Federal Court of Appeal  Cour d'appel fédérale

**Date: 20210324**

**Docket: A-245-19**

**Citation: 2021 FCA 61**

**CORAM:** **WEBB J.A.**
**BOIVIN J.A.**
**LOCKE J.A.**

**BETWEEN:**

**ATTORNEY GENERAL OF CANADA**

**Applicant**

**and**

**REBECCA HANNA**

**Respondent**

Heard by online video conference hosted by the registry on January 19, 2021.

Judgment delivered at Ottawa, Ontario, on March 24, 2021.

REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: BOIVIN J.A.
LOCKE J.A.

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## REASONS FOR JUDGMENT

**WEBB J.A.**

[1] This is an application for judicial review of the decision of the Appeal Division of the Social Security Tribunal (Appeal Division) dated May 29, 2019 (Tribunal File Number: AD-19-77). The Appeal Division allowed Ms. Hanna's appeal from the decision of the General Division of the Social Security Tribunal (General Division). The Appeal Division found that Ms. Hanna was entitled to benefits under the *Employment Insurance Act*, S.C. 1996, c. 23, (the Act) for the non-teaching period from the end of June 2018 to the beginning of September 2018.

[2] For the reasons that follow, I would allow this application for judicial review.

## I. Background

[3] Ms. Hanna was engaged as a teacher by the Algonquin and Lakeshore Catholic District School Board (the School Board). For the period from November 6, 2017 to February 2, 2018, she taught the same class for one hour each school day. The applicable contract was designated as a .17 FTE (Full-Time Equivalent Status).

[4] Subsequent to this period of employment, Ms. Hanna was engaged by the School Board for another period of employment as a teacher, commencing February 5, 2018. In the record, there are two letters from the School Board related to this employment. Both letters are dated January 19, 2018 and both are from the same Human Resources Officer. The copy of the letter at page 256 of the record indicates that it was signed by the Human Resources Officer but the copy at page 337 of the record is a copy of an unsigned letter.

[5] There are several parts of the two letters that are identical but the letters differ in some material respects. A comparison of the two letters reveals the following differences:

| **Letter at page 256 of the record:** | **Letter at page 337 of the record:** |
|---|---|
| This will confirm your acceptance of a 0.667 FTE long-term occasional teaching assignment at St. Paul Catholic High School, working 2 LTO sections effective February 5, 2018 <u>for the duration of Semester 2.</u> […] | This will confirm your acceptance of a 0.667 FTE long-term occasional teaching assignment at St. Paul Catholic High School, working 2 LTO sections effective February 5, 2018 <u>until the permanent teacher returns.</u> […] |

[emphasis added]

As an occasional, long-term teacher, you are paid the rate of occasional teacher as per your AQ category. You will not be eligible for benefits, and your pension is deducted from your pay bi-weekly. Once the permanent teacher returns, you will return to your daily occasional teaching position.

[…]

[…] You will only be paid for days work, and this includes no holiday pay.

[emphasis added]

[6] One letter indicates that Ms. Hanna was to be employed until the end of Semester 2, while the other letter indicates that she would only be engaged until the permanent teacher returns. It is far from clear why the School Board sent conflicting letters on the same day or which letter is the one that governed her employment. Neither letter refers to the other one. Neither the General Division nor the Appeal Division acknowledged the existence of these two letters. In any event, Ms. Hanna was employed until the end of Semester 2. On June 20, 2018, she accepted a contract for a full-time permanent teaching position for the 2018-2019 school year.

[7] Ms. Hanna applied for benefits under the Act for the period from July 2, 2018 to August 31, 2018.

[8] Section 33 of the *Employment Insurance Regulations*, SOR/96-332, (the Regulations) sets out certain restrictions on a teacher's ability to claim benefits under the Act, for the weeks of

unemployment during the particular teacher's non-teaching period. Subsections 33(1) and (2) of the Regulations state:

| | |
|---|---|
| **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 means the period 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) | enseignement La profession d'enseignant dans une école maternelle, primaire, intermédiaire ou secondaire, y compris une école de formation technique ou professionnelle. (teaching) |
| teaching means the occupation of teaching in a pre-elementary, an elementary or a secondary school, including a technical or vocational school. (enseignement) | 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, 23.1, 23.2 or 23.3 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, 23.1, 23.2 ou 23.3 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. |

[9] The Canada Employment Insurance Commission (the Commission) determined that Ms. Hanna was not entitled to benefits during July and August of 2018, as she did not satisfy any of the exceptions as set out in subsection 33(2) of the Regulations. Ms. Hanna requested a redetermination of this decision. The Commission maintained its position and Ms. Hanna then appealed to the General Division. Her appeal was dismissed. Ms. Hanna then applied for leave to appeal this decision to the Appeal Division. Leave to appeal was granted and her appeal was heard on May 21, 2019. The decision of the Appeal Division allowing her appeal is dated May 29, 2019 and this is the decision that is the subject of this judicial review application.

## II. Decision of the Appeal Division

[10] Both the General Division and the Appeal Division only considered the exceptions in paragraphs 33(2)(*a*) and (*b*) of the Regulations. There was no indication that Ms. Hanna was basing her claim for benefits on any employment other than her employment as a teacher.

[11] With respect to the question of whether Ms. Hanna's employment had been terminated (the exception set out in paragraph 33(2)(*a*) of the Regulations), the Appeal Division found that the General Division had committed certain errors in relation to its finding that her contract had not been terminated. However, the Appeal Division ultimately found that Ms. Hanna's employment had not been terminated. Therefore, paragraph 33(2)(*a*) of the Regulations did not operate to allow her to claim benefits during the non-teaching period in issue. Since the Appeal Division agreed with the General Division with respect to the disposition of this issue, the Attorney General is not challenging this finding in this application.

[12] Although she did appear at the hearing of the appeal, Ms. Hanna did not challenge the finding of the Appeal Division that her contract had not been terminated. In this application, Ms. Hanna did not file a notice of appearance. Having failed to file a notice of appearance, there was no requirement to serve any further documents on her (Rule 145 of the *Federal Courts Rules*, SOR/98-106). Ms. Hanna also did not file a memorandum of fact and law. As a result, she could not have challenged this finding at the hearing of this application, even if she had wanted to do so.

[13] Therefore, the only issue which is the subject of this application is the finding of the Appeal Division that the General Division erred in concluding that Ms. Hanna was not employed on a casual or substitute basis. In paragraphs 32 to 34 of its decision, the Appeal Division identified the errors that it determined were committed by the General Division:

> [32] The General Division found that the Claimant's "two contracts [including both the .17 FTE from November to February and the .667 FTE LTO contract from February to June] were not both predetermined and continuous. It continued to state that "in other words" the LTO contracts did not involve "on-call" teaching where she would not know what class she would be teaching one day to the next." It appears that the General Division understood that "predetermined and continuous" was a term which was interchangeable or synonymous with "on-call". However, on-call is a term which is generally applied to casual teachers. Substitute teaching may be on-call, but is not necessarily on-call.
>
> [33] Regardless of whether the General Division misdirected itself on this point, there is no indication in the decision that the General Division took into account the Claimant's evidence that she considered the employment to be day-to-day, or that the teacher she was replacing could have returned from sick leave at any time, which would have terminated the Claimant's contract.
>
> [34] This is a significant factor of relevance to the determination of whether the Claimant had been employed in a continuous and predetermined way. I find that the General Division erred under section 58(1)(c) of the DESD Act [the *Department of Employment and Social Development Act*, S.C. 2005, c. 34] by

> failing to consider the Claimant's evidence that her LTO contract could have terminated at any time before the end of the term in June 2018.

[14] In paragraph 32, the Appeal Division asserted that the General Division erred by construing that "predetermined and continuous" was synonymous with "on-call". While it appears that the Appeal Division did not base its decision to allow Ms. Hanna's appeal on this identified error (since paragraph 33 commences with "[r]egardless of whether the General Division misdirected itself on this point"), it is clear from the decision of the General Division that it did not treat "predetermined and continuous" as synonymous or interchangeable with "on-call".

[15] The reference to "on-call" teaching in the decision of the General Division is in paragraph 7:

> [7] Second: The Appellant's employment in teaching during the school-year 2017-2018 was not on a casual or substitute basis. Specifically, the Appellant had two teaching contracts during the school year which were both pre-determined and continuous. In other words: The Appellant's two contracts did not involve "on-call" teaching where she would not know what class she would be teaching one day to the next. Instead, the Appellant's two teaching contracts were pre-determined and continuous. […] I realize the Appellant submitted that her teaching contracts for the school year 2017-2018 were on a casual basis. However, the Appellant's contracts were continuous and pre-determined and would not meet the exempting condition of teaching defined as casual or substitute.
>
> [emphasis added]

[16] The two teaching contracts referenced in this paragraph 7 are the contract for the period from November 6, 2017 to February 2, 2018 and the subsequent contract which commenced on February 5, 2018.

[17] It is clear from paragraph 7 of the decision of the General Division that it did not equate "on-call" with "pre-determined and continuous", as found by the Appeal Division. The General Division explicitly stated that since the teaching contracts were both "pre-determined and continuous" they "did not involve 'on-call' teaching".

[18] It appears that the Appeal Division based its decision to allow Ms. Hanna's appeal on its finding that the General Division failed to consider Ms. Hanna's evidence that she considered her contract to be day-to-day and that her contract could be terminated by the return of the teacher she was replacing. Having found that the General Division made the error as identified by the Appeal Division, the Appeal Division noted that under the *Department of Employment and Social Development Act*, S.C. 2005, c. 34, (the DESDA) it had the authority to render the decision that the General Division should have made. The Appeal Division then reached its own conclusion that Ms. Hanna was employed as a substitute teacher and, therefore, met the requirements of the exception as set out in paragraph 33(2)(*b*) of the Regulations.

## III. Issue and standard of review

[19] The issue in this application is whether the Appeal Division erred in finding that there was a basis under paragraph 58(1)(*c*) of the DESDA upon which the Appeal Division could overturn the decision of the General Division. The standard of review is reasonableness (*Cameron v. Canada (Attorney General)*, 2018 FCA 100, at para. 3; *Court v Canada (Attorney General)*, 2020 FCA 199, at para. 4).

## IV. Analysis

[20] In *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, (*Vavilov*), the majority of the Supreme Court of Canada, at paragraph 108, noted the importance of the applicable statutory scheme when a court is reviewing an administrative decision:

> [108] Because administrative decision makers receive their powers by statute, the governing statutory scheme is likely to be the most salient aspect of the legal context relevant to a particular decision. That administrative decision makers play a role, along with courts, in elaborating the precise content of the administrative schemes they administer should not be taken to mean that administrative decision makers are permitted to disregard or rewrite the law as enacted by Parliament and the provincial legislatures. Thus, for example, while an administrative body may have considerable discretion in making a particular decision, that decision must ultimately comply "with the rationale and purview of the statutory scheme under which it is adopted": *Catalyst* [*Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2], at paras. 15 and 25-28; see also *Green* [*Green v. Law Society of Manitoba*, 2017 SCC 20], at para. 44. As Rand J. noted in *Roncarelli c. Duplessis*, [1959] S.C.R. 121 (S.C.C.) , at p. 140, "there is no such thing as absolute and untrammelled 'discretion'", and any exercise of discretion must accord with the purposes for which it was given: see also *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine* [*Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48], at para. 7*; Montréal (Ville) c. Administration portuaire de Montréal*, 2010 SCC 14, [2010] 1 S.C.R. 427 (S.C.C.), at paras. 32-33; *Nor-Man Regional Health Authority* [*Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59], at para. 6. Likewise, a decision must comport with any more specific constraints imposed by the governing legislative scheme, such as the statutory definitions, principles or formulas that prescribe the exercise of a discretion: see *Montréal (City)*, at paras. 33 and 40-41; *Canada (Attorney General) v. Almon Equipment Ltd.*, 2010 FCA 193, [2011] 4 F.C.R. 203 (F.C.A.), at paras. 38-40. The statutory scheme also informs the acceptable approaches to decision making: for example, where a decision maker is given wide discretion, it would be unreasonable for it to fetter that discretion: see *Delta Air Lines* [*Delta Air Lines Inc. v. Lukács*, 2018 SCC 2], at para. 18.

[21] The relevant statutory scheme related to appeals to the Appeal Division is set out in the DESDA. In particular, section 58 of the DESDA sets out the grounds for an appeal from a decision of the General Division to the Appeal Division:

| | |
|---|---|
| **58 (1)** The only grounds of appeal are that | **58 (1)** Les seuls moyens d'appel sont les suivants : |
| (*a*) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction; | *a*) la division générale n'a pas observé un principe de justice naturelle ou a autrement excédé ou refusé d'exercer sa compétence; |
| (*b*) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or | *b*) elle a rendu une décision entachée d'une erreur de droit, que l'erreur ressorte ou non à la lecture du dossier; |
| (*c*) the General Division 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. | *c*) elle a fondé sa décision sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments portés à sa connaissance. |

[22] The Appeal Division found, at paragraph 34 of its decision, that the General Division erred under paragraph 58(1)(*c*) of the DESDA "by failing to consider [Ms. Hanna's] evidence that her LTO contract could have terminated at any time before the end of the term in June 2018". It appears, therefore, that the basis for allowing Ms. Hanna's appeal was the "erroneous finding of fact" made by the General Division "without regard to the material before it". There is no suggestion that the General Division made any finding of fact in a "perverse or capricious manner".

[23] In this case, however, there was no indication that the General Division failed "to consider [Ms. Hanna's] evidence that her LTO contract could have terminated at any time before

the end of the term in June 2018". In paragraph 7 of the decision of the General Division, the member noted, "I realize the Appellant submitted that her teaching contracts for the school year 2017-2018 were on a casual basis". Therefore, the General Division did consider her evidence.

[24] Paragraph 58(1)(*c*) of the DESDA does not allow the Appeal Division to overturn a decision of the General Division simply because it would reach a different conclusion based on a different weighing of the evidence.

[25] In *Garvey v. The Attorney General of Canada*, 2018 FCA 118, this Court noted:

> [5] Under subsection 58(1) of the *Department of Employment and Social Development Act*, S.C. 2005, c. 34 (the DESDA), the SST-AD may intervene in factual findings or findings of mixed fact and law (which do not disclose an extricable error of law) made by the General Division only where those findings were made in a perverse or capricious manner or without regard to the evidence. This is a more stringent test than evidentiary reweighing and asks the SST-AD to consider whether the factual findings of the General Division were unreasonable, not whether they were incorrect.
>
> [6] Where a tribunal makes a factual finding that squarely contradicts or is unsupported by the evidence, its determination may be said to be made in a perverse or capricious manner or without regard to the evidence. Thus, all the Federal Court indicated in *Karadeolian, Griffin* and *Murphy* is that leave should be granted by the SST-AD if the SST-GD arguably overlooked or misconstrued key evidence because such a finding might warrant intervention under section 58 of the DESDA as it might be said to have been made in a perverse or capricious manner or without regard to the evidence. <u>The cases do not stand for the proposition that the SST-AD may re-weigh the evidence that was before the General Division.</u>
>
> [emphasis added]

[26] It appears that in reaching its conclusion that Ms. Hanna's "employment in teaching was on a casual or substitute basis", the Appeal Division was simply re-weighing the evidence.

However, paragraph 58(1)(*c*) of the DESDA does not stipulate that a valid ground of appeal is the failure of the General Division to give appropriate weight to any particular piece of evidence. It only provides a valid ground based on a finding of fact made in a "perverse or capricious manner" or "without regard for the material before" the General Division.

[27] In its decision, the Appeal Division failed to acknowledge that there were two letters of employment that Ms. Hanna had received from the School Board. In one letter, it is stated that her position could be terminated at any time upon the return of the permanent teacher. However, this condition was not included in the other letter which indicated that she was employed until the end of Semester 2. It was not reasonable for the Appeal Division to find that "the General Division based its decision on an erroneous finding of fact that it made […] without regard for the material before it". The evidence that was before the General Division included a contract that stated that Ms. Hanna was employed until the end of Semester 2, without any indication that the contract would terminate upon the teacher whom she was replacing returning to work.

[28] In its decision, the Appeal Division stated that the General Division did not consider Ms. Hanna's evidence despite the General Division having specifically acknowledged her evidence. The Appeal Division also failed to acknowledge that there was a letter in the record which confirmed the finding of the General Division that she was being employed for the duration of Semester 2. These shortcomings or flaws are "sufficiently central or significant to render the decision [of the Appeal Division] unreasonable" (*Vavilov*, at para. 100) in light of the statutory scheme that limits the grounds of appeal, and in particular, the ground relied upon by

the Appeal Division that "the General Division based its decision on an erroneous finding of fact that it made […] without regard for the material before it".

## V. Conclusion

[29] As a result, I would allow this application for judicial review on the basis that the Appeal Division failed to establish any applicable ground of appeal that would allow the Appeal Division to overturn the decision of the General Division and, therefore, its decision is unreasonable. In this application, the only remedy that was sought by the Crown was the return of this matter to the Appeal Division to be decided by a different member.

[30] Therefore, I would allow the application for judicial review, set aside the decision of the Appeal Division, and return the matter to the Appeal Division for determination by a different member. Since the Crown did not ask for costs, I would not award costs.

"Wyman W. Webb"
J.A.

"I agree
Richard Boivin J.A."

"I agree
George R. Locke J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**JUDICIAL REVIEW OF A DECISION OF THE SOCIAL SECURITY TRIBUNAL OF CANADA – APPEAL DIVISION, DATED MAY 29, 2019, TRIBUNAL FILE NUMBER AD-19-77**

| | |
|---|---|
| **DOCKET:** | A-245-19 |
| **STYLE OF CAUSE:** | ATTORNEY GENERAL OF CANADA v. REBECCA HANNA |
| **PLACE OF HEARING:** | HEARD BY ONLINE VIDEO CONFERENCE HOSTED BY THE REGISTRY |
| **DATE OF HEARING:** | JANUARY 19, 2021 |
| **REASONS FOR JUDGMENT BY:** | WEBB J.A. |
| **CONCURRED IN BY:** | BOIVIN J.A.<br>LOCKE J.A. |
| **DATED:** | MARCH 24, 2021 |

**APPEARANCES:**

| | |
|---|---|
| Marcus Dirnberger | FOR THE APPLICANT |
| Rebecca Hanna | ON HER OWN BEHALF |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| Nathalie G. Drouin<br>Deputy Attorney General of Canada | FOR THE APPLICANT |