



Citation: *Canada Employment Insurance Commission v SD*, 2021 SST 577

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: Canada Employment Insurance Commission
Representative: Louise Laviolette

Respondent: S. D.

Decision under appeal: General Division decision dated July 13, 2021
(GE-21-1044)

Tribunal member: Janet Lew

Type of hearing: Teleconference
Hearing date: October 7, 2021
Hearing participants: Appellant's representative

Decision date: October 12, 2021
File number: AD-21-237

Decision

[1] The appeal is allowed. I am setting aside the General Division decision. The Claimant elected to receive extended parental benefits.

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, S. D. (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 61 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 the Claimant elected to receive extended parental benefits and decided that her election is irrevocable.

[5] Before the hearing of this appeal proceeded, the Claimant informed the Social Security Tribunal that she had decided to withdraw the appeal. She explained that she had made significant changes to her family's life, all to ensure financial stability. She would no longer be pursuing standard parental benefits. However, it is the Commission's appeal and the Commission is uninterested in withdrawing its appeal.

[6] I still have to consider the issues on appeal. I agree with the Commission that the General Division based its decision on factual errors that it made without regard for the evidence before it. The General Division mistakenly found that the Claimant changed her election before she began receiving any parental benefits, when the Claimant had yet to notify the Commission of her intention in this regard.

[7] The parties agree with the outcome. They agree that the Claimant should continue to receive extended parental benefits, as she had requested in the first place. Essentially, they agree to vacate the General Division decision. For that reason, I am setting aside the General Division decision. The Claimant will keep her extended parental benefits in place.

Issues

[8] The Commission raises two basic arguments:

1. Did the General Division base its decision on a factual error that the Claimant had in fact changed her election of parental benefits?
2. Did the General Division fail to apply section 23(1.2) of the *Employment Insurance Act*?

[9] For the purposes of this appeal, I will focus on the first issue.

Analysis

[10] The Appeal Division may intervene in General Division decisions if there are jurisdictional, procedural, legal, or certain types of factual errors.¹

Background Facts

[11] 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.²

[12] There are two types of parental benefits:

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

² See Claimant's application, at GD3-8.

- 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.

[13] The Claimant chose extended over standard parental benefits.³

[14] The application asked, “How many weeks do you wish to claim?” The Claimant chose the number 61 on the drop-down menu⁴ in response to this question.

[15] The Claimant also indicated on the application form that she last worked on November 30, 2020. She expected to return to work on June 1, 2022,⁵ although kept her options open for an earlier return.

[16] Phone records show that the Claimant attempted to contact Service Canada⁶ in January 2021.⁷ She had come to the realization that the payment rate for extended benefits would not be enough. She wanted to change her election from the extended to the standard parental benefit option. During one phone call, she waited 118 minutes, and on another phone call, waited 50 minutes, to speak with an agent. However, the Claimant was unable to speak with anyone at Service Canada, let alone leave a message.

[17] Given the Claimant’s frustration, her spouse told her that they would try to manage with the extended benefits.⁸ But, a month into receiving parental benefits, the Claimant confirmed her suspicions. The extended benefits were insufficient.

³ See Claimant’s application, at GD3-9.

⁴ See Claimant’s application, at GD3-9.

⁵ See Claimant’s application, at GD3-7.

⁶ Service Canada acts as the agent for the Commission.

⁷ See Claimant’s telephone records, at GD5-2 to GD5-4.

⁸ See Notice of Appeal to the General Division, filed June 18, 2021, at GD2-5 and at approximately 7:10 to 10:50 of the audio recording of the General Division hearing.

[18] The Claimant contacted the Commission again. This time, she was able to speak with an agent. She asked to amend her parental benefits option. An agent told her that she could not change the benefit option anymore because parental benefits had already been paid.⁹

– **The reconsideration stage**

[19] The Claimant asked the Commission to reconsider its decision. She wanted to switch from extended to standard parental benefits. She explained that she was unable to support her family with extended parental benefits, largely because expenses had unexpectedly gone up with COVID-19. She explained that she was in financial straits and needed the standard benefit to keep her family and household afloat until she returned to work.

[20] The Commission did not change its mind on reconsideration. The Claimant appealed to the General Division.

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

[21] At the General Division hearing, the Claimant testified that she did not notice the statement on the application form that, once parental benefits have been paid, the choice between standard and extended parental benefits was irrevocable.¹⁰

[22] The Claimant also testified that once she realized that extended parental benefits were not enough, she began to rethink her plan of staying off work for 18 months. She tried to reach Service Canada to ask for standard parental benefits instead. However, she encountered busy phone lines or was unable to stay in a queue because she also had to care for a newborn.

[23] The Claimant's husband recommended that she take a break from trying to reach Service Canada. He told her that they would try to manage on extended parental benefits. After that, she did not have the chance to try to reach Service Canada again.

⁹ See Supplementary Record of Claim dated May 25, 2021, at GD3-21.

¹⁰ At approximately 6:08 to 7:10 of the audio recording of the General Division hearing.

Ultimately, once they began receiving parental benefits, they recognized that they could not manage. Extended parental benefits were not enough.¹¹

[24] After about a month of getting extended parental benefits, the Claimant called Service Canada once more. This time, the Claimant was able to speak with an agent. But, the agent told her that, by then, it was too late for her to change her election because she had already started getting parental benefits.

– **The General Division decision**

[25] 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.

[26] But, in this case, the General Division found that the Claimant had changed her election of parental benefits one month after she began receiving maternity benefits—before any parental benefits were paid. The General Division found that the Claimant elected standard benefits as of January 4, 2021, when she first tried to reach Service Canada. The General Division wrote, “She simply could not get through to Service Canada at that time to notify them.”

[27] The General Division found, in other words, that although the Claimant was unsuccessful in informing the Commission of her change in election, she had elected to receive standard parental benefits in January 2021.¹²

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

[28] The Commission argues that the General Division made a factual error by finding that the Claimant had in fact changed her election before she received parental benefits.

¹¹ At approximately 7:10 to 11:59 of the audio recording of the General Division hearing.

¹² See General Division decision, at paras. 20 to 22.

[29] The Commission also argues that the General Division made a legal error by failing to apply section 23(1.2) of the *Employment Insurance Act*.

Did the General Division base its decision on a factual error that the Claimant had in fact changed her election of parental benefits?

[30] By January 2021, the Claimant changed her mind about which parental benefit she wanted. She wanted to switch from the extended to standard option.

– The General Division erred in accepting phone records as proof that the Claimant had effectively changed her election.

[31] Despite trying to contact the Commission on multiple occasions in January 2021, however, the Claimant was unable to speak with anyone and communicate her desire to change her election.

[32] From the Commission's perspective, the Claimant had clearly elected extended parental benefits on her application form. She also asked for 61 weeks of parental benefits. She also indicated that she would be off work for approximately 18 months. This was consistent with the extended option.

[33] If the Claimant wanted to change what she chose for parental benefits, the Commission required notice from her that she had changed her election. The Commission did not specify what form this notice had to take, but the Claimant opted to attempt to contact the Commission by telephone. There was no evidence that the Claimant tried to write to the Commission with a request to change her election, before she received any parental benefits.

[34] The General Division accepted the Claimant's phone records as proof that the Claimant had successfully changed her election. But, the Claimant produced these records after parental benefits had been paid. Even so, the records do not prove anything, other than the fact that the Claimant attempted to contact the Commission and ended up waiting a considerable length of time on the phone.

[35] It would seem however that, if a claimant intends to change their election, that there should be some form of notice given to the Commission, so that the Commission is aware of the change in election.

[36] The General Division erred in accepting that the Claimant's efforts to contact the Commission as evidence that she had actually changed her election. This represents a perverse and capricious finding.

- **The General Division erred in overlooking the fact that the Claimant had until April 2021 to notify the Commission of any changes in her election of parental benefits**

[37] The General Division accepted that the Claimant's efforts to contact the Commission in January 2021 were sufficient. The General Division's conclusions seemed to suggest that the Claimant had exhausted all reasonable efforts to contact the Commission. But, this overlooked the fact that the Claimant had until April 2021 to try to change her election, before she would begin to receive extended parental benefits.

- **The General Division erred in overlooking the fact that the Claimant accepted that she would try to manage with extended parental benefits**

[38] The General Division overlooked the Claimant's evidence that she would try to manage with the extended parental option

[39] Although the Claimant wanted to switch her election, at some point, her husband told her that they would try to manage with the extended parental option. So, after this, the Claimant did not try reaching Service Canada again. Besides, she found herself busy with her newborn.

[40] The General Division did not refer to this particular evidence that her spouse told her that they would try to manage with the extended parental option. This evidence was important because it could have affected the outcome. It suggests that the Claimant decided that she would keep the extended parental option after all, despite her misgivings that it paid a much lower benefit rate compared to the standard option.

Remedy

[41] The parties agree on the outcome. They agree that the Claimant should continue to receive extended parental benefits. Essentially, they agree to vacate the General Division decision. For that reason, I am setting aside the General Division decision. This leaves the Commission's reconsideration decision in place. In other words, the Claimant will receive extended parental benefits.

Conclusion

[42] The appeal is allowed. The Claimant shall continue to receive extended parental benefits.

Janet Lew
Member, Appeal Division