



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *Canada Employment Insurance Commission v BA*, 2021 SST 297

Tribunal File Number: AD-21-108

BETWEEN:

**Canada Employment Insurance Commission**

Appellant

and

**B. A.**

Respondent

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

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DECISION BY: Stephen Bergen

DATE OF DECISION: June 24, 2021

## **DECISION AND REASONS**

### **DECISION**

[1] I am allowing the Commission's appeal. I am sending the matter back to the General Division for reconsideration.

### **OVERVIEW**

[2] The Respondent, B. A. (Claimant), applied for maternity and parental Employment Insurance benefits. She selected extended benefits for 48 weeks when she completed the benefit application form. When she received her first parental benefit, she noticed that it was significantly less than the benefits she had been receiving to that point. As a result, she contacted the Appellant, the Canada Employment Insurance Commission (Commission). The Commission explained that it reduced her benefit because she had selected the extended benefit.

[3] The Claimant told the Commission that the extended benefit was not sufficient, and she asked the Commission to change her parental benefit. The Commission informed her that it had no ability to change her parental benefit since she had already received a payment of the extended parental benefit. The Claimant for a reconsideration but the Commission would not change its decision.

[4] The Claimant successfully appealed to the General Division of the Social Security Tribunal. The General Division allowed her appeal, finding that the Claimant had always wanted to apply for standard benefits and indicated she wanted the extended benefit by mistake. The Commission is now asking for leave (permission) to appeal the General Division decision to the Appeal Division.

[5] I am allowing the appeal. The General Division made an important error of fact when it found that the Claimant selected the extended benefits by mistake. It based this finding on a misunderstanding of the Claimant's evidence.

[6] I am returning the matter to the General Division to reconsider because the Claimant did not have a fair opportunity to present her evidence.

## **WHAT GROUNDS CAN I CONSIDER FOR THE APPEAL?**

[7] “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:<sup>1</sup>

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**

[8] Did the General Division make an important error of fact by mischaracterizing the Claimant’s reasons for choosing the extended benefit?

[9] Did the General Division make an important error of fact by ignoring the evidence of the application for benefits form, and the explanation of the parental benefit choices that is included with the application?

[10] Did the General Division make an error of law when it found that the Claimant elected a different benefit than the benefit requested on her application form?

## **ANALYSIS**

[11] 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.<sup>2</sup> 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.<sup>3</sup>

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<sup>1</sup> 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).

<sup>2</sup> *Employment Insurance Act* (EI Act), section 23(1.1).

<sup>3</sup> EI Act, section 12(3)(b) and section 14(1).

[12] 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 claimant's election is "irrevocable."<sup>4</sup>

**Issue 1: Mischaracterizing the Claimant's reasons for choosing the extended benefit**

[13] The General Division made an important error of fact. The General Division accepted that the Claimant had made a mistake when she selected extended benefits because she believed she needed extended benefits in order to cover off the 48 weeks of her expected leave. (She thought one year was equal to 48 weeks.) The General Division viewed her misunderstanding as understandable, "in light of her problems completing the application due to her struggles with English."

[14] At the General Division hearing, the member raised the possibility of a language barrier with the Claimant, asking her if she had difficulties because the application was in English. Through an interpreter, the Claimant said, "Yes, [she] had difficulty with the questions regarding parental and maternal."

[15] I note that the Claimant did not volunteer the information that she had difficulty reading the application in English. Instead, the General Division's question suggested this as a possible reason the Claimant may have misunderstood the application information. I further note that it is not obvious from the Claimant's response what part of the General Division member's suggestion she agreed with, exactly. She could have been agreeing that she had problems understanding certain questions in the form, or she could have been agreeing that she had problems with those questions because of her ability to read English.

[16] Despite these difficulties with the Claimant's evidence, I accept that the Claimant answered affirmatively when the General Division asked whether she had difficulty because the forms were in English. I cannot find that the General Division made an error by considering that the Claimant might struggle to understand the benefits because she was not fluent in English.

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<sup>4</sup> EI Act, section 23(1.2).

[17] However, the General Division did mischaracterize the Claimant's evidence in another way.

[18] The General Division said that, "the Claimant testified she was having trouble understanding the way maternity and parental benefits interact and their differences."<sup>5</sup> When the General Division member asked the Claimant why she said she wanted extended benefits, the Claimant said only that, "from what [she understood] from what was on the form, to [her] it indicated that 48 weeks was one year."<sup>6</sup>

[19] This does not seem to answer the member's question but I am not confident that this was her entire answer. The Claimant's response was filtered through an interpreter. I listened to the audio tape and could hear that the Claimant used the English word "extended" as she answered the question. However, the interpretation of her response does not use "extended", or another word for extended, and it does not mention anything about the type of benefit the Claimant chose.

[20] I cannot know exactly what the Claimant said. She may have said that she understood from the form that the benefits offered for 48 weeks/one year were the extended benefits. She may have said that she understood that she could obtain 48 weeks/one year (that she wanted) only by choosing the extended option. Or, she may have said something else entirely.

[21] The General Division did not ask any follow-up questions about how the Claimant interpreted the questions on the application form, and the Claimant did not say anything more about it. There was no other evidence about the kind of difficulties the Claimant had with the questions about parental and maternal benefits, or what might have caused her to have difficulties.

[22] The General Division made an important error of fact because it replaced or embellished the Claimant's testimony.

[23] The Claimant may well have been having trouble understanding the way maternity and parental benefits interact and their differences, but she did not say this in so many words. She did

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<sup>5</sup> General Division decision, para 22.

<sup>6</sup> Audio recording of General Division hearing at timestamp 00:11:50.

not talk about her understanding of each of the parental benefits, or about why she thought she could choose the extended parental benefit on the form and still have her parental benefits paid at the rate for the standard benefit. The General Division's summary of the Claimant's evidence was not accurate; Nor could the General Division reasonably infer from the evidence that the Claimant's choice of parental benefit was a result of her trouble understanding each of the benefits and how they interacted.

**Issue 2: Ignoring the evidence of the application for benefits form**

[24] The Commission stated that the application form distinguishes between the maternity and parental benefits and that it clearly explains the differences between the standard parental benefit and the extended parental benefit. It argues that the General Division ignored this evidence when it evaluated the Claimant's understanding of the benefit choices, and the election required of her.

[25] I agree that the General Division made an important error of fact by determining that the Claimant had misunderstood her election, without considering the information in the application form.

[26] The General Division found that the Claimant did not understand what she was electing. However, it did not evaluate whether the application information could even support the manner in which the Claimant interpreted her election.

[27] It is unclear from the evidence how the Claimant actually interpreted the information on the application form. The Claimant did not say that she thought she had understood the information on the form, and her choices. Rather, she told the General Division that she had "difficulty" with questions of maternity and parental benefits.

**Issue 3: No authority to change the Claimant's election**

[28] The Commission also argued that the General Division had no ability to change the Claimant's choice of benefits. It submitted that the General Division was effectively allowing the Claimant to revoke her election, which is expressly prohibited by section 23(1.2) of the *Employment Insurance Act* (EI Act). According to the Commission, this was an error of law.

[29] I disagree. The law says that a claimant cannot change the parental benefit election after he or she receives the first payment of parental benefits. However, the General Division still has the power under section 64(1) of the DESD Act to decide any question of law or fact that is necessary for it to dispose of the appeal. This includes the ability to evaluate evidence of a claimant's intention at the time he or she completes the application, so that it can determine whether the election was actually made, or validly made.

[30] In my view, the purpose of section 23(1.2) is to prevent a claimant from changing his or her mind after making an election. It was not enacted to prevent reasonably diligent claimants from receiving the choice of benefit that they mistakenly thought they had requested. The Appeal Division has been reasonably consistent in its approach to this question, and there is no reason to depart from its reasoning in this case.<sup>7</sup>

[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).

## **REMEDY**

[32] I have the authority to change the General Division decision or I may 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.<sup>8</sup>

[33] The Commission suggested that I make the decision the General Division should have made. The Claimant would have preferred that I dismiss the Commission's appeal. However, she suggested that I make the decision the General Division should have made if I found an error in its decision. She maintains that I should confirm that she actually elected the standard benefit.

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<sup>7</sup> See for example, *Canada Employment Insurance Commission v J.H.*, AD-21-86; *Canada Employment Insurance Commission v. T. B.*, 2019 SST 823; *M. H. v Canada Employment Insurance Commission*, 2019 SST 1385; *V. V. v Canada Employment Insurance Commission*, 2020 SST 274; *M. L. v Canada Employment Insurance Commission*, 2020 SST 255.

<sup>8</sup> Section 59(1) of the DESD Act.

[34] I would only make the decision if I accepted that there was evidence on every issue that I must decide, and if I accepted that both parties had a full and fair opportunity to present her case. In this case, I cannot make the decision. I am not satisfied that the Claimant had a fair opportunity to present her case.

[35] I have found that the General Division made an error of fact because it made a decision based partly on its assumptions about why she chose extended benefits, rather than on the actual evidence. There was evidence that the Claimant meant to take a year off from work, but there was no clear evidence to relate that intention to her choice of extended benefits.

[36] As I have mentioned, I have reason to believe that the interpretation was either inaccurate or incomplete. In particular, I believe that her response to the General Division member's question about why she chose extended benefits was not properly interpreted. She used the English word, "extended" in her response but the interpreter did not mention extended. According to the interpretation, the Claimant said only that she understood from the form that 48 weeks was one year.

[37] For all I know, the Claimant responded to the question meaningfully, but I would have to speculate about what she might have said.

[38] Throughout the hearing, the General Division asked questions and the Claimant responded through the interpreter. At the close of the hearing, the General Division member asked the Claimant if she had anything to add. The Claimant said she had nothing to add.

[39] However, the General Division did not explain to the Claimant that would have to prove that she meant to choose the standard benefit and not the extended benefit, at the time of her application. It did not ask the Claimant about how much she knew about the information and instructions in the application form, or about her understanding of that information. It did not inform her that her understanding of the application information could be important to its decision.

[40] The Claimant would not likely have known that these things were relevant. She appeared to rely on the General Division to ask her questions about all the relevant facts.

[41] In these circumstances, I must send the matter back for the General Division to reconsider its decision. I find that the Claimant did not have a fair opportunity at the hearing to support her assertion that she had not intended to choose the extended benefit.



**CONCLUSION**

[42] I am allowing the appeal.

[43] I am returning the appeal to the General Division to reconsider its decision.

Stephen Bergen  
Member, Appeal Division

HEARD ON:	June 18, 2021
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	Rachel Paquette, Representative for the Appellant  B. A., Respondent