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

Citation : *Canada Employment Insurance Commission v JH*, 2021 SST 292

Tribunal File Number: AD-21-86

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

J. H.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: June 22, 2021

Canada

DECISION AND REASONS

DECISION

[1] I am dismissing the Commission's appeal.

OVERVIEW

[2] The Respondent, J. H. (Claimant), applied for both maternity and parental benefits because she was expecting a baby. The Claimant chose to receive benefits for 52 weeks and she selected the extended parental benefit. She returned to work after one year as planned but then received another benefit payment, which she had not expected. She contacted the Appellant, the Canada Employment Insurance Commission (Commission), to ask why she was still receiving benefits when she had completed her parental leave. That was when she discovered that the 52 weeks of parental leave she had requested had not included the 15 weeks of maternity benefits. She also discovered that each of the parental benefit payments she received was less than it would have been if she had selected the standard parental benefit option.

[3] The Claimant asked the Commission to recalculate her benefits based on the standard parental benefit, but the Commission refused. It told her that she was not allowed to change her election of parental benefit. The Claimant asked the Commission to reconsider, but it would not change its decision.

[4] Next, the Claimant appealed the reconsideration decision to the General Division of the Social Security Tribunal. (I will sometimes refer to the Social Security Tribunal, including both the General Division and the Appeal Division as the "Tribunal.") The General Division allowed her appeal. It found that it was more likely that the Claimant chose the standard parental benefit.

[5] The Commission disagrees with the General Division decision and is now appealing to the Appeal Division. The Commission is arguing that the General Division made an error of law when it invalidated the Claimant's election.

[6] I am dismissing the Commission's appeal. The General Division did not make an error of law by determining the validity of the election. The General Division is entitled to evaluate

whether the Claimant actually elected the parental benefit that she selected on the application form.

PRELIMINARY MATTERS

What I will consider

[7] When the Commission sought leave to appeal of the General Division decision, it argued that the General Division made an important error of fact in how it understood the evidence. It also argued that it made an error of law by effectively allowing the Claimant to revoke her election of the extended parental benefit.

[8] I granted leave to appeal, stating that the Commission had an arguable case that the General Division made an error of fact. I did not go on to assess whether the Commission also had an arguable case on the error of law.

[9] However, at the Appeal Division hearing, counsel for the Commission stated that it was focused on the error of law and a related error of jurisdiction. She said that I did not need to consider whether the General Division had made an error of fact.

[10] Accordingly, I will not be considering whether the General Division made an error of fact.

New Evidence

[11] The Claimant submitted a letter from her employer dated May 10, 2021, together with her written submission.[1] The Claimant agreed at the Appeal Division hearing that this was not in the evidence that was before the General Division. The letter is also dated after the General Division decision.

[1] AD2-3.

[12] I will not be considering the employer letter that the Claimant attached to his submissions. The letter is new evidence. The Federal Court of Appeal has repeatedly confirmed that the Appeal Division may not consider new evidence.[2]

WHAT GROUNDS CAN I CONSIDER FOR THE APPEAL?

[13] "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:3

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

[14] Did the General Division make an error of law or jurisdiction when it found that the Claimant had not elected the extended parental benefit that she selected in her application for benefits?

[15] More specifically, the issues are

1. Is the Claimant's election a "fact" that the General Division may find? Put another way: Did the General Division make an error of law by finding that the Claimant elected a parental benefit other than the benefit that she selected on the application form?

2. Did the General Division exceed its jurisdiction by giving a decision that the Commission itself could not have given?

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[2] *Parchment v Canada (Attorney General),* 2017 FC 354; *Marcia v. Canada (AG),* 2016 FC 1367. There are certain exceptions but none apply here.
[3] 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).

3. Did the General Division make an error of law by interpreting its ability to invalidate the election in a manner that was contrary to Parliament's intention to make the election irrevocable?

4. Did the General Division make an error of law by otherwise misinterpreting the meaning of irrevocable?

5. Did the General Division exceed its jurisdiction by applying equitable principles, or by granting an equitable remedy?

6. Did the General Division make an error of law by failing to consider the Claimant's obligation to inform herself about her rights and responsibilities?

ANALYSIS

Issue 1: Is it an error of law to find that the Claimant did not elect extended benefits, contrary to the Claimant's benefit choice on the application form?

[16] The Commission argued that the Claimant's selection of one or the other parental benefit on the application form is necessarily the Claimant's election. The Commission notes that section 23(1.1) of the EI Act requires a claimant to elect the desired parental benefit and that section 50(3) says that a claimant must claim benefits in the manner directed by the Commission. According to this argument, the claimant's choice on the form is the only thing that matters. The action of clicking on the "button" in the electronic application form to select extended benefits is all that is required to make an election.

[17] The Commission disagreed with a recent line of authority from the Appeal Division which treats the selection of the benefit as evidence of the Claimant's election, but not conclusive of the election. In several cases, the Appeal Division has found other evidence that overcame a claimant's presumptive choice on the application form. In the Commission's view, evidence of the claimant's capacity, understanding, or intention is not relevant to the claimant's election.

[18] In my view, section 23(1.1) and section 50(3) do not support the Commission's view that the Claimant's selection on the application form is all that matters. Certainly, a claimant must

choose a parental benefit when she applies for benefits and the Commission is empowered to require her using the form that it supplies or approves. Without applying for parental benefits, a claimant will not receive a parental benefit.

[19] However, claimants must complete **all** the required information on the Commission-approved form to receive **any** kind of Employment Insurance benefit. This does not mean that the Commission, or the General Division, must always reject evidence that a claimant's misunderstanding of part of the application caused the claimant to complete the application incorrectly.

[20] I appreciate that the election of a parental benefit is irrevocable and that it is different in this way from the other information a claimant provides on the application form. It is even different from other choices required of the claimant, such as the choice of regular benefits versus sick benefits. However, whether the election of extended parental benefits is irrevocable is not the same question as whether the Claimant elected extended parental benefits in the first place. The fact that the Commission asks claimants to make the election on the benefit application form does not exclude review of whether the selection on the form reflects a deliberate choice on the claimant's part. It does not exclude a review of other evidence of the claimant's intention. Section 23(1.1) and section 50(3) do not state or imply that the election on the form must be conclusively deemed to be the claimant's actual election.

[21] I am not convinced that a Claimant's election of parental benefits can always be determined with reference only to the Claimant's selection on the application form.

Issue 2: Did the General Division go outside its jurisdiction to review a decision that could not be made by the Commission because the election decision belongs to the Claimant?

[22] The Commission's second argument was that the claimant is the only one who may elect which parental benefit he or she wants. The election is the claimant's "decision" and not the Commission's decision.

[23] The Commission states that it cannot evaluate the claimant's election because it is empowered under section 48(3) only to decide whether the claimant is qualified to receive benefits. The Commission observed that the General Division has the power under section 54(1)

of the DESD Act to "give the decision that the Commission should have given." Since the Commission has no authority to "give" the election, it argues that the General Division likewise has no authority.

[24] I do not read section 48(3) as being exhaustive of the Commission's powers. Clearly, the Commission must also decide whether the claimant is entitled to receive the particular type of Employment Insurance benefit for which the claimant applied. It can also make decisions about the benefit rate and how many weeks of benefits are appropriate. I note that the EI Act distinguishes between standard and extended parental benefit on the basis of the benefit rate and weeks of benefits available.

[25] Furthermore, section 48(3) is headed "**Notification**". It states that the Commission is required to decided if the claimant is qualified "**and notify the claimant of its decision.**" In my view, section 48(1) is not meant to define the limits of the Commission's powers.

[26] However, I agree that the Commission cannot change a claimant's election or reinterpret the claimant's election in a manner that is contrary to the claimant's intention. It is up to the claimant to decide which parental benefit he or she wants to be paid. I also accept that the Commission has no legal obligation to investigate the circumstances of a claimant's election. Generally speaking, the Commission may presume that the claimant's choice on the application form is the claimant's election.

[27] This does not mean that the claimant's decision is always obvious, or that that the Commission has no ability to discover the claimant's intention using evidence outside of the application itself. There is nothing to prevent the Commission from verifying the claimant's intention in appropriate circumstances, such as where the parental benefit selected on the form is inconsistent with other available evidence.

[28] Similarly, where Commission's refuses to change his or her parental benefit and the claimant appeals, the General Division's analysis is not restricted to confirming that a claimant clicked the button for one benefit or the other. The General Division must also weigh the claimant's assertion of his or her original intention, together with other available evidence from which it may infer the claimant's original intention. The General Division must determine

whether the choice on the form actually represented the claimant's true intention. It may find that the "election" on the application form was not a valid election. It may find that the claimant actually elected the other parental benefit.

[29] Neither the Commission nor the General Division can make the election for a claimant. However, a claimant must have intended to make the election for it to be valid. Both the Commission and the General Division have the authority to evaluate the evidence to determine the claimant's intention.

[30] The General Division did not exceed its jurisdiction by finding that the Claimant had not made a valid election on the application form. It interpreted the Claimant's election and made a finding of fact that the selection on the application form was not the Claimant's election. However, it did not decide that the Claimant should have a different benefit than the Claimant elected.

Issue 3: Is invalidating the election contrary to the intention of Parliament?

[31] The Commission submitted that the Tribunal's approach has "effectively created an exception that Parliament has expressly precluded."[4]

[32] It argued that Parliament did not intend to give the Commission any flexibility to change the type of parental benefit paid to a claimant after the Claimant has received the first payment of the parental benefit.[5] According to the Commission, Parliament also intended that a claimant's selection on the application form should be conclusively deemed to be his or her election. According to the Commission, when the EI Act says that a claimant's election is irrevocable after the first payment of parental benefits, the Act is referring to the choice indicated on form.

[33] By doing so, the Commission suggests that Parliament intended that no circumstance could possibly exist in which the claimant's actual election could be something other than what he or she selected on the application form. According to the Commission, Parliament did not just mean to prevent a claimant from changing his or her mind about the choice of parental benefit. It

[4] AD3-20, para 33.
[5] AD3-18, para 29.

meant to prevent the Commission from ever finding that a claimant did not elect a parental benefit on evidence that this had never been the claimant's intention.

[34] If the Commission were correct that Parliament intended the "election' to be nothing more or less than the selection that is indicated on the application form, this would certainly mean that Tribunal could not find the election to be invalid. The claimant's intention at the time he or she completed the application form would be absolutely irrelevant.

[35] According to this interpretation, it would make no difference if the Commission had clearly directed a claimant to select a benefit that was contrary to the claimant's express desires. It would not matter that the claimant could not read, or did not understand English or French, and had an incompetent assistant or interpreter. It would not even matter if the claimant selected the wrong parental benefit "button" on the electronic form because of an unnoticed finger tremor. If the claimant did not notice the error before receiving the first parental benefit payment, the application form itself would be the complete and final answer to the claimant's challenge.

[36] There is no legal authority that says that the selection on the application form must be conclusively deemed to be the claimant's election. In *Karval v Canada (Attorney General)*,[6] the Federal Court upheld the Appeal Division's dismissal of a leave to appeal application by a claimant who was disappointed she could not change her election. However, *Karval* did not close the door to the possibility that a claimant's original "election" on the application form could be invalidated later on. To the contrary, it implied that there is at least one circumstance where that original selection might be remedied. The Court said that no legal remedies were available to the claimant because she was "not misled."

[37] In support of its argument that Parliament never intended that a claimant's election could be found invalid, the Commission referred to the minutes of a House of Commons Standing Committee on Finance (Minutes). In those Minutes, the Committee discussed amendments to the EI Act. As the Commission puts it, Parliament "opted out" of allowing claimants to revoke their election.[7]

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[6] *Karval v Canada (Attorney General)* 2021 FC 395
[7] AD3-18, para 30.

[38] It is apparent that the Committee declined to adopt a test from An Act Respecting Parental Insurance (ARPI), legislation that governs the Quebec Parental Insurance Plan. The Quebec ARPI prevents claimants from revoking their choice of parental benefits "except in exceptional circumstances." After discussing the ARPI, the Committee decided not to include a similar exception in the EI Act.

[39] The Commission argued that the Tribunal administrative du Quebec (TAQ) has interpreted the "exceptional circumstances" provision in the ARPI and determined that acting on incorrect or incomplete information is not an exceptional circumstance. The Commission argued that the EI Act does not allow for "exceptional circumstances", yet the Appeal Division has interpreted a claimant's ability to amend his or her election more generously than the TAQ interprets the ARPI.

[40] I note that the cited TAQ decision relied on the authority of its own prior decisions that the "error of an agent does not create rights." While I appreciate that the Commission disagrees with how this Tribunal evaluates the validity of a claimant's election, the Appeal Division has taken a different view of the effect of misinformation from authorized agents of the Commission.

[41] Where a claimant has relied on explicit advice from the Commission about the nature of his or her election of parental benefits, the Appeal Division has found the claimant's election is invalid.[8] It has also found a claimant's election to be invalid where the claimant has been able to prove that he or she chose a parental benefit based on a misunderstanding of the information in the application form.[9]

[42] In another kind of situation, where claimants have delayed their initial application for benefits, this Tribunal has also found that the claimants' reliance on incorrect information from Commission agents is "good cause" for the delay.[10] The Federal Court of Appeal, in *Canada (Attorney General) v. Pirotte*, confirmed that a mistake induced by representations on behalf of the Commission would be "good cause" for delay.[11]

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[8] *Canada Employment Insurance Commission* v *LV*, 2021 SST 98.
[9] *ML v Canada Employment Insurance Commission*, 2020 SST 255.
[10] *D.C. v. Canada Employment Insurance Commission*, 2018 SST 977.
[11] *Canada (Attorney General) v. Pirotte A-108-76.*

[43] In any event, the TAQ decision to which the Commission referred was not concerned with whether the election was invalid from the beginning. It was concerned with whether the claimant's circumstances were so exceptional to permit the claimant to revoke the election. The TAQ decision presumed the validity of the underlying election without actually considering whether the election itself was valid. In deciding as it did, the TAQ member apparently followed other decisions of the TAQ in which misinformation from an agent of the Quebec benefit scheme was not found to be a relevant consideration.

[44] It is not obvious from the TAQ reasons, but the TAQ may also have felt that the "incorrect or incomplete information" was insufficient to invalidate the election. Alternatively, the member may not have addressed his or her "mind" to the essential validity of the election.

[45] I am not persuaded by the reasoning of the TAQ. The manner in which the TAQ has interpreted "exceptional circumstances" under the ARPI has little to do with this appeal. How the TAQ decides if an election should be revoked under the APRI does not help the Tribunal interpret whether an election is valid under the EI Act.

[46] The Commission suggests that the Appeal Division has created a "legal fiction" that has the effect of defeating the intention of Parliament, or that the General Division is following a legal fiction.[12] I do not agree.

[47] The Minutes do not support the Commission's view that Parliament meant to prevent any enquiry into a claimant's actual intention or meant to foreclose challenges to the validity of the election. According to the Minutes, a member of the Committee proposed an amendment to the EI Act that would allow the election to be revoked, and the Committee rejected the amendment. However, I note that the amendment was proposed for the purpose of granting claimants greater flexibility in the event that their, "**situation changed along the way and it was possible for them to return to work sooner**."[13] Nothing in the minutes suggests that the Commission should not be able to revisit whether a claimant actually meant to choose a particular parental benefit at

[12] See Commission's argument AD3-20, para 34.
[13] *House of Commons*, *Standing Committee on Finance*, 42nd Parl, 1st Sess, No. 96 (30 May 2017) at 0855.

the time that he or she completed the application. Taken in context, the minutes to which the Commission referred suggest that Parliament's intention was that claimants should not be able to **change their minds** after making an election.

[48] The personal circumstances of claimants often change after they have made an election. In other cases, they re-evaluate which of the parental benefits was the better value. If the General Division invalidated the Claimant's election because she changed her mind, this would be contrary to Parliament's intention in enacting section 23(1.2).

[49] However, the General Division did not decide that the Claimant should be permitted to change her mind. It did not find that the Claimant's election was "invalid" so that it could provide a remedy for a claimant's second thoughts.

[50] The General Division was entitled to interpret the Claimant's election to require that she intended the election. This is not contrary to Parliament's choice to prevent claimants from revoking their election.

Issue 4: Did the General Division misinterpret the meaning of irrevocable?

[51] The Commission argued that the General Division misinterpreted section 23(1.2) of the EI Act, which makes a claimant's election irrevocable. It noted that the General Division said that section 23(1.2) has "the effect of preventing claimants from switching back and forth between the standard and extended parental benefit option."

[52] I do not think the General Division meant to suggest that a claimant's election is "only prohibited where a claimant is indecisive or has changed their election multiple times," as the Commission suggests.[14] When I read the entire decision, I am satisfied that the General Division understood that section 23(1.2) of the EI Act does not allow any change to a valid election. The General Division was grappling with what the Claimant understood at the time she completed

[14] AD3-20, para 35.

her application for parental benefits[15] and whether the Claimant actually made the election represented by the selection on the application form.[16]

[53] I am certain the Commission is aware that the Tribunal is engaged in a comprehensive plain language initiative. This drive for plain language decisions sometimes means that the Tribunal must give up some precision so that its decisions are easier to read. As a result, it is possible to make too much out of the particular word choices of the Tribunal.

[54] I understand the Commission's argument that permitting challenges to an election's validity creates some difficulty for the Commission, and perhaps for others as well. The Commission noted that an irrevocable election assists the Commission in several ways. It helps to administer parental benefits in an orderly and efficient manner, to coordinate EI parental benefits with the leave arrangements of individual employers, and to avoid the unnecessary recovery of overpayments. In the Commission's view, these were some of Parliament's objectives in making the election irrevocable.

[55] I accept that conclusively deeming a claimant's selection on the application form to be the claimant's election would be simpler and would likely avoid some complications. However, the Tribunal's evaluation of the validity of a claimant's election does not prevent the Commission from achieving its objectives.

[56] I expect there are other tools the Commission could use to achieve its goal of administrative efficiency that do not require that claimants accept a parental benefit that they had never meant to choose. For example, the Commission could send a statement to each Claimant before they sent the first parental benefit payment—as a matter of practice. This statement could confirm the date that the Commission will pay the first of the parental benefits, the number of weeks parental benefits will be paid, and the rate and amount of each payment to come.

[57] As matters stand, the claimant's selection of the parental benefit on the application form will still represent his or her actual election in the great majority of cases. This remains true, even though the Tribunal has the ability to review whether a claimant made a valid election on

[15] General Division decision, para 14.
[16] General Division decision, para 12.

the application form. In other words, the claimant will have made his or her election on the form in most cases, and the election will still be irrevocable after the first parental benefit payment.

[58] Furthermore, the Tribunal does not invalidate every election where the claimant asserts that he or she did not intend to choose the parental benefit paid by the Commission. It requires claimants to prove did not intend to choose the parental benefit chosen on the form. The evidence must be sufficient evidence to overcome what is effectively a presumption that the claimant meant to elect the parental benefit chosen on the form.

[59] In each case where the Appeal Division has rejected the claimant's selection of parental benefit on the application form, that selection was found to be inconsistent with other evidence of the claimant's intention at the time of the application. That other evidence has usually been other information on the application form itself, or information that was provided to the Commission at or about the same time as the application.

[60] The Tribunal has a power under section 64 of the DESD Act to decide any question of fact that it finds necessary to decide the appeal. It is usually a simple matter to determine what a claimant has selected on the application form. It is significantly more difficult to weigh the evidence and discern a claimant's intention or purpose aside from the form. Even so, this is a necessary enquiry if the claimant is to receive the benefit that he or she intended to choose, or *elect*.

[61] The General Division did not make an error of law by misinterpreting the meaning of irrevocable in section 23(1.2) of the EI Act.

Issue 5: Has the General Division gone beyond its jurisdiction to apply equitable principles?

[62] The Commission has argued that the Tribunal has no power that it has not been expressly granted by statute. It has no equitable jurisdiction, so it should not be applying equitable principles. According to the Commission, the Tribunal is inappropriately using its power to

decide questions of fact to, "resolve an injustice that it perceives resulting from the operation of section 23(1.2)."[17]

[63] The application of equitable principles is not the same as granting an equitable remedy. "Rescission" is an equitable remedy, but the General Division did not rescind a valid election once made. Instead, it found that the Claimant had not actually made the election indicated on the application for benefits.

[64] Regardless, I do not accept that the General Division applied "equitable principles", let alone granted an equitable remedy. In my view, the General Division examined the essential validity of the election, *without regard* for the effect of that election on the claimant. It did not examine the election for the purpose of remedying an injustice resulting from a claimant's inability to change the election.[18]

[65] The General Division is authorized under section 64(1) of the DESD Act to find those facts, which are necessary to dispose of the election.[19] The Claimant's intention is one of those facts. In fact, where the claimant disputes the election, the Tribunal must examine that claim and must make a finding about the claimant's intention.

[66] This allows the General Division to decide if there was a valid election to which section 23(1.2) can even attach. If there was not a valid election, the Tribunal must determine what election the claimant intended (assuming it has sufficient evidence). These are questions of fact that must be resolved to decide the appeal. Neither of these questions undermine the irrevocability of a valid election.

[67] During the Appeal Division hearing, I questioned the Commission about its contention that the General Division was applying equitable principles. During the Appeal Division hearing, the Commission spoke of the doctrine of election as form of estoppel, and about constructive trust/unjust enrichment.

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[17] AD3-22.
[18] As asserted by the Commission, AD2-22, para 41.
[19] Including the Appeal Division when it is substituting its decision for that of the General Division.

[68] It is not clear to me how equitable doctrines of election or constructive trust/unjust enrichment apply here. The Commission is arguing that the General Division **cannot,** or should not, apply the doctrine of election or estoppel. But "election" is a doctrine that actually binds a claimant to his or her election. I do not understand how the General Division applied this doctrine to invalidate the Claimant's election. I would think it might have supported the **Commission's position** (if equitable principles were applicable). After all, it is the Commission that is insisting that the Claimant must accept her original choice of the extended parental benefit on the application form.

[69] The Commission may be right that election is an equitable doctrine, which is "a question of intention based on knowledge."[20] However, the Court in the *Findlay v Findlay* case (cited by the Commission) first had to consider the respondent's intention, in order to determine whether the doctrine of election applied. The Court found that the doctrine of election **did not apply** because the respondent in that case had not intended to elect what the applicant asserted she elected.[21]

[70] In other words, a claimant must first intend an election before the claimant can be estopped at equity from making another choice. This does not mean that only "equity" can allow a claimant to avoid the effect of an election that the claimant had not intended.[22] It does not mean that the General Division was applying an equitable principle when it found the Claimant had not intended to chose the benefit she selected on the application

[71] If the Commission had explicitly misdirected the Claimant to make an inappropriate choice, she might have attempted an argument that the Commission should be estopped from insisting that the claimant be bound by that choice. However, the Claimant was not explicitly misdirected in this case, and did not rely on estoppel.

[72] Neither the General Division, nor the Appeal Division decisions referenced by the General Division, analyzed the validity of the Claimant's election using the lens of "estoppel."

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[20] *Findlay v Findlay*, 1951 CanLII 10 (SCC). Per Kerwin J., page 104,
[21] *Ibid.*
[22]

[73] The Commission also argued that the Tribunal's analysis should not be influenced by the equitable doctrine of "constructive trust." It discussed the case of *Moore v. Sweet*,[23] in which the court imposed a constructive trust in favour of a former spouse to get around an irrevocable life insurance beneficiary designation in favour of the deceased's latest wife.

[74] Again, I fail to see how "constructive trust' was relevant to the General Division's analysis, or relevant to any of the Appeal Division's decisions concerning the validity of the election. For the General Division, the critical question was this: What did the Claimant intend to elect? In *Moore v Sweet*, there was no question that the deceased person, who had made the beneficiary designation, actually intended to designate the beneficiary that he chose.

[75] Neither the General Division nor the Appeal Division (in the decisions the General Division found persuasive) employed a constructive trust analysis. The General Division did not find that the Commission held in trust the parental benefit that would have been payable to a claimant had the claimant chose the benefit that reflected his or her actual intention. It did not find that the Commission was unjustly enriched by withholding a portion of the parental benefit that the Claimant wanted.

[76] In the hearing, and in response to the Commission's suggestion that the Appeal Division was applying equitable principles or doctrines, I commented that the doctrine of mistake might be more applicable than the equitable doctrines raised by the Commission. The Commission asked me if I would like additional submissions on the applicability of a mistake type of analysis. I left this up to the Commission, but I noted that it had raised a concern about how the Appeal Division was not consistent in its decisions on claimants' elections. The Commission told me that the Appeal Division should be clear if it is basing its decisions on some kind of mistake analysis. In response to that, I said the Commission's submissions could be helpful if I found that I needed to formulate a more structured test for validity.

[77] On June 15, 2021, the Commission provided detailed and thoughtful submissions on the doctrine of mistake.

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[23] *Moore v Sweet*, 2018 SCC 52.

[78] However, in the introduction to those submissions, the Commission stated that I suggested that the Appeal Division relies on the contract law doctrine of mistake.[24] This is incorrect. I did not mean to suggest that the Appeal Division has been relying on contract law or the doctrine of mistake to determine the validity of a claimant's election.

[79] I mentioned in the hearing that there were both mistakes under common law and mistakes under equity and that "mistake" is not necessarily an equitable doctrine. I was hoping that the Commission would expand on its position that the Tribunal was in appropriately exercising an equitable jurisdiction by its focus on whether the parental benefit selection on the application mistook the claimant's true intention.

[80] One of the first arguments in the Commission's submissions of June 15, 2021, is that that the Tribunal should not be applying the common law doctrine of mistake.

[81] I agree with the Commission. The Tribunal's analysis should not incorporate the common-law doctrine of mistake, or its various qualifications and refinements. The courts have developed legal principles for mistake in contracts in the context of contractual relationships in which the terms are generally negotiable, or where the parties may freely choose to contract with others. These principles are not easily applied to claims for statutory benefits. This is because the "terms" of Employment Insurance benefits are imposed by statute and non-negotiable. Furthermore, Employment Insurance benefit claimants cannot seek better terms from other benefit providers.

[82] However, this does not mean that the Tribunal should treat a claimant's mistake as irrelevant. It does not mean that the General Division could not consider whether the Claimant selected a parental benefit that she did not intend to select.

[83] The EI Act does not precisely define what it means by the parental benefit "election." It should not be controversial to say that the claimant's election is his or her choice of parental benefit. That choice requires a claimant to consider the level of support the claimant requires and for how long. The Claimant must then select the benefit option that will allow the claimant to select the option that will best fulfill that intention. At the same time, the claimant must bear in

[24] AD7-2, para 1.

mind that the weeks he or she chooses will be combined with the weeks of maternity benefits, if applicable. The claimant may have to deduct weeks claimed by the other parent, if applicable.

[84] This is a significantly more complex decision than the decision to push one electronic button or the button that is just over a bit from the first. In my view, the actual "election" must be a deliberate choice between reasonable comprehensible options.

[85] The Claimant disputed that she had meant to ask for the kind of benefits that was the result of her selection on the application form. As a result, the General Division had to assess whether she actually made a deliberate choice to elect the extended parental benefit. This was an appropriate and necessary fact-finding exercise.

[86] The General Division did not exceed its jurisdiction by introducing equitable principles or remedies.

Issue 6: Did the General Division ignore the Claimant's duty to inform herself of her rights and responsibilities?

[87] The Commission says that ignorance of the law is no excuse. It says that claimants have an obligation to take reasonable steps to understand their rights and responsibilities under the EI Act.

[88] The courts have confirmed that an Employment Insurance benefit claimant has an obligation to take reasonable steps to understand his or her rights and responsibilities. These decisions have been in the context of a late application for benefits. They do not deal with the revocation of an election of parental benefit.[25] Nonetheless, I agree that claimants cannot simply claim to have been ignorant of the law or its effects. The question is what are the "reasonable steps", in the circumstances?

[89] The Commission argued that the application form and instructions are clear. It relies on the *Karval* decision, where the Federal Court said that the questions on the application form were

[25] *Canada (Attorney General) v. Albrecht*, [1985] 1 F.C. 710 (C.A.); *Canada (Attorney General) v. Caron* (1986), 69 N.R. 132; *Canada (Attorney General) v. Carry, 2005 FCA 367; Canada (Attorney General) v. Bryce*, 2008 FCA 118; *Canada (Attorney General) v. Somwaru, 2010 FCA 336.*

not "objectively confusing." The Court said that the claimant's choices were clear, and that it was clear that the parental benefit would be reduced where the extended option was chosen.[26]

[90] However, this was only one of the findings of fact in *Karval*. In *Karval*, the Court also relied on several other findings. It considered that the claimant's return to work date was unknown. It considered that the claimant selected 61 weeks of benefits (which exceeds the total of the maximum weeks of regular benefits plus the weeks of maternity benefits). It also considered that she received the extended benefit at the reduced rate for six months before asking the Commission to change her benefit type. The Court found that the Appeal Division acted reasonably in refusing leave to appeal, because of all of these facts.[27]

[91] *Karval* does not challenge the Tribunal's ability to determine the validity of the election. The Court in *Karval* said that a claimant who is "perplexed" by the form has an obligation to seek clarification.[28] This means that a claimant may not be presumed to have mistaken his or her election because she says she was confused by the application form.

[92] However, claimants do not necessarily know what it is they do not know. They may believe they understand the information and act on that understanding, right or wrong, without ever thinking that they need to seek clarification.

[93] The Commission provides what it believes to be complete instructions on the application for parental benefits. That information has been interpreted differently by different claimants. However, a claimant may believe that she understands the instructions and still be wrong. If instructions may reasonably be interpreted in a manner consistent with the claimant's understanding, then the claimant's review of the application information satisfies his or her obligation to take reasonable steps to understand her rights and responsibilities. It would make no sense to impose some obligation to make additional enquiries.

[94] The Claimant anticipated taking a year's leave from work to have her baby and look after him. She interpreted the information in the application for benefits to mean that the parental benefits are inclusive of the maternity benefits. Based on this understanding, the Claimant

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[26] *Supra* note 5 at para 11, 14.
[27] *Supra* note 5 at para 16
[28] *Ibid*.

selected extended benefits on the application form, which was the only way she could select more than 35 weeks of benefits. There have been a number of Tribunal decisions that address circumstances similar to those of the Claimant, involving similar misunderstandings. The Claimant is not the first person to misunderstand the information on the application form and the meaning of the parental benefit choice.

[95] The General Division concluded that the Claimant reasonably construed the question, "How many weeks do you wish to claim?" as a question asking how many weeks she wanted to take off work and receive benefits. This caused her to choose 52 weeks because that was equal to the 12 months she told her employer she would be taking off work. The General Division noted that nothing in the question indicated that the weeks requested were for parental benefits only and nothing on the page indicated that these parental benefits were in addition to the 15 weeks of maternity benefits. The General Division considered that the questions created some confusion and found it credible that the Claimant had made a mistake in what she selected.[29]

[96] The General Division's conclusion is either a finding of fact (with which I have no reason to interfere) or a question of mixed fact and law (with which I may not interfere[30]). Therefore, the General Division had no reason to require the Claimant to take *additional* steps to understand the parental benefit she had selected.

Summary

[97] The General Division did not make an error of law or jurisdiction when it found that the Claimant's election was invalid.

[29] General Division decision, para 16
[30] *Quadir v. Canada (Attorney General)*, 2018 FCA 21.

CONCLUSION

[98] I am dismissing the appeal.

Stephen Bergen
Member, Appeal Division

HEARD ON:	June 1, 2021
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	Hillary Perry, Department of Justice, Counsel for the Appellant J. H., Respondent