



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *Canada Employment Insurance Commission v LV*, 2021 SST 98

Tribunal File Number: AD-20-858

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

L. V.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: March 16, 2021

DECISION AND REASONS

DECISION

[1] I am dismissing the Commission's appeal. The General Division made an error when it failed to consider all the evidence. I have corrected the error but I have reached the same conclusion as the General Division.

OVERVIEW

[2] The Respondent, L. V. (Claimant), took a leave from her employment and applied for maternity and parental Employment Insurance benefits. She selected 41 weeks of extended parental benefits when she completed her application. After her maternity benefits lapsed, she began receiving the extended parental benefit. She contacted the Appellant, the Canada Employment Insurance Commission (Commission), because she was unhappy with the amount of the parental benefit. The Commission informed her that she had elected the extended benefit and that her election was irrevocable. The Claimant asked the Commission to reconsider but it would not change its decision.

[3] The Respondent appealed to the General Division of the Social Security Tribunal, which allowed her appeal. The General Division found that the Claimant was misled by information given to her by an agent of the Commission about the meaning of her election. As a result, it found that her election was not valid. The Commission appealed the General Division decision to the Appeal Division.

[4] I am dismissing the appeal. The General Division made an important error of fact when it failed to consider evidence from the application for benefits, which describes the number of weeks and benefit rate associated with each parental benefit option (parental information).¹ I have considered the parental information and made the decision the General Division should have made. I confirm that the Claimant's election was misled about the meaning of her election and that her election was not valid.

¹ GD3-7,8.

ISSUES

[5] Did the General Division make an error of law by allowing the Claimant to change her mind about her parental benefit election?

[6] Did the General Division make an important error of fact by ignoring the evidence of the benefit application form?

ANALYSIS

[7] Where a claimant qualifies to receive parental benefits, he or she may choose, or “elect,” to receive either the standard parental benefit or the extended parental benefit.² The standard benefit is paid at the rate of 55% of the claimant’s weekly earnings for up to 35 weeks. The extended parental benefit is paid at a reduced rate of 33% of the claimant’s weekly earnings, but may be paid for up to 61 weeks.³

[8] Once the Commission has paid any of the parental benefits to a claimant, the claimant cannot change his or her mind to ask for a different type of benefit. The election is “irrevocable.”⁴

Issue 1: Allowing the Claimant to change her mind

[9] The Commission argued that the General Division made an error of law by allowing the Claimant to amend her election.

[10] The Commission is correct that a claimant’s election is irrevocable under the EI Act, and that the EI Act does not allow for any exceptions.

[11] However, the General Division did not say that the Claimant could amend her election. It said that she had not made a deliberate and informed decision to choose the extended benefit and that the election was invalid “from the outset.” In other words, the General Division did not accept that she had ever made a valid election, so there was nothing to revoke.

² *Employment Insurance Act* (EI Act), section 23(1.1).

³ EI Act, section 12(3)(b) and section 14(1).

⁴ EI Act, section 23(1.2).

[12] As the General Division noted, other decisions of the Appeal Division have held that a claimant's election was invalid, permitting the claimant to make a new, valid election.⁵ A valid election is one where the claimant can make a deliberate choice between options. Misleading or mistaken information may invalidate a claimant's election in some circumstances.⁶

[13] The General Division did not make an error of law by following the guidance of the Appeal Division.

Issue 2: Ignoring the benefit application form

[14] The Commission argued that the General Division ignored the actual application for benefits completed by the Claimant. The included parental information states that the standard benefit is paid for up to 35 weeks at a rate of 55% of weekly insurable earnings. It also states that the extended benefit is paid for up to 61 weeks at a rate of 33%.⁷ Nothing in the parental information suggests that a claimant is entitled to some certain total sum, or that the Commission will consider how many weeks of benefits the claimant actually requests and adjust the benefit rate accordingly.

[15] The General Division made an important error of fact when it found that the Claimant was misled or misinformed about the differences between standard and extended benefit rates

[16] The General Division made an error because it did not consider the parental information. The Claimant completed the application for maternity and parental benefits. She may be presumed to be aware of the parental information that is included in the application. This information would have been relevant to the General Division's finding that she had not made an informed decision. However, the General Division did not refer to it in its analysis.

[17] Because I have found that the General Division made an error in how it reached its decision, I must consider what I should do about the error (remedy).

⁵ *V.V. v. Canada Employment Insurance Commission*, 220 SST 274.

⁶ *M. L. v Canada Employment Insurance Commission*, 2020 SST 255.

⁷ GD3-7

REMEDY

[18] I have the authority to change the General Division decision or make the decision that the General Division should have made. I could also send the matter back to the General Division for it to reconsider its decision.⁸

[19] Both the Claimant and the Commission suggest that I have all the evidence I need to make the decision. I agree that the General Division record is complete, and I will make the decision that the General Division should have made.

[20] The General Division accepted the Claimant's evidence that the Commission "told her she would receive her full entitlement prorated to the number of weeks of parental benefits she requested."⁹ It accepted that she was "led to believe that she would be paid the same amount of money if she asked for only 41 weeks, it would just be a larger weekly benefit payment because she was not claiming the full 61 weeks."¹⁰

[21] At the General Division, the Claimant testified that she first obtained this advice from a Commission agent in January 2020. This was in anticipation of her application for benefits in April. She also said that she called the Commission after receiving her first parental benefit payment and that an agent confirmed the Commission's initial advice.¹¹

[22] I have no reason to disturb the General Division's finding of fact that the Claimant received inaccurate information from the Commission. The Commission did not argue that the General Division ignored or misunderstood the evidence to find as it did. Furthermore, this finding is unaffected by the General Division's error.

[23] I agree with the Commission that the parental information describes the two options available and that one option specifies a rate of 55%, and one specifies a rate of 33%. I agree that the parental information does not suggest that the Commission may prorate the benefit rate if a

⁸ My authority is set out in sections 59(1) and 64(1) of the DESD Act.

⁹ General Division decision, para 17.

¹⁰ General Division decision, para 16.

¹¹ General Division decision, para 13, 14.

claimant selects a lesser number of weeks than the maximum. The parental information would not have led the Claimant to believe that the Commission would prorate her benefit rate.

[24] At the same time, the parental information does not clearly exclude the possibility that the stated rate could be adjusted where a claimant chooses less than the maximum number of weeks. It identifies the benefit rate for each option for “up to” a certain number of weeks. The application prompts the claimant to select the number of weeks he or she wants under either benefit, up to the maximum.

[25] As the General Division noted, one must consider all of the evidence to decide which option a claimant has chosen;¹²not just the benefit application itself.

[26] In this case, the Claimant did not apply for benefits until after a Commission agent explicitly told her that the Commission would adjust her benefit rate if she chose fewer than the maximum number of weeks. The Commission agent told her that she would receive the same amount of money in total, if she chose to receive benefits for anytime between 12 and 18 months. (Presumably, this included the 15 weeks of maternity benefits.) Assuming the Claimant read the parental information, she would likely have read it at the time that she was reviewing the application for benefits.

[27] I accept that the Claimant relied on the advice and representations of the Commission agent to interpret the parental information. For all she knew, the Commission had internal policies or practices by which it could offer the “correct” interpretation of the parental information.

[28] The Commission argues that “misinformation” cannot change the law (by which it means the rule that prevents a claimant from revoking his or her election). With respect, that is not the issue. The issue is whether the Claimant elected to receive what the Commission means by extended benefits.

¹² General Division decision, para 11, citing *Canada Employment Insurance Commission v. T.B.*, 2019 SST 823.

[29] In another decision of the Appeal Division, *M.L. v Canada Employment Insurance Commission*, the member stated, “To ‘elect’ is to make a deliberate choice between options.”¹³ I cannot conclude that the Claimant elected extended benefits unless I find either that the Claimant understood her options correctly, or that she should have understood her options.

[30] As I mentioned, the General Division accepted that the Commission misinformed the Claimant about the effect of her election and the amount she would receive under the benefit she selected. In *M.L.*, the Commission argued that various factors in the application process did not lead the claimant to make an election that she had not intended. However, in that case, the Commission took the position that “only explicit misinformation would invalidate an election about parental benefits.” I do not agree that explicit misinformation is the only circumstance that could invalidate an election but, in this case, the Commission did mislead the Claimant through explicit misinformation.

[31] The Commission maintains that the Claimant simply changed her mind after she began to receive the parental benefit. However, the evidence does not suggest that the Claimant changed her mind. The Claimant proactively sought the Commission’s interpretation of her benefits and benefit choices. She chose extended benefits because the Commission gave her incorrect information. This misinformation led her to believe that the extended benefit was something different from what it turned out to be. If the Commission had not misled the Claimant, she could have chosen the benefit appropriate to her circumstances and she would not have needed to ask for changes to her parental benefit.

[32] I find that the Claimant did not understand her options at the time she made the election. She never intended to select 41 weeks of benefits paid at 33% of her weekly insurable earnings.

[33] Furthermore, I find that the Claimant reasonably relied on the advice of the Commission agent. She may have read the parental information in the application but, in light of the Commission’s advice, I would not expect her to have a correct understanding of her options. As was also the case in *M.L.*; “The Claimant made an election that was misinformed, at the outset and beyond the point of irrevocability, because of the communication choices made by Service

¹³ *M. L. v Canada Employment Insurance Commission*, 2020 SST 255, para 27 (giving as an example, *Newcorp Properties Ltd. v West Vancouver (District)*, 1989 CanLII 2908 (BCSC)).

Canada and/or the Commission.”¹⁴ I adopt the reasoning of my Appeal Division colleague; “Someone who has been misled or misinformed about those options has not been able to make a deliberate choice of one over the other.”¹⁵

[34] I have considered the evidence that was before the General Division including the parental information, and I must reach the same conclusion as the General Division. The Claimant’s election of extended benefits was invalid.

CONCLUSION

[35] I am dismissing the appeal.

Stephen Bergen
Member, Appeal Division

HEARD ON:	March 9, 2021
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	Rachel Paquette, Representative for the Appellant L. V., Respondent

¹⁴ *M. L. v Canada Employment Insurance Commission*, 2020 SST 255.

¹⁵ *Ibid.*