



Citation: *Canada Employment Insurance Commission v KN*, 2021 SST 613

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: Canada Employment Insurance Commission
Representative: Angèle Fricker

Respondent: K. N.

Decision under appeal: General Division decision dated May 21, 2021 GE-21-788

Tribunal member: Janet Lew

Type of hearing: Teleconference

Hearing date: July 21, 2021

Hearing participants: Appellant's representative
Respondent

Decision date: October 21, 2021

File number: AD-21-202

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, K. N. (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 exceeded its authority in finding that the Claimant “[was] more likely to have chosen the standard parental benefits option.”¹ 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 asks the Appeal Division to dismiss the appeal. She maintains that she made an honest mistake when she selected extended parental benefits. She says that there are several Social Security Tribunal cases, similar to hers, in which the Tribunal allowed claimants to change their election even after benefits were paid. She says the Tribunal should let her change her election too.

[5] 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 that the General Division should have given, which is that the Claimant elected extended parental benefits and her election was irrevocable.

¹ See General Division decision, at para. 17.

Issues

[6] The Commission identifies the following as issues in this appeal:

- (a) Did the General Division exceed its jurisdiction by determining what option the Claimant elected on her application form, and by determining the validity of that election?
- (b) Did the General Division make an error in law by effectively changing the Claimant's election from extended to standard parental benefits after benefits had already been paid to her?
- (c) Did the General Division make an important factual mistake when it determined that the Claimant had elected standard parental benefits?
- (d) Did the General Division make an error in law by failing to require the Claimant to meet her obligations to know her rights and entitlements under the *Employment Insurance Act*?

[7] I will focus on whether the General Division based its decision on a factual error.

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] The Claimant last worked on December 4, 2020. On December 10, 2020, the Claimant applied for Employment Insurance maternity and parental benefits.

[10] The Claimant expected to be off work for one year. She had an agreement with her employer to be off work for that length of time. However, when she filled out the

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

application form for benefits, she did not provide a specific date of return.³ Similarly, the Record of Employment from the employer also does not show an expected date of recall.⁴

[11] The Claimant indicated on the application form that she wanted to receive parental benefits immediately after maternity benefits.⁵

[12] 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.

[13] When asked what type of parental benefit she was applying for, the Claimant checked off the extended option over the standard option. When asked how many weeks she wished, the Claimant responded that she wanted 61 weeks of benefits.⁶

[14] At the General Division hearing, the Claimant explained that she asked for 61 weeks of benefits because she thought it was closer to one year (52 weeks) than 35 weeks.⁷

[15] After receiving her first parental benefit payment at the lower extended rate, the Claimant immediately contacted the Commission. She wanted to change from extended to standard parental benefits. She explained that she made a mistake on the application form. However, the Commission responded that the Claimant could not change the parental benefit option because it had already started to pay her parental benefits.

³ See Claimant's application for benefits, at GD3-6.

⁴ See Record of Employment dated December 17, 2020, at GD3-18 to GD3-19.

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

⁶ See Claimant's application for benefits, at GD3-9.

⁷ See General Division decision, at para. 11.

[16] The Claimant asked the Commission to reconsider its position. She confirmed that she made a mistake by selecting extended parental benefits instead of standard parental benefits.⁸ The Commission maintained that it could not change the parental benefit type from extended to standard parental benefits.⁹ The Claimant appealed to the General Division.

[17] The General Division found that the Claimant was tired and unable to think clearly when she completed her application form. The General Division found that the Claimant genuinely “believed that she had selected the standard option that corresponded to her 1 year of maternity leave.”¹⁰ The General Division acknowledged that the Claimant selected the extended option on her application form, but accepted the Claimant’s explanation that this option more closely corresponded with the 52 weeks of leave that she would be off from work.

[18] The General Division concluded that the Claimant’s pre-existing agreement with her employer that she would be off work for one year “amply and credibly supports the [Claimant’s] statements ... regarding the kind of parental benefits she *likely* elected.”¹¹ The General Division concluded that, more likely than not, the Claimant had elected to receive standard parental benefits.¹²

Did the General Division make an important factual mistake when it determined that the Claimant elected standard parental benefits?

[19] The Commission argues that the General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner. The Commission argues that the General Division made a factual error when it concluded that, “the Claimant did not validly elect to receive extended parental benefits because

⁸ See Request for Reconsideration filed on April 14, 2021, at GD3-22 to GD3-23.

⁹ See Commission’s reconsideration decision dated May 3, 2021, at GD3-26 to GD3-27.

¹⁰ See General Division decision, at para. 16.

¹¹ General Division decision, at para. 17.

¹² See General Division decision, at paras.18 and 19.

she did not know that she would get 15 weeks of maternity benefits in addition to the requested number of parental.”¹³

[20] The General Division found that the Claimant did not understand that maternity benefits were a separate form of benefit and would account for the first 15 weeks of her maternity leave.¹⁴ The Claimant asked for 61 weeks of benefits. She believed 61 weeks most closely corresponded with a year, which is how much time she expected to be off work. This led her to choose the extended option on the application form.

[21] The Commission argues that the evidence does not support the General Division’s findings. The Commission argues that it is clear from the evidence that the Claimant knew or should have known (1) that there is a difference between maternity and parental benefits and (2) that she would be getting 15 weeks of maternity benefits on top of parental benefits.

[22] The Commission argues that the application form clearly shows that there is a difference between maternity and parental benefits. The Commission argues that there are at least two places on the application form where this is evident:

- The application form asks a claimant what type of benefit they are seeking. One of the options is maternity benefits. The form reads, “This option also allows you to receive maternity followed by parental benefits.”¹⁵ Another option is parental benefits.
- Under “Maternity Information,” the application form asks a claimant whether they want to receive parental benefits immediately after receiving maternity benefits. The form allows a claimant to respond either “Yes, I want to receive parental benefits immediately after my maternity benefits” or “No, I only want to receive up to 15 weeks of maternity benefits.”¹⁶

¹³ See Commission’s representations to the Appeal Division, at para. 41, AD8-16.

¹⁴ See General Division decision, at para. 15.

¹⁵ See Claimant’s application form, at GD3-5.

¹⁶ See Claimant’s application form, at GD3-8.

[23] The application form clearly establishes that there is a difference between maternity and parental benefits, and that payment of parental benefits follows after payment of 15 weeks of maternity benefits have finished.

[24] Even so, the Claimant was confused by the question about how many weeks of benefits she wanted. Although the question appeared under the heading "Parental Information," it did not specify that it was for just parental benefits. The Claimant interpreted the question to refer to the total weeks of benefits that she could receive, without distinguishing between maternity and parental benefits.

[25] The General Division's finding that the Claimant did not know that she would get 15 weeks of maternity benefits accurately reflected the Claimant's evidence that she was confused and made a mistake. The Claimant simply did not consider the fact that she would also get 15 weeks of maternity benefits. The Claimant testified,

I think I was confused because I thought about, like, one year and I kind of calculated it's from the day I ... it sounded to me probably 35 too little because when I applied for leave agreement with my employer, I indicated like, I think, 52 weeks or something like that. Ummm, from the date I ... kind of like put me off a little bit and I thought it was just too little and I thought maybe like short-term, so I just clicked on extended, thinking that it was just for a year.

And I thought this standard option was just a short one, something that maybe people do after three to four months. So yeah, I just didn't think ... ¹⁷

[26] When the General Division asked the Claimant why she chose more than a year of benefits, the Claimant testified:

Really, I think it's just a mistake.

In my mind, I wanted to choose a year and I just made it wrong. I wanted to take standard option but somehow I was confused and just chose extended. It was a mistake. And I wanted to correct it immediately and I'm sorry I only discovered it once I got the first payment but I couldn't discover it earlier because I didn't check the system.¹⁸

¹⁷ At approximately 17:16 to 18:04 of the audio recording of the General Division hearing.

¹⁸ At approximately 18:20 to 19:10 of the audio recording of the General Division hearing.

[27] I do not find that the General Division made a factual error over whether the Claimant failed to understand that maternity benefits were different from parental benefits and that the maternity benefits would account for the first 15 weeks of her maternity leave.

[28] The Commission may find it unreasonable that the Claimant was unaware that there is a difference, given the information on the application form. But, the reasonableness of the Claimant's understanding is a different issue from what the Claimant's evidence was.

[29] The Claimant testified that she was confused. This was the Claimant's evidence and the General Division accurately set it out.

[30] However, there is a significant discrepancy in the Claimant's evidence.

– **The Claimant's conflicting evidence**

[31] The Claimant testified at the General Division hearing that she was confident that she had chosen the standard option. She was certain of this until she received her first payment of parental benefits. That is when she realized that she had made a mistake.¹⁹

[32] The General Division accepted the "[Claimant's] sincere testimony that she believed she had selected the standard option that corresponded to her 1 year of maternity leave."²⁰ The General Division wrote that, "This was, in fact, the only option available to her in light of the pre-existing written agreement she reached with her employer prior to the birth of her child."²¹

[33] Yet, the Claimant also acknowledged that she clicked on the extended option. She explained that she did this because she thought this was the only option that would give her benefits for a year.²²

¹⁹ At approximately 7:48 to 8:10 of the audio recording of the General Division hearing.

²⁰ See General Division decision, at para. 16.

²¹ See General Division decision, at para. 16.

²² At approximately 17:16 to 18:04 of the audio recording of the General Division hearing.

[34] The Claimant could not have sincerely believed that she had chosen the standard option if, at the same time, she knew that she had chosen the extended option.

[35] The General Division overlooked and failed to address this conflicting evidence. This evidence was important for the General Division to address because it was relevant to its analysis and approach in determining whether the Claimant had consciously elected one parental benefit type over another.

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

Remedy

[37] How can I fix the General Division's error? I have two basic choices.²³ 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.²⁴

– The Parties' arguments

[38] The Commission asks 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 followed the principles set out in a case called *Karval*.²⁵ 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.

[39] The Claimant argues that *Karval* does not apply because the facts are different. Ms. Karval waited until six months after getting parental benefits at the reduced rate

²³ See section 59 of the *Department of Employment and Social Development Act*.

²⁴ *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.

²⁵ See *Karval v Canada (Attorney General)*, 2021 FC 395.

before calling the Commission. The Claimant immediately called the Commission—on the same day that she received her first parental benefit payment.²⁶

[40] The Claimant acknowledges that she made a mistake when she filled out her application for benefits. But, she says that she should be given a chance to correct her mistake. After all, why would the Commission let her report any mistakes? She notes that she can report mistakes through a link, “Mistakes can happen” on the webpage for her My Service Canada Account.²⁷

[41] The Claimant argues that elections can be changed. Otherwise, she asks, why would the Commission let her ask for a reconsideration, and then give her appeal rights to the General Division and now to the Appeal Division? She says these represent opportunities to correct her mistake.

[42] Finally, the Claimant says that the Tribunal has let many claimants change her election after benefits were paid. As these cases are similar to hers, she says she should also be able to correct her mistake.

– **Substituting my own decision**

[43] 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 conflicting evidence from the Claimant, but it is unnecessary to reconcile, and it does not prevent me from making my own decision. As well, neither party alleges that the hearing was unfair or that they did not have a fair chance to present their case at the General Division.

²⁶ There is some conflicting evidence as to when the Claimant contacted the Commission. For instance, in her phone call with the Commission on May 3, 2021, the Claimant asked for the change less than a week after she first noticed the payment. See Supplementary Record of Claim, at GD3-24. Nothing turns on this, as I accept that the Claimant called soon after she received parental benefits.

²⁷ At approximately 8:16 and 19:46 to 21:00 of the audio recording of the General Division hearing, and the Claimant’s submissions to the Appeal Division, dated July 15, 2021, at AD7-1.

– **The Claimant says the application process lets mistakes be corrected**

[44] The Claimant says she has not been able to correct her mistake because of a technicality.²⁸ But, she argues that the application process does allow for mistakes to be corrected. If she was unable to correct mistakes, she argues that surely there would be no chance to report mistakes. Or, she argues, the webpage on her My Service Canada Account would say, “Please do not contact us as the decision you made is final and irrevocable.” And, she says that there would no chance to ask for a reconsideration, or appeal to the General Division and Appeal Division.

[45] What the Claimant overlooks however is section 23(1.2) of the *Employment Insurance Act*. The section states that a claimant’s election is irrevocable once parental benefits are paid in respect of the same child or children.

[46] It is true that the Claimant could have corrected her mistake. But, according to section 23(1.2) of the *Employment Insurance Act*, there was a set timeframe when she could correct her mistakes. She had to have corrected her mistake anytime until she was paid parental benefits.

[47] The application form told claimants that their choice between standard and extended parental benefits would be irrevocable once parental benefits were paid. This was set out just before the form asked the Claimant to select the type of parental benefit she wanted.²⁹

– **The Tribunal has let other claimants change their election**

[48] The Claimant says there have been many cases in which the Tribunal has effectively let claimants change their election of parental benefits. She says her case is similar to those cases, so she too should be able to change her election.

[49] Apart from the fact that these cases are not binding on me, the great majority of them were decided before *Karval*.

²⁸ See Claimant’s Notice of Appeal to the General Division, at GD2-5.

²⁹ See Claimant’s application, at GD3-9.

– **Karval**

[50] 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.”³⁰

[51] 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.”³¹ But, it would be unavailable where a claimant “merely lacks the knowledge necessary to accurately answer unambiguous questions.”³²

[52] The Claimant says she made a mistake. But, she does not say that the application form was misleading. At most, the Claimant found the application form confusing. At the General Division, she testified that she, “wanted to choose the standard option but somehow I was confused and just chose extended.”³³

[53] The Claimant may have been confused because she filled out the application two weeks after she delivered her baby, and she was probably tired.³⁴ The Claimant confirmed that she was stressed, tired and fatigued when she applied.³⁵

[54] 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 form was misleading, ambiguous or so vague that it justifies invalidating an election.

[55] Indeed, the Court found that “there is also nothing very confusing about the application completed by Ms. Karval.”³⁶ From what I can determine, the Claimant filled out the same application form as Ms. Karval.

³⁰ See *Karval*, at para. 14.

³¹ See *Karval*, at para. 14.

³² See *Karval*, at para. 14.

³³ At approximately 21:45 to 21:55 of the audio recording of the General Division hearing.

³⁴ At approximately 21:45 to 21:55 of the audio recording of the General Division hearing.

³⁵ See Claimant’s submissions, dated June 30, 2021, at AD3-1.

³⁶ See *Karval*, at para. 16.

– **The Claimant's responsibilities**

[56] The Commission argues that it is clear from *Karval* that claimants are responsible for carefully reading and trying to understand their entitlement options. And, if they do not understand, they are responsible for asking questions too. The Commission says the Claimant simply did not fulfill her obligations and because of that, she chose the extended option.

[57] The Claimant says that *Karval* does not apply because the facts are dissimilar. But, the Federal Court set out basic principles that would seem to apply to any scenario. I see no basis to depart from these principles or to relieve the Claimant of this fundamental responsibility. The Claimant had to carefully read and try to understand her entitlement options and the application form.

[58] But, a claimant's responsibility does not end there. What must flow from this basic principle is that a claimant must also carefully and accurately fill out the application form.

[59] The Claimant was confident that she knew that she wanted the standard option and just clicked on the wrong option. However, this does not help her because it does not show that she was careful about filling out the application form,

[60] The Claimant also says that she asked for the extended option because she thought this was the only option that paid benefits for a year. She thought standard parental benefits were short-term "that people do for maybe three to four months."³⁷ But, this does not help her either because it shows that she did not carefully read or try to understand her options, although information about parental benefits was in the application.

[61] There are 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

³⁷ At approximately 17:32 to 18:23 of the audio recording of the General Division hearing.

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.

– **Due diligence required of a claimant**

[62] 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.

[63] The Claimant did not call the Commission until after she started getting parental benefits. She did not make the appropriate enquiries, even though she was confused.

[64] The Claimant was unable to correct her mistake before she was paid parental benefits because she did not discover her mistake until then. She explained that she did not check the system.³⁸

[65] The Claimant may say that she did not have to call anyone for help, because she also testified that she knew she wanted standard benefits. She testified that she was surprised when she began getting parental benefits at the reduced rate because she had been confident that she chose the standard option. In other words, she did not have any doubts about what to choose, so there would have been no need for her to contact the Commission with questions. But, as I stated above, this scenario does not help the Claimant because she had to fill out the application form properly in the first place.

– **Summary**

[66] The evidence shows that the Claimant elected extended parental benefits in her application. She acknowledges that she made a mistake. However, under *Karval*, a mistake does not provide a basis for a legal remedy when the application form was not misleading.

³⁸ At approximately 18:23 to 19:10 of audio recording of General Division hearing.

Conclusion

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

Janet Lew
Member, Appeal Division