



Citation: *Canada Employment Insurance Commission v LC*, 2021 SST 622

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: Canada Employment Insurance Commission
Representative: Angèle Fricker

Respondent: L. C.

Decision under appeal: General Division decision dated June 8, 2021
(GE-21-840)

Tribunal member: Janet Lew

Type of hearing: Teleconference
Hearing date: August 24, 2021
Hearing participants: Appellant's representative
Respondent

Decision date: October 29, 2021
File number: AD-21-213

Decision

[1] The appeal is allowed. The General Division did not analyze all of the evidence in a meaningful manner. It overlooked some of the evidence in its analysis. I am returning this matter to the General Division for a redetermination.

Overview

[2] This is an appeal by the Appellant, Canada Employment Insurance Commission (Commission), of the General Division decision. The General Division found that the Respondent, L. C. (Claimant), elected standard parental benefits over extended 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 exceeded its authority when it found that the Claimant elected standard parental benefits. The Commission also argues that the General Division made legal and factual errors. 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 that her election is irrevocable.

[4] The Claimant argues that the General Division did not make any errors. She asks the Appeal Division to dismiss the Commission's appeal. She says that she made an honest mistake when she selected extended parental benefits. She maintains that she always intended to take just one year of maternity and parental leave. The Claimant also says that there are several Social Security Tribunal cases, similar to hers, in which the Tribunal determined that claimants had elected standard parental benefits, even if they had checked the extended option on the application form. She says the outcome should be the same for her.

[5] I have to determine whether the General Division made any legal or factual errors. I find that the General Division failed to analyze the evidence in a meaningful manner. In particular, it overlooked some of the evidence relating to the Claimant's

decision-making process into her election. The matter is referred back to the General Division for reconsideration.

Preliminary Issue

[6] The Claimant argues that the Commission should have no basis to appeal the General Division decision because it did not appear at the General Division hearing.

[7] The Commission was a named party and participant at the General Division level. That alone gives the Commission standing and the right to bring an appeal to the Appeal Division.

[8] Additionally, section 55 of the *Department of Employment and Social Development Act* (DESDA) specifically provides a right of review to the Appeal Division “by any person who is the subject of the decision and any other prescribed person.”

[9] In a case called *Francis*,¹ the employed filed an application for leave to appeal the General Division decision to the Appeal Division. The Federal Court accepted that, “in the circumstances where the employer participates at the [General Division] level, the employer would have the right to seek to appeal as outlined in s. 55 [of the DESDA].”² This reasoning applies to the facts of this case too.

[10] Although it would have been far preferable had the Commission attended and fully participated in the General Division hearing, its absence alone does not disentitle it or strip it of any standing from making an appeal to the Appeal Division. Apart from the fact that the Commission was a named party at the General, the Commission participated at the General Division level. It filed representations on May 26, 2021 and relied on them in the absence of attending the hearing.

¹ *Francis v Canada (Attorney General)*, 2020 FC 642.

² In the facts of that case, however, the employer did not ask to be added as a party at the General Division and the employer was not involved in the proceeding at the General Division.

Issue

[11] The Commission raises several issues, but I will focus on whether the General Division failed to analyze the evidence in a meaningful manner.

Analysis

[12] The Appeal Division may intervene in General Division decisions if there are jurisdictional, procedural, legal, or certain types of factual errors.³

Background Facts

[13] The Claimant worked to September 9, 2020. On November 30, 2020, she applied for Employment Insurance maternity and parental benefits.

[14] The Claimant stated in the application that she would be returning to work on January 18, 2022,⁴ exactly a year after she expected her child to be born. Initially her employer did not know when she would be returning to her work.⁵ Later, her employer expected her to return to work on March 7, 2022.⁶

[15] The Claimant indicated on the application form that she wanted to receive parental benefits immediately after maternity benefits.⁷

[16] 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.

³ See section 58(1) of the *Department of Employment and Social Development Act*.

⁴ See Claimant's application, at GD3-7.

⁵ See Record of Employment, dated October 9, 2020, at GD3-20.

⁶ See Record of Employment, dated January 26, 2021, at GD3-22.

⁷ See Claimant's application, at GD3-8.

- Extended parental benefits - the benefit rate is 33% of an applicant's weekly insurable earnings up to a maximum amount. Up to 60 one weeks of benefits is payable to one parent.

[17] The Claimant chose the extended option over the standard option. When asked how many weeks she wished to claim, the Claimant responded that she wanted 52 weeks of benefits.⁸

[18] According to the Commission's records, the Claimant first received parental benefits on March 19, 2021. The Claimant noticed the amount was far less than she had been getting. She thought the weekly benefit rate would be the same throughout the duration of her leave.

[19] The Claimant contacted the Commission on April 9, 2021, to change the parental benefit type. The Commission advised the Claimant that it could not change the parental benefit type once it began paying parental benefits.⁹

[20] The Claimant asked the Commission to reconsider its position. She made a mistake on her form by asking for extended parental benefits for 52 weeks. She explained that she was unaware that the 15 weeks of maternity benefits were on top of the requested number of weeks of parental benefits.¹⁰ She assumed that the extended parental benefits for 52 weeks included the 15 weeks of maternity benefits.¹¹

[21] The Claimant wrote:

My intention was to receive Standard maternity benefits for the 15 weeks and the Standard parental benefits for the remaining 37 weeks. All of the benefits, Maternal and Parental, would be at the Standard rate of 55% of earnings.

I intend to go back to work in September 2021 even before the time that standard benefits would expire.¹²

⁸ See Claimant's application, at GD3-9.

⁹ See Supplementary Record of Claim, dated April 9, 2021, at GD3-26.

¹⁰ See Claimant's Request for Reconsideration, filed on April 30, 2021, GD3-29 to GD3-31.

¹¹ See Claimant's letter dated April 9, 2021, at GD3-31.

¹² See Claimant's letter dated April 9, 2021, at GD3-31.

[22] The Commission maintained that it could not change the parental benefit type from extended to standard parental benefits.¹³ The Claimant appealed to the General Division.

[23] The General Division found that the Claimant always intended to take one year of leave from work. The General Division accepted that, when the Claimant asked for 52 weeks of benefits, she thought she was asking for 52 total weeks of benefits, all at the same benefit rate. Therefore, when she noticed that her benefit rate had changed, she immediately contacted the Commission.

[24] The General Division accepted that the Claimant made a mistake and that she “really meant to elect standard parental benefits.”¹⁴ On this basis, the General Division found the Claimant had elected standard parental benefits.

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

- failed to analyze the evidence in a meaningful manner;
- based its decision on factual errors around the length of time she would be off work;
- exceeded its jurisdiction by determining what option the Claimant elected on her application form and the validity of that election;
- failed to apply section 23(1.2) of the *Employment Insurance Act*;
- failed to apply the principles set out in a case called *Karval*,¹⁵ or, in other words, failed to hold the Claimant to her obligation to know her rights and entitlements under the *Employment Insurance Act*.

¹³ See Commission's reconsideration decision dated May 3, 2021, at GD3-33 to GD3-34.

¹⁴ See General Division decision, at para. 19.

¹⁵ See *Karval v Canada (Attorney General)*, 2021 FC 395.

Did the General Division fail to analyze the evidence in a meaningful manner?

[26] The Commission argues that the General Division failed to analyze the evidence in a meaningful manner by failing to consider all of the relevant facts.

[27] The General Division determined that the Claimant must have elected standard parental benefits because she “always said that she wanted to take one year of leave”¹⁶ and she expected the same benefit rate throughout the year.

[28] The Claimant testified that she asked for 52 weeks of benefits because she was unaware that it meant that she was asking for 52 weeks of parental benefits, on top of 15 weeks of maternity benefits. In short, this would have resulted in 67 weeks of benefits. She thought it was, “all considered parental leave.”¹⁷

[29] The Claimant also testified that she knew that she was entitled to 52 weeks of maternity leave at 55% of her wage.¹⁸

When I looked at the standard leave, it says 37 weeks and I thought “Well, that’s not right, you know.” Ummm, so then I looked at the next one, and it said extended leave and of course, you could go through with, it was like, and however many weeks start at 38, 39, 40 ... and I was like ok, I’m like 52. And I did re-read it a couple of times. Ummm. No, and was like 52 weeks is equal to one year. That’s what I’m entitled to. That’s what I’m going to take.¹⁹

[30] The General Division erred when it found that it was more likely that the Claimant elected standard parental benefits.

[31] Although the Claimant was mistaken that extended parental benefits was the only option that provided coverage for at least one year, she did make a conscious decision when she selected extended parental benefits. The evidence was that the

¹⁶ See General Division decision, at para. 18.

¹⁷ At approximately 13:00 to 14:05 of audio recording of General Division hearing.

¹⁸ At approximately 26:45 to 27:10 of audio recording of General Division hearing.

¹⁹ At approximately 27:11 to 27:42 of audio recording of General Division hearing.

Claimant rejected the standard option because she saw from the description in the application form that it offered only 37 weeks of benefits.²⁰

[32] The General Division overlooked this aspect of the Claimant's decision-making process when she selected extended parental benefits. Yet, it was relevant to determining which type of parental benefit the Claimant elected.

[33] The General Division also erred when it accepted that the Claimant expected parental benefits at 55% of her weekly insurable earnings. After all, the Claimant testified that she read the description of parental benefits and chose extended parental benefits. The description for the extended option clearly shows that the benefit rate is 33% of a claimant's weekly insurable earnings. So, if the Claimant chose extended parental benefits on her application form, it is unclear why the Claimant should have expected to receive the benefit rate for standard parental benefits.

[34] The General Division failed to address this evidence in its analysis.

[35] The Claimant acknowledges that she made a mistake in choosing the extended parental option. It is clear that she found the information on the application form confusing.

[36] In *Karval*, the Federal Court said that legal remedies are unavailable where a claimant "merely lacks the knowledge necessary to accurately answer unambiguous questions."²¹ The Court also recognized that it is "undoubtedly the case that many government benefit programs will have complex features and strict eligibility requirements. More information, clearer language and better explanations can almost always be proposed in hindsight."²²

²⁰ The Claimant testified that she saw the standard option offered 37 weeks but it is likely that she misspoke because this option provides up to 35 weeks of benefits payable to one parent.

²¹ See *Karval*, at para. 14.

²² See *Karval*, at para. 14.

[37] However, the Federal Court did not rule out the availability of legal recourse under the appropriate circumstances. The Court said that it would be available, “where a claimant is actually misled by relying on official and incorrect information.”²³

[38] The Commission denies that the application form was misleading or that it caused the Claimant to make a wrong choice.

[39] The Commission argues that the application form was clear about the differences between extended and standard parental benefits. The Commission argues that there are several places in the application form that show the differences between maternity and parental benefits, including the following:

- i. under the heading “Benefit Type,” the application form asks a claimant the type of benefits 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 others.

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

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

- ii. Under the heading “Maternity Information,” the application form asks a claimant 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.

²³ See *Karval*, at para. 14.

[40] The General Division did not consider whether the application form could have misled the Claimant into believing that maternity benefits are the same thing as parental benefits, or that it misled her into believing that she had to choose extended parental benefits to ensure that she got benefits for a year.

[41] The General Division did not examine whether there was any basis for the Claimant's confusion and misunderstanding. Depending upon what caused the Claimant's confusion, that could have enabled the General Division to provide some relief for the Claimant.

[42] Given all of these considerations, I find that the General Division failed to analyze the evidence in a meaningful manner.

[43] Because of the nature of the General Division's error, I do not have to address the rest of the Commission's arguments regarding any errors that the General Division might have made. I turn now to consider the appropriate remedy.

Remedy

[44] How can I fix the General Division's error? I have two basic choices.²⁴ 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.²⁵

– The Parties' arguments

[45] The Commission urges me to allow the appeal and 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.

²⁴ See section 59 of the *Department of Employment and Social Development Act*.

²⁵ See *Weatherley v Canada (Attorney General)*, 2021 FCA 58, at paras. 49 and 51, and *Nelson v Canada (Attorney General)*, 2019 FCA 222, at para.17.

[46] The Claimant maintains that she always intended to return to work either (i) 52 weeks after payments of Employment Insurance benefits had started or (ii) one year after her baby was born, even if that meant that there would be some weeks in which she did not receive any benefits. She says that she never intended to take more than a year of parental leave.²⁶

[47] She claims that she is entitled to 52 weeks of benefits at 55%. She denies that she ever wanted extended parental benefits because she always wanted to receive benefits at the rate of 55% of her weekly insurable earnings. The Claimant says that she made an honest error because she did not have any help with the forms. She waited on hold for hours to speak with anyone.²⁷

[48] The Claimant made an honest mistake when she filled out the application form. She tried to get help with filling out the form. She testified that she tried to call Service Canada. She waited up to three hours on the phone but no one was available to help.

– **Other Tribunal decisions**

[49] The Claimant argues that there are several Tribunal decisions similar to hers in which claimants were recognized as having elected a different option from the one they chose on the application form. She argues that, because of these decisions, the Appeal Division too should recognize that, despite her mistake in choosing the extended option, she too should be entitled to receive standard parental benefits.

[50] The Claimant focused on two particular decisions:

- In *R.I.*,²⁸ (Tribunal file number: GE-20-1207), the claimant planned to take a year's leave. She selected the extended option on her application form. The General Division found that the claimant's choice on her application did not represent her election. It found that her plan to take a year's leave was consistent with the standard option. The General Division also found that R.I. made a mistake when she

²⁶ See Claimant's submissions of July 15, 2021, at AD2-1.

²⁷ See Claimant's submissions of July 15, 2021, at AD2-2.

²⁸ See *R.I. v Canada Employment Insurance Commission*, 2020 SST 517.

asked for 53 weeks of parental benefits. She only realized her mistake after she was paid parental benefits.

- The Claimant also relies on *M.D.*²⁹ (Tribunal file number: GE-20-1788). However, this decision was overturned on appeal.³⁰ The Appeal Division found that the General Division had improperly focused on M.D.'s intentions, without considering what answers M.D. put down on her application form. The Appeal Division found that M.D.'s responses on the form were consistent with the extended option. The Appeal Division concluded that M.D. had in fact validly elected extended parental benefits.

[51] The Claimant also relies on the following:

- *S.K.*³¹ (Tribunal file number: GE-20-5) and *J.B.*³² (Tribunal file number: GE-21-8) – In both cases, S.K. and J.B. asked for 52 weeks of extended parental benefits. Both planned to return to work after one year. In S.K.'s case, she had not been attentive when she filled out the form.
- *I.R.*³³ (Tribunal file number: GE-20-1742) – I.R. asked for 61 weeks of extended parental benefits. She planned to return to work after one year.
- *L.V.*³⁴ (Tribunal file number: GE-20-2231) – L.V. asked for 41 weeks of extended parental benefits. She made her election based on misinformation from the Commission. The General Division found that L.V. had not made an informed decision. Therefore, the General Division found the election was invalid.
- *M.H.*³⁵ (Tribunal file number: AD-19-503) – M.H. asked for 52 weeks of extended parental benefits. She expected to be off work for one year. The Appeal Division determined that it had the power to consider all of the relevant circumstances and to decide which option an applicant had chosen. The Appeal Division

²⁹ See *M.D. v Canada Employment Insurance Commission*, 2020 SST 1056.

³⁰ See *Canada Employment Insurance Commission v M.D.*, 2020 SST 1055.

³¹ See *S.K. v Canada Employment Insurance Commission*, 2020 SST 176.

³² See *J.B. v Canada Employment Insurance Commission*, 2021 SST 179.

³³ See *I.R. v Canada Employment Insurance Commission*, 2020 SST 865.

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

³⁵ See *M.H. v Canada Employment Insurance Commission*, 2019 SST 1385.

considered the application form read as a whole, M.H.'s planned return to work date, and the steps that M.H. took once she learned that her benefit rate had dropped. Overall, the Appeal Division found that M.H. was more likely to have chosen the standard parental benefits option.

- *T.B.*³⁶ (Tribunal file number: AD-19-426) – T.B. asked for 35 weeks of extended parental benefits. The Appeal Division followed the approach in M.H. by considering all of the circumstances.

[52] I am not bound by any of these decisions. More importantly, they were all decided before *Karval*, which I have to follow.

– **The Claimant's responsibilities**

[53] In *Karval*, the Federal Court held that, "fundamentally, it is the responsibility of a claimant to carefully read and attempt to understand her entitlement options and, if still in doubt, to ask the necessary questions."³⁷

[54] The Claimant testified that she "read through everything ... very thorough ... I double checked everything"³⁸ before she submitted her application. However, it is unclear from the Claimant's testimony what she might have read before she filed her application. It is unclear whether this was strictly the application form, or if there was other information that she read.

[55] If the Claimant read information other than the application form itself, this could have been relevant to deciding whether the Claimant had been misled into choosing extended parental benefits. That information would have had to have been official, inaccurate and misleading, and relied upon by the Claimant when she chose which parental benefit type she wanted.

³⁶ See *Canada Employment Insurance Commission v T.B.*, 2019 SST 823.

³⁷ See *Karval*, at para. 14.

³⁸ At approximately 25:43 to 26:31 of the audio recording of the General Division hearing.

[56] If the Claimant read just the application form, it would have been important to know whether she had checked and saw all the options available in the drop-down menu to the question “How many weeks do you wish to claim?”

[57] If the options went up to 61, that could have been a signal that the question related to only parental benefits. After all, the number 61 corresponds with the maximum number of weeks of extended parental benefits that are payable to one parent. In this case, the General Division did not elicit any evidence from the parties regarding the weeks available in the drop-down menu. The General Division also did not ascertain whether the Claimant had reviewed the options in the drop-down menu.

[58] This was relevant towards understanding whether the Claimant had fulfilled her responsibility to carefully read and understand her entitlement options.

– **Referring the matter back to the General Division**

[59] This is an appropriate case to refer back to the General Division. There is insufficient evidence to address why the Claimant chose extended parental benefits on the application form. That does not allow me to give my own decision.

Conclusion

[60] The appeal is allowed. The General Division failed to analyze the evidence in a meaningful manner. This matter is being returned to the General Division for a redetermination.

Janet Lew
Member, Appeal Division