Citation: *Canada Employment Insurance Commission v DT*, 2021 SST 351

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	Canada Employment Insurance Commission
Respondent:	D. T.

Decision under appeal:	General Division decision dated May 28, 2021 GE-21-773

Tribunal member:	Stephen Bergen
Type of hearing:	Teleconference
Hearing date:	July 13, 2021
Hearing participants:	Louise LaViolette Appellant's representative D. T. Respondent
Decision date:	**July 20, 2021**
File number:	AD-21-195

Decision

[1] I am allowing the appeal. The General Division made an error in how it found that the Claimant elected standard parental benefits. I am referring the matter to the General Division for reconsideration.

Overview

[2] The Respondent, D. T. (Claimant) applied for maternity and parental benefits two days after the birth of her child. When she completed the application form, she chose the extended benefits and selected, or accepted, 61 weeks of benefits from a drop-down list. On May 3, 2021, the Claimant read an email notice from the Appellant, the Canada Employment Insurance Commission (Commission). The notice informed her that she had been switched from maternity benefits to the reduced extended parental benefit. She immediately contacted the Commission, which told her that she had elected the extended parental benefit option, and that she could not change her election. The Claimant asked the Commission to reconsider but the Commission would not change its decision.

[3] The Claimant appealed to the General Division of the Social Security Tribunal, which allowed her appeal. The General Division found that the Claimant only wanted to receive benefits for a one-year leave. It also found that she had not understood the meaning of the extended benefit, and that she actually intended to elect standard benefits. The Commission is now appealing the General Division decision to the Appeal Division.

Preliminary Matters

[4] The Claimant submitted some print outs or screen shots of her MyService Canada Account and of EI deposits to her account.[1] She had not presented this same evidence to the General Division. The Appeal Division cannot consider new evidence

[1] AD9.

that the General Division was not able to review, so I will not be considering it in this appeal.[2]

What grounds can I consider for this appeal?

[5] "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:

a) The General Division hearing process was not fair in some way.

b) 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.

c) The General Division based its decision on an important error of fact.

d) The General Division made an error of law when making its decision.

Issues

[6] The issues in this appeal are

1. Did the General Division make an error of fact by ignoring or failing to analyze the explanations and instructions included with the application for benefits?

2. Did the General Division make an error of fact when it found that the Claimant did not understand the extended benefit option?

3. Did the General Division make an error of fact by ignoring or failing to analyze the Claimant's selection of 61 weeks of benefits?

4. Did the General Division make an error of law when it considered the Claimant's intention to decide that she had not elected the standard parental benefit?

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[2] *Hideq v. Canada (Attorney General), 2017 FC 439, Parchment v. Canada (Attorney General), 2017 FC 354.*

Analysis

[7] 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.[3] *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.[4]

[8] According to the EI Act, a claimant cannot change his or her election to ask for a different type of benefit after the Commission has paid the claimant any of the parental benefits. The claimant's election is said to be, "irrevocable."[5]

Issue 1: Should the General Division have considered the explanations and instructions found in the application for benefits?

[9] The Commission argued that the General Division ignored the explanations and instructions included with the application for benefits. This information identifies the two parental options. It states that the standard parental rate may be paid for up to 35 weeks at the usual benefit rate of 55% of the claimant's weekly earnings. It also states that the extended parental benefit may be paid for up to 61 weeks but at the reduced rate of 33%.[6]

[10] The General Division partly based its decision on its finding that the Claimant misunderstood the extended benefit option. This finding relied on the Claimant's own evidence that she had a baby only two days earlier and that she wasn't "herself". The Claimant told the General Division that she had no idea what she was doing and that she had not known what she was clicking. However, she did not say whether she read or understood the information in the application form. There was no evidence that the

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[3] *Employment Insurance Act* (EI Act), section 23(1.1).
[4] EI Act, section 12(3)(b) and section 14(1).
[5] EI Act, section 23(1.2).
[6] GD3-9,10.

Claimant paid any attention to the manner in which the application form explained the benefits.

[11] To find a mistake of fact to be an error, I would have to find that the mistake was one on which the General Division based its decision. The General Division noted that the Claimant did not understand the extended benefit. However, the General Division decision did not find that the Claimant did not understand the application form and it did not rely on the Claimant's understanding of the explanations in the application form. Therefore, it was not an error for the General Division to have failed to review the instructions and explanations included with the application form.

[12] The General Division did not make an important error of fact by ignoring the substance of the explanations or instructions included with the application form.

Issue 2: Did the General Division ignore or misunderstand evidence about the Claimant's understanding of the extended parental benefit?

[13] According to the General Division, the Claimant stated that she did not understand what it meant to select the "extended benefit" option because she had given birth so recently. This not accurate. The Claimant did not clearly state that she did not understand the extended benefit. She said she did not know what she was doing.

[14] Even so, it was reasonable for the General Division to infer from the Claimant's evidence that she had not understood the benefit option that she selected.

[15] However, the General Division made an important error of fact by omitting to consider or analyze the Claimant's efforts to educate herself as to her options.

[16] The Claimant may not have understood the benefit options and the benefit that she was selecting. However, as I have already noted, there was no evidence before the General Division that the Claimant reviewed the information or instructions included with the application form. There was no evidence that she made any other effort to understand the benefit options available through the election.

[17] The courts have not considered specifically whether claimants, who have not informed themselves about their parental benefit choice, may be relieved of the consequences of an unintentional or mistaken selection of parental benefits. However, the courts have stated that ignorance of the law is not an excuse for claimants who have failed to meet *other* requirements of the Employment Insurance Act.[7]

[18] The General Division should have considered that there was no evidence of the Claimant taking steps to educate herself about her benefit options. The lack of evidence is a relevant consideration, from which the General Division might have drawn an adverse inference (by this I mean it could have concluded that she did not make any efforts).

Issue 3: Did the General Division fail to analyze the Claimant's selection of 61 weeks of benefits?

[19] At the General Division, the Claimant supported her argument that she did not mean to elect extended benefits with testimony that she had never meant to take more than a year of leave to have her baby. She also supplied a Record of Employment, in which her employer indicated that he expected her to return on January 12, 2022, one year after the January 11, 2021, birth of her child.

[20] The General Division found that the Claimant made a mistake in choosing the 61 weeks because she did not fully understand the extended benefit. The Commission argued that the General Division did not explain how it reached this conclusion. It noted that the Claimant chose the extended benefit, but then separately chose 61 weeks of benefits. 61 weeks of benefits is more than the one year of benefits that the Claimant said she always meant to choose.

[21] However, it is the General Division's job to assess the Claimant's evidence. The Claimant testified that she did not know what she was "clicking" when she selected 61 weeks, but that she had never intended to take more than a year of leave. The General

[7] *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.

Division said that it believed the Claimant when she said that she made a mistake in selecting 61 weeks. It accepted that she made a simple mistake and that she had intended to take one-year leave.

[22] In support of its finding, the General Division stated that the Claimant had been consistent in asserting that she had never wanted to take more than 12 months' leave. It observed that the Claimant's stated intention was consistent with the return-to-work date that her employer had written when it prepared her ROE.

[23] The General Division also recognized that the Claimant had only given birth two days earlier. It stated that she might not have been able to focus on completing and understanding her online application. It is apparent that the General Division accepted that the Claimant's state of mind had something to do with her "simple mistake" of selecting a benefit that she had not wanted or intended to receive.

[24] The General Division might have done a better job of exploring the mechanics of how the Claimant came to make the mistake on the form, but I do not find the General Division's reasons are so inadequate that they amount to an error of law.

Issue 4: Was the Claimant's intention relevant to her Election?

[25] The Commission does not believe that the Claimant's intention is relevant to the question of which parental benefit she elected. It argued that application form drives all applications for parental Employment Insurance benefits, so how that form is competed is key. It suggests that the election is nothing more than the Claimant's selection on the form.

[26] The Commission argued that the General Division made an error of law or of jurisdiction because the law does not allow a claimant to revoke the election on the form after the first parental benefit has been paid. It submits that the General Division made an error when it disregarded her choice on the application form and instead relied on what the Claimant said she intended to elect.

[27] I do not accept that the General Division made an error of law or of jurisdiction by considering the Claimant's intention.

[28] The General Division cannot apply the law that says an election is irrevocable unless it determines that the claimant made the election in the first place. The General Division's ability to engage in this kind of fact-finding is found in section 64(1) of the DESD Act. The General Division is authorized to "decide any question of law or fact that is necessary for the disposition of any application made under [the DESD Act]."

[29] The Commission is really arguing that the "election" is nothing more than action of selecting a button on the online application form. That would mean that the application form itself is the only evidence that could possibly be relevant when examining the claimant's election.

[30] I disagree. The EI Act does not define "election" for the purpose of section 23(1.2), or state that the option selected on the application form must be conclusive of the claimant's election. The Appeal Division has issued a number of decisions in which it has confirmed that the claimant's intention is a relevant consideration.[8] I agree with that approach. The circumstances in this case give me no reason to ignore those decisions, or to disregard the Claimant's intention at the time when she completed her application.

[31] I accept that a claimant's election may be presumed from the manner in which the claimant completes the application form. However, the General Division may still find that the benefit option selected on the form does not represent a claimant's election after a review of all the evidence. Evidence of the claimant's intention is relevant and may properly be considered by the General Division.

[32] The General Division did not make an error of law by evaluating the Claimant's intention and finding that she had not elected the extended parental benefit based on her intentions at the time.

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[8] *ML v Canada Employment Insurance Commission*, 2020 SST 255; *Canada Employment Insurance Commission* v *LV*, 2021 SST 98;

Summary

[33] 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

[34] I have the authority to change the General Division decision or to 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.[9]

[35] The Commission suggested that I have all the evidence I need to make the decision and that I should make the decision. The Claimant asked that I dismiss the appeal. She did not take a clear position on whether I should make the decision or send it back to the General Division for a reconsideration.

[36] I have decided to refer the matter back to the General Division for reconsideration. I do not accept that the Claimant has had a fair opportunity to present evidence on all the issues that need to be decided. In particular, she has not had a fair opportunity to present evidence on whether she was paid the parental benefit before she tried to change or clarify her election. The Claimant attempted to submit evidence to the Appeal Division of when she received her first parental benefit payment.

[37] In her appeal to the Appeal Division, the Claimant maintained that the General Division had not made a mistake in finding that she had elected the standard benefit based on her intention at the time. However, she also argued that she should have been able to revoke her election in any event. She said that she called the Commission to say that there had been a mistake with her election **before** she received the first parental benefit. She believes that her election was still revocable when she told the Commission she did not want the extended parental benefits.

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[9] See the Appeal Division authority under section 59(1) and section 64 of the DESD Act.

[38] The Commission did not appear at the General Division hearing, and the Claimant relied on the General Division member to help her to understand the issues on which she should present evidence. Her testimony was focused on her intention at the time she completed the application. The Claimant's appeal was successful. The General Division accepted the Claimant's evidence and found that she had intended to elect standard benefits.

[39] In response to the Claimant's assertion that she asked to change her parental benefit before she was paid, the Commission argued that the Claimant was "paid" at the time that the cheque is recorded as "issued" in its system. It stated that it does not matter when the Claimant received the first parental benefit or when it was deposited to her account.

[40] I asked the Commission if it could refer me to any court decision that supported its view that "paid," meant, "Issued according to its system" and not received by the person to whom the benefit was supposed to be paid. The Commission representative stated that she was unaware of any decision that related to the payment of parental benefits specifically. She said that she believed the courts had interpreted "paid" in the context of other Employment Insurance benefits. However, she did not offer to provide any decisions to support her argument.

[41] I am returning the matter to the General Division to reconsider its decision. In my view, the question of what it means to be "paid" must be settled before the Claimant's election can be found to be irrevocable. If the Claimant must receive the benefit for it to be paid, then any evidence she has about when she was paid is important to the appeal decision. The Claimant has not had a fair opportunity to present this evidence.

Conclusion

[42] I am allowing the appeal. I am returning the matter to the General Division to reconsider its decision.

[43] Without limiting the issues which the General Division may consider, I direct the General Division to consider the meaning of "paid" for the purpose of section 23(1.2).

Depending on how the General Division interprets “paid,” it may be required to evaluate the Claimant’s new evidence to determine whether she asked to change her parental benefit before her choice was irrevocable.

Stephen Bergen
Member, Appeal Division