Citation: *Canada Employment Insurance Commission v AP*, 2021 SST 397

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	Canada Employment Insurance Commission
Representative:	Louise LaViolette
Respondent:	A. P.

Decision under appeal:	General Division decision dated May 25, 2021 GE-21-739

Tribunal member:	Janet Lew
Type of hearing:	Teleconference
Hearing date:	August 4, 2021
Hearing participant:	Appellant's representative
Decision date:	August 13, 2021
File number:	AD-21-180

Decision

[1] I am allowing the appeal. I am giving the decision that the General Division should have given. The Respondent A. P. (Claimant) elected to receive extended parental benefits. The election is irrevocable.

Overview

[2] The Appellant, Canada Employment Insurance Commission (Commission), is appealing the General Division decision. The General Division found that the Claimant elected to receive standard parental benefits instead of extended parental benefits.

[3] The Commission argues that the General Division made several legal and factual errors. The Commission requests that the appeal be allowed and that the Appeal Division give the decision that the General Division should have given, namely, that the Claimant had elected to receive extended parental benefits and that her election was irrevocable once parental benefits had been paid.

[4] The Claimant did not make any submissions.

[5] I find that the General Division made an important factual mistake about the length of time that the Claimant intended to be off work. The General Division based its decision that the Claimant intended and therefore elected to receive standard parental benefits on its mistaken finding that the Claimant intended to be off work for one year. The Claimant clearly testified that she had intended to be off work for "about 14 months."[1]

[6] I find that the evidence establishes that the Claimant elected to receive extended parental benefits. I find also that, once benefits were paid, the election was irrevocable.

Preliminary matters – Service of General Division decision

[7] I am satisfied that the Social Security Tribunal served a copy of the General Division decision on the Claimant. The Tribunal also contacted the Claimant by email

[1] At approximately 7:45 to 8:14 and 8:24 to 8:34 of the audio recording of the General Division hearing (VLC media player).

and left telephone messages with her to remind her about the hearing. As a result, I am satisfied that the hearing can proceed in the Claimant's absence.

Issues

[8] The issues in this appeal are:

a) Did the General Division fail to consider the Claimant's evidence that she intended to take upwards of 14 months of leave?

b) Did the General Division fail to analyze the evidence in a meaningful way?

c) Did the General Division fail to apply section 23(1.2) of the *Employment Insurance Act*?

d) Did the General Division fail to apply the case of *Karval*?[2]

e) If the answer is "yes" to any of the above questions, what is the appropriate remedy? In other words, how should I fix the error(s)?

Analysis

[9] Section 58(1) of the *Department of Employment and Social Development Act* lets the Appeal Division intervene in decisions of the General Division. But, this only happens in a limited set of circumstances. The section does not give the Appeal Division any power to conduct any reassessments.

[10] The Appeal Division may intervene if there are jurisdictional, procedural, legal, or factual errors.[3]

a) Factual background

[11] The Claimant chose extended parental benefits on her application for maternity and parental benefits. She also asked for 60 weeks of benefits. She contacted the

[2] See *Karval v Canada (Attorney General of Canada),* 2021 FC 395.
[3] Under section 58(1) of the *Department of Employment and Social Development Act,* the factual error is one upon which the General Division based its decision, and the error was made in a perverse or capricious manner or without regard for the material before it.

Commission after receiving parental benefits. She asked to change her election from extended to the standard option. She claimed that she had made a mistake and had intended to choose the standard option, as she had not planned on being out of work for that long.

[12] The Commission informed the Claimant that she could not change her election because parental benefits had already been paid. The Commission maintained this position on reconsideration, so the Claimant appealed to the General Division.

[13] The General Division allowed the Claimant's appeal. It found that the Claimant had made a mistake when she completed her application. It found that she had intended to elect standard parental benefits as she wanted about a year off work. The General Division found that the Claimant was confused when she made her election.

[14] The Commission argues that the General Division made several legal and factual errors under section 58(1) of the DESDA.

b) Did the General Division fail to consider the Claimant's evidence that she intended to take upwards of 14 months of leave?

[15] The Commission argues that the General Division failed to consider the Claimant's evidence that she did not have a fixed date for returning to work and that she intended to take upwards of 14 months of leave from work. The Commission argues that, if the General Division had considered this evidence, it would have necessarily concluded that being off work for up to 14 months was consistent with electing to receive extended parental benefits. And, the Commission argues, the General Division would have had no choice but to conclude that the Claimant had elected to receive extended parental benefits.

[16] The Claimant worked two jobs. At the General Division hearing, the Claimant testified that she intended to take "about 14 months" [4] off from work. She had discussed

[4] At approximately 7:45 to 8:14 and 8:24 to 8:34 of the audio recording of the General Division hearing (VLC media player).

this with her employers and they agreed that she would be off work for this length of time.

[17] The Claimant's employers filled out records of employment that showed they did not know when the Claimant would be returning to work.[5] Similarly, in her Employment Insurance application form, the Claimant stated that she did not know when she would be returning to work.[6]

[18] The General Division also asked the Claimant if she had decided when she would be returning to work. The Claimant testified that she was planning to go back to work, "at about December, the beginning of December."[7] This is about 13.5 months after she last worked in mid-October 2020.

[19] In other words, there was no evidence before the General Division to support any finding that the Claimant intended to return to work within a year.

[20] The General Division noted the Claimant's testimony. The General Division wrote, "At the hearing, [the Claimant] explained that both her employers knew that she intended to take from 12 to 14 months of maternity leave after the birth of her child, as she had discussed this with them."[8] (my emphasis)

[21] The General Division misstated the Claimant's testimony. The Claimant never testified that she intended to take 12 to 14 months off work, or that she told her employers this. The Claimant clearly testified that she intended to take "about 14 months" off work.

[22] The General Division also made a mistake when it concluded that the Claimant wanted "a year off to be with her newborn"[9] and "about a year of benefits."[10]

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[5] See records of employment, at GD3-17, GD3-19, and GD3-21.
[6] See Employment Insurance application form, at GD3-4.
[7] At approximately 14:30 to 14:48 of the audio recording of the General Division hearing.
[8] See General Division decision, at para. 7.
[9] See General Division decision, at para. 15.
[10] See General Division decision, at para. 18.

[23] The General Division defined “about a year of benefits” to be equivalent to the length of time a claimant can receive a combination of standard parental and maternity benefits. So, this would be upwards of 50 weeks, or close to 12 months, since a claimant can get 15 weeks of maternity benefits, followed by up to 35 weeks of standard parental benefits.

[24] The General Division’s conclusion that the Claimant wanted “a year off” and “about a year of benefits,” and that she likely intended to elect one year of maternity and parental benefits combined, does not accord with the evidence. As I noted above, the Claimant clearly testified that she intended to take “about 14 months” off from work.

[25] The General Division primarily based its decision on these factual errors. If the General Division had appreciated the Claimant’s evidence that she intended to take “about 14 months” from work, it likely would not have concluded that this timeframe was consistent with choosing standard parental benefits.

[26] In short, I find that the General Division made an important factual error upon which it based its decision. Given the nature of the error, it is unnecessary to address the balance of the Commission’s arguments.

Remedy

[27] How can I fix the General Division’s error? I have several choices.[11] I can substitute my own decision or I can refer the matter back to the General Division for reconsideration. If I substitute my own decision, I may make findings of fact.[12]

[28] The Commission is asking me to give the decision that the General Division should have given. This seems appropriate. There is a sufficient evidentiary record. The evidence is clear and straightforward, and the parties addressed each of the necessary issues to enable me to make a decision.

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[11] See Section 59 of the DESDA.
[12] See *Weatherley v Canada (Attorney General)*, 2021 FCA 158, at paras. 49 and 53, and *Nelson v Canada (Attorney General)*, 2019 FCA 222, at para. 17.

[29] The Claimant indicated that she wanted to receive parental benefits immediately after her maternity benefits, instead of receiving up to 15 weeks of maternity benefits only.[13]

[30] The application form explained the differences between the standard and extended parental benefit options, as follows:

> Standard option:
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> - The benefit rate is 55% of your weekly insurable earnings up to a maximum amount.
> - Up to 35 weeks of benefits payable to one parent.
> - If parental benefits are shared, up to a combined total of 40 weeks payable if the child was born or placed for the purpose of adoption.
>
> Extended option:
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> - The benefit rate is 33% of your weekly insurable earnings up to a maximum amount.
> - Up to 61 weeks of benefits payable to one parent.
> - If parental benefits are shared, up to a combined total of 69 weeks payable if the child was born or placed for the purpose of adoption.

[31] The Claimant selected the extended parental benefit option.[14]

[32] The Claimant intended to be off work for "about 14 months." She also asked for 60 weeks of benefits. Both of these factors are consistent with the extended parental option that the Claimant chose.

[33] The Claimant states that she made a mistake. She told the Commission that she thought she had applied for the 35 weeks of standard parental benefits.[15] When she

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[13] See Employment Insurance application, at GD3-8.
[14] See Employment Insurance application, at GD3-9.
[15] See telephone log notes dated February 23, 2021, at GD3-29. The Commission noted that it had erroneously created this "action item." It referred to the Supplementary Record of Claim, dated March 31, 2021.

asked the Commission to reconsider its decision denying her request to switch benefit types, she wrote, “made a mistake, meant to put standard parental, not planning on being out of work that long, was confused when applying for maternity leave.”[16]

[34] At the hearing before the General Division, the Claimant testified that she intended to be off work for “about 14 months.” She also testified that she was confused when she completed the application form. The process was unclear, as she had not previously applied for benefits. She read the form but did not understand it. She did not know that maternity and parental benefits were different and thought they were “combined together.”[17]

[35] The Claimant calculated that 15 weeks of maternity benefits and 35 weeks of standard parental benefits totalled 50 weeks of benefits. The Claimant had asked for 60 weeks of (parental) benefits in her application. The General Division did not question, and the Claimant did not offer to explain why she asked for 60 weeks of benefits, if she had truly intended to receive standard parental benefits from the outset.

[36] In a case called *Karval*, the Federal Court held that,

> … where a claimant like Ms. Karval is not misled but merely lacks the knowledge necessary to accurately answer unambiguous questions, no legal remedies are available. Fundamentally, it is the responsibility of a claimant to carefully read and attempt to understand their entitlement options and, if still in doubt, to ask the necessary questions. Ms. Karval deliberately selected the extended benefit option and, had she read the application, she would have understood that the parental payments would be reduced.[18]

[37] Much like *Karval*, if the Claimant had been confused and was left in doubt about her options, she had a duty to ask questions before making her selection. Unless official and incorrect information misled her, no legal remedies are available.

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[16] See Request for Reconsideration, filed April 13, 2021, at GD3-33 to GD3-34.
[17] At approximately 9:15 to 9:52 of the audio recording of the General Division hearing.
[18] See *Karval v Canada (Attorney General of Canada),* 2021 FC 395 at para. 14.

[38] Nothing in the evidence at the General Division supported the Claimant's assertions that she had intended to elect to receive standard parental benefits.

[39] The *Employment Insurance Act* does not let a claimant cancel or change her election once parental benefits have been paid.[19] This was also set out in the application form, which states, "Once parental benefits have been paid for the same child, the choice between standard and extended parental benefits is irrevocable."

[40] The evidence supports a finding that the Claimant elected to receive extended parental benefits. She cannot change or cancel her election since benefits have been paid.

Conclusion

[41] The appeal is allowed.

Janet Lew
Member, Appeal Division

[19] See section 23(1.2) of the *Employment Insurance Act*.