



Citation: *Canada Employment Insurance Commission v LU*, 2021 SST 619

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: Canada Employment Insurance Commission
Representative: Rachel Paquette

Respondent: L. U.

Decision under appeal: General Division decision dated June 11, 2021
(GE-21-855)

Tribunal member: Janet Lew

Type of hearing: On the record

Decision date: October 22, 2021

File number: AD-21-206

Decision

[1] The appeal is allowed in part. I have made the decision that the General Division should have given. I am rescinding the decision of the Appellant, the Canada Employment Insurance Commission (Commission) to pay benefits to the Respondent, L. U. (Claimant), in accordance with her election on November 2, 2020.

Overview

[2] This is an appeal by the Commission of the General Division decision. The General Division found that the Claimant had elected to receive Employment Insurance standard parental 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. The Claimant did not file any submissions in the appeal before the Appeal Division.

[5] I have to determine whether the General Division made any legal or factual errors. I find that the General Division made a factual error about the Claimant's election on November 2, 2020. Even so, I find that the Claimant's election that day was invalid. As a result, I am rescinding the Commission's decision to pay benefits to the Claimant in accordance with her election on November 2, 2020. The Claimant should now decide between standard and extended parental benefits.

Preliminary matter

[6] The Appeal Division initially scheduled a teleconference hearing but the parties were unable to agree on any mutually convenient times for the hearing. The parties agreed to proceed with the appeal, based on the documents already on file.

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 the Commission's argument that the General Division made a factual error when it found that the Claimant did not make or change her election on November 2, 2020.

Analysis

[8] The Appeal Division may intervene in General Division decisions if there are jurisdictional, procedural, legal, or certain types of factual errors.¹ The Appeal Division does not have any authority to conduct any reassessments or new hearings.

Background facts

[9] On August 20, 2020, the Claimant stopped working. She sought Employment Insurance maternity and parental benefits.

[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.

– The Claimant's first application of September 2020

[11] The Claimant applied for Employment Insurance benefits on September 25, 2020. She did not expect to return to her employment because of the pandemic.

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

[12] The Claimant stated that she wanted to receive parental benefits immediately after maternity benefits.² She asked for 61 weeks of extended parental benefits.³

– **The Claimant's second application of October 2020**

[13] The Claimant filed a second application for benefits on October 7, 2020. She confirmed that she did not expect to return to her employment because there was a shortage of work.

[14] This time, the Claimant asked for 35 weeks of standard parental benefits.⁴

– **The Claimant's election of parental benefits on November 2, 2020**

[15] The Commission contacted the Claimant on November 20, 2020, to clarify what type of parental benefits the Claimant sought. The Commission's telephone log notes say, "The [Claimant] said that she would like extended parental for 61 weeks."⁵

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

[16] The Claimant began receiving parental benefits in April 2021 at the reduced rate for extended parental benefits. She noticed that the benefits were much lower than she expected.

[17] The Claimant contacted the Commission to change her election from extended to standard parental benefits. The Commission explained that it was too late to change her election because parental benefits had already been paid.⁶

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

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

⁴ See Claimant's application, at GD3-27.

⁵ See Supplementary Record of Claim, dated November 2, 2020, at GD3-36.

⁶ See Supplementary Record of Claim dated May 7, 2021, at GD3-38. The General Division found that the Claimant contacted the Commission on April 13, 2021. Nothing turns on whether the Claimant called the Commission on April 13, 2021 or on May 7, 2021.

– **The reconsideration stage**

[18] The Claimant asked the Commission to reconsider its decision. She wrote, “I was misinformed with the length of maternity leave. I originally applied for the standard leave.”⁷

[19] The Claimant contacted the Commission on May 19, 2021. The Commission advised the Claimant once again that it was unable to change the parental type once one week of benefits had been paid. Her election was irrevocable, so the Commission would be maintaining its decision.⁸

[20] The Commission did not change its mind on reconsideration.⁹ The Claimant appealed to the General Division. She again wrote that she had been “misinformed with the length of maternity leave”¹⁰ and that she had originally applied for standard parental benefits.

– **The General Division decision**

[21] 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.

[22] The General Division accepted the Claimant’s evidence that:

- She spoke with the Commission on November 20, 2020, and an agent told her that, with the extended option, the benefit rate was 55% for one year, from the start of maternity benefits, and would drop to 33% for the remaining weeks after the end of that year.¹¹
- Based on this advice, she decided to choose 61 weeks of extended parental benefits. She informed the Commission of her election.

⁷ See Claimant’s Request for Reconsideration, filed May 12, 2021, at GD3-39 to GD3-40.

⁸ See Supplementary Record of Claim, dated May 19, 2021, at GD3-41.

⁹ See Commission’s reconsideration decision dated May 19, 2021, at GD3-42.

¹⁰ See Claimant’s Notice of Appeal to the General Division, filed May 20, 2021, at GD2.

¹¹ See General Division decision, at para. 23.

[23] The General Division found that the Claimant's election of extended parental benefits was based on a mistake about the rate of benefits. The member found that the Claimant was clear in her evidence that she needed benefits at the 55% rate and did not agree to the reduced rate of 33%. The General Division found that, "The Claimant's statement in this conversation [on November 2, 2020 with the Commission] that she would like extended benefits does not change her opting for standard benefits in her second application."¹²

[24] In other words, the General Division found that the November 2, 2020 conversation did not change the Claimant's choice from standard to extended parental benefits because it was based on a mistake and was "contrary to the Claimant's continuing intention to receive benefits for one year at the 55% rate and return to work after that."¹³

[25] The General Division also said that it was giving more weight to the Claimant's written choice in her second application for benefits than to her verbal "choice" on November 2, 2020.

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

[26] 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 a factual error. In particular, the Commission argues that the General Division made a factual error in a perverse or capricious manner without regard for the evidence when it found that the conversation between the Claimant and the Commission on November 2, 2020 did not change the Claimant's choice.
- Failed to apply section 23(1.2) of the *Employment Insurance Act*.

¹² See General Division decision, at para. 25.

¹³ See General Division decision, at para.25.

Did the General Division base its decision on a factual error about the Claimant's election?

[27] The Commission argues that the General Division based its decision on a factual error that the conversation between the Claimant and the Commission on November 2, 2020 did not change the Claimant's choice.

[28] The Commission notes that the Claimant testified that the phone log notes accurately recorded what her response was about which parental benefit type she wanted. The Claimant testified that she wanted the extended option for 61 weeks. This was a change from her most recent application when she had requested 35 weeks of standard parental benefits.

[29] Indeed, the General Division noted that the Claimant gave this evidence. The General Division wrote

In her conversation with the Commission on November 2, 2020, she did say she would like the extended option for 61 weeks. She testified she made that choice based on her discussion with the Commission's agent. The agent told her that with the extended option, the benefit rate remained at 55% for one year from the start of maternity benefits, and would drop to 33% for the remaining weeks after the end of that year.¹⁴

[30] It is clear from the Claimant's evidence that she had changed her mind about what parental benefit type she wanted and the duration of those benefits since she filed her second application.

[31] While the Claimant might have been mistaken about how much she would receive in extended parental benefits, she did change her choice as a direct result of the Commission's phone call to her. Her choice may have been contrary to her continuing intention to receive parental benefits at the rate of 55% over the course of a year, but it was a choice nevertheless, even if it was based on what the General Division characterized as a "mistake."

¹⁴ See General Division decision, at para. 23.

[32] The General Division found that the Claimant's "statement in [the November 2, 2020] conversation that she would like extended benefits does not change her option for standard benefits in her second application." This is a perverse and capricious finding, in light of the Claimant's testimony at the General Division.

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

Remedy

[34] How can I fix the General Division's error? I have two basic choices.¹⁵ 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.¹⁶

– The Parties' arguments

[35] 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. The Claimant did not make any arguments at the Appeal Division.

– Substituting my own decision

[36] 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.

¹⁵ See section 59 of the *Department of Employment and Social Development Act*.

¹⁶ *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.

– **Elections are irrevocable**

[37] The Commission argues that, under section 23(1.2) of the *Employment Insurance Act*, once parental benefits have been paid in respect of the same child, a claimant's election is irrevocable. The Commission argues that no exceptions or circumstances exist that would allow a claimant to change their election.

[38] The Commission claims that it is irrelevant that the Claimant was mistaken about what she would receive. Uncertainty or lack of knowledge regarding the Employment Insurance benefit scheme did not provide any remedies.¹⁷

[39] Here, the Commission submits that the Claimant could no longer change her election from extended to standard parental benefits after April 13, 2021, because parental benefits had already been paid to her on that date.

– **The Claimant relied on misinformation**

[40] The Commission cites *Karval*, a case in which the Federal Court said legal remedies were unavailable where a claimant “merely lacks the knowledge necessary to accurately answer unambiguous questions.”¹⁸

[41] But, in the proceedings at the General Division, the Claimant said this did not describe her situation at all. The Claimant said that an agent misled her and that she relied on this incorrect information in choosing extended parental benefits for 61 weeks.

[42] In both her Request for Reconsideration and Notice of Appeal to the General Division, the Claimant wrote that she had been “misinformed with the length of maternity leave.” The Claimant testified that the Commission had advised her that, with the extended option, the benefit rate remained at 55% for one year from the start of maternity benefits, and would drop to 33% for the remaining weeks after the end of that year.

¹⁷ See Commission's Representations to the Appeal Division, dated July 30, 2021, at AD2-4, citing *Karval v Canada (Attorney General)*, 2021 FC 395..

¹⁸ See *Karval*, at para. 14.

[43] The Commission argues that the phone log notes accurately describe its conversation with the Claimant, and that she chose extended parental benefits for 61 weeks. I agree that the phone log notes accurately reflect this portion of the phone conversation. The Claimant readily acknowledges that she said she wanted extended parental benefits for 61 weeks.

[44] However, the Claimant says that there was more to her conversation with the Commission. She says that the agent told her she could expect payment at 55% of her weekly insurable earnings for one year, starting from the date of payment of maternity benefits.

[45] The General Division accepted the Claimant's testimony on this point. It found the Claimant's evidence reliable. Or, put another way, the General Division found the Commission's notes incomplete, at best. The General Division was entitled to make this finding on the evidence.

[46] The Commission did not attend the General Division hearing. The Commission did not challenge the Claimant's evidence at the hearing that an agent had misinformed her that she could expect payment at 55% of her weekly insurable earnings for one year, starting from the date of payment of maternity benefits. And, the Commission never produced any evidence—such as affidavit material—to try to refute the Claimant's evidence about her conversation with the Commission. Significantly, the Commission does not dispute her claims about the conversation.

[47] Quite simply, there was no evidence that was inconsistent with the Claimant's testimony that an agent had misinformed her. The Claimant was misled and relied on this information. It was central to her election of extended parental benefits.

– ***Karval***

[48] The Commission suggests that, despite the Claimant's reliance on its misinformation, she is still unable to change her election because of section 23(1.2) of the *Employment Insurance Act* which does not allow an election to be changed once parental benefits have been paid.

[49] The section also does not give the Appeal Division any authority to change a claimant's election even under the circumstances that a claimant relied on misinformation.

[50] However, the Federal Court in *Karval* did not rule out the availability of legal recourse for a claimant. The Courts said that it would be available, "Where a claimant is actually misled by relying on official and incorrect information."¹⁹ That seems to aptly describe the Claimant's situation.

[51] The Federal Court held that certain legal recourse might be available under the doctrine of reasonable expectations. But, it did not specifically detail how any misinformation and resulting error could be corrected, if at all, at the General Division or Appeal Division levels.

[52] A review of some of the case authorities suggests that the doctrine of reasonable expectations applies in only a contractual setting, while other cases suggest that it applies to procedure and does not define substantive rights. For instance, in a case called *Moreau-Bérubé*,²⁰ the Supreme Court of Canada held that the doctrine does not create substantive rights.

Rather, it operates as a component of procedural fairness, and finds application when a party affected by an administrative decision can establish a legitimate expectation that a certain procedure would be followed: *Reference re Canada Assistance Plan (B.C.)*, 1991 CanLII 74 (SCC), [1991] 2 S.C.R. 525, at p. 557, *Baker, supra*, at para. 26. The doctrine can give rise to a right to make representations, a right to be consulted or perhaps, if circumstances require, more extensive procedural rights.

[53] Other cases have described the doctrine as an equitable remedy.

[54] These cases all indicate that a remedy under the doctrine of reasonable expectations is available only under a very limited set of factual circumstances. Neither

¹⁹ See *Karval*, at para. 14.

²⁰ *Moreau-Bérubé v New Brunswick (Judicial Council)*, 2002 SCC11 at para.78.

the General Division nor the Appeal Division appear to have any authority to provide a legal remedy under the doctrine.

[55] But, section 23(1.2) of the *Employment Insurance Act* assumes a valid election. Therefore, if a claimant was misled and made their election based on misinformation from someone who they should have been able to expect to provide accurate information, it cannot be said that they made a valid election in the first instance.

[56] The Claimant's election of November 2, 2020, is invalid.

Conclusion

[57] The appeal is allowed in part. The General Division based its decision on a factual error. However, the Claimant's election on November 2, 2020 was invalid because she relied on misinformation from the Commission. For that reason, I am rescinding the Commission's decision to pay the Claimant extended parental benefits. The Claimant may now decide choosing between standard and extended parental benefits.

Janet Lew
Member, Appeal Division