



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *M. H. v Canada Employment Insurance Commission*, 2019 SST 1385

Tribunal File Number: AD-19-503

BETWEEN:

**M. H.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

---

**SOCIAL SECURITY TRIBUNAL DECISION**  
**Appeal Division**

---

DECISION BY: Jude Samson

DATE OF DECISION: November 28, 2019

## DECISION AND REASONS

### DECISION

[1] The appeal is allowed.

### OVERVIEW

[2] M. H. is the Claimant in this case. A couple of weeks after giving birth, she applied for Employment Insurance (EI) maternity and parental benefits. She planned to take a year's leave from work to raise her newborn child.

[3] The EI program provided the Claimant with 15 weeks of maternity benefits. As for her parental benefits, however, the Claimant had to choose (or "elect") between two options: standard or extended.<sup>1</sup> The Canada Employment Insurance Commission's online form explained that the standard option provides up to 35 weeks of benefits at a higher benefit rate, while the extended option provides up to 61 weeks of benefits at a lower benefit rate.

[4] Since the Claimant wanted to take a year's leave, she figured that she needed the extended option. When making this selection, it seems that the Claimant forgot that she would receive 15 weeks of maternity benefits before her parental benefits. As a result, the standard option would have been enough after all.

[5] Because of this selection, the Claimant's benefit rate dropped when she switched from maternity to parental benefits. Not expecting this change, the Claimant called the Commission to see what had happened. The Commission explained the situation and said that, since the Claimant was already receiving parental benefits, it was too late to change to the standard option.

[6] The Claimant asked the Commission to reconsider its decision, but it denied having any discretion in this type of case. The Claimant then appealed the Commission's decision to the Tribunal's General Division, but it dismissed her appeal. Specifically, the General Division concluded that it was too late for the Claimant to change from one option to the other.

---

<sup>1</sup> Since December 2017, applicants for EI parental benefits must choose the maximum number of weeks during which benefits can be paid. This requirement is set out in section 23(1.1) of the *Employment Insurance Act* (EI Act). Relevant legal provisions can be found at the end of this decision.

[7] The Claimant is now appealing the General Division decision to the Tribunal's Appeal Division.

[8] In my view, the General Division failed to decide a relevant issue in this case. As a result, I am allowing the appeal. I am also giving the decision that the General Division should have given: The Claimant chose the standard (and not the extended) parental benefits option. These are the reasons for my decision.

### **NEW EVIDENCE NOT CONSIDERED**

[9] The Claimant filed new evidence at the Appeal Division level.<sup>2</sup> By new evidence, I am referring to a document that the Claimant had not submitted to the General Division. This document contains several emails between the Claimant and her employer confirming her return to work date.

[10] The Appeal Division's limited role will be discussed in more detail below. Normally, however, the Appeal Division must base its decisions on only the information that the General Division had in front of it. The new evidence that the Claimant has presented in this case does not fall within any of the exceptions to this general rule. As a result, I ignored the Claimant's new evidence when reaching this decision.

### **ISSUES**

[11] As part of this decision, I asked and answered the following questions:

- a) Did the General Division fail to decide a relevant issue by assuming that the Claimant had chosen the extended parental benefits option?
- b) If so, what is the best way to fix the General Division's error?
- c) Did the Claimant choose the standard or extended parental benefits option?

---

<sup>2</sup> AD8-6 to 7.

## ANALYSIS

[12] I must follow the law and procedures set out in the *Department of Employment and Social Development Act* (DESD Act). As a result, I can intervene in this case only if the General Division committed one or more of the errors listed under section 58(1) of the DESD Act.<sup>3</sup>

[13] In this case, I focused on whether the General Division failed to decide an issue that it should have decided.<sup>4</sup> Based on the wording of the DESD Act, any error of this type could justify my intervention in this case.<sup>5</sup>

[14] If the General Division did commit an error, then the DESD Act also defines my powers to try to fix that error.<sup>6</sup>

### **Issue 1: Did the General Division fail to decide a relevant issue?**

[15] Yes, the General Division failed to decide whether the Claimant had, in fact, chosen the standard or extended parental benefits option. Instead, the General Division skipped ahead and simply asked whether the Claimant could change from one option to the other.<sup>7</sup>

[16] The Claimant accepts that she provided this answer to an important question on her application form:<sup>8</sup>

As of December 3, 2017, two options are available for parental benefits, standard and extended.

- Standard option - up to 35 weeks of benefits at a benefit rate of 55% of your weekly insurable earnings up to a maximum amount
- Extended option - up to 61 weeks of benefits at a benefit rate of 33% of your weekly insurable earnings up to a maximum amount

---

<sup>3</sup> These errors are also known as grounds of appeal.

<sup>4</sup> Section 58(1)(a) of the DESD Act describes this error as a refusal by the General Division to exercise its jurisdiction.

<sup>5</sup> *Canada (Attorney General) v Jean*, 2015 FCA 242 at para 19.

<sup>6</sup> These powers are established in section 59(1) of the DESD Act.

<sup>7</sup> See how the General Division framed the relevant issue on page 2 of its decision.

<sup>8</sup> GD3-9.

**If parental benefits are being shared by two parents, the parental benefit option selected by the parent who first makes a claim is binding on the other parent.**

To avoid an incorrect amount of benefits being paid, ensure you choose the same option as the other parent.

Once parental benefits have been paid on the claim, the choice between standard and extended parental benefits is irrevocable.

Select the type of parental benefits you are applying for:

Standard option – up to 35 weeks of benefits at a benefit rate of 55% of your weekly insurable earnings up to a maximum amount

Extended option – up to 61 weeks of benefits at a benefit rate of 33% of your weekly insurable earnings up to a maximum amount

[17] Based on this response, the General Division understood the Claimant to have admitted that she chose the extended option.

[18] However, the Claimant has consistently argued that this selection did not correspond to her choice. Indeed, the answer to this one question was not in line with her intentions and conflicted with other answers that she provided on the same application form.

[19] To borrow from the Claimant's representative, the answer above was evidence of the Claimant's choice, but should not have been interpreted as conclusive proof of her choice. As a result, the Claimant urged the General Division to look at all the circumstances of her case, rather than basing its decision on an answer to just one question that she found rather confusing.

[20] For example, the Claimant highlighted the following answers on her application form, which are more in line with the standard option:<sup>9</sup>

---

<sup>9</sup> GD3-7 and GD3-9.

Last day worked (DD/MM/YYYY)

XX/10/2018

Will you be returning to work with this employer

Yes

No

Do you know the date of your return?

Yes

No

My date of return is: (DD/MM/YYYY)

XX/09/2019

. . .

Parental benefits are payable only to the biological, adoptive, or legally recognized parents while they are caring for their newborn or newly adopted child, up to a maximum combined total of 61 weeks.

Consequently, the 61 weeks can be paid to one parent, or shared between both parents.

How many weeks do you wish to claim?

52

How many weeks does the child's other parent wish to claim?

0

[21] At the General Division level, the Claimant argued that the Commission should have realized that she was taking a year's leave. As a result, the extended option made no sense in her case: she lost over \$8,000 in benefits because of this mix-up.

[22] Meanwhile, the Commission argued that the Claimant's choice was made clear based on the selection shown under paragraph [16] above. In addition, the Commission maintained that

the Claimant could not change that choice once she received the first dollar of her parental benefits.<sup>10</sup>

[23] This case, in my view, is similar to two that the Tribunal has recently decided.

[24] In *M. C. v Canada Employment Insurance Commission*,<sup>11</sup> the applicant applied for parental benefits over the phone. Later, the parties disagreed about whether the applicant had chosen the standard or extended parental benefits option. The General Division looked at all the circumstances of the case, weighed contradictory evidence, and found that M. C. had, in fact, chosen the extended option.

[25] The Tribunal took a similar approach in *Canada Employment Insurance Commission v T. B.*<sup>12</sup> Like in this case, the applicant in *T. B.* applied for her maternity and parental benefits online. T. B. denied selecting the extended parental benefits option on her application form. She claimed that, if she had made that selection, then it was a mistake. Regardless, T. B. argued that it should have been obvious to the Commission, based on all the answers on her application form, that she intended to choose the standard option.

[26] In *T. B.*, the General Division looked at all of the relevant circumstances and concluded that she had, in fact, chosen the standard option. I later confirmed that the General Division was right to proceed in this way.

[27] At the hearing of this case, the Commission argued that I am not obliged to follow the *T. B.* decision. In addition, it questioned the validity of that decision because the Commission still had time to apply to the courts to have it judicially reviewed.

[28] Given the similarities between the two cases, I have decided to follow *T. B.* in this case. In passing, I also note that the Commission does not appear to have applied for a judicial review of the *T. B.* decision, although the deadline has now passed.<sup>13</sup>

---

<sup>10</sup> EI Act, s 23(1.2).

<sup>11</sup> *M. C. v Canada Employment Insurance Commission*, 2019 SST 666.

<sup>12</sup> *Canada Employment Insurance Commission v T. B.*, 2019 SST 823.

<sup>13</sup> In *Canada (Attorney General) v Bri-Chem Supply Ltd.*, 2016 FCA 257 at paras 33–56, the Federal Court of Appeal discussed why tribunal decisions should be followed, and the circumstances when they do not have to be followed.

[29] In my view, *T. B.* and *M. C.* are important decisions. In those cases, the Tribunal recognized how sections 23(1.1) and 23(1.2) of the *Employment Insurance Act* are designed to prevent people who are receiving parental benefits from switching between the standard and extended options. The Tribunal has not tried to interfere with the application of those provisions.

[30] Nevertheless, applicants are still able to argue that the Commission misinterpreted a choice that they made before they started to receive their parental benefits. Specifically, confusion can arise based on contradictory answers that applicants provide on their application forms. In these cases, the Commission might consider acting early to clarify the intentions of the applicants. If asked, however, the Tribunal also has the power to look at all the relevant circumstances and to decide which option an applicant had, in fact, chosen.<sup>14</sup>

[31] Like in *T. B.*, therefore, the General Division was required to start its analysis in this case by deciding whether the Claimant had, in fact, chosen the standard or extended option. But the General Division skipped that question. As a result, the General Division failed to decide a relevant issue. It also provided me with grounds to intervene in this case.

## **Issue 2: What is the best way to fix the General Division's error?**

[32] I have decided to give the decision that the General Division should have given.

[33] I chose this option because the record is complete. This includes the written and oral evidence presented at the General Division level, along with the submissions presented at both the General and Appeal Division levels.

[34] In short, I have the ability and the information needed to make a final decision in this case.<sup>15</sup> I have reviewed all the material in the file and listened to the recording of the General Division hearing. As a result, I see little benefit in returning the matter to the General Division for a new hearing.

---

<sup>14</sup> Section 64(1) of the DESD Act gives the Tribunal broad powers to decide relevant questions of fact.

<sup>15</sup> Section 59(1) of the DESD Act establishes my power to give the decision that the General Division should have given. See also section 64(1) of the DESD Act and the Federal Court of Appeal's decision in *Nelson v Canada (Attorney General)*, 2019 FCA 222 at paras 16–18.



**Issue 3: Did the Claimant choose the standard or extended parental benefits option?**

[35] The Claimant is more likely to have chosen the standard option.

[36] This case is like *T. B.* because the Claimant's application form revealed contradictions. Specifically, the Claimant's return to work date was more consistent with the standard option than with the extended option. As a result, I must look at all the circumstances and decide which option the Claimant is most likely to have chosen.

[37] On the one hand, the Claimant did select the extended benefits option on her application form.

[38] On the other hand, the Claimant consistently said that she intended to take a year's leave from work, which is more consistent with the standard option. She said that she made the length of her leave clear to her employer and confirmed it in her sworn evidence at the General Division hearing.<sup>16</sup> Indeed, this is consistent with the Claimant's planned return to work date, as indicated on her application form, and the fact that she was claiming a year's worth of benefits (in total) and that her husband was claiming none.<sup>17</sup>

[39] Finally, the Claimant contacted the Commission after it reduced her benefits. She also provided a reasonable explanation for the roughly five-week delay between the time her benefits went down and when she contacted the Commission.

[40] Overall, therefore, I am satisfied that the Claimant is more likely to have chosen the standard parental benefits option. I reached this conclusion based on the Claimant's

- a) application form, read as a whole;
- b) planned return to work date, which she had confirmed with her employer; and
- c) the steps that she took upon discovering that her benefit rate had dropped.

---

<sup>16</sup> GD2-9; GD3-21; General Division hearing at approximately 5:20 to 6:50.

<sup>17</sup> See the Claimant's answers under paragraph [18] above.

**CONCLUSION**

[41] In this case, the General Division committed an error by failing to decide a relevant issue, namely, whether the Claimant chose the standard or extended parental benefits option.

[42] In the circumstances, it is appropriate for me to step in and give the decision that the General Division should have given. I am allowing the appeal and declaring that the Claimant chose to receive her parental benefits according to the standard option.

Jude Samson  
Member, Appeal Division

HEARD ON:	November 1, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	M. H., Appellant Andrew Newman (law student), Representative for the Appellant S. Prud'Homme, A. Dumoulin (observer), M. Allen (observer), Representatives for the Respondent

## **Relevant Legal Provisions**

### ***Department of Employment and Social Development Act***

#### **Grounds of appeal**

**58 (1)** The only grounds of appeal are that

- (a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
- (b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
- (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.

• • •

#### **Decision**

**59 (1)** The Appeal Division may dismiss the appeal, give the decision that the General Division should have given, refer the matter back to the General Division for reconsideration in accordance with any directions that the Appeal Division considers appropriate or confirm, rescind or vary the decision of the General Division in whole or in part.

• • •

#### **Powers of tribunal**

**64 (1)** The Tribunal may decide any question of law or fact that is necessary for the disposition of any application made under this Act.

### ***Employment Insurance Act***

#### **Parental benefits**

**23 (1)** Notwithstanding section 18, but subject to this section, benefits are payable to a major attachment claimant to care for one or more new-born children of the claimant or one or more children placed with the claimant for the purpose of adoption under the laws governing adoption in the province in which the claimant resides.

**Election by claimant**

(1.1) In a claim for benefits made under this section, a claimant shall elect the maximum number of weeks referred to in either subparagraph 12(3)(b)(i) or (ii) for which benefits may be paid.

**Irrevocability of election**

(1.2) The election is irrevocable once benefits are paid under this section or under section 152.05 in respect of the same child or children.