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

Citation: *V. V. v Canada Employment Insurance Commission*, 2020 SST 274

Tribunal File Number: AD-20-3

BETWEEN:

V. V.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: April 1, 2020

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed. I have made the decision the General Division should have made and rescinded the Commission's decision to pay benefits based on the Claimant's selection of the extended parental benefit.

OVERVIEW

[2] The Appellant, V. V. (Claimant), applied for maternity and parental benefits. She wanted to receive both maternity and parental benefits for a total of one year but she mistakenly selected the extended parental benefit rather than the standard parental benefit. She did not realize her mistake until she began receiving the parental benefit. The Respondent, the Canada Employment Insurance Commission, refused to change her benefit because the election of benefit type is irrevocable. It maintained this decision on reconsideration.

[3] The Claimant appealed to the General Division of the Social Security Tribunal but the General Division dismissed her appeal. She is now appealing to the Appeal Division.

[4] The appeal is allowed. The General Division made an error of law, and I have made the decision that the General Division should have made. The application process misled the Claimant and her initial election of extended benefits is therefore invalid. Therefore, the decision to pay extended parental benefits is rescinded and the Claimant may make a new election for parental benefits.

WHAT GROUNDS CAN I CONSIDER FOR THE APPEAL?

[5] "Grounds of appeal" are the reasons for the appeal. To allow the appeal, I must find that the General Division made one of these types of errors:[1]

1. The General Division hearing process was not fair in some way.
2. The General Division did not decide an issue that it should have decided. Or, it decided something it did not have the power to decide.

[1] This is a plain-language version of the three grounds. The full text is in section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).

3. The General Division based its decision on an important error of fact.
4. The General Division made an error of law when making its decision.

ISSUE

[6] Did the General Division make an error of law by accepting that the Claimant's selection of parental benefits on the application form was conclusive of the Claimant's election?

ANALYSIS

Is a claimant's selection of parental benefits on the application form the same as the claimant's election?

[7] The *Employment Insurance Act* (EI Act) states that a claimant shall elect either 35 weeks (referred to as "standard benefits") or 61 weeks ("extended benefits") of parental benefits and that this election becomes irrevocable once benefits are paid based on that election.[2]

[8] The General Division found as fact that the Claimant made a genuine mistake when she selected extended benefits on her online application for parental benefits, and it found that she had always intended to select standard benefits. In reaching these findings, the General Division considered the Claimant's assertion that she was expected to return to work in one year. The General Division accepted that the Claimant's Record of Employment stated that the Claimant's expected return to work date was one year from the date she first took leave. The General Division also considered the Claimant's understanding of the application's drop-down selection for weeks of benefits. The Claimant said that she understood she was actually selecting a total number of weeks for combined maternity and parental benefits, and not just parental benefits. The General Division acknowledged that the Claimant had no way to verify that she had made the correct selection until after she received the first benefit payment. It also noted that she said she had tried to call the Commission the day after that first payment. Nonetheless, the General Division found that the Claimant had elected the extended parental benefit.

[9] The General Division made an error of law when it held that the legislation does not permit it to find the Claimant's written election to be invalid. The General Division reached its decision based solely on the fact that the Claimant selected the extended benefit on the

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[2] *Employment Insurance Act*, sections 23(1.1) and 23(1.2).

application form.[3] The General Division understood the Claimant's circumstances; acknowledging that she did not intend to make the benefit selection that she made, and that it was a genuine mistake at the time she did it.[4] It understood that the Claimant made a mistake based on how she interpreted the explanation of the benefits within the application form.[5] However, the General Division ultimately took none of this into consideration because it interpreted the selection she made on her application form as being conclusive of her election.

[10] The courts have not interpreted the meaning of "election" for the purpose of section 23(1.1) or 23(1.2) of the EI Act. However, other Appeal Division decisions have held that a claimant's choice of standard or extended benefits on the application form does not necessarily represent the claimant's election. One decision of the Appeal Division upheld a decision of the General Division in which a claimant's intention to elect the other benefit was confirmed by outward expressions. [6] The Appeal Division also stated that the General Division was obliged to look at other circumstances that cast doubt on her choice.[7] In another Appeal Division decision, the Tribunal considered what was included in, and left out of, the application information as well as other information on the claimant's My Service Canada Account and found that the election on the application form was invalid.[8]

[11] Like these other Appeal Division decisions, I do not accept that a claimant's choice on the application form is necessarily the claimant's election, or that the circumstances in which a claimant makes that choice are irrelevant. Parliament explicitly made the election irrevocable. However, it did not define "election", or state that a claimant's selection on the application form must be conclusively deemed to be his or her election. In my view, the purpose of making the election irrevocable is to prevent claimants from changing their minds as their circumstances change and they reassess which type of benefit would be most advantageous. Its purpose is not to punish claimants for provable slips or objectively reasonable misunderstandings at the time that they complete their applications.

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[3] General Division decision, paras 17 and 19
[4] General Division decision, paras 15 and 16.
[5] General Division decision, para 8.
[6] *Canada Employment Insurance Commission and T. B.*, 2019 SST 823 at para 45.
[7] *Ibid* at paras 36 and 37.
[8] *M. L. v Canada Employment Insurance Commission*, 2020 SST 255, at para 23.

[12] I find that the General Division made an error by interpreting the law in such a way as to hold claimants strictly accountable for the manner in which they complete their applications for benefits, without regard for their particular circumstances.

Summary of errors

[13] I have found that the General Division made an error of law. This means I must consider what manner of remedy is appropriate.

REMEDY

Nature of remedy

[14] I have the authority to change the General Division decision or make the decision that the General Division should have made.[9] I could also send the matter back to the General Division to reconsider its decision.

[15] I accept that the General Division has already considered all the issues raised by this case and that I can make the decision based on the evidence that was before the General Division. I will make the decision that the General Division should have made.

New decision

[16] The Claimant argued to the General Division that she had not intended to select a total of eighteen months of benefits. She said that she needed only twelve months because this corresponded to her return to work date. She argued in her Notice of Appeal to the General Division that she had found the application to be ambiguous and had ticked the wrong box. She also argued that she received a confirmation notice that told her the duration of leave to which she was entitled but did not identify the number of weeks of benefits for which she had applied.[10] She told the General Division that she could not have realized her mistake until she received her first extended parental benefit payment.[11]

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[9] My authority is set out in section 59 of the DESD Act.
[10] GD2-7
[11] General Division decision, para. 11

[17] The General Division found as fact that the Claimant had intended to select the standard parental benefit and that she made a genuine mistake in selecting the extended benefit. The General Division acknowledged that the Claimant was aware that her expected return to work date was one year from when she left work, and that she had selected extended benefits because they seemed to fit her return-to-work schedule.[12] The Claimant believed that she would receive only 35 weeks of any kind of parental benefit if she selected the standard benefit. I have no reason to interfere with the General Division's finding, and I confirm that the Claimant never intended to select the extended benefit.

[18] Part of the Claimant's explanation for why she did not select the benefit she desired is that the information embedded in the application is ambiguous when it comes to defining the election options. The information relevant to choosing between standard and extended benefits is as follows:

a) A claimant may choose to receive maternity benefits followed by parental benefits.

b) If the claimant chooses maternity benefits alone, she is entitled to up to 15 weeks of maternity benefits.

c) If the claimant chooses both maternity and parental benefits, the claimant can elect to receive a maximum of 35 weeks of benefits at 55% of her insurable earnings for standard benefits or to receive a maximum of 61 weeks at 33% for extended benefits.

d) The election between standard and extended benefits is introduced with an explanation of who may receive parental benefits. Parental benefits are said to be payable to parents caring for their newborn child.

[19] At no point does the application clearly state that parental benefits are separate from maternity benefits and not inclusive of maternity benefits. Therefore, a claimant could consider both maternity and parental benefits to fall under benefits "payable only to […] parents while they are caring for their newborn […] child."[13] In addition, the application does not explain that a

[12] General Division decision, para 15.
[13] Benefit application, GD3-6.

claimant may claim up to the maximum number of weeks of parental benefits that relate to standard or extended benefits, **in addition to** the full 15 weeks of maternity benefits.

[20] The only place where the application mentions the entitlement to 15 weeks of maternity benefits is where it describes benefits that are available to a claimant who chooses maternity benefits **without other parental benefits** (as opposed to the benefits available to a claimant who chooses to receive "parental benefits immediately after [her] maternity benefits.")[14] Where a claimant wishes to receive both benefits, the application process does not explain how many weeks of maternity benefits the claimant can receive, or whether these weeks of maternity benefits will be in addition to the weeks of parental benefits that she elects.

[21] The Claimant argues that she did not mean to choose extended parental benefits but that she misunderstood the nature of the parental benefits. The Claimant says that her selection did not correspond to her actual intention. Her employer had given her a one-year leave so that she could give birth to, and care for, her child. She chose 52 weeks of extended parental leave because she understood the weeks of parental leave to be the total number of weeks of benefits, including any maternity period. She knew she would be away from work for 52 weeks, so she believed the 35 weeks of benefits available under the standard parental benefit option could not possibly be enough support. If she had known that she could have received 15 weeks of maternity leave in addition to 35 weeks of standard parental leave at the higher rate, she would have made that choice.

[22] In my view, the information about maternity and parental benefits that is included in the online application is imprecise, incomplete and ambiguous. It would have been simple enough for the Commission to expressly state in its online application that the parental benefit is a distinct benefit from the maternity benefit and that a claimant may qualify for 15 weeks of maternity benefits in addition to either the standard or extended parental benefit. However, this is not the information presented to a claimant. In my view, it is reasonable for a claimant who chooses to receive "parental benefits immediately after [her] maternity benefits" to understand that the "parental benefits" of this sequence is just a continuation of the maternity form of

[14] Benefit application, GD3-6

parental benefits. It is also reasonable for a claimant to believe that her weeks of maternity benefits are worked into the weeks of parental benefits that she selects.

[23] Furthermore, a claimant could reach this conclusion without necessarily appreciating that some other interpretation may also be possible or that he or she might have to seek clarification outside the application process.

[24] I accept that a claimant's election cannot be valid unless it is at least deliberate. I would not go so far as to find that claimants must fully appreciate all of the consequences of their selection to make valid elections. However, a claimant cannot make a deliberate choice unless he or she is presented with a choice between reasonably comprehensible options.

[25] In this case, the General Division found that the Claimant chose a benefit that she did not mean to choose. I do not accept that the Claimant should be prejudiced by her selection of extended benefits when her choice was based on a reasonable interpretation of the information and instructions in the application. I find that it was reasonable for the Claimant to have understood that the extended benefit was the only benefit that could give her more than 35 weeks of benefits in total.

[26] As a result, I find that the Claimant's selection of the extended parental benefit was invalid from the outset because the incompleteness, imprecision, or ambiguity of the application misled her to make a selection that was contrary to her intention and purpose. I am rescinding the Commission's decision to pay extended parental benefits to the Claimant. It is open to the Claimant to make a valid election of parental benefits in her claim.

CONCLUSION

[27] The appeal is allowed. The General Division made an error of law. The Claimant's election of extended parental benefits on May 16, 2019, was not valid. Accordingly, I am rescinding the Commission's decision to pay the Claimant extended parental benefits. The Claimant may now make her election of parental benefits in her May 16, 2019, claim.

Stephen Bergen
Member, Appeal Division

METHOD OF PROCEEDING:	Questions and answers
SUBMISSIONS:	V. V., Appellant J. L., Representative for the Appellant