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

Citation: *PK v Canada Employment Insurance Commission*, 2020 SST 906

Tribunal File Number: AD-20-699

BETWEEN:

P. K.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Stephen Bergen

Date of Decision: October 20, 2020

Canada

DECISION AND REASONS

DECISION

[1] The application for leave to appeal is refused.

OVERVIEW

[2] The Applicant, P. K. (Claimant), applied for maternity and parental Employment Insurance benefits. For her parental benefits, the Claimant selected the extended parental benefit option instead of the standard parental benefit. This meant that the Respondent, the Canada Employment Insurance Commission (Commission), would pay her parental benefit at a reduced rate after she had used up her maternity benefits. About six months after the Commission started to pay the reduced parental benefit, the Claimant asked the Commission to change the benefit from an extended benefit to the standard benefit. The Commission refused, saying that the Claimant could not change her choice of parental benefit. The Claimant asked the Commission to reconsider but the Commission did not change its decision.

[3] The Claimant appealed to the General Division of the Social Security Tribunal, which dismissed her appeal. She requested leave (permission) to appeal the General Division decision to the Appeal Division but she also asked the General Division to rescind or amend its decision based on new evidence. The General Division refused to rescind or amend its decision. The Claimant has now asked the Appeal Division to proceed with her original leave to appeal application (of the first General Division decision).

[4] I am refusing leave. The Claimant has no reasonable chance of success. She has not made out an arguable case that the General Division acted unfairly or that it made an important error of fact.

WHAT GROUNDS CAN I CONSIDER FOR THE APPEAL?

[5] To allow the appeal process to move forward, I must find that there is a “reasonable chance of success” on one or more of the “grounds of appeal” found in the law. A reasonable

chance of success means that there is an arguable case. This would be some argument that the Claimant could make and possibly win.[1]

[6] "Grounds of appeal," means reasons for appealing. I can only consider whether the General Division made one of these types of errors:[2]

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.
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.

PRELIMINARY MATTERS

[7] The Claimant appealed the Commission decision that said that she had elected extended parental benefits and could not change that decision. When the General Division dismissed her appeal, the Claimant obtained a letter from her employer. She sent the letter to the General Division, and asked it to rescind or amend its decision. The General Division refused.

[8] The Claimant appealed the General Division's refusal of her rescind or amend application (AD-20-778), but that is a different appeal. This is an appeal of the General Division's original decision to dismiss the Claimant's appeal (AD-20-699). The Claimant has sent submissions to the Appeal Division for each of her appeals.

[9] While I have not formally joined the two appeals, I did write to the Claimant on September 29, 2020, telling her that I would be considering the two appeals together. Some of the Claimant's submissions for AD-20-778 have more to do with this appeal than with her other appeal. Therefore, I will also consider the submissions the Claimant sent to the Tribunal in her other appeal, AD-20-778 (where they are relevant to the issues I need to decide in this appeal).

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[1] This is explained in a case called *Canada (Minister of Human Resources Development) v Hogervorst*, 2007, FCA 41; and in *Ingram v Canada (Attorney General)*, 2017 FC 259.
[2] 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.*

ISSUES

[10] Is there an arguable case that the General Division process was procedurally unfair?

[11] Is there an arguable case that the General Division should not have found that the Claimant elected extended benefits because it ignored or misunderstood:

a) that the Commission's actions or omissions were "mistakes"?
b) that the Claimant discussed her return to work with her employer?
c) that the Commission's forms do not require a specific return to work date?
d) the Claimant's evidence that the application process and form were confusing?
e) the Claimant's stated reason for not contacting the Commission when her benefit was reduced (or it improperly used the Claimant's delay to conclude that she was aware she was receiving the benefit she had requested to receive)?
f) that the Commission made a mistake in the reconsideration process?

ANALYSIS

Issue 1: Procedural fairness

[12] The Claimant argued that the General Division did not follow procedural fairness.[3] "Procedural fairness" is not about the fairness of the decision result. It is about fairness of the process. Procedural fairness means that participants in an appeal to the General Division have a right to be heard and a right to an unbiased decision-maker.

[13] In her most recent submission, the Claimant explained why she believed that the General Division was not procedurally fair.[4] She argued that the General Division relied on a Record of Employment (ROE) that it obtained after the hearing. She said that she did not have a chance to respond to the new ROE, which means that she believes the General Division did not give her an adequate opportunity to be heard.

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[3] AD1-9 (AD-20-699).
[4] AD3-2 (AD-20-778).

[14] At the hearing, the General Division told the Claimant that the only ROE in the file was an amended ROE (of March 10, 2020). It informed the Claimant that it would be asking the Commission to provide the original ROE to the Tribunal. It also told the Claimant that the Tribunal would email a copy of the document to the Claimant.[5] The Claimant did not object to the General Division receiving another document or state that she wanted to be able to respond to the original ROE.

[15] The General Division requested a copy of the original March 13, 2019, ROE on the day of the hearing, June 11, 2020. It received the document the same day and emailed a copy to the Claimant on June 12, 2020. The Claimant has not argued that she did not receive the original ROE document from the Tribunal.

[16] The General Division issued its decision six days later on June 18, 2020.

[17] Before the General Division requested the original ROE, there was no evidence that the employer expected the Claimant to return on any particular date. In fact, the evidence supported an opposite conclusion. The Claimant testified that her employer had **not** asked for a return-to-work date and that they had **not** arranged a specific return date.[6] She said that they had **not** had a conversation when she went on leave[7] and that they had "**left it open**".[8] She said she had banked overtime leave and vacation when she went on maternity leave. She said her employer recommended that such leave be taken after maternity leave.[9] She meant to ask her employer to give her this time off near the end of her maternity leave, but "**never had those conversations,**" when she first went on maternity leave.[10]

[18] In addition, the Claimant's May 11, 2019, application for benefits stated that she did not know the date of her return.[11] The amended ROE in the appeal file said that the Claimant's return

[5] Audio record of General Division hearing at timestamp 00:25:00.
[6] 21:00
[7] 21:58
[8] 21:05; 23:50
[9] 21:40
[10] 21:57.
[11] GD3-7.

to work date was unknown. (But this meant little, since the amended ROE also stated that the Claimant had resigned and would not be returning from maternity leave.)

[19] The Claimant told the General Division that she formed an intention to take only one year of leave even before she made her election. The General Division asked for the original ROE to see if it indicated the Claimant's anticipated return to work date and to see if that date was one year from the date the Claimant started her leave. The original ROE might have shown that the employer understood that the Claimant planned to return after a year when the Claimant took her maternity leave. If it had, this would have been some evidence to support that the Claimant had the intention to take only one year's leave when she made her parental benefit election.[12]

[20] However, the original ROE did not show that the employer expected the Claimant to return after one year of leave. The ROE stated that the Claimant's expected date of recall was "unknown". This was consistent with the Claimant's testimony that she and her employer had not discussed her return-to-work date and that they had left it open.

[21] The original ROE was only meaningful to the decision for what it did not do. The original ROE said her return to work date was "unknown" to the employer. This did not add anything that the Claimant had not already said in her testimony, statements or documents and it did not contradict any of the Claimant's evidence.

[22] It would have been better if the General Division clearly told the Claimant that she could respond to the original ROE document if she wanted to. However, the Claimant has not explained what she would have said in response to the original ROE if she had the chance, or how this could have affected the decision. She could not have challenged the original ROE document without going back on her own testimony.

[23] The Claimant's argument that the General Division did not give her a chance to respond to the original ROE has no reasonable chance of success.

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[12] GD3-35.

Issue 2a: The Commission's Mistakes

[24] The Claimant seems to believe that she might have been successful in her appal if she had used the word "mistake" to describe how the Commission's actions or omissions led to her misunderstanding of the benefit options. She argued that the Commission did not warn her that the General Division would not listen to her unless she used specific words that the General Division "understands".[13]

[25] When she prepared her submissions for the Appeal Division, she reframed her objections to the Commission's decision and described the Commission's forms or its process as "mistakes". She stated, "I will restate this in the words that you want—The Commission has made a BIG MISTAKE in interpreting my benefit election."[14](Emphasis in original). In her submissions for the appeal AD-20-778, she itemized various mistakes in the Commission's information, practices, or processes.[15]

[26] The Claimant argued that the General Division ignored these mistakes. According to the Claimant, the Commission's administrative processes are flawed and its application forms are unclear. She argues that these mistakes were responsible for her confusion about her options and about the difference between maternity and parental benefits.

[27] There is no arguable case that the General Division made an error by ignoring the Commission's "mistakes". The General Division did not require the Claimant to characterize the Commission's actions or omissions as "mistakes". There is also no arguable case that the General Division made an error by not recognizing or accepting that the Commission made such a mistake.

[28] I think the Claimant got the idea that she was specifically required to argue that the Commission had made a mistake from the General Division decision itself. The General Division

[13] AD1-12 (AD-20-778)
[14] AD1-10 (AD-20-699).
[15] AD1 (AD-20-778)

stated that, "[t]he Claimant did not say that the Commission made a mistake about her election."[16]

[29] However, the General Division was not saying that the Claimant should have used particular words. The General Division was talking about what the Claimant said in her reconsideration request. It was explaining that it would have expected the Claimant to dispute how the Commission interpreted her election, if that had been her concern. The Claimant requested a reconsideration because she had not known she would not be able to **change** her choice of benefit. She did not assert that she had always intended to choose the standard benefit.[17]

[30] The General Division did not require the Claimant to use particular words or to make her argument in a particular way. Its decision did not depend in any way on whether the Claimant described the Commission's actions or omissions, or any of its information, practices, or processes as "mistakes". Furthermore, it did not need to find that the Commission had made a "mistake" to assess the Claimant's intention or determine which benefit she had elected.

Issue 2b: Evidence that the Claimant Discussed her Return-to-work with her Employer

[31] In her other appeal of the General Division's rescind or amend application, the Claimant submitted that the General Division ignored that she had been in discussions with her employer to return to work in May 2020.[18] However, there was no evidence before the General Division to support that these discussions occurred. Therefore, there is no arguable case that the General Division ignored it.

[32] As I have already mentioned, the Claimant testified to the General Division that she did not discuss her return to work plans with her employer. There was no evidence that the Claimant told her employer that she planned to return to work on May 2020, or after only one year of maternity leave.

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[16] General Division decision, para 23.
[17] General Division decision, paras 23, 24.
[18] AD3-2 (AD-20-778).

[33] I note that the Claimant sent the General Division a letter from her employer with her rescind or amend application. In the letter, the employer wrote about the Claimant's expected return-to-work date. However, the General Division did not accept that it could rescind or amend based on the letter. The Claimant appealed that refusal to the Appeal Division (AD-20-778) as a separate matter from this appeal.

[34] The Claimant has tried to submit the employer letter to this appeal, but the Appeal Division told her that it could not consider new evidence that was not before the General Division when it made its decision. The General Division did not have the letter from the Claimant's employer when it made the June 18, 2020, decision that is on appeal here.

[35] There was no evidence before the General Division that could have supported a finding that the Claimant had made an agreement with her employer to return to work after a year.[19] The General Division noted that the Claimant herself testified that she had not arranged a return-to-work date with her employer.[20] It considered that the Claimant said she did not know when she would return to work in her application for benefits. It also considered the original ROE, in which her employer wrote that her return to work date was "unknown".

Issue 2c: Commission's Failure to Collect Information on a Specific Return-to-work Date

[36] The General Division found that the Claimant did not know when she was going to return to work. It relied on information from the Claimant's application and from her Record of Employment. The Claimant argued that the Commission made a mistake because it did not require or obtain specific return-to-work information. In addition, it did not explain how important this information could be. She said that the Commission should require claimants to complete a "return to work date" on the benefit application form. In addition, it should require employers to complete an expected recall date on the Record of Employment (ROE) form, and not accept "unknown" as an answer.[21]

[37] The Claimant has no arguable case that the General Division made an error by relying on the information collected by the Commission. The General Division is not required to seek out

[19] General Division decision, para 15.
[20] General Division decision, paras 13, 14.
[21] AD1-10 (AD-20-778).

additional evidence that is not in the appeal file. At the same time, it cannot tell the Commission what sort of information it should collect or how it should draft its forms.

[38] Neither the Claimant, nor the employer gave the Commission an expected date of return. The benefit application form allows an applicant to indicate an expected date of return to work. The application form asks claimants if they know the date they will be returning to work. If a claimant answers "yes", the form asks for the expected date of return. The Claimant stated that she did not know when she would be returning to work.[22] The ROE document allows an employer to indicate the expected date of return to be completed. It has a section in which it asks for the expected date of recall to work, but it allows the employer to tick off a box for "unknown."[23] The employer ticked off the "unknown" box.

[39] The General Division was entitled to consider the application form as evidence that the Claimant did not know when she would be returning to work. It was also entitled to consider the original ROE as evidence that the employer did not know her return-to-work date. The General Division must make a decision on all the evidence that is before it, and it is entitled to weigh that evidence as it sees fit.

[40] The Claimant had the burden of proof at the General Division. This means that the Claimant had to find and submit evidence to show the General Division that the Commission decision was wrong. The Claimant thinks that the application form and the ROE should require a specific return-to-work date. Whether or not that would be appropriate, neither the Claimant nor the employer identified a return-to-work date in this case. The General Division needed to decide based on the evidence that it had. The Claimant cannot show that the General Division made an error by not considering evidence that was not even before it.

Issue 2d: Confusing Application Form

[41] The Claimant has said that she was confused by the process and was misled by the application form into selecting the wrong benefit. The Claimant told the General Division that she had always intended to choose the option that would give her a year of parental benefits.

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[22] GD3-7.
[23] GD6-2.

[42] The Claimant has repeated these arguments to the Appeal Division. She argues that the General Division did not understand that the Commission's application process and its forms had confused the Claimant. She said she was confused because

i. The application for benefits form did not allow her to select the 52 weeks of benefits that she wanted.
ii. The form does not explain that maternity and parental benefits are separate benefits.
iii. The form does not explain how her benefits would be calculated.
iv. The form only allows her to select one kind of benefit, which suggests that there is only one kind of benefits that she could collect.

[43] There is no arguable case that the General Division ignored the Claimant's evidence about her confusion. I will discuss what the General Division said about each of these sources of confusion in the following paragraphs.

i. Claimant could not select 52 weeks

[44] The General Division noted that the Claimant chose the extended benefits option, and also selected 61 weeks of benefits. 61 weeks of benefits was only available under the extended benefits option. The standard parental benefits option offered a maximum of 35 weeks.

[45] The Claimant appears to think the General Division was wrong about her ability to choose the weeks she needed to take a year of leave. She says the form only gave her a choice between 35 weeks and 61 weeks. She selected 61 weeks because 35 weeks would not be enough.[24]

[46] However, the Claimant is mistaken about the application form. The form did not force her to choose either 61 weeks (9 weeks more than she needed) or 35 weeks (17 weeks less). After a claimant chooses the type of parental benefit, the online benefit application presents a drop-down menu so that the claimant may select how many weeks of that benefit the claimant actually wants. The *maximum* number of weeks that a claimant can select for the standard option

[24] AD1-10 (AD-20-699); AD1-9 (AD-20-778).

is 35 weeks, and the *maximum* number of weeks for the extended option is 61 weeks. However, the Claimant could have selected 52 weeks of benefits.

ii. Maternity and parental benefits are separate.

[47] The Claimant said that she understood she had selected a total number of weeks of parental benefits that included her maternity benefits.

[48] The General Division noted the Claimant's testimony that she did not understand the difference between the two benefits, and that she thought it was all one benefit.[25] However, the General Division also noted that she still chose more than the year of benefits that she said she had intended to take as maternity leave.[26] Whether she thought she was selecting weeks of benefits that included both the maternity and parental benefits, or only the parental benefit, her selection of 61 weeks could only be consistent with the election of extended benefits. It could not be consistent with standard benefits.

[49] In other words, the Claimant's misunderstanding about the difference between maternity and parental benefits could not have influenced the choice that she made. Her selection of 61 weeks was more than the total of her 15 weeks of maternity benefits plus 35 weeks of standard benefits (which she claims she would have chosen if she had known the benefits were separate). It is also more than the 52 weeks of benefits she said she wanted in total.

iii. Calculation of benefits

[50] The Claimant argued that the form was not clear about how her benefits were calculated.

[51] However, the General Division did not ignore this. It explained that the form instructions actually identified the two separate benefits and explained how each benefit was calculated.[27]

[25] General Division decision, para 18.
[26] General Division decision, para 24.
[27] General Division decision, para 19.

iv. Claimant could only select one kind of benefit on application.

[52] On her application for benefits, the Claimant selected maternity benefits and not parental benefits to indicate what kind of benefit she was seeking.[28] She says that this contributed to her confusion and affected her choice of benefits.

[53] The General Division did not specifically consider that the form may have limited the Claimant to choosing only one type of benefit, or how this could have contributed to her confusion.

[54] However, the Claimant does not appear to have made this argument to the General Division. The Claimant may be right that the application form only allows a claimant to describe the benefits she is seeking by selecting one of the options provided. Even so, the General Division could not have made an error in failing to consider this circumstance if it was not in the Claimant's statements or testimony.

[55] In any event, the "maternity benefit" option the Claimant selected includes a definition of the benefit. It states that it "allows you to receive maternity followed by parental benefits." The form may have forced her to choose only one benefit but it is not obvious how this confused the Claimant or how it caused her to select extended parental benefits instead of standard parental benefits.

Conclusion on the Claimant's confusion.

[56] There is no arguable case that the General Division ignored or misunderstand the Claimant's objections to the information and instructions in the application form. The General Division acknowledged the Claimant's testimony that she was confused and that she had only meant to take a year of leave.[29] Furthermore, it reviewed the circumstances that the Claimant believed contributed to her confusion.

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[28] GD3-3
[29] General Division decision, para 25.

[57] The General Division found that that there was no obvious contradiction in the Claimant's responses on the application form.[30] It noted that the Claimant chose the maximum number of weeks of support, and that this was consistent with her statement in the application form that she did not know when she was returning to work.[31] The General Division did not believe that the Claimant chose 61 weeks because she was confused about her benefits and thought this was the only way she could get a year of benefits. According to the General Division, it was more likely that the Claimant asked for 61 weeks of parental benefits because she wanted benefits for longer than a year.[32]

[58] The General Division's findings and conclusions are based on the General Division's assessment and weighing of the evidence that was before it. I cannot consider new evidence[33] and, when I am deciding whether to grant leave, I am not allowed to reweigh or re-evaluate the evidence.[34]

[59] There is no arguable case that the General Division ignored or misunderstood the evidence.

Issue 2e: Reason for Delay

[60] The Claimant has not made out an arguable case that the General Division made an important error when it found that the Claimant's delay in contacting the Commission meant that she knew she had elected the reduced benefit.

[61] The General Division considered that the Claimant did not contact the Commission for almost six months after the Claimant experienced a drop in her benefits.[35] It noted that the application form explains how the Commission pays the standard parental benefit at a rate that is 55% of weekly insurable earnings. For the extended parental benefit, the rate is 33%. Therefore, claimants who have elected extended benefits should expect to see a significant drop in their

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[30] General Division decision, para 17.
[31] GD3-7.
[32] General Division decision, para 18.
[33] *Canada (Attorney General) v O'Keefe*, 2016 FC 503.
[34] *Bergeron v. Canada (Attorney General)*, 2016 FC 220; *Hideq v. Canada (Attorney General)*, 2017 FC 439; *Parchment v. Canada (Attorney General)*, 2017 FC 354.
[35] General Division decision, para 20.

benefit payments when they transition from maternity benefits to parental benefits. The General Division observed that the Claimant's rate dropped, starting with the week of September 1, 2019. The Claimant did not contact the Commission for an explanation until the end of February 2020.[36]

[62] The Claimant disagreed with the General Division. She denies that she expected a reduction in her benefits based on the election she had made. The Claimant told the General Division that she did not contact the Commission because she assumed it had correctly calculated the benefit rate. She also says that she took immediate steps to notify the Commission it had made a mistake after she noticed she was receiving reduced rate payments. She agrees that this was in February 2020, but she says that she should not be expected to notice the Commission's mistake immediately.[37]

[63] The General Division did not ignore or misunderstand the Claimant's explanation. It simply did not accept it as credible. The General Division found that it was more likely that the Claimant did not question the reduced rate because she understood which benefit she had elected. That is, she expected her benefit payment to drop because she had chosen the extended benefit.[38]

[64] In support of this finding, the General Division cited the lengthy delay. However, it also referred to the Claimant's request for reconsideration. The Claimant asked for the reconsideration because the Commission had failed to tell her that she would not be able to change her election. Her reconsideration request did not claim that she was confused when she made the election or that the General Division misunderstood her election.

Issue 2f: Mistake in Reconsideration Process

[65] There is no arguable case that the General Division made an important error of fact by ignoring a mistake in the reconsideration process.

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[36] *Ibid*; see also GD2-8.
[37] AD1-11 (AD-20-778)
[38] General Division decision, para 22.

[66] The Claimant said that the Commission's refusal to reconsider her decision was a mistake, but she may have misunderstood the nature of a reconsideration. When the Claimant contacted the Commission about her reduced benefit and requested a change, a Commission agent advised her to seek a reconsideration. The agent told her to note down that she wanted to change her benefit election. From her leave to appeal submission, it appears that the Claimant understood this to be how the Commission was administratively processing her change of election. However, she also stated in her reconsideration application that the Commission had already told her that her election decision was irrevocable.

[67] In any event, the reconsideration process was not just a registration of a change in her choice of election. The Commission had already made a decision. The reconsideration process was the only way that the Claimant could challenge that decision. Her challenge was not successful, but that does not mean that the Commission made a "mistake" or acted improperly by denying her reconsideration. The Commission told the Claimant that she had a right to appeal to the General Division, which she did. But the General Division could not overturn the reconsideration just because the Claimant had expected the Commission to change her election.

[68] The Claimant also says there were delays in her reconsideration request and she had to resubmit it. None of this is relevant to the General Division decision about her intention at the time she made her election or to its decision that she elected the extended benefit.

Summary

[69] The Claimant clearly disagrees with the General Division's conclusion. However, the General Division weighed and assessed the evidence and made findings of fact, as it was required to do. I was unable to find an arguable case that the General Division process was unfair, that it made an error of law, or that it made important errors of fact because it ignored or misunderstood the evidence.

[70] The Claimant has no reasonable chance of success on appeal.

CONCLUSION

[71] The application for leave to appeal is refused.

Stephen Bergen
Member, Appeal Division

REPRESENTATIVES:	P. K., Self-represented