees granting unemployment insurance benefits to the respondent.

[2] The Commission maintains that the respondent is a teacher in a secondary school and was therefore not entitled to receive benefits during her summer non-teaching period, that is, from July 4 to August 23, 2011. The Commission bases its decision on section 33 of the *Employment Insurance Regulations*, SOR/96-332 (Regulations), which limits entitlement to benefits for certain classes of workers, including certain teachers who are not working because of the non-teaching periods that occur annually, including summer vacation. The Commission relies in particular on the definition of "teaching" ["*enseignement*"] in the Regulations.

[3] The Board of Referees and the Umpire on the other hand found that the Commission had erred in concluding that the respondent was a teacher within the meaning of section 33 of the Regulations. They preferred the position of the respondent, who argued that she was providing [TRANSLATION] "adults with training to assist them in integrating into society and the labour market" and that these duties did not make her a teacher within the meaning of the Regulations cited above.

Relevant legislation

[4] Section 33 of the Regulations reads in part as follows:

Additional Conditions and Terms in Relation to Teachers	**Modalités supplémentaires pour les enseignants**
33. (1) The definitions in this subsection apply in this section.	**33.** (1) Les définitions qui suivent s'appliquent au présent article.
"non-teaching period"	« enseignement »
"non-teaching period" means the period	« enseignement » La profession

that occurs annually at regular or irregular intervals during which no work is performed by a significant number of people employed in teaching. (*période de congé*)
"teaching"
"teaching" means the occupation of teaching in a pre-elementary, an elementary or a secondary school, including a technical or vocational school. (*enseignement*)

d'enseignant dans une école maternelle, primaire, intermédiaire ou secondaire, y compris une école de formation technique ou professionnelle. (*teaching*)
« période de congé »
« période de congé » La période qui survient annuellement, à des intervalles réguliers ou irréguliers, durant laquelle aucun travail n'est exécuté par un nombre important de personnes exerçant un emploi dans l'enseignement. (*non-teaching period*)

(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

(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.

. . .

[…]

[Emphasis added.]

[Mon soulignement.]

Issue

[5] The issue is therefore whether section 33 of the Regulations applies in the present case, that is: [TRANSLATION] "During her reference period, was the respondent employed in teaching in a pre-elementary, an elementary or a secondary school, including a technical or vocational school"?

Analysis

[6] In my opinion, an analysis of the facts of the case in light of the relevant legislation requires that this question be answered in the negative. No matter which standard of review is used, the Commission's decision that the respondent is not entitled to receive benefits because section 33 of the Regulations applies to her is incorrect and cannot stand.

[7] The effect of my conclusion is that the respondent is entitled to receive benefits, as has been the case, in fact, for the last 23 years. Although this outcome is the same as in the decisions of the Board of Referees and the Umpire, any comparison ends there, as my line of reasoning is entirely different.

[8] Indeed, the Board of Referees and the Umpire did not go beyond considering whether the respondent was a teacher, thereby ignoring the rest of the definition of "teaching". In all fairness to them, it should be noted that the parties had focused on that issue without considering that, for the purposes of the Regulations, a teacher's duties are performed "in a pre-elementary, an

elementary or a secondary school, including a technical or vocational school". The Board of Referees and the Umpire therefore erred in not considering whether the respondent was engaged in teaching in one of the institutions mentioned in the Regulations. This error does not, however, affect the outcome.

[9] For my part, contrary to the Board of Referees and the Umpire, I find that the respondent was a teacher during her qualifying period. However, I am of the opinion that she was not a teacher within the meaning of section 33 of the Regulations because she was not teaching in one of the educational institutions mentioned in section 33 of the Regulations. She was therefore not subject to that provision.

1. The respondent is a teacher

[10] The respondent thus argued that she was not a teacher so that section 33 of the Regulations would not apply to her. Had the respondent relied on the complete definition of "teaching" in making that argument, I would have agreed with her. However, the record clearly shows that the respondent, the Board of Referees and the Umpire limited themselves to defining her occupation without considering the full wording of the definition set out in subsection 33(1) of the Regulations. Indeed, the Board of Referees concluded that the respondent [TRANSLATION] "has no teaching diploma and is not certified in the field of academic teaching. She has not received the required training and does not have the necessary qualifications to claim to be a teacher" (decision of the Board of Referees, applicant's record, page 71). The conclusion of the Board of Referees and the Umpire based on these considerations is erroneous.

[11] Beyond the required conditions for being employed in teaching within the meaning of section 33 of the Regulations, I do not see how it can be argued that the respondent is not a teacher.

[12] During her qualifying period, the respondent was employed by the Commission scolaire Marguerite-Bourgeoys, the second largest school board in Quebec. In her Record of Employment, the employer describes her as a teacher (applicant's record, page 40). She herself refers to the *Basic adult general education regulation*, R.R.Q. c. I-13.3, r. 9 [BAGER], made pursuant to section 448 of the *Education Act*, R.S.Q. c. I-13.3 [EA], to describe the nature of the services she provides in the course of her work.

[13] The BAGER deals with the nature and purpose of educational services for adults, which include training services, popular education services and student services. Training services include instructional services and orientation services. Section 3 of the BAGER provides that instructional services include, among other services, Secondary Cycle One and Two services, as well as social integration and sociovocational integration services. These integration services are specifically defined in sections 9 and 10 of the BAGER. These definitions correspond to the instructional services described by the respondent and accepted by the Board of Referees for the purpose of explaining the nature of her work.

[14] Sections 9 and 10 read as follows:

> **9.** Social integration services are designed to provide adults experiencing adjustment difficulties of a psychological, intellectual, social or physical nature with access to individualized learning that will enable them to acquire basic social skills and will prepare them for further studies, if they wish to do so.
>
> **10.** Sociovocational integration services are designed to allow adults to acquire the competencies required to enter or remain in the labour market or, to pursue their studies, if they wish to do so.

[15] The Board of Referees determined that the respondent is [TRANSLATION] "helping a group of adults by providing training services [intended to] to facilitate their integration into society and the labour market so that the group of adults could acquire training" (decision of the Board of Referees, applicant's record, pages 68, 70 and 71). One need only look at the plain meaning of the words to conclude, in light of the BAGER, that the respondent provides instructional services and that she conveys the content of an educational program to the adults enrolled in the training program, which makes her a teacher (see *Syndicat des enseignantes et enseignants de la banlieue de Québec c. Commission scolaire des Chutes de la Chaudière*, [1998] J.Q. n^{o} 3056 (CA)).

[16] Neither the fact that the respondent does not hold a teaching licence within the meaning of section 23 of the EA and is not a member of a teachers' union nor the fact that the adults enrolled in the training program do not receive diplomas or a formal evaluation is relevant to determining the respondent's occupation.

[17] I note first of all that the relevant portion of section 23 of the EA provides as follows:

23. To provide preschool education services or <u>to teach</u> <u>at the</u> elementary or	23. Pour dispenser le service de l'éducation préscolaire ou <u>pour enseigner</u>

secondary level, a teacher must hold a teaching licence determined by regulation of the Minister of Education, Recreation and Sports. Teaching licences shall be issued by the Minister of Education, Recreation and Sports.	au primaire ou au secondaire, une personne doit être titulaire d'une autorisation d'enseigner déterminée par règlement du ministre de l'Éducation, du Loisir et du Sport et délivrée par ce dernier.
The following persons shall be exempt from the obligation set out in the first paragraph:	Est dispensé de cette obligation:
(1) a teacher hired by the lesson or by the hour;	1° l'enseignant à la leçon ou à taux horaire;
. . .	[…]
[Emphasis added.]	[Mon soulignement.]

[18] This exemption applies to the respondent because she is paid by the hour (applicant's record, page 42).

[19] Furthermore, the BAGER provides for a variety of ways to certify studies, depending on the instructional services that are offered. Section 30 provides for the awarding of diplomas to graduates in secondary or vocational studies. Section 32 provides that, under certain conditions, a training certificate in sociovocational insertion for adults may be awarded. Generally speaking, the BAGER also provides, in section 26, for the issuing of a statement of learning achievement to students. For certain instructional services, no particular certification is provided.

[20] I therefore reject the respondent's arguments and conclude that she is a teacher within the meaning of the EA and the BAGER, but this conclusion alone does not resolve the issue. The Commission contends that the respondent is subject to section 33 of the Regulations. However,

for this to be true, a teacher must be employed in that capacity in one of the educational institutions mentioned in that provision.

2. The respondent does not teach in a secondary school

[21] No one questioned the fact that, during her qualifying period, the respondent was teaching in an adult education centre set up by the Commission scolaire Marguerite-Bourgeoys in the Filion Building (applicant's record, page 42). In that building, the school board offers adults social integration training. Adult training centres are not mentioned in the text of subsection 33(1) of the Regulations, unlike technical or vocational schools which, by their inclusion, are assimilated to secondary schools.

[22] To accept that the Filion Building is a secondary school because secondary-level training, among other things, is provided there would require making an addition to the definition reproduced above. According to the applicant's argument, a general and vocational college, too, would sometimes be a secondary school because under the *College Education Regulations*, R.R.Q., c. C-29, r. 4, the Minister of Education, Recreation and Sports may make remedial activities compulsory if the holder of a secondary school diploma has not obtained the required number of credits in certain Secondary IV and V subjects. With respect, the Commission's argument does not hold water.

[23] There are other reasons, in my opinion, for which an adult training centre is not a secondary school.

[24] First, there are important fundamental differences between the two in terms of both the target clientele and the school calendar. Indeed, under the EA, which in Quebec governs elementary and secondary level instructional services, secondary school is generally for persons 18 years of age and younger (or 21 years in the case of a handicapped person), and school attendance is compulsory for them up to the age of 16 (see sections 1 and 2 of the EA). The months of July and August constitute a non-teaching period.

[25] Adult education, on the other hand, is for persons 16 years of age and older. School attendance is not compulsory for these persons (section 14 of the EA). The school calendar is different and does not necessarily include a summer break. Furthermore, Saturdays and Sundays do not appear on the list of holidays for adults (section 23 of the BAGER).

[26] These rules are similar to those in other provinces. Education generally falls within the jurisdiction of the provinces, and the term "secondary school" is found in a number of provincial statutes which could not have escaped the attention of the Commission when it adopted the Regulations that are relevant in the present case. It is therefore not inappropriate to refer to those statutes in order to determine the meaning of that term (Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis Canada, 2008) at p. 419). A consultation of some of these education statutes, including Quebec's *Education Act* referred to previously, confirms my conclusion that a secondary school and an adult training centre are different from one another.

[27] The school calendar for students enrolled in an elementary or a secondary school includes approximately 200 days of school attendance. In Quebec, the *Basic school regulation for preschool, elementary and secondary education*, R.R.Q., c. I-13-3, r. 8, provides that the school year consists of a teaching period running from September to June (interrupted by the festive season break, a week-long winter break and nearly 20 professional development days) and a main non-teaching period during the months of July and August.

[28] The same is true in British Columbia, Saskatchewan, Ontario and Nova Scotia, for example (see *School Calendar Regulations*, B.C. Reg. 114/2002; *The Education Act, 1995*, S.S. 1995, c. E-0.2, s. 163(6); *School Year Calendar, Professional Activity Days*, R.R.O. 1990, Reg. 304; *Education Act*, S.N.S. 1995-96, c. 1., s. 2.).

[29] Such is not necessarily the case for adult training centres (see for example the BAGER and, for Manitoba, *The Adult Learning Centres Act*, C.C.S.M. c. A5), where the schedules are flexible and established by taking into account the particular clientele for which this training is intended. The facts in this case show that the respondent has a schedule like that of her colleagues who teach secondary school, but this is not the result of a rule imposed by statute. Her particular case does not in any way change the fundamental characteristics that distinguish an adult training centre from a secondary school.

[30] Similarly, the various legislative provisions enacted by the provinces with regard to the instruction provided in secondary schools are generally more complex, more rigid and more elaborate than those concerning training for adults. This is not surprising, given that for most

students, secondary studies lead to postsecondary and university studies requiring a well-defined academic profile.

[31] Second, subsection 33(1) of the Regulations provides that a secondary school includes "a technical or vocational school" ("*école de formation technique ou professionnelle*"). No mention is made of an adult training centre. If the Commission had wanted, in adopting these Regulations, to give the term "secondary school" a meaning going beyond its ordinary meaning, it seems to me that it would have done so explicitly, as was the case when it chose to include "technical or vocational" schools. In the BAGER, adult education is a separate concept from technical or vocational training. Moreover, there is a specific regulatory scheme governing vocational training (see *Basic vocational training regulation*, R.R.Q., c. I-13.3, r. 10).

[32] These differences, particularly the difference with respect to the schedules for instructional activities, are significant when it comes to examining the general context of the Regulations and the ill that they were intended to remedy.

[33] The unemployment insurance scheme is a public insurance program that is based on the concept of social risk and the purpose of which is to preserve workers' economic security and ensure their re-entry into the labour market by paying temporary income replacement benefits in the event of loss of employment (see *Reference re Employment Insurance Act (Can.), ss. 22 and 23*, 2005 SCC 56, [2005] 2 S.C.R. 669, paragraph 48).

[34] The Regulations in question here were made pursuant to paragraph 54(*j*) of the Act. This paragraph provides as follows:

[t]he Commission may, with the approval of the Governor in Council, make regulations	[l]a Commission peut, avec l'agrément du gouverneur en conseil, prendre des règlements :
. . .	[…]
(*j*) prohibiting the payment of benefits, in whole or in part, and restricting the amount of benefits payable, in relation to persons or to groups or classes of persons who work or have worked for any part of a year in an industry or occupation in which, in the opinion of the Commission, there is a period that occurs annually, at regular or irregular intervals, during which no work is performed by a significant number of persons engaged in that industry or occupation, for any or all weeks in that period	*j*) interdisant le paiement de prestations, en tout ou en partie, et restreignant le montant des prestations payables pour les personnes, les groupes ou les catégories de personnes qui travaillent ou ont travaillé pendant une fraction quelconque d'une année dans le cadre d'une industrie ou d'une occupation dans laquelle, de l'avis de la Commission, il y a une période qui survient annuellement à des intervalles réguliers ou irréguliers durant laquelle aucun travail n'est exécuté, par un nombre important de personnes, à l'égard d'une semaine quelconque ou de toutes les semaines comprises dans cette période
. . .	[…]
[Emphasis added.]	[Mon soulignement.]

[35] The intent of Parliament is to pay benefits to those individuals who, through no fault of their own, find themselves unemployed and who are seriously engaged in an earnest effort to find work. Under section 33 of the Regulations, the teachers referred to are not considered to be unemployed during the annual non-teaching periods and are therefore not entitled to receive

benefits unless they meet one of the three criteria set out in subsection 33(2) of the Regulations (*Oliver v. Canada (Attorney General),* 2003 FCA 98, paragraph 16 [*Oliver*].

[36] Thus there are important policy considerations underlying section 33 of the Regulations and the choice of the groups of claimants on which it imposes a rule limiting entitlement to benefits. Again, it should be noted that adult training centres are absent from the list of educational institutions mentioned in the definition of the word "teaching". It is not for this Court to speculate on the reasons for this, any more than it is to add to the text of the Regulations by including adult training centres on the list of educational institutions in section 33 of the Regulations.

[37] I cannot help but note, however, that the purpose of section 33 of the Regulations (formerly section 46.1 of the *Unemployment Insurance Regulations* made under paragraph 58(*b*.1) of the Act then in force) is to prevent "double dipping". As Justice Desjardins wrote in *Canada (Attorney General) v. St-Coeur*, [1996] F.C.J. No. 514 (QL) (F.C.A.):

> [8] The object of section 46.1 of the Regulations is to prevent teachers, whose salary is spread over a twelve-month period but who do not provide services every day, from being able to receive monies which come from two separate sources but which fulfil the same role.

[38] This principle was later restated in *Oliver*, at paragraph 27, and in *Stone v. Canada (Attorney General),* 2006 FCA 27 at paragraphs 33 and 34.

[39] In the present case, it should be noted that the respondent is paid by the hour. There is no evidence in the record showing that when she receives unemployment benefits during the summer, she is earning income "from two separate sources but which fulfil the same role".

Conclusion

[40] Thus, the respondent is entitled to receive benefits during her non-teaching period from July 4 to August 23, 2011. This outcome is not inconsistent with the object of the Act or the Regulations.

[41] I would therefore dismiss the application for judicial review without costs, as the respondent did not seek any.

"Johanne Trudel"
J.A.

"I agree.
Marc Noël J.A."

"I agree.
Robert Mainville J.A."

Certified true translation
Erich Klein

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

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