Citation: *Canada Employment Insurance Commission v MO*, 2021 SST 435

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	Canada Employment Insurance Commission (Commission)
Appellant's Representative:	R. Paquette
Respondent:	M. O. (Claimant)

Decision under appeal:	General Division decision dated March 12, 2021 (File number GE-21-350)

Tribunal member:	Jude Samson
Type of hearing:	Teleconference
Hearing date:	June 23, 2021
Hearing participants:	Appellant's representative Respondent
Decision date:	August 9, 2021
File number:	AD-21-104

Decision

[1] M. O. is the Claimant in this case. The General Division found that she had chosen to receive Employment Insurance (EI) parental benefits under the **standard** option, even though she had selected the **extended** option on her application form. The Canada Employment Insurance Commission (Commission)[1] is appealing that decision.

[2] For the reasons below, I am dismissing the Commission's appeal. The Claimant is entitled to receive parental benefits under the standard option.

Overview

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

[4] The standard option offers a higher rate of parental benefits, paid for up to 35 weeks. The extended option offers a lower 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] It has always been clear to the Claimant that she wanted to take a year's leave from work after the birth of her child. She also wanted to claim EI benefits throughout this time. However, the Commission says that the Claimant applied for 67 weeks of EI benefits: 15 weeks of maternity benefits, followed by 52 weeks of extended parental benefits.

[6] After the Claimant's maternity benefits ran out, the Commission paid her parental benefits at the lower, extended option rate. When the Claimant noticed the change in her bank account, she contacted the Commission and they explained the situation to her.

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

[7] So, the Claimant asked 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 it had already paid her some parental benefits.

[8] The Claimant appealed the Commission's decision to the Tribunal's General Division and won. Although the Claimant had selected the extended option on her application form, the General Division found that she had chosen the standard option because it better matched with her intentions of taking a year's leave.

[9] The Commission is now appealing the General Division decision to the Tribunal's Appeal Division.[3] It argues that the General Division went beyond its powers, that its decision contains errors of law, and that it based its decision on an important mistake about the facts of the case.

[10] I have decided that the General Division based its decision on an important mistake about the facts of the case. I have also decided to give the decision that the General Division should have given.

[11] The Claimant has shown that the Commission's application form misled her into answering the questions in the wrong way. As a result, the Claimant's choice between the standard and extended options is invalid. So, I am rescinding the Commission's decision to pay extended parental benefits to the Claimant. The Claimant needs to make that choice again. However, I understand from her appeals and the information in the record that she chooses the standard option.

[12] In the circumstances, I am dismissing the Commission's appeal.

[3] I already gave the Commission leave (or permission) to appeal.

Issues

[13] My decision focuses on these issues:

a) Can I consider new evidence?

b) Did the General Division base its decision on an important mistake about the facts of the case when it found that the Claimant had chosen to receive standard parental benefits?

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

d) Did the Claimant validly choose between the standard and extended options?

Analysis

[14] I can intervene in this case only if the General Division made a relevant error. So, I have to consider whether the General Division:[4]

- acted unfairly;
- failed to decide an issue that it should have decided, or decided an issue that it should not have decided;
- misinterpreted or misapplied the law; or
- based its decision on an important mistake about the facts of the case.

I have not considered any new evidence

[15] New evidence is evidence that the General Division did not have in front of it when it made its decision.

[16] The Appeal Division's limited role normally prevents me from considering new evidence.[5] The law says that I must focus on whether the General Division made any of

[4] The relevant errors, formally known as "grounds of appeal," are listed under section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).
[5] The Appeal Division's role is mostly defined by sections 58 and 59 of the DESD Act.

the relevant errors listed above. And that assessment is usually based on the materials that the General Division had in front of it. I cannot take a fresh look at the case and come to my own conclusions based on new and updated evidence.

[17] There are exceptions to the general rule against considering new evidence.[6] For example, I can consider new evidence that provides general background information only or that describes how the General Division might have acted unfairly.

[18] Here, both parties filed new evidence:

- The Claimant filed two letters from her employer.[7]
- The Commission wove new evidence into its submissions, including screenshots from its website.[8]

[19] None of this information falls within an exception to the general rule against considering new evidence, so I did not consider it.

[20] The Commission argued that I should consider its new evidence because it provides general background information only. I disagree.

[21] Since discovering the problem, the Claimant has consistently argued that the Commission's application for parental and maternity benefits is confusing.[9] Still, the Commission has never filed any evidence showing what clarifying information might have been available to the Claimant.

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[6] Although the context is somewhat different, the Appeal Division normally applies the exceptions to considering new evidence that the Federal Court of Appeal listed in *Sharma v Canada (Attorney General)*, 2018 FCA 48 at para 8 and that the Federal Court listed in *Greeley v Canada (Attorney General)*, 2019 FC 1493 at para 28.
[7] See pages AD4-2 and AD4-3.
[8] See, paragraphs 18, 19, and the second half of paragraph 20, including the related screenshots from the Commission's website (on pages AD3-7 to 10).
[9] The Claimant's reconsideration request starts on page GD3-23.

[22] Now, the Commission argues that this new evidence should be considered for the following reasons:[10]

- The screenshots attempt to contextualize the application process.
- The screenshots give the Tribunal a fuller picture of information about maternity and parental benefits that the Claimant could have accessed before completing her application form.
- The screenshot from a My Service Canada Account shows information that the Claimant could have accessed after completing her application. It is also relevant to whether the Claimant made a mistake when she elected to receive extended parental benefits.

[23] This is not general background information. This evidence is relevant to one of the Claimant's main arguments. It is evidence about what the Claimant knew, or could have known. It also suggests that the Claimant was careless by not looking at all this information.

[24] I also question the reliability of the Commission's new evidence. Websites change. Yet I do not know when these screenshots were taken and whether this is the exact information that was available to the Claimant at the relevant times.

[25] For example, the information in the My Service Canada Account screenshot does not belong to the Claimant.[11] This screenshot seems to have been taken in March 2021. The Claimant submitted her application for benefits in September 2020.

[26] Finally, the Commission could have easily provided this information to the General Division, but it chose not do so.

[27] For all these reasons, I did not consider any of the new evidence filed in this appeal.

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[10] The Commission's arguments are on page AD7-4.
[11] See page AD3-10.

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

[28] When applying for parental benefits, the Claimant had to choose between the standard and extended options.[12] She could not change options after receiving parental benefits from the Commission.[13]

[29] The Claimant selected the extended option on her application for EI benefits. And she selected 52 in response to the question, "How many weeks do you wish to claim?" This answer is consistent with the extended option, because the standard option offers no more than 35 weeks of benefits.

[30] The General Division found that the Claimant made these selections intentionally. Even if she was mistaken, she thought that this was what she needed to do to claim a year's worth of EI benefits.

[31] Regardless, the General Division found that the Claimant had, in fact, chosen the standard option.

[32] To get to that result, the General Division relied on evidence that the Claimant intended to take a year's leave. So, the standard option best matched her intentions and made the most sense financially.

[33] The General Division also relied on the Appeal Division's decision in a case called *Employment Insurance Commission v TB*.[14] But the glaring contradictions on TB's application form meant that it revealed no clear choice between the standard and extended options. So, the Tribunal had to look at all the evidence and decide which option TB was mostly likely to have chosen. In other words, the facts in this case and in *TB* are quite different.

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[12] Section 23(1.1) of the EI Act sets out this requirement.
[13] Section 23(1.2) of the EI Act describes when a parent's choice becomes irrevocable (or final).
[14] *Employment Insurance Commission v TB,* 2019 SST 823.

[34] Here, it was perverse for the General Division to find that the Claimant had chosen the standard option. This finding ignores the clear and deliberate answers that the Claimant provided to the Commission on her application form.

[35] In short, the Commission's job was to interpret the information the Claimant provided on her application form. It was not to read the Claimant's mind.

[36] Although the Claimant chose the extended option on her application form, it is still possible for the Tribunal to find that her choice was invalid. One way she can do that is by showing that she based her choice on misleading information from the Commission. For the reasons below, I find that that is what happened here.

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

[37] At the hearing before me, both parties argued that, if the General Division made an error, then I should give the decision the General Division should have given.[15]

[38] I agree. This means that I can decide whether the Claimant validly chose the extended option.

The Claimant's choice is invalid because she based it on misleading information from the Commission

[39] I use a two-step approach when deciding cases like this one:

a) What option did the applicant choose on her application form? The applicant's choice must be clear.[16] If not, then the Tribunal must look at all the circumstances and decide which option the applicant is more likely to have chosen.

b) Was the applicant's choice valid? In several cases, the Tribunal has found the applicant's choice to be invalid because it was based on misleading

[15] 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.
[16] Cases like *Semenchuck v Ruhr*, 1996 CanLII 7148 (SK QB) have emphasized the need for a choice to be clear and unequivocal.

> information from the Commission.[17] In these cases, applicants need to make their choice again.

[40] Here, the Claimant clearly and intentionally chose the extended option. There are no glaring conflicts on her application form. All the answers she provided to the Commission are consistent with the extended option.

[41] But was the Claimant's choice validly made?

[42] It was always clear to the Claimant that she wanted about 52 weeks of EI benefits in all. But the Commission says that she applied for 67 weeks of benefits: 15 weeks of maternity benefits, followed by 52 weeks of extended parental benefits (paid at a lower rate).

[43] Why the difference? Because, as the Claimant has shown, she relied on misleading information from the Commission. Specifically, the Claimant based her answers on the Commission's application form, which was missing critical and timely information. As a result, the Claimant's choice between the standard and extended options was invalid.

[44] The Claimant says that two parts of the application form are especially misleading. First, she was asked to choose between these two options: [18]

> Standard option:
>
> - 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.

[17] See, for example, *ML v Canada Employment Insurance Commission*, 2020 SST 255; *Canada Employment Insurance Commission v LV*, 2021 SST 98; and *KK v Canada Employment Insurance Commission*, (May 5, 2021) AD-21-16; and *VV v Canada Employment Insurance Commission*, 2020 SST 274. To the best of my knowledge, the Commission has not applied to judicially review any of these decisions.
[18] See page GD3-8.

- 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:

- 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.

[45] This led the Claimant to believe that the standard option was insufficient because she wanted a year's worth of benefits, which is more than 35 weeks.

[46] Then the Claimant was asked, "How many weeks do you wish to claim?"[19] She answered 52 to this question.

[47] According to the Claimant, it only made sense to choose the extended option in response to the first question so that she could claim 52 weeks in response to the second.

[48] The Commission says that these questions were about the Claimant's parental benefits only and that its application form is clear when read as a whole.

[49] The Claimant disagrees. She argues that the form needs to be clearer because parents are often completing it at an especially vulnerable time in their lives: just before or after the birth of a baby. She also says that the large number of cases the Tribunal is seeing on this issue contradicts the Commission's claim that its application form is clear.

[50] Based on the questions on the Commission's form, I can easily understand why the Claimant completed the form in the way that she did.

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[19] See page GD3-9.

[51] These questions misled the Claimant because they never clearly stated the difference between maternity and parental benefits. For example:

- When answering these questions, she was never told to ignore the 15 weeks of maternity benefits that she would receive.

- The first question does not explain that maternity benefits are paid at the higher (55%) rate. This might have helped the Claimant to understand that her benefits would go down if she chose the extended option.

[52] 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.

[53] According to the Commission, these parts of the application should have signalled to the Claimant that the relevant questions were just about her parental benefits.

[54] I disagree. These parts of the application form are not terribly illuminating. In fact, the Commission never mentioned them in their submissions to the General Division.

[55] Rather than providing important information to applicants when they need it, the application form leaves applicants to make inferences and guess at what might be important later in the application process.

[56] I do not see how these parts of the application form signal to a person that they should deduct 15 weeks from the total length of their leave before answering the Commission's questions.

[57] In support of its position, the Commission also relies on a Federal Court decision called *Karval v Canada (Attorney General)*.[20]

[58] Specifically, the Commission argues that, like in *Karval*, the Claimant was simply 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.

[59] The Commission also highlights how the judge in *Karval* found the application form to be clear. It argues that I must follow the Federal Court's decision in *Karval*.

[60] The facts in this case are very different from those in *Karval*. So, the *Karval* decision applies to this case in a very limited way.

[61] Importantly, Ms. Karval chose the extended option because she was uncertain about her return to work date.[21] Then, after receiving extended parental benefits for six months, she decided she would prefer the standard option. However, the law clearly prohibits this.

[62] 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.[22]

[63] Here, the application form misled the Claimant: the lack of important and timely information prevented the Claimant from providing the Commission with accurate answers.

[64] I also cannot agree that the judge in *Karval* was making binding pronouncements about the clarity of the application form. The *Karval* decision simply confirms that the Appeal Division reasonably refused leave (or permission) to appeal in her case. So, I do

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[20] *Karval v Canada (Attorney General)*, 2021 FC 395.
[21] See paragraph 8 in *Karval v Canada (Attorney General)*, 2021 FC 395.
[22] See paragraph 14 in *Karval v Canada (Attorney General)*, 2021 FC 395.

not need to follow what the judge in *Karval* also happened to say about the application form for parental and maternity benefits.[23]

[65] Finally, the Commission raised new arguments at the Appeal Division hearing.[24] It argued that neither the Commission nor the Tribunal has the power to change the Claimant's choice after parental benefits have been paid. In short, the Claimant made her choice by ticking the box next to the extended option on her application form. Nothing else matters.

[66] The Commission also maintained that the Claimant had to choose between the standard and extended options as part of her application and that neither the Commission nor the Tribunal can second guess her choice. Plus, the law prevents the Tribunal from changing the Claimant's choice, whether directly or indirectly, after the Commission has started paying parental benefits to the Claimant.[25] Finally, the Commission emphasized its ability to decide how a claim for benefits is to be made and on what form.[26]

[67] I disagree with these arguments for the following reasons:

- Nowhere in the law does it say precisely how a person's choice is to be made or that it must always be determined based on just one tick on an application form.

- The Commission interprets every application form to assess the applicant's choice and determine the rate at which it should pay their benefits. The Commission makes these decisions, implicitly or explicitly, every time it pays benefits to an applicant.[27]

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[23] In *Canada (Attorney General) v Redman*, 2020 FCA 209 at para 19, the Federal Court of Appeal reminded the Tribunal to distinguish between the parts of a court decision that are "binding" and those that are not.
[24] The Commission submitted its new arguments in writing after the hearing: see AD7. And the Claimant responded to those arguments: see AD8.
[25] In support of its arguments, the Commission relies on section 23(1.2) of the EI Act.
[26] See sections 23(1.1), 50(2), and 50(3) of the EI Act.
[27] See *Canada Employment Insurance Commission v TH*, 2020 SST 800 at para 29.

- Did the applicant make a clear choice? Was it validly made? These are questions of law and fact that the Tribunal has the power to decide.[28]

- The courts have recognized that relief may be available when the Commission misleads an applicant.[29]

- The Tribunal is not changing the Claimant's choice after she started to receive benefits. Instead, it is assessing whether her choice was valid from the start. If not, the Claimant must choose again. The Tribunal is not making the choice for her.

- The Commission emphasizes how applications must be made using a form that it supplies or approves.[30] However, that same part of the law also says that applications must be completed in accordance with the Commission's instructions. The Claimant did that. But the Commission's instructions misled her to the point that she thought she had completed the form correctly, and in line with her plans of taking a year's leave.

- The fact that the Claimant had to choose between the standard and extended options as part of her application does not change the Tribunal's ability to consider whether her choice was validly made.

[68] Importantly, the Tribunal decides every case based on its facts. Clearly, the law prohibits applicants from switching options because of changed circumstances. However, some relief is available to applicants, like the Claimant, who can establish that the Commission misled them during the application process.

[28] See section 64(1) of the DESD Act.
[29] See *Karval v Canada (Attorney General)*, 2021 FC 395 at para 14.
[30] See section 50(3) of the EI Act.

Conclusion

[69] The General Division based its decision on a serious mistake about the facts of the case. This error allows me to intervene in this case and to give the decision the General Division should have given.

[70] Although I disagree with part of the General Division's reasoning, I reached the same result using a different approach. The Claimant has shown that the Commission's application form misled her into answering its questions in the wrong way. As a result, the Claimant's choice between the standard and extended options is invalid and I am rescinding the Commission's decision to pay extended parental benefits to the Claimant.

[71] So, to complete her claim, the Claimant needs to choose between standard and extended parental benefits. I understand from her appeal and the information in the record that she chooses the standard option.

[72] In the circumstances, I am dismissing the Commission's appeal.

Jude Samson
Member, Appeal Division