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

Citation: *Canada Employment Insurance Commission v RW*, 2021 SST 299

Tribunal File Number: AD-21-200

BETWEEN:

Canada Employment Insurance Commission

Applicant

and

R. W.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Stephen Bergen

Date of Decision: June 25, 2021

Canada

DECISION AND REASONS

DECISION

[1] I am refusing the Commission's application for leave to appeal.

OVERVIEW

[2] The Respondent, R. W. (Claimant), left her work on November 26, 2020 because she was having a baby. She applied for maternity and parental Employment Insurance benefits on December 4, 2020. When she completed the application form, she chose 52 weeks of benefits from the drop-down list.

[3] The Applicant, the Canada Employment Insurance Commission (Commission), issued the first payment of parental benefits on April 9, 2021. The Claimant called the Commission on April 19, 2021, as soon as she realized her benefit payment had dropped.[1] The Commission informed the Claimant that her parental benefit was less than her maternity benefit because she had elected the extended benefit option. The Claimant told the Commission that she had not meant to choose the extended benefit.

[4] The Commission informed the Claimant that she could not change her election because it had already made a payment of parental benefits to her. The Claimant asked for a reconsideration but the Commission would not change its decision.

[5] The Claimant appealed to the General Division of the Social Security Tribunal, which allowed her appeal. The General Division found that the Claimant had only intended to elect one year of combined maternity and parental benefits, and that she actually elected the standard benefit. The Commission is now asking for leave (permission) to appeal the General Division decision to the Appeal Division.

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[1] Note: the General Division stated that the Commission said the first payment was on April 23, 2021 and found this as a fact. However, I accept that this was a simple slip. April 23, 2021 was the date the Claimant requested a reconsideration (see GD3-29). There was no evidence that the first payment was April 23, 2021 and this was not the Commission's position (see GD4-2). In fact, the Claimant had already called the Commission about her first payment on April 19, 2021 (Audio recording of General Division decision at timestamp 00:11:15).

[6] I am refusing leave to appeal. There is no arguable case that the General Division's failed to consider the application for benefits form, or that it made an error of law in finding that the Claimant elected standard benefits.

WHAT GROUNDS CAN I CONSIDER FOR THE APPEAL?

[7] To allow the appeal process to move forward, I must find that there is a "reasonable chance of success" on one or more of the "grounds of appeal" found in the law. A reasonable chance of success means that there is an arguable case. This would be some argument that the Commission could make and possibly win.[2]

[8] "Grounds of appeal" means reasons for appealing. I am only allowed to consider whether 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

[9] Is there an arguable case that the General Division made an important error of fact by ignoring the information on the application for benefits form that explained the parental benefit choices?

[10] Is there an arguable case that the General Division made an error of law when it found that the Claimant elected a different benefit than the benefit she requested on her application form?

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[2] This is explained in a case called *Canada (Minister of Human Resources Development) v Hogervorst*, 2007, FCA 41; and in *Ingram v Canada (Attorney General)*, 2017 FC 259.
[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.*

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.[4] *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.[5]

[12] 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."[6]

Issue 1: The General Division failed to consider the parental benefit explanation in the application form

[13] There is no arguable case that the General Division made an important error of fact by failing to consider how the benefit application form itself explains the parental benefits and the election.

[14] I agree that the General Division's decision does not recite the information that is included with the application for benefits form. However, the General Division was aware of the explanation of benefits on the application form and it was interested in the Claimant's knowledge and understanding of that information.[7] In the hearing, the General Division member told the Claimant that the application form described the parental benefits. The member said that the standard parental benefit paid a higher rate for a shorter period and that the extended benefit paid a smaller benefit over a longer period.[8]

[15] The Claimant acknowledged that she had read the descriptions of the different benefits in the application form. She said that she understood the difference between the two benefits.[9]

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[4] *Employment Insurance Act* (EI Act), section 23(1.1).
[5] EI Act, section 12(3)(b) and section 14(1).
[6] EI Act, section 23(1.2).
[7] General Division decision, para 9.
[8] Audio recording of General Division decision at timestamp 00:08:45
[9] Audio recording of General Division decision at timestamp 00:09:10

However, she also said that she did not recognize that she would be getting the reduced benefit because, "in her head", she had chosen the standard benefit.[10]

[16] The Commission argued that the General Division failed to acknowledge that there was information in the application form by which she should have known the difference between her maternity and parental benefits. It said that one area of the application informs claimants that they can receive maternity benefits followed by parental benefits, and another area asks claimants if they want to receive parental benefits immediately after receiving maternity benefits.

[17] However, the General Division decision did not conclude that the application information was objectively confusing, or that the application information confused the Claimant in this case. Its decision did not turn on what the Claimant understood about the nature of the choice that she needed to make. The decision assessed the Claimant's intention based on how it related to her work circumstances as well as on what the Claimant believed about what she had selected when she completed the form.

[18] The Claimant selected 52 weeks of benefits from the drop-down menu because she knew she would be taking about a year off from work altogether. She said she could not be sure of the exact date of her return. However, she expected it could be as early as October or November 2021.[11] She said that she had discussed this with her employer who informed her that it just needed four weeks' notice of the date she would be returning to work.[12]

[19] The Claimant also testified that she competed the application the day after her baby was born and that she was sleep deprived. She told the General Division, she "swears" that she chose the standard benefit,[13] as she had done when she applied for benefits after the birth of her last child.[14] When she came to the button where she had to select the number of weeks, she told the General Division that the menu offered her 35 weeks. This was not what she expected, but she said she was able to change it to 52 weeks, which is how many weeks of benefits she had wanted in total. She questioned whether the system may have changed her benefit selection to the

[10] Audio recording of General Division decision at timestamp 00:09:15
[11] Audio recording of General Division decision at timestamp 00:07:30
[12] Audio recording of General Division decision at timestamp 00:07:50
[13] Audio recording of General Division decision at timestamp 00:14:05
[14] Audio recording of General Division decision at timestamp 00:09:55

extended benefit automatically, because she chose a number of weeks in excess of what the system anticipated for standard benefits.

[20] In other words, the Claimant believes that she either selected extended benefits unknowingly or she failed to notice that the system auto-corrected her selection to extended benefits.

[21] The application does not state that the parental benefit is an entirely separate benefit from the maternity benefit. This must be inferred from the application form information, and it is not the only inference possible. But even if the information were as clear as the Commission asserts, it would not have been so significant to the Claimant's mistake that I would expect the General Division to mention it specifically. The General Division is presumed to be aware of the evidence that is before it. It is not required to refer to each and every piece of evidence.[15]

[22] The General Division did not make an important error of fact by failing to refer to the instructions or explanations in the application for benefits form.

Issue 2: The General Division made an error of law by allowing the Claimant to change her election.

[23] There is no arguable case that the General Division made an error of law by allowing the Claimant to change the election on her application form.

[24] The General Division 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 decide 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.

[25] Whether a claimant has elected extended parental benefits in the first place is not the same question as whether a claimant's election may be changed. I recognize that the Commission asks claimants to make the election on the benefit application form and that the election can't be changed. However, this does not mean that the General Division cannot examine other evidence to decide whether the claimant made a deliberate choice when he or she

[15] *Simpson v Canada (Attorney General)*, 2012 FCA 82.

selected the parental benefit on the application form. Nothing in the EI Act states or implies that the election on the form must be conclusively deemed to be the claimant's actual election.

[26] In this case, the Claimant did not elect extended benefits but later change her mind and decide that she would rather have standard benefits. The General Division found as fact that the Claimant had never meant to elect the extended parental benefit and that she believed she was choosing the standard parental benefit.

[27] In a number of decisions, the Appeal Division has found that a claimant's actual election of parental benefit may be different from the benefit the claimant selected on the application form. It has treated the selection of the benefit as *evidence* of the Claimant's election, but not conclusive of the election.[16] I am not bound by other decisions of the Appeal Division but the Commission has not given me any reason that I should depart from the reasoning in those other decisions.

[28] The Commission has not made out an arguable case that this line of decisions is incorrect at law or that the General Division made an error of law by agreeing with the Appeal Division.[17]

[29] The Commission has no reasonable chance of success in the appeal.

CONCLUSION

[30] I am refusing the application for leave to appeal.

Stephen Bergen
Member, Appeal Division

REPRESENTATIVES:	Angele Fricker, for the Applicant

[16] 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.
[17] General Division decision, para 14.