



Citation: *Canada Employment Insurance Commission v JN*, 2021 SST 715

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: Canada Employment Insurance Commission
Representative: Rachel Paquette
Respondent: J. N.

Decision under appeal: General Division decision dated May 25, 2021
(GE-21-748)

Tribunal member: Melanie Petrunia
Type of hearing: Teleconference
Hearing date: September 27, 2021
Hearing participants: Appellant's representative
Respondent
Decision date: November 28, 2021
File number: AD-21-198

Decision

[1] The appeal is allowed. The Claimant elected to receive extended parental benefits and her election was irrevocable.

Overview

[2] The Respondent, J. N. (Claimant) applied for and received Employment Insurance (EI) maternity benefits, followed by parental benefits. On her application for parental benefits, she had to elect (choose) between two options: standard and extended.

[3] The standard option offers a higher benefit rate, paid for up to 35 weeks. The extended option offers a lower benefit rate, paid for up to 61 weeks. When combined with 15 weeks of maternity benefits, the standard option provides EI benefits for about a year, whereas the extended option provides EI benefits for about 18 months.

[4] The Claimant selected the extended option on her application form and said she wanted to claim 52 weeks of benefits. She also provided a return to work date that is one year after her child's date of birth.

[5] The Commission paid parental benefits to the Claimant under the extended option. Soon after noticing that the amount of her EI benefits had gone down, she asked the Commission to switch to the standard option.

[6] The Commission refused the Claimant's request. The Commission said that it was too late for the Claimant to change options because she had already received parental benefits.

[7] The Claimant appealed the Commission's decision to the Tribunal's General Division and won. The General Division found that the Claimant had chosen the standard option. According to the General Division, the standard option best matched the Claimant's intentions.

[8] The Commission is now appealing the General Division decision to the Tribunal's Appeal Division. It argues that the General Division went beyond its powers, made

errors of law and based its decision on an erroneous finding of fact in allowing the appeal.

[9] I have decided that the General Division based its decision on an important mistake about the facts of the case. I have also decided to give the decision that the General Division should have given, which is that the Claimant elected to receive extended parental benefits and that this election was irrevocable.

Issues

[10] I have focused on the following issues:

- a) Did the General Division base its decision on an important mistake about the facts of the case when it found that the Claimant had chosen to receive standard parental benefits?
- b) If so, what is the best way to fix the General Division's error?

Analysis

[11] I can intervene in this case only if the General Division made a relevant error. So, I have to consider whether the General Division:¹

- acted unfairly;
- failed to decide an issue that it should have decided, or decided an issue that it should not have decided;
- misinterpreted or misapplied the law; or
- based its decision on an important mistake about the facts of the case.

¹ The relevant errors, formally known as "grounds of appeal," are listed under section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).

Background

[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] The Claimant made an application for maternity and parental benefits on December 13, 2020. In her application, the Claimant said that her last day of work was December 4, 2020. She said that she would be returning to work with the same employer on December 4, 2021.²

[14] The Claimant indicated that she wanted to receive parental benefits immediately after maternity benefits. She chose the option for extended parental benefits. The Claimant was asked how many weeks of benefits she wished to receive and she chose 52 weeks from the drop down menu.³

[15] The first payment of extended benefits was processed on April 9 and received by the Claimant on April 13, 2021. She contacted the Commission right away but was unable to get through to someone until April 21st due to wait times.⁴ The Claimant asked to change to standard benefits. The Commission refused the Claimant’s request to switch because the choice was irrevocable once she had been paid extended benefits.⁵ On April 27, 2021, the Claimant made a request for reconsideration but the Commission maintained its decision.

² GD6-2

³ GD3-8

⁴ GD3-28

⁵ Section 23(1.2) of the Employment Insurance Act says that the Claimant’s election is irrevocable once benefits have been paid.

[16] The General Division allowed the Claimant's appeal. It found that the Claimant elected standard parental benefits. The General Division found that the Claimant believed she was selecting the entire length of her EI benefits and indicated the total number of maternity and parental weeks combined. The Claimant did not intend to be off work for more than one year.

– **The General Division decision**

[17] In its decision, the General Division found that the Claimant had elected standard parental benefits. It found that the Claimant selected to receive extended parental benefits on her application form, despite her plan to only take one year off work. The Claimant acknowledged that she chose the extended option on the form, but that it was not what she intended.⁶

[18] The General Division accepted the Claimant's testimony that she didn't realize she made a mistake in her application for benefits. She selected 52 weeks of benefits believing that she was choosing the number of total weeks, including both maternity and parental benefits.⁷

[19] The General Division accepted that a Claimant's election is irrevocable once benefits have been paid. However, it found that the Claimant's choice on the application form is not the only factor to consider in determining what election she made. The General Division considered that the Claimant's intention in making her choice is relevant to deciding which type of benefits she likely elected to receive.⁸

[20] The General Division decided that the Claimant chose standard parental benefits because she believed that she was selecting the entire length of her benefits, including maternity and parental, when she chose 52 weeks. It found that it would not be reasonable for her to choose extended parental benefits if she only intended to take a total of one year off. Because it found that the Claimant had actually elected standard

⁶ General Division decision at para 8.

⁷ General Division decision at para 9.

⁸ General Division decision at paras 13 and 14.

parental benefits, the General Division decided that the election of extended benefits was not being revoked.⁹

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

[21] The Commission argues that the General Division made several errors in its decision. It makes the following arguments:

- The General Division erred in law by effectively changing the claimant’s election from extended to standard parental benefits after benefits had been paid to the claimant;
- The General Division exceeded its jurisdiction by determining what option the claimant elected on their application form and the validity of that election;
- The General Division based its decision on an erroneous finding of fact made in a perverse or capricious manner when it ignored or failed to consider the claimant testimony that she was not really clear about the difference between maternity and parental benefits,
- The General Division erred in law by failing to hold the claimant to their obligation to know their rights and entitlements under the *Employment Insurance Act*.

The General Division based its decision on a factual error by failing to consider the Claimant’s testimony

[22] In its decision, the General Division stated that it found the Claimant’s explanation that she thought maternity and parental were the same period to be credible. It accepted that she only wanted 52 weeks off in total.¹⁰

⁹ General Division decision at para 17.

¹⁰ General Division decision at para 15.

[23] At the hearing before the General Division, the Claimant said that she wasn't aware that there were two different benefits, parental and maternity¹¹ and that there wasn't anyone there to explain it to her.¹²

[24] The General Division asked the Claimant if she read the information available on the application form explaining the difference between the two types of benefits and the rate. The Claimant said that the days after giving birth were a blur and that if she had read it she would have selected the right type of benefits.¹³ She stated that she didn't recall exactly what happened, that she may have made an error in clicking the wrong thing but said that a mistake was made.¹⁴

[25] The Claimant also testified that she does understand the difference between the two types of benefits but it is possible that she didn't at the time that she filled out the application. When asked about the application form, she said, "it's pretty clear to me, but I must not have seen that. Had I seen that, I would understand it, it's not too difficult."¹⁵

[26] The Claimant also stated that when she first started receiving parental benefits at a reduced amount, she thought that it might be normal. She then spoke to a friend who was taking 18 months off of work and receiving the same amount in benefits. The Claimant realized that something was wrong and contacted the Commission to change her election.¹⁶

[27] The General Division does not address these aspects of the Claimant's testimony in its decision. This evidence is relevant to explaining how the Claimant's mistake arose and was important to address. If the Claimant did not understand the differences between the two types of parental benefits, this evidence could have been

¹¹ Recording of General Division hearing at 7:30

¹² Recording of General Division hearing at 7:50

¹³ Recording of General Division hearing at 9:08

¹⁴ Recording of General Division hearing at 9:15

¹⁵ Recording of General Division hearing at 9:55

¹⁶ Recording of General Division hearing at 12:00 to 12:20

relevant in determining whether the Claimant had consciously elected one parental benefit type over another.

[28] The Claimant's testimony is unclear as to whether or not she understood that the two types of benefits are different. It also suggests that she did not read the application form clearly and that, if she had, she would have filled it out differently.

[29] Here, it was perverse for the General Division to find that the Claimant had chosen the standard option. This finding ignores the clear and deliberate answers that the Claimant provided to the Commission on her application form.

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

I will fix the General Division's error by giving the decision it should have given

[31] At the hearing before me, both parties argued that, if the General Division made an error, then I should give the decision the General Division should have given.¹⁷

[32] I agree. I find that 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.

The Claimant elected to receive extended parental benefits and the election was irrevocable

[33] The Appeal Division and the General Division have issued a number of decisions concerning the election of standard or parental benefits. In many of these decisions, the Tribunal has considered which type of benefits the Claimant actually elected. Where there is conflicting information on the application form, the Tribunal has determined which election the Claimant is more likely to have chosen. In other cases, the Tribunal has considered the Claimant's intention in making the election.

¹⁷ Sections 59(1) and 64(1) of the DESD Act give me the power to fix the General Division's errors in this way. Also, see *Nelson v Canada (Attorney General)*, 2019 FCA 222 at paras 16 to 18.

[34] In a more recent decision, the Appeal Division has found that these earlier decisions did not properly consider the information on the application form concerning the benefit rate.¹⁸ Some of the earlier cases were also decided before the recent Federal Court decision of *Karval*.¹⁹

[35] In the *Karval* decision, the Federal Court found that it is the responsibility of Claimants to carefully read and try to understand their entitlement options. If they are unclear, they should ask the Commission. It found that the benefit rate and the irrevocability of the election are both clearly stated on the application form.²⁰

[36] The facts in *Karval* were different from those in the Claimant's case. Ms. Karval elected to receive extended parental benefits and chose 61 weeks of benefits. After receiving parental benefits for 6 months, she tried to switch to standard benefits. Despite these factual differences, the comments of the Court noted above apply to the Claimant's situation.

[37] The Court in *Karval* left open the possibility that a Claimant might have recourse where they are actually misled by the Commission.²¹ Other decisions of the Appeal Division have found this to be the case in certain circumstances.²² I find that the Claimant was not misled in this case.

The Claimant was not misled by the application form

[38] In the Claimant's submissions she refers to the application form as deceiving.²³ However, the Claimant's evidence before the General Division does not suggest that the application form misled her. In fact, she testified that it is clear to her that if she read

¹⁸ See *Canada Employment Insurance Commission v. M.C.*, 2021 SST 598 at para 70.

¹⁹ *Karval v. Canada (Attorney General)*, 2021 FC 395.

²⁰ *Karval* at para 14.

²¹ *Karval* at para 14.

²² See, for example, *ML v Canada Employment Insurance Commission*, 2020 SST 255; *Canada Employment Insurance Commission v LV*, 2021 SST 98; and *KK v Canada Employment Insurance Commission*, (May 5, 2021) AD-21-16; and *VV v Canada Employment Insurance Commission*, 2020 SST 274.

²³ AD4

the application form closely, she would have understood that maternity and parental benefits were different.

[39] The evidence before the General Division shows that the Claimant made a mistake. She thought that she was asking for a total number of weeks of benefits and mistakenly chose the extended benefit option. Her evidence throughout the reconsideration and at the General Division consistently shows that she mistakenly chose the extended option, but not because she was misled by the Commission.

– **The Claimant made a clear election**

[40] Some Tribunal decisions have considered that the Claimants did not make a clear election if there is contradictory information on the application form. In this case, the only information that could be said to contradict the Claimant's choice is the return to work date she provided. The request for 52 weeks of parental benefits is consistent with the choice of extended parental benefits, though I understand this number was mistakenly stated.

[41] The application form provides the following information:

Standard option:

- The benefit rate is 55% of your weekly insurable earnings up to a maximum amount.
- Up to 35 weeks of benefits payable to one parent.
- If parental benefits are shared, up to a combined total of 40 weeks payable if the child was born or placed for the purpose of adoption.

Extended option:

- The benefit rate is 33% of your weekly insurable earnings up to a maximum amount.
- Up to 61 weeks of benefits payable to one parent.
- If parental benefits are shared, up to a combined total of 69 weeks payable if the child was born or placed for the purpose of adoption.

If parental benefits are being shared, the parental benefit option selected by the parent who first makes a claim is binding on the other parent(s).

You must choose the same option as the other parent(s) to avoid delays or incorrect payments of benefits.

Once parental benefits have been paid for the same child, the choice between standard and extended parental benefits is irrevocable.

[42] The Claimant then must choose the type of benefits that they are applying for and select either standard or extended parental benefits. The application form clearly showed that the Claimant selected extended parental benefits.

[43] A return to work date is not required on an application for benefits and does not determine a Claimant's eligibility. I find that the indication of a contradictory return to work date does not invalidate a clear choice made when asked to select a type of benefits.

– Does a mistake invalidate the Claimant's election?

[44] When Parliament amended the *Employment Insurance Act* to introduce the option for extended parental benefits, it also included the provision that makes a Claimant's choice irrevocable. There is a similar provision in the Quebec Insurance Plan. However, the Quebec legislation, states that the election is irrevocable, except in exceptional circumstances.²⁴

[45] Parliament chose not to include any exceptions to the irrevocability of the election. It is unfortunate for the Claimant that a simple mistake on an application form can have significant financial consequences for her. Her circumstances are

²⁴ Quebec Insurance Plan s. 18.

sympathetic. However, I must apply the law as it is written.²⁵ I do not find that the legislation leaves any room to revoke an election on the basis of a mistake.

[46] A Claimant is permitted to change their election after the application form is submitted but before parental benefits have been paid. Claimants can create an account with Service Canada to review the start date and the benefit rate of their maternity and parental benefits. This does provide the ability for Claimants to ensure that the choice they made on their application form was the choice that they intended.

Summary

[47] The Claimant elected to receive 52 weeks of extended parental benefits. Her choice of extended benefits was a mistake. Unfortunately, this mistake was not discovered until after parental benefits had been paid. At that point, the choice was irrevocable.

Conclusion

[48] The appeal is allowed. The Claimant elected extended parental benefits and the election was irrevocable.

Melanie Petrunia
Member, Appeal Division

²⁵ *Canada (Attorney General) v. Knee*, 2011 FCA 301, at para 9 the Court states: “adjudicators are permitted neither to re-write legislation nor to interpret it in a manner that is contrary to its plain meaning.”