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

Citation: *Canada Employment Insurance Commission v KD*, 2021 SST 335

Tribunal File Number: AD-21-194

BETWEEN:

Canada Employment Insurance Commission

Applicant (Commission)

and

K. D.

Respondent (Claimant)

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Jude Samson

Date of Decision: July 13, 2021

Canada

DECISION AND REASONS

DECISION

[1] The Canada Employment Insurance Commission (Commission) has filed an Application to the Appeal Division. The Commission is asking for leave (permission) to appeal the General Division decision in this case. For the reasons below, I have decided that the Commission's appeal has no reasonable chance of success. As a result, I must refuse permission to appeal.

OVERVIEW

[2] K. D. is the Claimant in this case. She applied for and received Employment Insurance (EI) maternity benefits, followed by parental benefits. On her application for parental benefits, she had to elect (choose) between two options: standard or extended.

[3] The standard option offers a higher benefit rate, paid for up to 35 weeks. The extended option offers a lower benefit rate, paid for up to 61 weeks. When combined with 15 weeks of maternity benefits, the standard option provides EI benefits for about a year, whereas the extended option provides EI benefits for about 18 months.

[4] The Claimant found the application form confusing. She selected the extended option on her form but some of her answers are more in line with the standard option. The Commission paid parental benefits to the Claimant at the lower, extended option rate.

[5] The Claimant noticed that her benefit rate had dropped when she switched from maternity to parental benefits, so she quickly contacted the Commission and asked for the standard option. The Commission refused the Claimant's request. The Commission said that it was too late for the Claimant to change options because she had already received parental benefits.

[6] The Claimant appealed the Commission's decision to the Tribunal's General Division and won. The General Division found that the Commission's application form was so misleading that it prevented the Claimant from making a valid choice between the standard and extended options. It also found that the answers she provided on her application form conflicted with one another.

[7] The Commission now wants to appeal the General Division decision to the Tribunal's Appeal Division. It argues that the General Division decision contains legal errors.

[8] The Commission's appeal has no reasonable chance of success. I have no choice, then, but to refuse permission to appeal.

ISSUES

[9] Is there an arguable case that the General Division made an error of law by failing to:[1]

a) analyze the evidence in a meaningful way?

b) require that the Claimant further inform herself about the benefits she wanted to receive?[2] and

c) apply section 23(1.2) of the *Employment Insurance Act* (EI Act), which prevented the Claimant from changing options after she had started to receive parental benefits?

ANALYSIS

[10] Most Appeal Division files follow a two-step process. This appeal is at step one: permission to appeal.

[11] The legal test that the Commission needs to meet at this step is a low one: Is there any arguable ground on which the appeal might succeed?[3] If the appeal has no reasonable chance of success, then I must refuse permission to appeal.[4]

[12] To decide this question, I considered whether the General Division could have made an error of law, which is one of the relevant errors.[5]

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[1] The Commission's Application to the Appeal Division also refers to alleged errors of fact, but its arguments refer only to these errors of law: see pages AD1-3 and AD1-8.
[2] This principle is from the Federal Court's recent decision in *Karval v Canada (Attorney General)*, 2021 FC 395.
[3] This legal test is described in cases like *Osaj v Canada (Attorney General)*, 2016 FC 115 at para 12 and *Ingram v Canada (Attorney General)*, 2017 FC 259 at para 16.
[4] This is the legal test described in section 58(2) of the *Department of Employment and Social Development Act* (DESDA).
[5] The relevant errors, formally known as "grounds of appeal," are listed under section 58(1) of the DESDA.

Summary of the General Division decision.

[13] On her application for parental benefits, the Claimant selected the extended option. However, the General Division found that her choice was invalid.

[14] To get to that result, the General Division referred to three Appeal Division decisions. One of those decisions says that an applicant's choice between the standard and extended options is invalid if the application process misleads the applicant into making the wrong choice.[6] The other two decisions say that conflicting answers on an applicant's application form can make her choice invalid because it is unclear.[7] The Commission has not challenged any of these decisions in court.

[15] As part of its decision, the General Division found that the information on the application form misled the Claimant and prevented her from making a valid choice.[8]

[16] The General Division identified the part of the form that was misleading and noted critical information that was missing from the form. Specifically, the General Division focused on the question "How many weeks do you wish to claim?"

[17] Since she was planning to take about a year's leave, the Claimant answered "48" to this question (12 months × 4 weeks/month = 48 weeks).[9] However, claiming parental benefits for 48 weeks also meant that the Claimant had to choose the extended option.

[18] The General Division found that the "How many weeks to you wish to claim?" question misled the Claimant into thinking that the Commission was asking for the total number of weeks during which she wanted to receive EI benefits. The question did not specify that it was asking only about **parental benefits** (without the 15 weeks of maternity benefits).

[19] In addition, the application form did not warn the Claimant that, by choosing the extended option for 48 weeks, she would receive a lower total amount of benefits.

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[6] *ML v Canada Employment Insurance Commission*, 2020 SST 255.
[7] *Canada Employment Insurance Commission v TB*, 2019 SST 823; *MH v Canada Employment Insurance Commission*, 2019 SST 1385.
[8] See paragraph 19 of the General Division decision.
[9] A letter from the Claimant's employer supports this statement: see page GD2-11.

[20] The General Division also noted that the answers on the Claimant's application form contradicted one another.[10] For example, her return to work date did not match the number of weeks of EI benefits that she was claiming.

[21] In fact, the Claimant's application form requests 15 weeks of maternity benefits and 48 weeks of parental benefits, so 63 weeks in all. However, her application form also shows that she planned to return to work in about a year.

There is no arguable case that the General Division failed to analyze the evidence in a meaningful way.

[22] The Commission now argues that the General Division failed to analyze the evidence in a meaningful way. Its argument is essentially this: If the General Division had considered the whole application form, it would not have found that the "How many weeks do you wish to claim?" question was misleading.

[23] In support of its argument, the Commission relies on two parts of the application form. First, the "How many weeks do you wish to claim?" question appears under the heading "Parental Information." And second, the following question, which appears earlier in the application, under the heading "Maternity Information":

> Do you want to receive parental benefits immediately after receiving maternity benefits?
>
> ⊙ Yes, I want to receive parental benefits immediately after my maternity benefits.
>
> ○ No, I only want to receive up to 15 weeks of maternity benefits.

[24] According to the Commission, these parts of the application highlight the difference between maternity and parental benefits. They also signalled to the Claimant that the "How many weeks do you wish to claim?" question was referring to parental benefits only.

[25] The Commission's argument has no reasonable chance of success.

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[10] See paragraphs 20 and 21 of the General Division decision. The Claimant's application form starts on page GD3-3.

[26] I accept that the General Division must analyze the evidence in a meaningful way.[11] However, the General Division does not need to mention every piece of evidence that it has in front of it.[12] Instead, I can presume that the General Division considered all the evidence.

[27] In its decision, the General Division clearly considered the contents of the application form. Plus, the parts of the application form that that the Commission is highlighting are not nearly so illuminating or important that the General Division needed to mention them. In fact, the Commission did not highlight these parts of the application form in its arguments to the General Division.[13]

[28] The Commission has not explained, nor can I see, how these parts of the application form would have helped the Claimant. They clearly do not signal that, when answering the "How many weeks do you wish to claim?" question, an applicant needs to deduct 15 weeks of maternity benefits from their answer.

There is no arguable case that the General Division failed to impose relevant legal obligations on the Claimant.

[29] The Commission's second argument relies on the Federal Court's recent decision in *Karval v Canada (Attorney General)*.[14]

[30] Specifically, the Commission argues that the General Division overlooked the Claimant's evidence that she was confused when completing her application form and didn't really understand the difference between the standard and extended options. According to *Karval*, applicants need to seek information about the benefits they're applying for and ask the Commission questions if there are things they don't understand.

[31] However, the *Karval* decision clearly doesn't apply in this case.

[32] Ms. Karval might have been confused during the application process, but all the answers on her application form pointed to the extended option. Plus, even after the amount of her EI

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[11] *Oberde Bellefleur v Canada (Attorney General)*, 2008 FCA 13.
[12] See the Federal Court of Appeal's decision in *Simpson v Canada (Attorney General)*, 2012 FCA 82 at para 10.
[13] The Commission's written arguments to the General Division are in document GD4. The Commission did not participate in the General Division hearing.
[14] *Karval v Canada (Attorney General)*, 2021 FC 395.

benefits went down, she waited six months before contacting the Commission and asking to switch options. So, a change in circumstances was likely motivating Ms. Karval's request to change options. However, the law clearly prohibits this.

[33] In *Karval*, the Court was careful to distinguish between people who lack the knowledge to answer clear questions and those who are misled by relying on incorrect information that the Commission provides.[15]

[34] Here, the General Division found that the Commission's application form misled the Claimant: the lack of clear and complete information prevented the Claimant from making a valid choice.[16]

[35] Plus, in this case, the Claimant's application form did not reveal a clear choice between the standard and extended options. This allowed the General Division to consider the evidence and determine which option the Claimant had, in fact, chosen.

[36] These important factual differences mean that the *Karval* decision does not apply in this case.

This is no arguable case that the General Division failed to apply section 23(1.2) of the EI Act.

[37] The General Division decision acknowledges the legal effect of section 23(1.2) of the EI Act.[17]

[38] However, the General Division decided to follow a series of Tribunal decisions that say that, in some situations, an applicant's choice is invalid from the beginning. In other words, the Claimant never validly chose between the standard and extended options. This is different from allowing the Claimant to change options.

[15] See paragraph 14 of the *Karval* decision.
[16] See paragraph 21 of the General Division decision.
[17] See paragraph 9 of the General Division decision.

[39] The General Division arrived at its conclusion because the Commission's application form misled the Claimant, preventing her from making a valid choice between the standard and extended options.

[40] Importantly, the Commission's arguments generally overlook the General Division's finding that the Claimant's application form contained conflicting answers. Since the Claimant's choice between the standard and extended options was unclear, there are two reasons why her choice was invalid. So, the General Division had to look at all the evidence and decide which option the Claimant had chosen.

There is no arguable case that the General Division ignored or misinterpreted the evidence.

[41] Aside from the Commission's arguments, I have reviewed the file and examined the General Division decision.[18]

[42] The evidence supports the General Division's decision. I did not find evidence that the General Division might have ignored or misinterpreted. Finally, the Commission has not argued that the General Division acted unfairly in any way.

CONCLUSION

[43] I have concluded that the Commission's appeal has no reasonable chance of success. I have no choice, then, but to refuse permission to appeal.

Jude Samson
Member, Appeal Division

REPRESENTATIVE:	R. Paquette, for the Applicant

[18] The Federal Court has said that I must do this in decisions like *Griffin v Canada (Attorney General)*, 2016 FC 874 and *Karadeolian v Canada (Attorney General)*, 2016 FC 615.