



Citation: *Canada Employment Insurance Commission v CM*, 2021 SST 755

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: Canada Employment Insurance Commission
Representative: Julie Villeneuve
Respondent: C. M.

Decision under appeal: General Division decision dated June 18, 2021
(GE-21-900)

Tribunal member: Melanie Petrunia
Type of hearing: Teleconference
Hearing date: October 1, 2021
Hearing participants: Appellant's representative
Respondent
Decision date: December 12, 2021
File number: AD-21-230

Decision

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

Overview

[2] The Respondent, C. M. (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 39 weeks of benefits. She did not provide a return to work date on the application form.

[5] The Commission paid parental benefits to the Claimant under the extended option on January 8, 2021. On April 15, 2021, the Claimant 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 it was more likely than not that Claimant elected standard parental benefits. It found that she intended to choose standard and made a mistake when she chose extended parental benefits.

[8] The Commission is now appealing the General Division decision to the Tribunal's Appeal Division. It argues that the General Division 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 made an error of law. 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.

Preliminary matters

[10] With her written submissions, the Claimant included an email from her employer that was not previously provided to the Commission or the Tribunal's General Division.

[11] Generally, the Appeal Division does not consider new evidence on appeal. There are some exceptions to that rule but none of them apply here.¹ The exceptions apply when the new information provides general background, is required to prove procedural issues or demonstrates that there was no evidence before the decision maker. The new evidence provided by the Claimant does not fall into any of these categories.

[12] I will not consider the new evidence that the Claimant has provided with her submissions.

Issues

[13] 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?

¹ Parchment v. Canada (Attorney General), 2017 FC 354.

Analysis

[14] I can intervene in this case only if the General Division made a relevant error. So, I have to consider whether the General Division:²

- failed to provide a fair process;
- 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.

Background

[15] 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.

[16] The Claimant made an application for maternity and parental benefits on September 28, 2020. In her application, the Claimant said that her last day of work was September 4, 2020. She did not provide a date when she planned to return to work.³

² 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).

³ GD3-6

She also stated that the expected due date was September 6, 2020 and that she gave birth on September 11, 2020.⁴

[17] 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 39 weeks from the drop down menu.⁵

[18] The first payment of extended benefits was processed on January 8, 2021. The Claimant contacted the Commission on April 15, 2021 to request to change to standard parental benefits.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. The Claimant made a request for reconsideration but the Commission maintained its decision.

– **The General Division decision**

[19] The General Division allowed the Claimant's appeal. It found that it was more likely than not that the Claimant elected standard parental benefits. This decision was based on the information in the Claimant's application as a whole and her testimony at the hearing.⁷

[20] The General Division placed a lot of weight on the Claimant's ROE which showed a return to work date of September 20, 2021.⁸ It found that the Claimant intended to be off work for about one year and was focused on indicating the number of weeks she would be off. She mistakenly chose extended parental benefits.

⁴ GD3-7

⁵ GD3-8

⁶ GD3-19

⁷ General Division decision at para 20.

⁸ General Division decision at para 21.

– 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 based its decision on an erroneous finding of fact made in a perverse or capricious manner when it ignored or failed to consider relevant evidence from the Claimant’s application for benefits;
- The General Division erred in law by failing to analyze the evidence in a meaningful way;
- The General Division erred in law by failing to apply s. 23(1.2) of the *Employment Insurance Act*.

The General Division failed to meaningfully analyze the evidence

[22] In its decision, the General Division stated that the Claimant made a mistake when she chose extended parental benefits. It accepted the Claimant’s testimony that she was focused on counting the number of weeks that she would be off work, which led her to indicate 39 weeks of parental benefits.⁹ The Claimant answered the questions on the application form out of sequence and didn’t realize her choice would affect her benefit payments.¹⁰

[23] The General Division also noted that the Claimant stated in her request for reconsideration and notice of appeal that when she had given her employer a return to work date that was a few weeks after the due date. Her child was born late and she wanted to return to work after her first birthday. Because of this, she chose extended parental benefits.¹¹

[24] On the Claimant’s application form, she chose 39 weeks of parental benefits. The Claimant was planning to take a little more than a year off in total. After subtracting 15

⁹ General Division decision at para 21.

¹⁰ General Division decision at para 18.

¹¹ General Division decision at para 15.

weeks of maternity benefits, this left an additional 39 weeks that the Claimant planned to be off work.

[25] The General Division notes that the Claimant has accrued vacation leave that she planned to use for the additional weeks that she did not receive EI benefits. It accepted the Claimant's explanation that she did not realize that she was telling the Commission how many weeks she wanted to collect benefits.

[26] The Commission argues that the General Division failed to take into consideration the information provided on the application form and the answers that the Claimant provided. The application form explains the differences between the standard and extended option and clearly indicates the different benefits rates. After a claimant chooses between standard and extended benefits, the form asks: "How many weeks do you wish to claim?"

[27] The question on the application form is clear. The Claimant was asked how many weeks she wished to claim and there is nothing on the form to suggest that she is being asked how many weeks she will be off work.

[28] The General Division finding that the Claimant had chosen the standard option ignores the clear and deliberate answers that the Claimant provided to the Commission on her application form. The General Division failed to meaningfully analyze this evidence, which was an error of law.

[29] 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

[30] 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.¹²

¹² 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.

[31] 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

[32] 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.

[33] 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.¹³ Some of the earlier cases were also decided before the recent Federal Court decision of *Karval*.¹⁴

[34] 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.¹⁵

[35] 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.

¹³ See *Canada Employment Insurance Commission v. M.C.*, 2021 SST 598 at para 70.

¹⁴ *Karval v. Canada (Attorney General)*, 2021 FC 395.

¹⁵ *Karval* at para 14.

[36] The Court in *Karval* left open the possibility that a Claimant might have recourse where they are actually misled by the Commission.¹⁶ Other decisions of the Appeal Division have found this to be the case in certain circumstances.¹⁷ I find that the Claimant was not misled in this case.

The Claimant was not misled by the application form

[37] In the Claimant's submissions she states that it was always her intention to return to work after approximately one year off.¹⁸ The Claimant chose 39 weeks of benefits because it matched the amount of time she planned to be off work. She did not realize that this choice would impact the rate of benefits that she would receive.

[38] The evidence before the General Division shows that the Claimant made an unfortunate mistake. She was focused on counting the total number of weeks she would be off work 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

[39] 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, there is no information on the application form that could be said to contradict the Claimant's choice of extended parental benefits. The request for 39 weeks of parental benefits is consistent with the choice of extended parental benefits, though I understand this number was mistakenly stated.

[40] The application form provides the following information:

¹⁶ *Karval* at para 14.

¹⁷ 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.

¹⁸ AD3-2

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.

[41] 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.

[42] A return to work date is not required on an application for benefits and does not determine a Claimant's eligibility. The Claimant did not provide a return to work date on her application form. I recognize that the Claimant's Record of Employment showed a

return to work date of September 20, 2021. There is no contradictory information on the application form to suggest that the Claimant's election on that form was not clear.

– **Does a mistake invalidate the Claimant's election?**

[43] 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.¹⁹

[44] 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 sympathetic. However, I must apply the law as it is written.²⁰ I do not find that the legislation leaves any room to revoke an election on the basis of a mistake.

[45] 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

[46] The Claimant elected to receive 39 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.

¹⁹ Quebec Insurance Plan s. 18.

²⁰ *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."

Conclusion

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

Melanie Petrunia
Member, Appeal Division