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

Citation: *Canada Employment Insurance Commission v SR*, 2021 SST 213

Tribunal File Number: AD-21-88

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

S. R.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: May 25, 2021

Canada

DECISION AND REASONS

DECISION

[1] I am allowing the appeal and returning the matter to the General Division for reconsideration.

OVERVIEW

[2] The Respondent, S. R. (Claimant), applied for sickness benefits and she also requested maternity and parental benefits. When her sickness and maternity benefits were used up, she began to receive the parental benefit. The Claimant was surprised to see that her benefits had been reduced so soon, so she contacted the Applicant, the Canada Employment Insurance Commission (Commission). The Commission told her that it had reduced her benefit payment because she chose extended benefits.

[3] The Claimant asked the Commission to change her parental benefit to the standard benefit, but it refused. It explained that she had already begun to receive parental benefit payments and this meant that she could not change to the standard benefit. The Commission did not change its decision after the Claimant asked it to reconsider.

[4] The Claimant appealed the reconsideration decision to the General Division of the Social Security Tribunal, and the General Division allowed her appeal. The General Division found that she had not understood the differences between the parental benefit choices and that she had made a mistake. It found that she meant to select standard parental benefits. The Commission is appealing the General Division decision to the Appeal Division.

[5] I am allowing the appeal. The General Division understood that the Claimant considered the parental benefit options and that she chose the extended benefit (and selected 61 weeks of benefits) because she wanted benefits for as long as possible. The General Division’s decision that she chose the standard benefit does not follow from the evidence.

WHAT GROUNDS CAN I CONSIDER FOR THE APPEAL?

[6] "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.
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.

ISSUES

[7] Did the General Division make an important error of fact when it found that the Claimant chose the standard option?

ANALYSIS

[8] 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 Employment Insurance Act (EI Act) states that 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]

[9] According to the EI Act, a claimant cannot change his or her mind to ask for a different type of benefit after the Commission has paid any of the parental benefits to a claimant. The claimant's election is said to be, "irrevocable."[4]

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[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).
[2] EI Act, section 23(1.1).
[3] EI Act, section 14(1). Section 14(1) says that the benefit rate is normally 55% but that it is 33% where a parental benefit election is made to select a 61 week benefit maximum (the "extended" option) under section 12(3)(b)(ii).
[4] EI Act, section 23(1.2).

Finding That the Claimant Chose the Standard Option

[10] The Claimant told the General Division that she misunderstood the nature of the benefits. She thought that she would receive 52 weeks at the higher benefit rate, and then receive the lower benefit rate for a further 9 weeks. She said that she was not well at the time and that she relied on her mother's advice.

[11] The Commission accepts that the Claimant may have been mistaken about how much she would receive in benefits under the extended benefit option. However, the Commission argues that she was not misled by the benefit application information. It notes that the answers that she gave to the application questions were consistent with one another. Her choice of 61 weeks of extended benefits was also consistent with her stated intention to take as much time away from work as she could.

[12] I agree with the Commission. The General Division made an important error of fact. The evidence before the General Division did not support its conclusion that the Claimant elected the standard benefit.

[13] The "Parental Information" section of the application form explains that the standard option offers up to 35 weeks for one parent (or up to 40 weeks if benefits are shared by both parents), at a rate of 55% of weekly insurable earnings. It states that the extended option offers up to 61 weeks (or 69 weeks for both parents) at a benefit rate of 33%.[5] Immediately following this explanation, the form asks claimants to select the number of weeks that they want to claim.

[14] The Claimant chose the extended option and selected 61 weeks of parental benefits. A claimant can only access 61 weeks of benefits if he or she has chosen the extended option.

[15] The General Division noted that the Claimant did not understand that there was a difference between maternity benefits and parental benefits.[6]

[16] I recognize that is possible that the Claimant could have been confused on this point. The application does not clearly identify that it is only asking a claimant to select the number of

[5] GD3-12.
[6] General Division decision, para 14.

weeks of *parental* benefits, and not the weeks of combined maternity and parental benefits. It is not intuitive that "parental" benefits excludes maternity benefits.

[17] However, this could not have been the reason for the Claimant's choice. 61 weeks of parental benefits are only available to a claimant who chooses extended benefits. Her selection of 61 weeks was not consistent with an intention to receive standard benefits.

[18] Maternity benefits are 15 weeks. Standard benefits are for a maximum of 35 weeks. Therefore, a claimant can only get a maximum of 50 weeks of combined maternity and *standard* parental benefits. If the Claimant had actually wanted standard benefits and thought she was selecting a number of weeks of benefits in which her maternity and standard benefits were combined, she should not have selected 61 weeks. Even if she had made her choice thinking that she would be combining parental benefits with the other parent, she could only have received the 15 weeks of maternity benefits plus a maximum of 40 weeks of standard benefits, for a total of 55 weeks.

[19] Furthermore, the Claimant herself told the General Division that she selected 61 weeks of benefits because it was the maximum amount of time she could be away from work.[7] When I asked her if the General Division understood her correctly on this point, she confirmed that it had. She said that the most important thing to her was that she receive benefits for as long as possible.

[20] The Claimant's choice of 61 weeks was not only consistent with her choice of "extended benefits" on the application form. It was also consistent with her stated intention to receive benefits as long as possible.

[21] The General Division noted that the Claimant suffered from mental illness and was under a doctor's care when she applied for benefits. It stated that her personal circumstances were relevant to her understanding of her election. The Claimant also told the General Division that she did not read the application form well.

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[7] General Division decision, para 13.

[22] However, the General Division observed that she had help from her mother in completing the application.[8] The Claimant and her mother understood that she could receive 52 weeks at the standard rate, and then also receive 9 additional weeks of extended benefits at a reduced rate.

[23] Neither the form of the application itself, nor any other evidence before the General Division, suggests how the Claimant and her mother might have come to this understanding. Likewise, there was no evidence of how they might have thought the Claimant could elect 61 weeks of "standard" benefits.

[24] The form explains the two options. The advantage of the extended benefit was that it offered her up to 61 weeks. The advantage of the standard benefit was that it offered a higher benefit rate. The Claimant told the General Division that she and her mother had "done the math" before making her choice.[9] I do not know what they were calculating, but it seems that the Claimant and her mother appreciated that the Claimant needed to make a choice between the parental benefit types. They seemed to be aware that this choice involved a trade-off of some kind.

[25] In reaching its decision, the General Division considered two decisions of the Appeal Division supporting the notion that a claimant may make a new election if they misinterpreted their original choice. This is true. There have been decisions in which the Appeal Division has found that a claimant's initial election was invalid because the claimant had never intended to elect the benefit they had selected on the application.

[26] However, each of the Appeal Division decisions cited by the General Division was dependent on its own facts. In *Canada Employment Insurance Commission v T. B.*[10], the claimant argued that she meant to choose the standard benefit. She had chosen the extended benefit but had selected only 35 weeks. The claimant was able to prove that she had not intended to select the extended benefit because her selection of 35 weeks was more consistent with a choice of standard benefits. It made little sense that she would have chosen a reduced benefit when she could have received the same number of weeks at the higher benefit rate.

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[8] General Division decision, para 19.
[9] General Division decision, para 13.
[10] *Canada Employment Insurance Commission v T. B.*, 2019 SST 823.

[27] In *M. H. v Canada Employment Insurance Commission*[11], the claimant chose the extended benefit and selected 52 weeks of benefits. The claimant argued that she had always meant to take 52 weeks in total, including her maternity benefits and the maximum number of regular benefits. 52 weeks approximated the number of weeks she would have received in total. In addition, the claimant testified that she had intended to take only one year off from her work, and there was other evidence that she had told her employer that she was taking a one-year leave. Therefore, her assertion that she had always intended to elect the standard benefit was supported by evidence.

[28] The General Division understood that a claimant's election becomes irrevocable once the claimant begins to receive parental benefits. Unless a claimant can prove that his or her election of the parental benefit does not reflect the claimant's intention at the time of the election, it cannot be changed. There is no Appeal Division decision that suggests that claimants can change their minds about their election because their choice was based on an imperfect understanding of how much they would receive in benefits.

[29] The Claimant may have relied on her mother's calculations of what she might expect to receive in benefits from each option, but she deliberately chose 61 weeks of extended benefits because she wanted to take as much time off as possible. The evidence before the General Division could not support its conclusion that the Claimant originally intended to elect the standard benefit or that she actually elected the standard benefit.

[30] Therefore, the General Division's finding that the Claimant elected the standard benefit was "perverse or capricious."[12] It made an important error of fact.

[31] 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).

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[11] *M. H. v Canada Employment Insurance Commission*, 2019 SST 1385.
[12] Under section 58(1)(c) of the DESD Act, the General Division makes an error if it bases its decision on a finding of fact that it makes in a perverse or capricious manner or without regard for the material before it.

REMEDY

[32] 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.

[33] The Claimant would like her appeal to be resolved as soon as possible but cannot be sure if she wants me to make the decision. The Commission suggests that I should send the matter to the General Division for a reconsideration. It states that the other parent of the Claimant's child also claimed parental benefits.

[34] I agree with the Commission.

[35] The nature and timing of the other parent's election was not before the General Division, but it would be relevant to the decision on this appeal. If I were to make the decision, I could not consider the circumstances of the other parent's application, because this is new evidence. However, it is still relevant to the Claimant's appeal. The first parent to claim parental benefits makes an election that is binding on the other parent.[13] If the other parent was the first claimant and properly elected the standard benefit, then the Claimant should have been entitled to the standard benefit.

[36] Since I am not authorized to obtain additional evidence or to consider additional evidence, I am sending this matter back to the General Division for a reconsideration.

[37] Section 32 of the *Social Security Regulations* gives the General Division a discretionary power to refer questions to the Commission. It is open to the General Division to ask the Commission to investigate and report on the circumstances of the other parent's election.

CONCLUSION

[38] I am allowing the appeal and returning the matter to the General Division for reconsideration.

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[13] EI Act, section 23(1.3).

Stephen Bergen
Member, Appeal Division

HEARD ON:	May 20, 2021
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	Louise LaViolette, Representative for the Appellant S. R., Respondent