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

Citation: *Canada Employment Insurance Commission v MC*, 2021 SST 342

Tribunal File Number: AD-21-105

BETWEEN:

Canada Employment Insurance Commission

Appellant (Commission)

and

M. C.

Respondent (Claimant)

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Jude Samson

DATE OF DECISION: July 15, 2021

Canada

DECISION AND REASONS

DECISION

[1] The Canada Employment Insurance Commission (Commission)[1] is appealing the General Division decision in this file. In that decision, the General Division found that M. C. (Claimant) had chosen to receive Employment Insurance (EI) parental benefits under the **standard** option.

[2] I am allowing the Commission's appeal. I am also giving the decision the General Division should have given: Based on all the evidence, the Claimant validly chose to receive parental benefits under the **extended** option.

OVERVIEW

[3] The Claimant established a claim for EI maternity benefits, followed by parental benefits. On her application for parental benefits, she had to choose between two options: standard and extended.[2]

[4] 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, and the extended option provides EI benefits for about 18 months.

[5] On her application, the Claimant selected the extended option. However, another answer on her application was more in line with the standard option. The Commission paid the Claimant parental benefits at the lower, extended option rate.

[6] Later, the Claimant asked the Commission to switch to 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 some parental benefits.

[7] The Claimant appealed the Commission's decision to the Tribunal's General Division and won. Although the Claimant had intentionally selected the extended option on her

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[1] The Commission normally operates through Service Canada.
[2] Section 23(1.1) of the *Employment Insurance Act* (EI Act) calls this choice an "election."

application form, the General Division found that the Claimant had chosen the standard option because it better matched with her intentions.

[8] The Commission is now appealing the General Division decision to the Tribunal's Appeal Division.[3] It argues that the General Division based its decision on an important error about the facts of the case. It also argues that the General Division decision contains legal errors.

[9] I am allowing the Commission's appeal. The General Division based its decision on an important error about the facts of the case. I have also decided to give the decision the General Division should have given. Although her application form contains contradictions, I find that the Claimant validly chose the extended option. And, by the time she contacted the Commission about changing options, it was already too late for her to do so.

ISSUES

[10] My decision focuses on these issues:

a) Did the General Division base its decision on an important error of fact when it found that the Claimant had chosen to receive standard parental benefits?[4]

b) If so, what is the best way to fix the General Division's error?

c) Is the Claimant entitled to the standard option?

ANALYSIS

The General Division based its decision on an important error about the facts of the case

[11] When applying for parental benefits, the Claimant had to choose between the standard and extended options.[5] She could not change options after the Commission paid parental benefits to either parent after the birth of their child.[6]

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[3] I already gave the Commission leave (or permission) to appeal.
[4] The precise error (or ground of appeal) is described under section 58(1)(c) of the *Department of Employment and Social Development Act* (DESD Act).
[5] Section 23(1.1) of the EI Act sets out this requirement.
[6] Section 23(1.2) of the EI Act describes when a parent's choice becomes irrevocable (or final).

[12] There was a lot of confusion around the time of the Claimant's requests for EI benefits.

[13] The Claimant had a difficult pregnancy. She spent many weeks in hospital before her child's birth in June 2020. During her hospitalization, she applied for EI sickness benefits, but the Commission paid her the EI Emergency Response Benefit instead. The Commission then had trouble switching her to maternity and parental benefits. This resulted in an overpayment of emergency response benefits.

[14] The Claimant seems to have kept in touch with her employer throughout this time. It appears that her employer was trying to be helpful, flexible, and accommodating.

[15] The Claimant hoped to take a year's leave from work following the birth of her child. However, given the complications during her pregnancy, her employer said that it would be better to mark her down as returning to work in December 2021, after a leave of 18 months. The Claimant's employer said it was easier to change from a longer leave to a shorter one than the other way around.

[16] When it came time to apply for maternity and parental benefits, the Claimant was under the impression that her application for EI benefits should match her employer's records: in other words, that she would be on leave for 18 months.

[17] It appears that the Claimant's employer might have given her this information and told her what to put on her application. The Claimant does not seem to point to the Commission as an important source of misinformation.

[18] The General Division then made these findings in paragraph 13 of its decision:

> I accept as fact the Claimant's testimony that she intended to take the standard maternity leave, but her employer set her return date at December 2021 in case she had complications as she had with her pregnancy. I find that the Claimant chose the extended option to be in line with her employer setting a return date beyond 12 months. However, I find that her intention from the time she first spoke to her employer, and when she completed her application for benefits, was to receive standard parental benefits. I find that the Claimant's selection of 18 weeks of parental benefits is more consistent with payment of standard than extended parental benefits.

[19] These findings led the General Division to conclude that the Claimant had chosen the standard option.[7]

[20] The General Division's conclusions are perverse, contradictory, and must be set aside.

[21] Although the Claimant had to choose one option or the other, the General Division seems to have found that the Claimant chose both:

- She intentionally chose the extended option because she felt that her application form needed to match her employer's records.
- She chose the standard option because it best matched her tentative plan of taking a year's leave.

[22] In the end, the General Division concluded that the Claimant was entitled to benefits under the standard option because it best matched the amount of time that she had hoped to be away from work.

[23] It was perverse for the General Division to have allowed the Claimant's hope of taking a year's leave override the fact that she intentionally chose the extended option when completing her application.

[24] In addition, the evidence contradicts the General Division's conclusions in important ways.

[25] First, the evidence in this case does not support a connection between the Claimant's chosen option and the amount of time she hoped to be away from work. The Claimant told the General Division that she had hoped to take a year's leave. But, that is not what she had in mind when applying for EI benefits. Instead, she completed her application thinking that it needed to match her employer's records, which showed that she would be away from work for 18 months.[8]

[26] Second, the evidence does not support the General Division's conclusion that the Claimant had always intended to receive standard parental benefits, including when she applied

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[7] See paragraph 14 of the General Division decision.
[8] This is from the audio recording of the General Division hearing starting at approximately 0:13:30.

for EI benefits and when she first spoke to her employer. That is not what she told the General Division: She said that she was trying to keep her options open and did not make a firm decision until later.[9]

[27] Even though the Claimant applied for EI benefits in July 2020, conversations between the Commission and the Claimant in December 2020 show that the Claimant still had not finally decided whether she would be away from work for 12 or 18 months.[10] Even at that time, the Claimant's employer was expecting her back to work in December 2021. Although an earlier return to work remained possible, the Claimant admitted that she would need to discuss it with her employer.

[28] In fact, the Claimant's Notice of Appeal to the General Division, which she filed late, is the first document showing that the Claimant had firmly decided that she wanted to receive standard benefits and to take a year's leave.

[29] Significantly, the General Division did not mention any of this documentary evidence when finding that the Claimant had always intended to take a year's leave.

[30] And third, the General Division overlooked evidence from the Claimant showing that, when she claimed **18 weeks** of benefits, she likely thought she was claiming **18 months** of benefits. Even at the General Division hearing, the Claimant sometimes confused weeks and months.

[31] The Claimant told the General Division that she had chosen 18 weeks because that was the maximum amount of leave her employer would allow.[11] She also said that it was the number her employer had told her to put on her form.[12]

[32] The Claimant was clearly confusing 18 weeks with 18 months. Her employer was expecting her to be away from work for up to 18 months, not 18 weeks. Plus, at no time did the

[9] This is from the audio recording of the General Division hearing starting at approximately 0:13:30.
[10] See the telephone conversation records between the Claimant and the Commission on pages GD3-21 to 25.
[11] This is from the audio recording of the General Division hearing at approximately 0:13:30.
[12] See paragraph 9 of the General Division decision.

Claimant tell the General Division that she had thought about taking so little time away from work. The Claimant had always planned to take at least a year's leave.

[33] In other words, the General Division made an error of fact by saying that the Claimant's choice of 18 weeks reflected her intention of choosing the standard option. The General Division should not have come to that conclusion without also considering whether the Claimant had actually thought she was selecting 18 months, which reflects an intention of choosing the extended option.

[34] For all these reasons, the General Division's conclusion that the Claimant had chosen to receive standard parental benefits is perverse and contrary to the evidence. It must be set aside.

I will fix the General Division's error by giving the decision that it should have given

[35] At the hearing before me, the parties agreed that they had been fully able to present their case in front of the General Division. They also agreed that, if the General Division had made an error, then I should give the decision the General Division should have given.[13]

[36] I agree. This means that I can decide whether the Claimant chose the standard or extended option when applying for parental benefits.

The Claimant validly chose the extended option

Guiding principles

[37] The Tribunal is receiving a large number of cases like this one. They signal how the application process for this important program can be confusing and difficult to navigate. This is especially true since many people are completing this application at a vulnerable time.

[38] So, before explaining my decision further, it is worth setting out a few guiding principles that I have distilled from some of the Tribunal's past decisions.

[13] Sections 59(1) and 64(1) of the DESD Act give me the power to fix the General Division's errors in this way. Also, see *Nelson v Canada (Attorney General)*, 2019 FCA 222 at paras 16 to 18.

[39] In cases like this one, the Tribunal focuses on two questions:

a) Did the applicant make a clear choice between the standard and extended options?

b) Should the applicant's choice be considered invalid because the Commission misled them into choosing the wrong option?

[40] The first question focuses on what an applicant signalled to the Commission on their application form. It is not about the option that would have best met the applicant's wants, needs, or goals. The EI system is application-driven, and it is important that the Commission be able to act based on an applicant's clear choice.[14]

[41] However, an applicant's choice has important consequences, and the law does not specify precisely how the applicant has to make it. Although the context is different, some court decisions have discussed the legal effect of choosing between two competing options, and they have stressed how the person's choice must be very clear.[15]

[42] In addition to the tick boxes used to select between the standard and extended options, Tribunal decisions have highlighted other answers on the application form that can shed light on the applicant's choice:

- the number of weeks of parental benefits that the applicant and the child's other parent are claiming; and

- the applicant's return to work date.

[14] See *Canada Employment Insurance Commission v MD*, 2020 SST 1055 at para 35.
[15] Cases such as *Semenchuck v Ruhr*, 1996 CanLII 7148 (SK QB) have emphasized the need for a choice to be clear and unequivocal.

[43] In some cases, the Tribunal has said that the applicant's answers show an obvious conflict. For example, Tribunal decisions have found that an application form showed no clear choice between the standard and extended options in the following cases:

- The applicant selected the extended option, but the number of weeks they were claiming fell within the standard option.[16]
- The applicant selected the extended option and claimed more than 35 weeks of benefits, but they said that they planned to return to work in a year.[17]
- The applicant selected the standard option, but the number of weeks they were claiming was beyond the number of weeks that the law allowed.[18]

[44] When the application form shows no clear choice between the standard and extended options, the Tribunal looks at all the relevant circumstances of the case to determine which option the applicant is most likely to have chosen.

[45] The second question recognizes that, even if the applicant did make a clear choice, their choice can become invalid if the Commission misled them into making the wrong choice. For example, this situation was recognized in the following types of cases:

- The application form misled the applicant into thinking that they could receive up to 35 weeks of standard parental benefits. However, the standard option allowed the applicant to claim only a few weeks of benefits because they applied close to the child's first birthday.[19]

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[16] See *Canada Employment Insurance Commission v TB*, 2019 SST 823.
[17] It is common in these cases for applicants not to recognize the difference between maternity and parental benefits. Because they plan to take a year's leave, the standard option does not seem to be enough, so they select the extended option and say that they are claiming 52 weeks of benefits. See, for example, *IR v Canada Employment Insurance Commission*, 2020 SST 865; *PL v Canada Employment Insurance Commission*, 2020 SST 276; and *MH v Canada Employment Insurance Commission*, 2019 SST 1385.
[18] See *SD v Canada Employment Insurance Commission*, 2020 SST 265.
[19] Section 23(2) of the EI Act sets out the "parental benefits window." See, for example, *ML v Canada Employment Insurance Commission*, 2020 SST 255.

- The Commission, through an agent or information on its website, provided the applicant with wrong information (or failed to provide critical information), which misled the applicant into making the wrong choice.[20]

- The incompleteness, imprecision, or ambiguity of the application form misled the applicant into choosing an option that was contrary to their intention and purpose.[21]

[46] These cases do not offend the rule that prevents applicants from changing options once they have started to receive parental benefits.[22] In the first situation, no clear choice was ever made. And, in the second situation, the applicant's choice became invalid because they relied on misleading information from the Commission.

[47] Importantly, the Tribunal must decide whether the Commission's information was misleading, rather than just unclear or confusing. The Federal Court has recently said that applicants should inform themselves about the benefits they are applying for and ask the Commission questions if there is anything they do not understand.[23]

[48] So, it is only when applicants rely on misleading information from the Commission that their choice can be considered invalid.

[49] I recognize that there is a recent Appeal Division decision that says that, with the right evidence, an applicant's intentions can trump the clear choice they signalled on their application form.[24] This approach is a bit different from the ones I summarized above. And, it remains to be seen whether the Tribunal will use it in other decisions. However, I do not need to consider the issue as part of my decision in this case.

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[20] See *Canada Employment Insurance Commission v LV*, 2021 SST 98; and *KK v Canada Employment Insurance Commission*, (May 5, 2021) AD-21-16.
[21] See *VV v Canada Employment Insurance Commission*, 2020 SST 274.
[22] Section 23(1.2) of the EI Act explains when an applicant's choice becomes irrevocable.
[23] See paragraph 14 of the Federal Court's decision in *Karval v Canada (Attorney General)*, 2021 FC 395.
[24] See *Canada Employment Insurance Commission v JH* (June 22, 2021), AD-21-86.

Applying the guiding principles to this case

[50] In this case, the Claimant provided the following answers on her application form, which created an obvious conflict:

- She selected the extended option.
- She said she was claiming just 18 weeks of benefits, which is well within the standard option.

[51] As a result, the Claimant's application showed no clear choice between the standard and extended options.

[52] So, I have to look at all the circumstances of the Claimant's case and decide what option she did, in fact, choose.

[53] The Claimant explained to the General Division that, based on conversations with her employer, she had felt that maintaining maximum flexibility required her to indicate that she was taking 18 months leave (even if she hoped to return to work in 12 months). She also felt that her application for maternity and parental benefits needed to match her employer's records and that both could be changed later.

[54] Although the Claimant's application form requests 18 weeks of parental benefits, it is likely that she was confused and thought she was claiming 18 months of benefits. From her evidence, it seems clear that she was trying to take the maximum amount of leave allowed by her employer and by the program: 18 months. That is what her employer had told her to do.

[55] Plus, the Claimant never told the General Division that she had thought about taking less than a year's leave. On the contrary, she spent time deciding whether to take 12 or 18 months away from work. In fact, in December 2020, the Claimant seemed satisfied to increase her claim for parental benefits from 18 to 61 weeks.[25]

[56] For these reasons, I find that the Claimant intentionally chose the extended option.

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[25] See page GD3-24.

[57] Now, the second question: Did the Commission mislead the Claimant into choosing the wrong option? No.

[58] At the Appeal Division hearing, the Claimant told me about different ways in which she had found the application form to be confusing. This was new evidence that I cannot consider. My powers are limited to giving the decision that the General Division should have given.[26] This means that I can consider only the information that the General Division had in front of it.

[59] During the General Division hearing, the Claimant repeatedly described how confused she was when applying for EI benefits. As a result, she should have done more to investigate her entitlement to maternity and parental benefits and, if she had any remaining questions, she should have asked them to the Commission.[27]

[60] In this case, the key sources of confusion appear to concern the Claimant's understanding:

- about how to complete the application form, based on advice from her employer;
- that she needed to request benefits for the maximum length of time (18 months); and
- about how she could change the length of her leave at any time.

[61] The Claimant has not pointed to any misinformation from the Commission that caused her to be confused about these things. However, the application form does say this: "Once parental benefits have been paid on the claim, the choice between standard and extended parental benefits is irrevocable."[28]

[62] So, it appears that the Claimant had not finally decided on the length of her leave until after December 2020. But, by then, she had already been receiving parental benefits at the lower rate since October, so it was already too late to change options.

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[26] Section 59(1) of the DESD Act describes my powers in this way.
[27] See *Karval v Canada (Attorney General)*, 2021 FC 395.
[28] This part of the application form is on page GD3-7.

CONCLUSION

[63] I am allowing the Commission's appeal. The General Division based its decision on an important error about the facts of this case. As a result, I decided to give the decision the General Division should have given.

[64] The Claimant's application form does not show a clear choice between the standard and extended options. However, based on all the circumstances of her case, I find that she chose the extended option. The Commission did not provide any misleading information that would invalidate her choice.

Jude Samson
Member, Appeal Division

HEARD ON:	June 23, 2021
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	L. LaViolette, Representative for the Appellant M. C., Respondent