



Citation: *Canada Employment Insurance Commission v AK*, 2021 SST 757

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: Canada Employment Insurance Commission
Representative: Anick Dumoulin
Respondent: A. K.

Decision under appeal: General Division decision dated July 22, 2021
(GE-21-1052)

Tribunal member: Janet Lew
Type of hearing: Teleconference
Hearing date: October 5, 2021
Hearing participants: Appellant's representative
Respondent
Decision date: December 13, 2021
File number: AD-21-252

Decision

[1] The appeal is allowed. The Claimant's election of extended parental benefits is irrevocable for the reasons I have set out above.

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, A. K. (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 55 weeks of benefits.¹

[3] The Commission argues that the General Division made a legal error by letting the Claimant change her election to standard parental benefits. The Commission argues that while the Claimant mistakenly believed that she had to choose extended benefits to get benefits for a year, that was not enough to invalidate or void her election. The Claimant argues that the Claimant therefore could not change her election once she was paid 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 the Claimant elected to receive extended parental benefits and that her election is irrevocable.

[5] The Claimant asks the Appeal Division to dismiss the appeal. She maintains that she made a mistake because the application form was unclear. She argues that she acted promptly once she learned that there was a reduction in her weekly benefits, and that the Commission will not suffer prejudice. She asks that she be allowed to change her election from extended to standard parental benefits.

Issues

[6] The issues in this appeal are as follows:

¹ See Claimant's application for benefits, at GD3-9.

- a) Did the General Division make a legal error by letting the Claimant change her election from extended to standard parental benefits because she was unfamiliar with her options and did not fully understand what she was doing?
- b) Did the General Division make a legal error by effectively letting the Claimant change her election from extended to standard parental benefits after parental benefits had already been paid to her?
- c) Did the General Division make a legal error by trying to match the Claimant's intentions with her election of parental benefits?

[7] I will focus on the first issue above.

Analysis

[8] The Appeal Division may intervene in General Division decisions if there are jurisdictional, procedural, legal, or certain types of factual errors.²

Background Facts

[9] The Claimant applied for Employment Insurance sickness, maternity and parental benefits. When the Claimant filled out the application form, she answered that she wanted to receive parental benefits immediately after maternity benefits.³

[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.

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

³ See Claimant's application, at GD3-8.

[11] The Claimant chose extended over standard parental benefits.⁴

[12] The application asked, “How many weeks do you wish to claim?” The Claimant chose the number 55 on the drop-down menu⁵ in response to this question.

[13] The Claimant also indicated on the application form that she last worked on January 7, 2021. She did not have an exact date for her return to work.⁶ Her employer indicated on the record of employment that it did not know when she would be returning to work.⁷

[14] After the Claimant received her first parental benefit payment, she phoned the Commission. She asked to amend her parental benefits option. An agent told her that she could not amend her option because parental benefits had already been paid.⁸

– **The reconsideration stage**

[15] The Claimant asked the Commission to reconsider its decision. She wanted to switch from extended to standard parental benefits. She wrote that she was “not aware that [she] had applied for extended parental benefits until [she] received ... payment on May 18, 2021.”⁹ She explained that, when she was applying, she was “confused by the medical leave, maternity leave, and parental leave and when [she] was filling out [her] application [she] must have applied for extended leave by mistake.”¹⁰

[16] The Claimant wrote that she wanted to apply for standard leave. She claims that if the Commission had confirmed what she had chosen, she would have immediately corrected her selection from extended to standard benefits, before she ever received payment of the parental benefit.

[17] The Claimant also explained why she asked for 55 weeks of benefits. She thought the application form asked her to include all weeks for medical leave, maternity,

⁴ See Claimant's application, at GD3-9.

⁵ See Claimant's application, at GD3-9.

⁶ See Claimant's application, at GD3-7.

⁷ See Record of Employment dated January 6, 2021, at GD3-18.

⁸ See Supplementary Record of Claim dated May 25, 2021, at GD3-21.

⁹ See Claimant's letter of May 25, 2021, accompanying request for reconsideration, at GD3-24.

¹⁰ See Claimant's letter of May 25, 2021, accompanying request for reconsideration, at GD3-24.

and parental leave. She did not realize that the question, “How many weeks do you wish to claim” was about only parental benefits.

– **The Claimant’s evidence at the General Division**

[18] At the General Division hearing, the Claimant testified that she always intended to take a year off work. So, she asked for extended parental benefits because she thought that she would be limited to getting only 35 weeks of benefits if she chose the standard option. She wanted medical, maternity and parental benefits, so thought she had to take the extended option. She testified that she asked for 55 weeks, because she thought this included the three weeks of medical leave that she was taking.¹¹

[19] On May 18, 2021, the Claimant noticed a large difference in payments. The Claimant testified that the large drop in pay raised a red flag for her, so she logged onto her My Service Canada Account. She saw that her maternity benefits had ended. She was now getting extended parental benefits.

[20] The Claimant contacted Service Canada. The agent told her that, as parental benefit payments had already been made, she could not change from extended to standard parental benefits.¹²

[21] The Claimant asked the Commission to reconsider its decision. The Claimant wrote that she was unaware that she had applied for the extended option until after she received her first payment of the parental benefit on May 18, 2021.¹³ The General Division asked the Claimant about this statement. She explained that she did not realize that “they were going to dock me that much when the time was up for maternity.”¹⁴

[22] The Claimant also testified that the application process confused her. She testified that, in hindsight, she should have called for help, but she did not have time

¹¹ At approximately 9:17 to 10:35 of the audio recording of the General Division hearing.

¹² At approximately 12:00 to 13:26 of the audio recording of the General Division hearing.

¹³ See Claimant’s letter dated May 25, 2021, at GD3-24.

¹⁴ At approximately 13:26 to 14:35 of the audio recording of the General Division hearing.

then and had “so many things on the go,” with the pandemic and the impending birth of her child.¹⁵

– **The General Division decision**

[23] The General Division agreed with the Commission that once parental benefits are paid, a claimant cannot change their election for parental benefits. However, the General Division rejected the Commission’s arguments that a claimant’s outward choice on an application form is the only relevant information in deciding what a claimant elected.

[24] The General Division determined that it had to consider all of the relevant evidence regarding what kind of parental benefits a claimant likely elected to receive. This included considering how long a claimant intended to be off work, as well as the claimant’s understanding of maternity and parental benefits.

[25] The General Division accepted the Claimant’s explanation that she had asked for 55 weeks of benefits because she understood it included sickness, maternity and parental benefits. The General Division also accepted the Claimant’s explanation that she asked for extended benefits because she mistakenly understood that, if she chose the standard option, she would only get 35 weeks of benefits in total.

[26] The General Division found that the application form was unclear, particularly for the average person. The General Division found the application form so ambiguous that a claimant would not know what to choose. Indeed, the General Division found that the Claimant did not understand that parental and maternity were separate periods.

[27] Because the General Division found that the application form was unclear, it concluded that the Claimant’s understanding about maternity and parental benefits was reasonable.

[28] The General Division found that the Claimant elected to receive standard benefits because she thought she was asking for a year of benefits. The General

¹⁵ At approximately 15:07 to 16:01 of the audio recording of the General Division hearing.

Division found that the Claimant's belief was consistent with asking for standard parental benefits.

[29] The General Division found that it would have been illogical for the Claimant to choose extended benefits if she wanted to be off work for one year, because it would result in not maximizing the benefits available to her.

[30] The General Division recognized that an election is irrevocable once parental benefits have been paid, but it found that the Claimant had elected standard benefits, so there was nothing to revoke.¹⁶

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

[31] The Commission argues that the General Division made legal errors, by:

- Trying to match the Claimant's belief or intentions with her election of parental benefits.
- Letting the Claimant change her election due to her own mistake and misunderstanding of the Employment Insurance program, and
- By letting the Claimant change her election after parental benefits had already been paid to her.

Did the General Division make a legal error?

[32] The Commission argues that the General Division made a legal error by letting the Claimant change her election because she was unfamiliar with her options and did not fully understand what she was doing. The Commission says that a claimant's limited knowledge of or unfamiliarity with the employment insurance program does not allow for a re-election of parental benefits.

¹⁶ See General Division decision, at para 35.

[33] The Commission argues:

Even if the claimant truly believed that she had to choose the extended option to get benefits for a year, a mistake—on its own—generally should not be enough to invalidate or void an election.

A mistake generally should not be sufficient, unless the application form somehow contributed to or was responsible in part for that claimant's mistake.¹⁷

[34] The Commission acknowledges that some circumstances may lead to invalidating or voiding a claimant's election of parental benefits. But, the Commission argues that there are very limited circumstances when this can occur.

[35] The Commission says that the only time when an election is invalidated is if the application form contributes to or causes a claimant's mistake. But where that mistake has been caused by a claimant's own failure to carefully read and attempt to understand her entitlement options, the Commission says that no legal remedies are available.¹⁸

[36] The Commission claims that the application form contained all the necessary information for the Claimant to decide on the appropriate parental benefit type:

- Under the heading, "Benefit Type," several types of benefits are listed. These include regular benefits, fishing benefits, sickness benefits, maternity benefits, parental benefits, compassionate care benefits, family caregiver benefits. There is a description for each benefit type. This lets an applicant know why the benefit is offered. For instance, maternity benefits are available for those who are pregnant or have recently given birth. Parental benefits are available for those who are caring for a newborn or newly adopted child.

¹⁷ See Representations of the Commission to the Social Security Tribunal—Appeal Division, filed September 16, 2021, at AD2-3.

¹⁸ See Commission's Representations to the Appeal Division, at AD2-3, and at approximately 10:22 of the audio recording of the Appeal Division hearing.

The Commission notes that the option for sickness benefits lets a claimant receive sickness benefits before maternity benefits. And the option for maternity benefits allows a claimant to receive maternity followed by parental benefits.

The Commission argues that it is clear from the list that sickness benefits, maternity benefits, and parental benefits are different from each other.¹⁹

- Under the heading “Maternity Information,” the application asks claimants, “Do you want to receive parental benefits immediately after receiving maternity benefits?”²⁰ The Commission argue that it is clear from this question that maternity benefits and parental benefits are two separate types of benefits.

The Commission argues that, under the same heading, it is also clear that a claimant can receive up to 15 weeks of maternity benefits. The option for maternity benefits reads, “No, I only want to receive up to 15 weeks of maternity benefits.”

- Under the heading, “Parental Information,” there is information about both the standard and extended parental benefit options. Each option sets out the benefit rate and the number of weeks payable. The Commission notes that sickness and maternity benefits are not mentioned anywhere under this heading.²¹

[37] The Commission argues that, had the Claimant considered the application form in its entirety, she would have realized that sickness and maternity benefits are different from parental benefits. The Commission argues that the application form was not so unclear or misleading that it could have led the Claimant to mistakenly believe that sickness, maternity, and parental benefits were the same thing, or that the 35 weeks for

¹⁹ See Claimant’s application for Employment Insurance benefits, at GD3-6.

²⁰ See Claimant’s application for Employment Insurance benefits, at GD3-8.

²¹ See Claimant’s application for Employment Insurance benefits, at GD3-9.

standard and 61 weeks for extended parental benefits included or were the equivalent of sickness and maternity benefits.

[38] The Commission also argues that, had the Claimant referred to her My Service Canada Account early on, she would have noted that there was a difference between each of the accounts.

[39] The Claimant testified at the General Division that she had logged onto her account. She logged onto her account after receiving the first payment of parental benefits.²²

[40] When the Claimant logged onto her account, she confirmed that maternity benefits had ended and that she was now receiving parental benefits. However, this does not substantiate the Commission's arguments that the Claimant would have necessarily seen that there was a difference between each of the accounts. There was no evidence at the General Division that showed what the Claimant's My Service Canada Account might have displayed before the Claimant accessed it after she received her initial parental benefit payments.

[41] The Claimant argues that the application form was unclear and misleading, so there was no way she could have known that maternity and parental benefits were different from each other. She points to the fact that the General Division member noted that, thus far for 2021, she has dealt with more than 25 cases similar to the Claimant's case. The member wrote that, if the application for maternity and parental benefits was clear and unambiguous, she would not have as many files with similar fact scenarios.

[42] However, the General Division member's observations does not form part of the evidence. On top of that, the General Division member failed to provide the Commission with any opportunity to respond to her observations.

[43] Despite arguing that the application form was unclear and was misleading, the Claimant testified at the General Division that, in the course of completing the

²² At approximately 12:00 to 13:10 of the audio recording of the General Division hearing.

application form, she discovered that sickness, maternity, and parental benefits are different benefits.²³ She had also testified that she did not realize that “they were going to dock me that much when the time was up for maternity.”²⁴ This evidence suggests that the Claimant was aware that maternity and parental benefits are different.

[44] However, I recognize that the Claimant also testified that she only understood the differences “to a point.”²⁵

[45] When the Claimant saw that the standard parental option offered 35 weeks of benefits, she became confused because she thought she needed more than 35 weeks for combined sickness, maternity and parental benefits. For this reason, she thought her only option was the extended parental option, as she understood it offered up to 61 weeks for medical, maternity and parental benefits. By claiming 55 weeks, the Claimant thought she was including sick leave benefits as well.²⁶

– **The General Division’s findings**

[46] The General Division member noted the case of *Karval*.²⁷ The member found the case distinguishable on its facts.

[47] The member noted the Federal Court’s comments. At paragraph 14, the Court wrote:

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. Where a claimant is actually misled by relying on official and incorrect information, certain legal recourse may be available under the doctrine of reasonable expectations. However, where a claimant like Ms. Karval is not misled but merely lacks the knowledge necessary to accurately answer unambiguous questions, no legal remedies are available. Fundamentally, it is the responsibility of a claimant to carefully read and attempt to understand their entitlement options and, if still in doubt, to ask the necessary questions.

²³ At approximately 6:04 to 6:52 of the audio recording of the General Division hearing.

²⁴ At approximately 13:26 to 14:35 of the audio recording of the General Division hearing.

²⁵ At approximately 9:40 to 10:30 of the audio recording of the General Division hearing.

²⁶ At approximately 10:50 to 11:01 of the audio recording of the General Division hearing.

²⁷ See *Karval v Canada (Attorney General)*, 2021 FC 395.

[48] The General Division found that these comments did not apply in the Claimant's situation. The General Division said that it recognized that the Court found the questions on the parental benefits section on the application form not objectively confusing. But, the General Division found that the Court failed to "address the interplay between [the parental benefits] section and the maternity benefits section."²⁸

[49] In particular, the General Division found that the application form was unclear that, when claiming how many weeks of parental benefits a claimant wanted, that they were separate from the weeks of maternity benefits. The member found that the application form did not specify that maternity benefits are a wholly separate type of benefit and are not part of the parental benefit section.

[50] The member wrote:

While the maternity section refers to 15 weeks of maternity benefits in the "No" option, I find it may not be obvious to a claimant that this is independent from the parental benefits section. If a claimant chooses "yes" to the question above, they may not know that they are asking to receive up to 15 weeks of maternity benefits, because it does not state that they will receive up to 15 weeks in addition to parental benefits.

Further, while the question itself of, "do you want to receive parental benefits immediately after receiving maternity benefits?" suggests that there is some separation between benefit types, I find that this is not plain and obvious person who does not work with EI benefits on a daily basis. It may suggest a separation between benefits, but it is not clear in defining the difference such that a claimant will certainly be clear about what they have elected to receive.

[51] The General Division concluded that this was not a case where the Claimant lacked the knowledge to answer unambiguous questions. This was because it found that the difference between maternity and parental benefits and the relationship between the two benefits was ambiguous.

²⁸ See General Division decision, at para 25.

– **The General Division’s error**

○ **Interpretation of Karval**

[52] The General Division misinterpreted *Karval*. It gave an overly wide interpretation to the Court’s determination in *Karval* as to when relief is available to a claimant.

[53] The Court indicated that relief is available where a claimant is actually misled by relying on official and incorrect information.

[54] But, the General Division did not point to or find that there was any information on the application form that was actually incorrect. Indeed, the General Division found that it “is not evidently clear that ... maternity benefits are a separate period of time.”²⁹ It also found that the “the application form did not specify that maternity benefits are a wholly separate type of benefit, and are not part of the parental benefit election.”³⁰ The General Division also found that it was “not plain and obvious to the average person”³¹ that there is a separation between benefit types.

[55] The General Division’s description of the application form’s deficiencies directly falls into the category in which the Court ruled out any relief. The Court ruled out relief in cases where information might be lacking, or where clearer language and better explanations could have been provided.

[56] The application form certainly could have been clearer. It could have provided more information and better explanations. But, unless the application form was incorrect, and actually misleading, the Claimant cannot rely on its shortcomings to invalidate or change her election.

○ **Different types of benefits**

[57] The General Division also erred when it found that the application form did not specify that maternity benefits are a wholly separate type of benefit, and are not part of the parental benefit election. This finding ignored the section under the heading “Benefit Type.”³²

[58] The section lists different types of benefits. There is no connection or similarity between most of the benefits. For instance, fishing benefits are for self-employed persons engaged in fishing. This type of benefit has no bearing or connection to say, family caregiver benefits, which benefits those providing care or support to a critically ill family member.

[59] While it may appear that there is some similarity between maternity benefits and parental benefits, they are listed separate and apart from the other. Each has an accompanying description that differs from the other. Hence, the General Division erred in finding that the application form does not specify that maternity benefits are a wholly separate type of benefit.

- **Weekly benefit rate**

[60] Finally, the General Division's analysis overlooked the fact that there are two defining features to the different parental benefit types. The two features that separate extended from standard parental benefits are: (1) the maximum number of weeks that are available and (2) the weekly rate of benefits.

[61] The Claimant testified that the large drop in pay raised a red flag for her. The weekly benefit rate changed from 55% for maternity benefits to 33% for extended parental benefits. At this point, clearly, the Claimant's concern was the benefit rate she was getting, rather than how long she would be getting benefits.

[62] Yet, there was no analysis or any consideration by the General Division into why it would have been reasonable for the Claimant to expect to receive 55% of her weekly insurable earnings when she had chosen the extended parental option. After all, the application form clearly says the extended parental option pays benefits at a rate of 33% of an applicant's weekly insurable earnings up to a maximum amount.

²⁹ See General Division decision, at para 25.

³⁰ See General Division decision, at para 25.

³¹ See General Division decision, at para 26.

³² See Claimant's application form, at GD3-6.

[63] The General Division focused on the number of weeks of benefits the Claimant expected to receive, without addressing what benefit rate the Claimant expected to receive.

[64] If the Claimant had truly expected to receive 55% of her weekly benefit rate, this could not have explained why she chose the extended parental benefit type.

[65] While an applicant can expect to receive benefits for the number of weeks they request, so too should they expect to be paid at the benefit rate for the option that they chose. It is clear from the application form that standard parental benefits pay a higher weekly rate of benefits than extended parental benefits pay. But, the General Division did not look at this when it assessed the Claimant's intentions or belief when she completed the application form.

[66] The General Division found that the Claimant believed that the extended option was the only parental benefit type that would give her benefits for the year. But, the extended option also said that it would pay benefits at 33% of weekly insurable earnings. It is unclear from the evidence whether the Claimant overlooked this part of the description, or was, at the time, prepared to accept the 33% weekly benefit rate for the extended parental type when she made her election.

[67] By choosing the extended parental option, the Claimant had to have been aware, or should have been aware, that she was also choosing to receive benefits at a lower weekly rate.

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

Remedy

[69] How can I fix the General Division's error? I have two basic choices.³³ I can substitute my own decision or I can refer the matter back to the General Division for

³³ Section 59 of the *Department of Employment and Social Development Act*.

reconsideration. If I substitute my own decision, this means I may make findings of fact.³⁴

– **The Parties’ arguments**

[70] The Commission urges me to 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.

[71] The Claimant argues that, even if the General Division made a factual mistake, it should not change the outcome. She says it is clear that the application form was misleading. Or, at best, the application form did not give her enough information to let her fill it out correctly. She says that she always wanted to take only a year off work. She simply made an honest mistake when she filled out the application form and asked for extended benefits.

[72] The Claimant argues the irrevocability provisions should not apply because she had received only one parental benefit payment before she called the Commission

– **The Claimant’s responsibilities**

[73] As both the General Division and I have noted, the Court held in *Karval* that, “Fundamentally, it is the responsibility of a claimant to carefully read and attempt to understand their entitlement options and, if still in doubt, to ask the necessary questions.”³⁵

[74] What follows from this is that, fundamentally, it is the responsibility of a claimant to not only carefully read and attempt to understand their entitlement options, but to also carefully and accurately complete the application form. (This assumes, of course, that

³⁴ *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.

³⁵ See *Karval v Canada (Attorney General)*, 2021 FC 395, at para 14.

the information setting out a claimant's entitlement options is clear and not misleading in any way.)

[75] There is no legal basis on the facts of this case to relieve the Claimant of these fundamental responsibilities. There is no evidence that shows that any information on the application form was incorrect and misleading. As I have explained above, unless the application form contained incorrect information and actually misled the Claimant, no relief is available, even if she made an honest mistake and received only payment before trying to change her election.

Conclusion

[76] The appeal is allowed. The Claimant's election of extended parental benefits is irrevocable for the reasons I have set out above.

Janet Lew
Member, Appeal Division