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

Citation: *Canada Employment Insurance Commission v MD*, 2020 SST 1055

Tribunal File Number: AD-20-767

BETWEEN:

Canada Employment Insurance Commission

Appellant
(Commission)

and

M. D.

Respondent
(Claimant)

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Jude Samson

DATE OF DECISION: December 15, 2020

Canada

DECISION AND REASONS

DECISION

[1] I am allowing the Commission's appeal. M. D. is the Claimant in this case. Her and her spouse validly chose to receive parental benefits under the extended option. When the Claimant later asked to switch to the standard option, it was already too late for her to do so.

OVERVIEW

[2] The Claimant applied for Employment Insurance (EI) benefits shortly after the birth of her second child. It was a difficult time for the Claimant and her family. The birth was difficult. Her newborn had medical issues that required trips to the hospital. She also had a toddler at home. For financial reasons, she needed her EI benefits to start quickly. And all this in the shadow of a global pandemic.

[3] As part of her application for parental benefits, the Claimant had to choose between:

a) the standard option, which offered her 55% of her weekly earnings (to a maximum amount), paid for up to 35 weeks; and

b) the extended option, which offered her 33% of her weekly earnings (to a maximum amount), paid for up to 61 weeks.[1]

[4] When combined with maternity benefits, the standard option provides EI benefits for up to 12 months. The extended option provides benefits for up to 18 months. The total amount of benefits payable under each option is about the same, if the person claims benefits for the full 12 or 18 months.

[5] After having her baby, the Claimant planned to take about 14 months leave. She chose the extended option. But she says that she based her choice on an honest but mistaken belief that

[1] When combined with maternity benefits, the standard option provides EI benefits for up to 12 months whereas the extended option provides benefits for up to 18 months.

the Commission would use the maximum amount of parental benefits and prorate it over 14 months.

[6] When the Claimant realized that she would be paid at the extended option rate—and that she would lose about $4,000 compared to what she could have received by choosing the standard option—she quickly called the Commission and asked to switch options.

[7] The Commission refused the Claimant's request. Since the Commission had already paid parental benefits to the Claimant's spouse, it said that it was too late for the Claimant to switch options.

[8] However, the General Division decided that the Claimant was entitled to the standard option because it better matched her goal of obtaining the maximum amount of parental benefits. Critically, the General Division found that the Claimant would have chosen the standard option if she had better understood how parental benefits work.

[9] The Claimant's case is very sympathetic. Nevertheless, I have decided that I must allow the Commission's appeal. The law does not provide the flexibility that the Claimant needs to receive parental benefits under the standard option. These are the reasons for my decision.

ISSUES

[10] The Commission argues that the General Division based its decision on an important error about the facts of the case. It also argues that the General Division made an error of law by allowing the Claimant to switch options at a time when the law prohibited that change. If established, these errors would allow me to cancel or change the General Division decision.[2]

[11] When reaching this decision, I focused on these issues:

a) Did the General Division make relevant errors of fact and law when it concluded that the Claimant was entitled to the standard parental benefits option?

[2] Sections 58(1)(b) and 58(1)(c) of the *Department of Employment and Social Development Act* (DESD Act) define these relevant errors (or grounds of appeal) in a more precise way.

b) If so, what is the best way of fixing the General Division's error?

c) Is the Claimant entitled to standard parental benefits?

ANALYSIS

Issue 1: The General Division based its decision on relevant errors of fact and law.

The General Division based its decision on an important error of fact when it found that the Claimant had not chosen the extended option.

[12] When applying for parental benefits, the Claimant had to choose between the standard and extended options.[3] This was an important decision because the Claimant's choice also bound her spouse.[4] Plus, the couple could not change options after the Commission had paid parental benefits to either of them.[5]

[13] When completing her application form, the Claimant had to choose between the two options. As a result, assessing the Claimant's choice starts with her application form. That is how she communicated her choice to the Commission.

[14] There are a few questions on the Claimant's application form that could reveal her choice of options. For example:

a) after a description of the standard and extended options, the Claimant was asked to select her preferred option. She chose "Extended option".[6]

b) the Claimant's planned return to work date was about 14 months after her child was born.[7] She also claimed 15 weeks of maternity benefits, plus 47 weeks of parental benefits.[8] An applicant can only receive this many weeks of parental benefits under the extended option.

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[3] Section 23(1.1) of the *Employment Insurance Act* (EI Act) establishes this requirement.
[4] Section 23(1.3) of the EI Act describes how the choice of one parent binds the other.
[5] Section 23(1.2) of the EI Act describes when a parent's choice becomes irrevocable.
[6] See the Claimant's application form on page GD3-9.
[7] See pages GD3-7 and 8.
[8] See page GD3-10.

[15] The Claimant's spouse filed his application for parental benefits just a couple of days after the Claimant. He also chose the extended option.[9]

[16] Paragraphs 17 to 19 of the General Division decision contain its main findings around the Claimant's choice of options. Significantly, the General Division found that the Claimant:

a) did not choose the extended option; and

b) "would have" chosen the standard option.

[17] But these paragraphs make no mention of the Claimant's application form. Instead, the General Division focused on the Claimant's intentions, which were to collect the maximum available amount of parental benefits. Since this was incompatible with collecting benefits at the extended rate over 14 months, the General Division found that the Claimant "would have" chosen the standard option.[10]

[18] By determining the Claimant's choice in this way, the General Division based its decision on a relevant error of fact. The General Division ignored relevant evidence that it had in front of it: namely, the Claimant's application form. The General Division also relied on an irrelevant consideration: what the Claimant would have chosen if she had had a different understanding of the EI scheme.

[19] The General Division should have started its analysis by looking at what the Claimant had communicated to the Commission on her application form. It should not have based its decision exclusively on the Claimant's thoughts and objectives.

[20] There is another reason for rejecting the General Division's approach: it would make the Commission's job near impossible. Rather than relying on application forms, the Commission would have to probe each applicant's intentions and determine the option that best met their objectives.

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[9] See page GD3-23.
[10] In paragraphs 18 and 19 of its decision, the General Division makes findings about what the Claimant would have chosen (if she had understood the program correctly).

[21] In its decision, the General Division relied on another case where the Appeal Division found that a person who had selected the extended option button on her application form had, in fact, chosen the standard option: *MH v Canada Employment Insurance Commission*.[11]

[22] But there is an important difference between that case and this one. In this case, all the answers on the Claimant's application form were consistent with the extended option. In *MH*, the answers on the applicant's application form conflicted with one another. As a result, MH's choice could not be determined based on the application form alone. In the circumstances, the Tribunal needed to look at all the evidence and decide which option MH had in fact chosen from the beginning.

[23] The General Division misinterpreted *MH* if it took that case to mean that the Tribunal can focus exclusively on an applicant's intentions—and ignore their application form—when determining that applicant's choice.

[24] In the circumstances, the General Division's finding that the Claimant had not chosen the extended option was based on an important error about the facts of the case. When reaching this conclusion, the General Division ignored important evidence and relied instead on irrelevant considerations.

The General Division made other errors of fact and law.

[25] I have two other concerns about the General Division decision that are briefly worth mentioning.

[26] First, the General Division seemed to base its decision on the fact that the application form and information provided by the Commission on its website had confused the Claimant into thinking that her benefits could be prorated over 47 weeks.[12] Plus, in paragraph 18 of its decision, the General Division found that the Claimant and her spouse thought that they could receive extended parental benefits at 55% of their earnings.

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[11] *MH v Canada Employment Insurance Commission*, 2019 SST 1385.
[12] See the General Division's findings in paragraph 18 of its decision.

[27] However, the General Division made no clear finding about how these misunderstandings came to be. Nor did it point to any evidence that might have led to this confusion.

[28] This amounts to another error of fact that the General Division committed. I was unable to find the evidence on which the General Division might have based this finding. To the contrary, the Commission's website and application forms clearly said that, depending on the chosen option, parental benefits would be paid at either 55% or 33% of weekly insurable earnings (up to a maximum amount).[13] None of the evidence says that parental benefits can be prorated to some other amount.

[29] Second, the General Division also committed a relevant error of law by asking itself the wrong question.[14] The precise language used by the General Division decision is telling. The General Division decided that the Claimant was entitled to receive parental benefits under the standard option based on what she "would have" chosen. The question the General Division needed to decide was what the Claimant had, in fact, chosen. It was not what the Claimant "would have" chosen if she had had better information.

Issue 2: I will give the decision the General Division should have given.

[30] I will give the decision that the General Division should have given and determine whether the Claimant is entitled to collect parental benefits under the standard option because:[15]

a) the law requires that I decide appeals as informally and as quickly as possible.[16]

b) the Tribunal's General and Appeal Divisions have equal powers to decide the relevant issues in a case.[17]

c) I have all the facts needed to decide this issue.

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[13] For the Commission's website, see page GD3-42. For the Claimant's application form, see page GD3-9.
[14] Section 58(1)(b) also allows me to intervene in a case when the General Division makes an error of law.
[15] Section 59(1) of the DESD Act sets out the powers that I have to try to fix an error made by the General Division.
[16] This requirement is set out in section 3(1)(a) of the *Social Security Tribunal Regulations*.
[17] Section 64(1) of the DESD Act gives me the power to decide questions of law and fact. The Federal Court of Appeal confirmed these powers in *Nelson v Canada (Attorney General)*, 2019 FCA 222 at paras 16 to 18.

Issue 3: The Claimant is not entitled to standard parental benefits.

The Claimant chose the extended option.

[31] Relying on cases like *MH*, the Claimant argued that her application form did not reveal a clear choice between the standard and extended options because:

a) it made no financial sense for the Claimant to choose the extended option when claiming 47 weeks of parental benefits;[18] and

b) the Claimant's husband claimed only five weeks of parental leave, which is the number of weeks available under the standard option.

[32] The Claimant stressed how the Commission's decision means that her family loses roughly $4,000 in parental benefits, which is a significant amount for them.

[33] I am unable to accept the Claimant's arguments. All the answers that the Claimant (and her spouse) provided on their application forms are available under the law and are compatible with the extended option. And while it might not have made financial sense for the Claimant to choose the extended option, I cannot say that an application form is ambiguous whenever someone chooses the extended option and claims less than the full 61 weeks of benefits.

[34] There is no evidence on which I could draw such a sweeping conclusion. For example, it might make sense for a person who is claiming 59 or 60 weeks of parental benefits to choose the extended option. But what makes sense for one person might not make sense for somebody else, and it is near impossible to draw hard and fast lines in this type of situation.

[35] Finally, the Claimant's argument is contrary to the overall scheme of the *Employment Insurance Act* (EI Act), which is application-driven. Adopting the Claimant's approach would unduly burden the Commission. It would mean that the Commission would have to question any application on which the applicant chose the extended option and claimed less than 61 weeks of benefits.

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[18] If she had understood the consequences of her decision, the Claimant told the General Division that she would have chosen the standard option and budgeted for two months without benefits.

[36] For these reasons, I have concluded that the Claimant's application form is clear: she chose the extended option.

The Claimant made a valid choice.

[37] The Claimant also argued that the Tribunal should consider her choice invalid because she made it based on an honest but mistaken belief about how parental benefits would be paid.

[38] I am aware of two situations in which the Tribunal has found an applicant's choice to be invalid. As a result, the applicant was able to re-make their choice.

[39] First, there are cases in which applicants attempted to claim more weeks of parental benefits than what the law allowed.[19] These situations arose because there is a period within which applicants can receive parental benefits. This period is often called the parental benefits window and it runs from when the child is born or placed for adoption.[20]

[40] In these cases, the applicants asked for 35 weeks of standard benefits, but were entitled to much less because their child was almost a year old. In other words, their parental benefits window was about to close. In these cases, the Tribunal found that the application form misled the applicants by failing to provide them with critical information about how many weeks of parental benefits they could claim under the standard option.

[41] Second, there is a case in which the Appeal Division found an applicant's choice to be invalid because she had made it by mistake.[21] Specifically, the application form noted that an applicant choosing the standard option could claim no more than 35 weeks of parental benefits.

[42] However, it did not clearly explain to the applicant how she was also entitled to 15 weeks of maternity benefits and how she needed to add the two together to know the full number of weeks during which she could receive benefits. As a result, the application form misled the

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[19] This situation was discussed in *ML v Canada Employment Insurance Commission*, 2020 SST 255 and *RC v Canada Employment Insurance Commission*, 2020 SST 390.
[20] In the case of standard benefits, the window ends after 52 weeks. In the case of extended benefits, the window is stretched to 78 weeks.
[21] *VV v Canada Employment Insurance Commission*, 2020 SST 274.

applicant into thinking that she needed to choose the extended option if she wanted to take a year's leave.

[43] Those cases are different from this one because:

a) they are also cases in which the application form did not reveal a clear choice by the applicant. In the first situation, the applicants claimed many more weeks of benefits than the law would allow. And in the second situation, the Claimant's return to work date conflicted with the number of weeks claimed (when maternity and parental benefits were added together).

b) some part of the application form misled the applicants into choosing the wrong option.

[44] In this case, as I have already found, all the Claimant's answers were compatible with the extended option. Plus, the evidence does not reveal how the application form (or the Commission's website) misled the Claimant into thinking that the amount of her benefits would be prorated to some amount between 33 and 55% of her weekly insurable earnings.

[45] As a result, I have concluded that the Claimant validly chose the extended option.

Confusion about the time the Claimant had to change options is not relevant.

[46] I do have some concern that information on the Commission's website might have misled the Claimant into thinking that she had more time to change from one option to the other.

[47] Specifically, the Commission's website says this: "Once you start receiving parental benefits, **you cannot change options.**"[22] In this case, the Claimant had not started to receive parental benefits. Instead, it was her spouse's receipt of parental benefits that meant that they were both locked into the extended option.

[22] See page GD3-42. Bold in original. Underlining added.

[48] The Claimant's application form is a bit clearer. It says: "Once parental benefits have been paid on the claim, the choice between standard and extended parental benefits is irrevocable."[23] But since each parent has to file their own application, is there one claim or two?

[49] In a different case, however, the Appeal Division has held that this misunderstanding is not relevant to and does not invalidate an applicant's choice between standard and extended benefits.[24] This confusion about timing does not change or take away from the valid election that the Claimant made as part of her application for EI benefits.

By mid-July 2020, it was too late for the Claimant to change options.

[50] Overall, therefore, I find that:

a) as part of her application for EI benefits, the Claimant chose the extended parental benefits option;

b) the Claimant's spouse also chose the extended option and the Commission paid him parental benefits in early July 2020;[25]

c) in mid-July 2020, when the Claimant realized that she had misunderstood how extended parental benefits would be paid, it was already too late for her to change from the extended option to the standard option.

Only Parliament can change the EI Act.

[51] The Claimant also argued that the law should be more flexible so that it can better accommodate vulnerable applicants (like her).

[52] The Tribunal's role is limited to interpreting the EI Act. No matter how strongly I might agree with the Claimant's suggestion, I do not have the power to change the EI Act. Only Parliament has that power.

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[23] See page GD3-23.
[24] The Appeal Division came to this conclusion in paragraph 35 of *Canada Employment Insurance Commission v TH*, 2020 SST 800.
[25] The Commission paid extended parental benefits to the Claimant's spouse on or around July 1, 2020: see pages GD3-33 to 35.

[53] Parliament has made several changes to the parental benefits scheme in recent years. It built some flexibility into those changes. However, this case illustrates how vulnerable families could benefit from further improvements. Specifically, the time that families have to switch from one option to the other is sometimes very short.

CONCLUSION

[54] The General Division made relevant errors of fact and law that allow me to intervene in this case. As a result, I decided to give the decision the General Division should have given.

[55] Briefly, the Claimant validly chose the extended option as part of her application for parental benefits. Later, she asked the Commission to switch to the standard option. However, the Commission noted that it had already paid parental benefits to the Claimant's spouse, and appropriately decided that it was too late for the Claimant to change options.

[56] For all these reasons, I am allowing the Commission's appeal.

Jude Samson
Member, Appeal Division

HEARD ON:	November 19, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	A. Dumoulin, Representative for the Appellant M. D., Respondent