



Citation: *Canada Employment Insurance Commission c MC*, 2021 SST 597

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: Canada Employment Insurance Commission
Representative: Angèle Fricker

Respondent: M. C.

Decision under appeal: General Division decision dated May 31, 2021 (Tribunal File Number: GE-21-771)

Tribunal member: Janet Lew

Type of hearing: Teleconference

Hearing date: August 11, 2021

Hearing participants: Appellant's representative
Respondent

Decision date: October 20, 2021

File number: AD-21-190

Decision

[1] The appeal is allowed. The Claimant elected extended parental benefits. Her election was irrevocable

Overview

[2] This is an appeal by the Appellant, the Canada Employment Insurance Commission (Commission), of the General Division decision. The General Division found that the Respondent, M. C. (Claimant), had elected to receive Employment Insurance standard parental benefits, although she had chosen extended parental benefits on her application form and had asked for 52 weeks of benefits.

[3] The Commission argues that the General Division made legal and factual errors by letting the Claimant change her election to standard parental benefits. The Commission maintains that the Claimant clearly elected extended parental benefits.

[4] The Commission asks the Appeal Division to allow the appeal and give the decision that it says the General Division should have given. The Commission argues that the General Division should have decided that (i) the Claimant elected to receive extended parental benefits and (ii) that her election is irrevocable.

[5] The Claimant asks the Appeal Division to dismiss the appeal. She claims that she always wanted to take only a year off work and that this is clearly set out in her application form. She claims that she always wanted standard parental benefits but she found the application form confusing. The confusion caused her to fill out the form incorrectly.¹

[6] I have to determine whether the General Division made any legal or factual errors. I find that the General Division overlooked several important facts, so I also have to determine the appropriate remedy. I find it is appropriate to give the decision should have given, which is that the Claimant elected extended parental benefits and her election was irrevocable.

¹ See Claimant's submissions dated July 28, 2021, at AD3-2 to AD3-3.

Issue

[7] The Commission raises several arguments, but I will focus on whether the General Division based its decision on a factual error. In particular, I will focus on whether the General Division based its decision on a factual error that the application form misled the Claimant into making the wrong choice between standard and extended parental benefits.

Analysis

[8] The Appeal Division may intervene in General Division decisions if there are jurisdictional, procedural, legal, or certain types of factual errors.² The Appeal Division does not have any authority to conduct any reassessments or new hearings.

Background facts

[9] On July 20, 2020, the Claimant applied for Employment Insurance maternity and parental benefits. When the Claimant filled out the application form, she answered that she wanted to receive parental benefits immediately after maternity benefits.³

[10] There are two types of parental benefits:

- Standard parental benefits – the benefit rate is 55% of an applicant's weekly insurable earnings up to a maximum amount. Up to 35 weeks of benefits is payable to one parent.
- Extended parental benefits - the benefit rate is 33% of an applicant's weekly insurable earnings up to a maximum amount. Up to 61 weeks of benefits is payable to one parent.

[11] The Claimant last worked on July 10, 2020 and expected to return to work a year later, on July 12, 2021.⁴ She wanted Employment Insurance benefits for one year.

² See section 58(1) of the *Department of Employment and Social Development Act*.

³ See Claimant's application, at GD3-7.

⁴ See Claimant's application, at GD3-6.

– **The application process**

[12] Initially, the Claimant chose standard parental benefits.⁵

[13] When the Claimant came to the question, “How many weeks do you wish to claim,” she chose the number 52 on the drop-down menu.⁶ She thought she had to choose 52 weeks to ensure that she got a year of benefits.

[14] Because she saw that standard benefits offered only up to 35 weeks of benefits, the Claimant changed her initial choice from standard to extended parental benefits.

[15] The Claimant did not realize that the question, “How many weeks do you wish to claim?” related to only parental benefits and did not include maternity benefits.

[16] In other words, if the Claimant had asked for 35 weeks of benefits, this would have given her 35 weeks of parental benefits, on top of 15 weeks of maternity benefits. Therefore, the Claimant could have chosen standard parental benefits, as it would have given her benefits for a year.

[17] The Claimant tried contacting the Commission but was unable to speak with anyone because the telephone lines were busy. She completed as much as she could. She made sure that it was clear on the application form that she would be returning to work in a year. She hoped that, if she did fill out the form incorrectly, that someone would contact her.

– **Once the Claimant started getting parental benefits**

[18] The Claimant began receiving parental benefits in November 2020. She noticed that the benefits were much lower than she expected.

[19] According to the Commission’s phone log notes, the Claimant called the Commission on April 15, 2021 to change her election from extended to standard parental benefits. She explained that she had made an error on her application form.⁷

⁵ See Claimant’s application, at GD3-8.

⁶ See Claimant’s application, at GD3-8.

⁷ See phone log notes of April 15, 2021, at GD3-22.

The Claimant states that, initially, agents assured her that she should be able to change her election.

[20] However, in another phone conversation on April 20, 2021, the Commission explained that it could not change the Claimant's election because she was already receiving parental benefits.⁸ The Commission explained that it could have changed the Claimant's election up until the time she first started getting parental benefits.

– **The reconsideration stage**

[21] The Claimant asked the Commission to reconsider its decision. She acknowledged that she misunderstood the form and had filled it out incorrectly. She explained that she wanted to receive standard parental benefits as she was taking only one year off work.⁹

[22] The Claimant told the Commission that she noticed a change in the benefit rate in November 2020, so tried contacting the Commission then. But, she was unable to reach anyone. She reasoned that there had to have been an error on the Commission's end to explain the rate change.

[23] The Commission did not change its mind on reconsideration.¹⁰ The Claimant appealed to the General Division.¹¹ She explained that, all along, she had wanted standard parental benefits, but had chosen extended parental benefits in error.

– **The Claimant's evidence at the General Division**

[24] At the General Division hearing, the Claimant testified that she read the part on the application form that explains the difference between maternity and parental benefits. At first, she chose the standard option for parental benefits. But, when it came time to claiming how many weeks she wanted, she began to question whether she would have enough weeks of benefits to cover her time off work.

⁸ See Supplementary Record of Claim dated April 20, 2021, at GD3-23.

⁹ See Claimant's Request for Reconsideration, filed May 4, 2021, at GD3-24 to GD3-25.

¹⁰ See Commission's reconsideration decision dated May 6, 2021, at GD3-27.

¹¹ See Claimant's Notice of Appeal to the General Division, filed May 6, 2021, at GD2.

[25] The Claimant testified that she “totally forgot that maternity benefits and parental benefits were separate.”¹² She ended up picking the extended option. She also tried to contact the Commission so she could ask and make sure that she chose the right option. However, she was unable to reach anyone. So, she filed her application anyway and hoped that someone from the Commission would contact her.

[26] The Claimant testified that it was “definitely an error – should have picked standard not extended.”¹³ She says that she “should have read that part ... I didn’t read it.”¹⁴ The General Division member did not clarify what the Claimant was referring to when she said she did not read “that part.”

[27] The Claimant testified that she thinks that if she had taken her time and had some help with her baby and toddler, she probably would have filled out the application form correctly.¹⁵

[28] The Claimant also testified that she did not notice the statement on the application form that, once parental benefits were paid, the choice between standard and extended parental benefits was irrevocable. She explained that she had a screaming baby and just wanted to file the application so she could receive benefits.¹⁶

– **The General Division decision**

[29] The General Division noted that, under section 23(1.2) of the *Employment Insurance Act*, a claimant cannot change their election of parental benefits once parental benefits have been paid.

[30] But, in this case, the General Division determined that it was not changing the Claimant’s choice of benefits. Rather, it was deciding what the Claimant meant or intended to select on the form. The General Division equated the Claimant’s intention with an election. In this case, the Claimant intended to get a year’s worth of benefits.

¹² At approximately 9:10 to 9:35 of the audio recording of the General Division hearing.

¹³ At approximately 10:21 to 10:30 of the audio recording of the General Division hearing.

¹⁴ At approximately 13:40 to 14:00 of the audio recording of the General Division hearing.

¹⁵ At approximately 15:19 to 15:28 of the audio recording of the General Division hearing.

¹⁶ At approximately 11:13 to 11:39 of the audio recording of the General Division hearing.

[31] The General Division accepted that the Claimant mistakenly believed that she had to choose the extended option and ask for 52 weeks of benefits, to cover the year that she planned to be off work. The General Division found that, as the Claimant planned to be off work for a year, she likely intended to elect one year of maternity and parental benefits combined. This would have required choosing the standard option.

[32] The General Division found that the Claimant “should be put back in a position consistent with her true choice of standard parental benefits.”¹⁷

– **The Commission’s appeal to the Appeal Division**

[33] The Commission argues that the General Division made several errors, as follows, that it:

- Based its decision on a factual error that the application form was confusing and that it misled the Claimant into making an election that was contrary to her intentions;
- Failed to analyze the evidence in a meaningful manner;
- Failed to apply section 23(1.2) of the *Employment Insurance Act*;
- Exceeded its jurisdiction by determining (a) what option the Claimant elected and (b) the validity of that election.

Did the General Division base its decision on a factual error that the application form was confusing and that it misled the Claimant?

[34] The Commission argues that the General Division based its decision on a factual error that the application form was confusing and that it misled the Claimant into making an election that was contrary to her intentions.

[35] The Claimant testified that she expected to be off work for one year and wanted benefits for that length of time. So, when she saw the question, “How many weeks do

¹⁷ See General Division decision, at para. 28.

you wish to claim?” she believed that she had to ask for 52 weeks of benefits. She misunderstood the application form.¹⁸ As a result, she believed that she had to change her selection from standard to extended parental benefits.

[36] The General Division accepted that the Claimant’s request for 52 weeks represented her intention to actually select standard parental benefits because, in the Claimant’s eyes, the 52 weeks included one year of maternity and parental benefits combined. The General Division found that the Claimant was unaware that she would be receiving the requested number of weeks of parental benefits on top of 15 weeks of maternity benefits.

[37] The General Division found that the Claimant did not understand the question, “How many weeks do you wish to claim?” because she did not understand that maternity and parental benefits are different.¹⁹ The General Division noted that the Claimant qualified this as “human error.”²⁰

[38] The Commission argues that the General Division suggested that the Claimant did not understand the Employment Insurance benefit scheme because of the application form itself. The Commission argues, in other words, that the General Division found the application form confusing and misleading. The Commission argues that the General Division’s findings ignore the evidence.

[39] The Commission argues that there are two places in the application form that show the differences between maternity and parental benefits:

- i. Under the heading “Benefit Type,” applicants are asked which type of benefit they are seeking. The options include regular, fishing, sickness, maternity, parental, compassionate care, and family caregiver benefits. The form lists each option separately from the other options.²¹

¹⁸ See Notice of Appeal to the General Division, at GD2-6.

¹⁹ See General Division decision, at para. 20.

²⁰ See General Division decision, at para. 20.

²¹ See Claimant’s application form, at GD3-3.

The option for maternity benefits explains that the benefit is for those who are pregnant or have recently given birth. The form also explains that the maternity option also allows claimants to receive maternity benefits followed by parental benefits.

The option for parental benefits explains that the benefit is for those who are caring for a newborn or newly adopted child.

- ii. Under the heading “Maternity Information,” applicants are asked whether they want to receive parental benefits immediately after receiving maternity benefits. There are two choices. A claimant can specify whether they want to receive parental benefits immediately after maternity benefits, or they can ask to receive up to 15 weeks of maternity benefits only.²²

[40] Yet, it seems that the Claimant was aware that maternity benefits and parental benefits are different from each other. She testified that, at some point, she “totally forgot [that the two benefits are different].”²³

[41] The Claimant did not explain how she came to understand that the question “How many weeks do you wish to claim” covered the total number of weeks of benefits that she wanted.

[42] The question “How many weeks do you wish to claim” falls under the heading “Parental Information,” so arguably an applicant should be aware that the question must relate to parental benefits only.

[43] On the other hand, arguably, as the heading itself says nothing about benefits, an applicant might not necessarily know that the question relates to parental benefits only.

²² See Claimant’s application form, at GD3-7.

²³ At approximately 9:10 to 9:35 of the audio recording of the General Division hearing.

[44] Further, the question is non-specific. The question is not explicit about which benefit is being claimed. In other words, the question does not ask, "How many weeks of parental benefits do you wish to claim?"

[45] While the question is non-specific and the heading arguably of limited guidance, this overlooks the fact that the application form gives options to the question, "How many weeks do you wish to claim." The options appear in a drop-down menu. The options include up to 61 weeks.

[46] Given the options go up to only 61 weeks, applicants should realize that the question relates to only parental benefits. After all, the number 61 coincides with the maximum number of weeks of parental benefits that are payable to one parent.

[47] There was no evidence from the Claimant that she carefully viewed the options in the drop-down menu.

[48] It is not reasonable for an applicant to rely solely on the question "How many weeks do you wish to claim" to guide their choice of parental benefits. It is not reasonable either to say the question is the source of confusion and misinformation for choosing extended parental benefits.

[49] It is unreasonable for an applicant to view the question in isolation, without any consideration for the options to the question, or the balance of information on the application form.

[50] The Claimant may have thought about the information on standard and extended parental benefits when she answered "How many weeks do you wish to claim?" The application form sets out how many weeks of benefits are available for each type of parental benefit. For standard parental benefits, a claimant can receive up to 35 weeks of parental benefits. From this, the Claimant may have understood that she would be limited to 35 weeks of benefits. So, she might have chosen extended parental benefits, believing that 35 weeks of standard parental benefits was insufficient if she wanted to take a year off work.

[51] But again, this ignored the balance of information on the application form. The application form clearly showed that maternity benefits are different from parental benefits. This is evident on the form under the heading “Benefit Type” where it asks an applicant what type of benefit they are seeking.

[52] If anything, the Claimant suggested that she read the application form incorrectly because she was distracted. She wrote, “screaming baby who doesn’t sleep and a grumpy toddler didn’t help.”²⁴ She also gave this evidence at the General Division hearing. She testified that the “baby was screaming so bad. It’s all I remember. So just put [the application] in because I had to get money... just had to get it done.”²⁵ Her testimony suggested that she had not carefully read the application form.

[53] The General Division did not consider any of this evidence, despite its significance in possibly explaining how the Claimant’s mistake arose. This evidence was important to address. After all, if the Claimant did not understand the differences between the two types of parental benefits, this evidence could have been relevant in determining whether the Claimant had consciously elected one parental benefit type over another.

[54] As I have found that the General Division erred, I do not have to address the balance of the Commission’s arguments.

Remedy

[55] How can I fix the General Division’s error? I have two basic choices.²⁶ 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, this means I may make findings of fact.²⁷

²⁴ See Claimant’s Notice of Appeal to the General Division at GD2-6.

²⁵ At approximately 11:13 to 11:39 of the audio recording of the General Division, in response to question about whether she saw the irrevocability section on the application form.

²⁶ See section 59 of the *Department of Employment and Social Development Act*.

²⁷ *Weatherley v Canada (Attorney General)*, 2021 FCA 58, at paras. 49 and 53, and *Nelson v Canada (Attorney General)*, 2019 FCA 222, at para. 17.

[56] This is an appropriate case in which to substitute my own decision. The facts are not in dispute and the evidentiary record is sufficient to enable me to make a decision. There is no allegation by either party that they did not get a fair hearing at the General Division or that they did not have a reasonable opportunity to present their case at the General Division.

– **The Parties' arguments**

[57] The Commission urges me to give the decision that the General Division should have given. The Commission argues that the General Division should have found that the Claimant elected to receive extended parental benefits and that her election is irrevocable.

[58] The Claimant argues that, even if the General Division made a factual mistake, it does not change the outcome because the evidence is clear that she always wanted to take only a year off work. She simply made an honest mistake when she filled out the application form and asked for extended benefits. She tried to get help with filling out the form. But, the phone lines were busy.

– **The Claimant's conflicting information on the application form**

[59] The Claimant gave conflicting information on the application form. She stated that she would be returning to work in a year. Yet, at the same time, she asked for benefits to last for more than a year by asking for 52 weeks of parental benefits.

[60] Once the Claimant returns to work in a year, her benefits will end. While she will receive parental benefits for the year that she is on leave, she will receive a lower weekly rate because she chose extended parental benefits instead of standard parental benefits. She chose extended parental benefits because she thought that would ensure that she would get benefits for a year. She did not realize that 35 weeks of standard parental benefits would have also paid her benefits for a year, in combination with 15 weeks of maternity benefits.

[61] The Claimant hoped that, if she had completed the application form incorrectly, someone from the Commission would contact her and help her correct her form. Unfortunately, for the Claimant, this did not happen.

– **The Claimant’s responsibilities**

[62] As the Federal Court held in the case of *Karval*, “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.”²⁸

[63] The corollary to this basic principle must be that, fundamentally, it is the responsibility of a claimant to not only carefully read and attempt to understand their entitlement options, but to also carefully and accurately complete the application form.

[64] There is no legal basis on the facts of this case to relieve the Claimant of these fundamental responsibilities. The Claimant gave conflicting information that did not reflect what she truly wanted, but it was because she had not taken the time to carefully read the application form in the first place. As she testified at the General Division hearing, if she had taken the time and had some help looking after her baby and toddlers, she likely would have correctly filled out the form.²⁹

[65] There are significant factual differences between Ms. Karval’s case and the Claimant’s case. But, much like Ms. Karval, had the Claimant carefully read the application form, she would have understood that, by clicking on the extended option, payments would be paid at a lower rate than if she had clicked on the standard option. And, she would have also understood that, once payments of parental benefits were made, she would be unable to change her choice of parental benefits.

²⁸ See *Karval v Canada (Attorney General)*, 2021 FC 395, at para. 14.

²⁹ At approximately 15:19 of the audio recording of the General Division hearing.

– **The Claimant's election of parental benefits**

[66] The Claimant wanted benefits for a year. Standard parental benefits would have been the most favourable option for her because it paid a higher weekly rate while also providing coverage for a year (combined with the 15 weeks of maternity benefits).

[67] The Claimant cites numerous decisions factually similar to hers. The claimants in each of those cases selected extended parental benefits on their application form. They tried to change their election to standard parental benefits after they began getting parental benefits.³⁰ In *J.B.*³¹ and *S.K.*,³² the General Division determined that the claimants there must have elected standard parental benefits because that choice aligned with their intentions. In *V.V.*,³³ the Appeal Division rescinded the claimant's election and let her make a new election. The Claimant argues that I should follow these cases.

- In *V.V.*, the Appeal Division found the application process misled V.V. The Appeal Division found that V.V. should not be prejudiced by her initial selection when her choice was based on a reasonable interpretation of the information and instructions. The Appeal Division found that it was reasonable that V.V. understood that extended parental benefits was the only option that gave her more than 35 weeks of benefits in total. The Appeal Division found that the application was imprecise, incomplete, and ambiguous. As a result, the Appeal Division found V.V. could not possibly have made a valid election. The Appeal Division rescinded the election and let V.V. make a new election
- In *J.B.*, the claimant planned to be off work for one year only. She chose the extended parental option because she thought that was the only option that gave her coverage for a year. She was unaware of the difference between standard and extended parental benefits. The General Division found J.B.

³⁰ See Claimant's arguments dated July 28, 2021, at AD3.

³¹ See *J.B. v Canada Employment Insurance Commission*, 2021 SST 179.

³² See *S.K. v Canada Employment Insurance Commission*, 2020 SST 176.

³³ See *V.V. v Canada Employment Insurance Commission*, 2020 SST 274.

was confused by the information on the application form. The General Division found that it was more likely than not that J.B. intended and therefore elected to receive standard parental benefits.

- In *L.V.*, the General Division found that L.V. had not made an informed election for extended parental benefits because of erroneous advice that she got from the Commission.³⁴
- In *S.K.*, the claimant planned to return to work after one year. She mistakenly elected extended benefits because she thought this was the only option that would give her benefits for a year. The General Division found that S.K. more likely than not elected standard parental benefits because she always intended to return to work in a year.

[68] The General Division and Appeal Division have produced numerous decisions on the issue of parental benefits. Many members have decided along the lines that one has to consider all of the evidence to determine a claimant's true intentions. This has led members to look beyond a claimant's radio button choice of parental benefit.

[69] There is some attraction to this approach. But the underlying weakness to this approach is that, when considering what an applicant wants at the outset, it focuses on an applicant's desire for a certain number of weeks of benefits, to the exclusion of the benefit rate. Yet, the benefit rate cannot be divorced from any consideration of one's election of a parental benefit option. Choosing one parental benefit type provides coverage up to a certain number of weeks, but it also comes with an associated benefit rate. With respect, this consideration has been missing from the analyses in the above decisions.

[70] The members accepted that the applicants in each of the decisions wanted benefits for a year, but there was no evidence that addressed what benefit rate each applicant understood they would be receiving. There was no consideration either that,

³⁴ See *L.V. v Canada Employment Insurance Commission*, 2020 SST 835.

even if the applicants' mistaken beliefs that maternity and parental benefits were the same thing, that they would have still been better off with the standard option.³⁵

[71] While an applicant can expect to receive benefits for the number of weeks they request, so too should they expect to be paid at the benefit rate for the option that they chose. It is clear from the application form that standard parental benefits pay a much higher weekly rate of benefits than extended parental benefits pay. But, none of this was canvassed at the General Division level when assessing what the applicant's intentions were when they completed the application forms.

[72] To simplify: If an applicant believed they were receiving benefits for the entire duration of their leave at the parental benefit rate, they would still be paid less at the extended parental rate of 33% over 52 weeks, compared to the standard parental rate of 55% over 35 weeks.

[73] These four decisions are not binding on me, and I respectfully decline to follow them for the reasons I have set out above. More importantly, they were decided before *Karval*.

– ***Karval***

[74] In *Karval*, the Federal Court has since made it clear that an imprecise, incomplete or ambiguous application form is insufficient to invalidate an election. After all, “many government benefit programs have complex features and strict eligibility requirements. “More information, clearer language and better explanations can almost always be proposed in hindsight.”³⁶

[75] The Court did not rule out the availability of legal recourse. It would be available “Where a claimant is actually misled by relying on official and incorrect information.”³⁷

³⁵ I am excluding *L. V.*, as the facts are distinguishable in that case.

³⁶ See *Karval*, at para. 14.

³⁷ See *Karval*, at para. 14.

But, it would be unavailable where a claimant “merely lacks the knowledge necessary to accurately answer **unambiguous questions**”³⁸(my emphasis).

[76] The Claimant does not suggest that the application was misleading, but she suggests that it was ambiguous. I agree that the application form could have provided more information and offered better and more complete explanations. But, that does not mean the application was ambiguous or so vague that it justifies invalidating an election.

[77] The question “Select the type of parental benefits you are applying for” was not ambiguous. The question gave the Claimant two options: either the standard option or the extended option. There was clear information in the application about the differences between the two options.

[78] The question “How many weeks do you wish to claim,” could have been more explicit, but that does not mean it is ambiguous, for the reasons I have discussed above. Had the Claimant carefully reviewed the options in the drop-down menu, she would or should have recognized that the question referred to parental benefits.

[79] Indeed, the Court found that “there is also nothing very confusing about the application completed by Ms. Karval.”³⁹ From what I can determine, the Claimant filled out the same application form as Ms. Karval.

– **Due diligence required of a claimant**

[80] The Court also said that Ms. Karval should have asked the necessary questions, if she was in doubt or found the application perplexing. In other words, the Court said that a claimant had to exercise due diligence and make the appropriate investigations.

[81] In the Claimant’s case, she tried to contact the Commission, but the phone lines were always busy. So, she went ahead and submitted her application form online. She did not pursue any other efforts to try to understand the benefits program or to confirm whether she had correctly filled out the application form.

³⁸ See *Karval*, at para. 14.

³⁹ See *Karval*, at para. 16.

[82] While the Claimant was anxious to make sure that she would get benefits as soon as possible, it was still open to her to try to call the Commission. The application form clearly stated that, “once parental benefits have been paid on the claim, the choice between standard and extended parental benefits is irrevocable.”⁴⁰ So, she had until parental benefits were paid to continue trying to call the Commission, and to change her selection. She did not do so. She waited too long to contact the Commission to change her election.

– **Summary**

[83] The evidence shows that the Claimant elected extended parental benefits in her application. She acknowledges that she did not carefully read the application form and made a “human error.” However, under *Karval*, this does not provide a basis for a legal remedy for her.

Conclusion

[84] The appeal is allowed. The Claimant elected extended parental benefits. Her election was irrevocable

Janet Lew
Member, Appeal Division

⁴⁰ See Claimant’s application form, at GD3-8.