



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *KK v Canada Employment Insurance Commission*, 2021 SST 182

Tribunal File Number: AD-21-16

BETWEEN:

**K. K.**

Appellant  
(Claimant)

and

**Canada Employment Insurance Commission**

Respondent  
(Commission)

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

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DECISION BY: Jude Samson

DATE OF DECISION: May 5, 2021

## **DECISION AND REASONS**

### **DECISION**

[1] K. K. is the Claimant in this case. I am allowing her appeal. The Claimant's original choice between standard and extended parental benefits was invalid. To complete her application, the Claimant must make that choice again.

### **OVERVIEW**

[2] The Claimant applied for and received Employment Insurance (EI) maternity benefits followed by parental benefits. On her application, she ticked the box for extended parental benefits. This option provided her with a lower rate of weekly benefits, but paid over a longer period. Later, she asked the Commission to switch to the standard option. This option offered her a higher rate of weekly benefits, but paid over fewer weeks.

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

[4] The Claimant appealed the Commission's decision to the Tribunal's General Division.

[5] At the General Division level, the Claimant argued that it made no financial sense for her to choose the extended parental benefits option. She said that she would have chosen the standard option if she had understood the difference between the two options. Based on information the Commission provided, the Claimant also thought that she would receive standard parental benefits first. And once those ran out, then she would switch to extended benefits.

[6] The Claimant stressed how she applied for benefits just days after giving birth to her first child, which made her more vulnerable. She also argued that the information she received from the Commission—on the application form, on its website, in her My Service Canada online account, and over the phone—was confusing and incomplete.

[7] Regardless, the General Division found that the Claimant had chosen the extended option. Plus, by the time the Claimant asked to change options, it was already too late to do so.

[8] The Claimant is now appealing the General Division decision to the Appeal Division. I find that the General Division made errors in this case. I also find that I can give the decision the General Division should have given.

[9] The Commission's confusing and incomplete information misled the Claimant into making the wrong choice on her application form. As a result, the Claimant's choice was invalid. She must make her choice again.

## **ISSUES**

[10] In this decision I will discuss the following issues:

- a) Did the General Division overlook a relevant issue by not determining whether the Claimant validly chose between the standard and extended parental benefit options?
- b) Did the General Division base its decision on serious mistakes about the facts of the case when it found that the Commission provided clear information to the Claimant?
- c) If the General Division made errors, what is the best way of fixing its errors?
- d) Did the Claimant validly choose between standard and extended parental benefits?

## **ANALYSIS**

[11] Appeal Division files follow the two-step process described in the *Department of Employment and Social Development Act* (DESD Act). This appeal is at step two: the merits stage.

[12] For the Claimant to win her appeal, she must establish that the General Division made one or more relevant errors (or grounds of appeal) listed under section 58(1) of the DESD Act. In this case, the focus is on whether the General Division:

- a) overlooked a relevant issue; or
- b) based its decision on an important error about the facts of the case.

**The General Division overlooked a relevant issue.**

[13] When people apply for parental benefits, they have to choose between the standard and extended parental benefit options.<sup>1</sup> On the online application form, people do this by selecting one radio button or the other.

[14] However, there are cases in which the Tribunal has decided that the button an applicant chose did not represent their choice between the two options.

- a) In some cases, the Tribunal has found that the applicant provided contradictory answers on their application form.<sup>2</sup> In those cases, the applicant's choice was unclear, and the Tribunal had to look at all the circumstances of the case to determine which option the applicant had, in fact, chosen.
- b) In other cases, the Tribunal has found that the applicant was misled into making the wrong choice based on confusing or incomplete information that the Commission provided to the applicant.<sup>3</sup> In those cases, the Tribunal has concluded that the applicant's choice was invalid and should be made over again.

[15] In this case, the General Division considered all the answers the Claimant provided on her application form and concluded that she had chosen the extended benefits option.

[16] However, the General Division does not seem to have considered whether the Claimant's choice was valid. As part of her appeal, the Claimant argued that the Commission provided her with confusing and incomplete information. As a result, the General Division should have considered the validity of her choice. By not doing so, the General Division overlooked a relevant issue.<sup>4</sup>

[17] I recognize that the General Division did assess the clarity of some information the Commission provided to the Claimant. However, it is not clear why it made that assessment or

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<sup>1</sup> The need to elect (or choose) between options is in section 23(1.1) of the *Employment Insurance Act* (EI Act).

<sup>2</sup> See, for example, *Canada Employment Insurance Commission v TB*, 2019 SST 823, and *MH v Canada Employment Insurance Commission*, 2019 SST 1385.

<sup>3</sup> See, for example, *ML v Canada Employment Insurance Commission*, 2020 SST 255, and *VV v Canada Employment Insurance Commission*, 2020 SST 274.

<sup>4</sup> This is a jurisdictional error under section 58(1)(a) of the DESD Act.

what the consequence would have been if it had found the Commission's information to be unclear. Certainly, it never said that it was assessing the validity of the Claimant's choice between standard and extended benefits.

[18] Plus, for the reasons below, I have found that the General Division made other errors when it found that the information the Commission provided to the Claimant was clear.

**The General Division based its decision on important errors about the facts of the case when it found that information the Commission provided to the Claimant was clear.**

[19] The Claimant explained to the General Division how, based on information the Commission had provided to her, she expected to receive the following EI benefits:<sup>5</sup>

- a) 15 weeks of maternity benefits (paid at the higher benefit rate),
- b) followed by 35 weeks of standard parental benefits (paid at the higher benefit rate),
- c) and then 11 weeks of extended parental benefits (paid at the lower benefit rate).

[20] In the Claimant's case, the higher benefit rate was \$505/week and the lower benefit rate was \$330/week.

[21] The Claimant told the General Division that the Commission provided her with information on its website, as part of the application form, in her My Service Canada account, and over the phone. After the General Division hearing, the Claimant provided print screens of some of the information that she said was confusing.<sup>6</sup>

[22] The Commission did not attend the General Division hearing. Nor did it provide the General Division with any additional information from its website or internal phone records to clarify any of the information the Claimant found confusing.

[23] The Claimant explained that the information in her My Service Canada online account changed around the time she switched from maternity benefits to parental benefits. Before that

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<sup>5</sup> See paragraph 16 of the General Division decision.

<sup>6</sup> These print screens are on pages GD5-5 to GD5-7.

change, which the Claimant did not notice at the time, nothing alerted her to the fact that the amount of her benefits would go down.

[24] The General Division assessed the Claimant's evidence and wrote this at paragraphs 25 and 26 of its decision.

I considered the print screens that the Claimant submitted from the Service Canada website, which she says are confusing. I find that the website gives clear instructions that you must choose between standard and extended parental benefits. The website also warns that you cannot change options after you start receiving parental benefits. This information is consistent with the instructions on the online benefit application.

I considered the Claimant's recent My Service Canada Account statement. While the Commission input an incorrect end date for her claim that was just one year after she gave birth, the statement correctly identifies that she requested 61 weeks of extended benefits at a lower weekly rate.

[25] I have a few problems with this part of the General Division decision.

[26] First, the Commission accepted that it provided confusing information to the Claimant. However, the General Division never acknowledged this important concession. For example:

- a) In the notes of a conversation between the Claimant and one of the Commission's agents, the agent admitted "that the application is somewhat unclear at times, as to what will result from the choices made."<sup>7</sup>
- b) In its submissions to the General Division, the Commission also noted that the Claimant "provided an honest explanation in that she misunderstood that the reduced rate the extended program provides would be applied so early in her maternity leave period."<sup>8</sup> It also acknowledged how the application process was confusing in the ways the Claimant alleged.<sup>9</sup>

[27] Second, the General Division found that the Commission's website clearly says that a person must choose between standard and extended parental benefits and that a person cannot

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<sup>7</sup> See page GD3-27.

<sup>8</sup> See pages GD4-3 to GD4-4.

<sup>9</sup> See page GD4-8.

change options after they start receiving parental benefits. The General Division said that this information from the website is in addition to what appears on the online application form.

[28] However, I do not know what evidence the General Division used to make findings about the contents of the Commission's website. The print screens that the Claimant provided do not support the General Division's findings. I could not find any other extracts from the Commission's website among the documents that the General Division could consider.

[29] Third, the General Division does not seem to have understood that the information in the Claimant's My Service Canada account changed when she started to receive parental benefits. The Claimant described how this information appeared before the change and why it confused her. But she no longer had access to the information from before the change.

[30] The General Division does not seem to have appreciated the importance of this change. The Claimant alleged that the old information in her My Service Canada account was confusing. Instead, the General Division considered the new information and found that it was clear.

[31] For all these reasons, paragraphs 25 and 26 of the General Division decision contain relevant errors of fact.

[32] At the hearing before me, the Commission's representative tried to explain where on its website and in the Claimant's My Service Canada account the Claimant could have found the clarifying information she needed. However, the Commission should have provided that evidence to the General Division.

[33] The Appeal Division's limited role means that I cannot normally consider new evidence.<sup>10</sup> New evidence is evidence that the General Division did not have in front of it. I cannot take a fresh look at the case and come to my own conclusion based on new and updated evidence.

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<sup>10</sup> The Appeal Division's role is mostly defined by sections 58 and 59 of the DESD Act.

[34] There are exceptions to the general rule against considering new evidence.<sup>11</sup> For example, I will consider new evidence that provides general background information only or that describes how the General Division might have acted unfairly. But none of the relevant exceptions apply in this case.

**I will fix the General Division's errors by giving the decision that it should have given.**

[35] At the hearing before me, the parties agreed that they had a full opportunity to present their case in front of the General Division. They also agreed that, if the General Division made an error, then I should give the decision the General Division should have given.

[36] In the circumstances, I have decided to give the decision that the General Division should have given. This means that I can decide whether the Claimant validly chose between standard and extended parental benefits.<sup>12</sup>

**The Claimant's choice of extended parental benefits is invalid.**

[37] Following the birth of her child, the Claimant planned to take about 63 weeks of leave from her job.<sup>13</sup> However, the Claimant had important financial responsibilities that she also needed to consider.<sup>14</sup> So, the amount of leave she took had to be balanced against the amount of EI benefits that she would receive.

[38] Based on information from the Commission's website,<sup>15</sup> the Claimant understood that she could receive standard parental benefits, followed by extended benefits. There is no evidence that the Commission's website provided any information to the contrary.

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<sup>11</sup> Although the context is somewhat different, the Appeal Division normally applies the exceptions to considering new evidence that the Federal Court of Appeal listed in *Sharma v Canada (Attorney General)*, 2018 FCA 48 at para 8 and that the Federal Court listed in *Greeley v Canada (Attorney General)*, 2019 FC 1493 at para 28.

<sup>12</sup> Sections 59(1) and 64(1) of the DESD Act give me the power to fix the General Division's errors in this way.

<sup>13</sup> See the letters from the Claimant's employer starting on pages GD5-2 and GD5-4.

<sup>14</sup> See the Claimant's reconsideration request from page GD3-23 to GD3-26.

<sup>15</sup> See pages GD5-6 to GD5-7.



[39] According to the Claimant, the Commission's online application form did nothing to contradict her belief either. Specifically:

- a) The application form did not make clear that parental benefits were **in addition to** the full 15 weeks of maternity benefits. So, 35 weeks of standard parental benefits were clearly not enough. Instead, the Claimant felt obliged to choose the extended parental benefits option.
- b) Just like how selecting the maternity benefits radio button allowed the Claimant to apply for maternity and parental benefits, the Claimant understood that selecting the extended option radio button meant that she was applying for standard plus extended parental benefits.<sup>16</sup> The application form failed to make clear that the Claimant had to choose standard **or** extended parental benefits and that extended parental benefits could not start **after** standard benefits.
- c) The application form does nothing to warn users that, by choosing the extended option and taking a leave of less than 18 months, they are making a questionable financial choice. A person who chooses the extended option can receive the same amount of benefits as a person who chooses the standard option, but only if they claim benefits for all 61 weeks.

[40] Importantly, the Commission also recognizes that its application process was confusing in the way the Claimant alleges.

[41] After submitting her application, the Claimant still had several months to change from the extended option to the standard option. And as part of the application form, the Commission promised to give the Claimant accurate information about her claim and to let her know about any decisions it made as part of her claim.<sup>17</sup>

[42] But again, the Commission never alerted the Claimant to the fact that, after 15 weeks, her benefits would go down and stay down for the rest of her claim.

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<sup>16</sup> See pages GD3-5 and GD3-9 of the application form.

<sup>17</sup> See page GD3-12, along with sections 48(3) and 49(3) of the EI Act.

[43] For example, the Claimant called the Commission soon after submitting her application to confirm that the Commission had received it and to know the amount of her benefits. One of the Commission's agents confirmed that it had received her application and that it would pay her \$505/week. The agent never flagged to the Claimant that her benefits would go down after 15 weeks.

[44] Similarly, the information in the Claimant's My Service Canada account changed a couple of weeks before the Commission started paying parental benefits to the Claimant. But the Commission never notified the Claimant of this change. Nor did it encourage her to login to her account. If the Claimant had received that sort of notice, she might have been able to change options one to two weeks before the start of her parental benefits.

[45] Instead, the Claimant first noticed the problem when the Commission deposited less money into her account. And she contacted the Commission within days to try to fix the problem.

[46] In other words, this is not the case of a person who made a deliberate and informed choice, but then decided to change it later.

[47] I recognize that there are court decisions saying that the Commission cannot ignore the law, even if its agents provide an applicant with poor advice.<sup>18</sup> However, like in other Tribunal decisions, I have concluded that the confusing and incomplete information that the Commission provided to the Claimant invalidated her choice between standard and extended parental benefits. Simply, the Commission's confusing and incomplete information prevented the applicant from making a deliberate choice between the available options.

[48] In addition, information on the Claimant's application form revealed a degree of confusion. In one part of her application, the Claimant said that she was claiming 61 weeks of parental benefits, which is equivalent to a leave of about 18 months.<sup>19</sup> But in another part of her

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<sup>18</sup> *Granger v Canada Employment and Immigration Commission*, 1986 CanLII 3962 (FCA); *Canada (Attorney General) v Shaw*, 2002 FCA 325.

<sup>19</sup> See page GD3-9. Eighteen months is reached when 15 weeks of maternity leave are added to 61 weeks of extended parental benefits.

application, she said that she planned to be away from work for about 14 months.<sup>20</sup> And as already mentioned, this difference had a reasonably significant impact on the total amount of benefits the Claimant would receive.

[49] In all the circumstances of this case, I find that the Commission misled the Claimant into making the wrong choice on her application. There is compelling evidence that the Claimant based her choice on a reasonable misunderstanding of the information that the Commission provided to her. In addition, the Commission's confusing and incomplete information continued after the Claimant submitted her application, during the period when she could have switched options.

[50] The choice the Claimant made on her application form was invalid from the beginning. I am rescinding the Commission's decision to pay extended parental benefits to the Claimant. To complete her application, the Claimant must now make a valid choice between standard and extended parental benefits.

## **CONCLUSION**

[51] I am allowing the Claimant's appeal. The General Division made errors by overlooking a relevant issue and by basing its decision on important mistakes about the facts of the case. These errors allow me to intervene in this case. Specifically, I decided to give the decision the General Division should have given.

[52] The Claimant chose extended parental benefits on her July 2020 application form. However, the Commission's incomplete and confusing information misled her into making that choice. As a result, the Claimant's choice is invalid and I am rescinding the Commission's decision to pay extended parental benefits to the Claimant. To complete her claim, the Claimant must now choose between standard and extended parental benefits.

Jude Samson  
Member, Appeal Division

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<sup>20</sup> See page GD3-6.

HEARD ON:	March 23, 2021
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	K. K., Appellant J. Lachance, Representative for the Respondent