



Citation: *Canada Employment Insurance Commission v NP*, 2021 SST 753

## Social Security Tribunal of Canada Appeal Division

# Decision

**Appellant:** Canada Employment Insurance Commission  
**Representative:** Annick Dumoulin  
**Respondent:** N. P.

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**Decision under appeal:** General Division decision dated June 16, 2021  
(GE-21-883)

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**Tribunal member:** Melanie Petrunia  
**Type of hearing:** Teleconference  
**Hearing date:** September 28, 2021  
**Hearing participants:** Appellant's representative  
Respondent  
**Decision date:** December 12, 2021  
**File number:** AD-21-210

## Decision

[1] The appeal is allowed in part. I am rescinding the Appellant's decision to pay the Respondent benefits in accordance with her election of extended parental benefits.

## Overview

[2] The Respondent, N. P. (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 approximately 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 made an error of law 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.

[10] The Claimant has shown that she was misled into answering the questions in the wrong way. As a result, the Claimant's choice between the standard and extended options is invalid. So, I am rescinding the Commission's decision to pay extended parental benefits to the Claimant. The Claimant needs to make that choice again. However, I understand from her appeals and the information in the record that she chooses the standard option.

[11] In the circumstances I am allowing the appeal, in part.

## **Issue**

[12] I have focused on the following issues:

- a) Did the General Division make an error of law 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**

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

- 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.

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<sup>1</sup> 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

[14] 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.

[15] The Claimant made an application for maternity and parental benefits on November 3, 2020.<sup>2</sup> In her application, the Claimant said that her last day of work was August 30, 2020. The Claimant’s expected date of birth was October 25, 2020; however, she gave birth on October 15, 2020.<sup>3</sup>

[16] On the application form, the Claimant said that she would be returning to work with the same employer on October 25, 2021.<sup>4</sup> Her Record of Employment also confirms this return to work date and shows that she was on Short Term Disability from September 4 to October 14, 2020.<sup>5</sup>

[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 52 weeks from the drop down menu.<sup>6</sup>

[18] The first payment of extended benefits was processed on March 5, 2021. The Claimant contacted the Commission on March 23, 2021 requesting to change to

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<sup>2</sup> GD3-15

<sup>3</sup> GD3-8

<sup>4</sup> GD3-7

<sup>5</sup> GD3-17

<sup>6</sup> GD3-10

standard benefits. The Commission refused the Claimant's request to switch because the choice was irrevocable once she had been paid extended benefits.<sup>7</sup>

[19] On March 26, 2021, the Claimant contacted the Commission and requested an urgent call back. She explained that she was misinformed by a Service Canada agent who told her she had to apply for extended benefits. She said that she was going back to work after one year off and wanted the standard parental benefits.<sup>8</sup>

[20] The following day, a Service Canada agent called the Claimant back and she confirmed that she wanted 35 weeks of standard parental benefits. She was told her that it might take some time to change because the request had to go to the processing centre.<sup>9</sup>

[21] When the Claimant followed up with the Commission in May 2021, she was told that her request to change had been denied and that she did not request reconsideration. The Claimant stated that she did make a request but said that she would go to a Service Canada office with the form.<sup>10</sup> The Commission maintained its decision on reconsideration.

[22] 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.<sup>11</sup>

#### **– The General Division decision**

[23] In its decision, the General Division found, on a balance of probabilities, that the Claimant had elected standard parental benefits.<sup>12</sup> It found that the Claimant made a

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<sup>7</sup> Section 23(1.2) of the Employment Insurance Act says that the Claimant's election is irrevocable once benefits have been paid.

<sup>8</sup> GD3-23

<sup>9</sup> GD3-23

<sup>10</sup> GD3-24

<sup>11</sup> General Division decision at paras 17 and 18.

<sup>12</sup> General Division decision at para 17.

mistake when she selected to receive extended parental benefits on her application form, despite her plan to only take one year off work.<sup>13</sup>

[24] At the hearing before the General Division the Claimant stated that she contacted Service Canada about a week before applying for benefits. She told the agent she spoke to that she wanted to take a year off of work. She was told that she needed to apply for extended parental benefits if she wanted a year off and that she would only get 35 weeks if she applied for standard benefits.<sup>14</sup>

[25] The Claimant told the General Division that she selected 52 weeks of benefits believing that she was choosing the number of total weeks, including both maternity and parental benefits.<sup>15</sup>

[26] 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 found that it must consider all of the relevant evidence in deciding which type of benefits the Claimant likely elected to receive.<sup>16</sup>

[27] The General Division decided that the Claimant chose standard parental benefits based on the information on the application form as a whole. It found that the Claimant believed that she was selecting the entire length of her benefits, including maternity and parental, when she chose 52 weeks.<sup>17</sup> The General Division decided that the Claimant had actually elected standard parental benefits.

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

[28] The Commission argues that 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. It says that the General Division failed to

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<sup>13</sup> General Division decision at para 18.

<sup>14</sup> General Division decision at para 16.

<sup>15</sup> General Division decision at para 16.

<sup>16</sup> General Division decision at paras 13 and 14.

<sup>17</sup> General Division decision at para 18.

analyze the evidence in a meaningful manner and did not consider all of the relevant facts.

### **The General Division made an error of law**

[29] When applying for parental benefits, the Claimant had to choose between the standard and extended options.<sup>18</sup> She could not change options after receiving parental benefits from the Commission.<sup>19</sup>

[30] The Claimant selected the extended option on her application for EI benefits. In response to the question, “How many weeks do you wish to claim?” she chose 52 weeks. This answer is consistent with the extended option, because the standard option offers no more than 35 weeks of benefits.

[31] The General Division found that the Claimant made these selections intentionally. Even if she was mistaken and given the wrong advice by the Service Canada agent, she thought that this was what she needed to do to claim a year’s worth of EI benefits.

[32] Regardless, the General Division found that the Claimant had, in fact, chosen the standard option.

[33] To get to that result, the General Division relied on the evidence as a whole. It found that it was more likely than not that the Claimant chose the standard option.

[34] The General Division also relied on the Appeal Division’s decision in a case called *Employment Insurance Commission v TB*.<sup>20</sup> But the glaring contradictions on TB’s application form meant that it revealed no clear choice between the standard and extended options. So, the Tribunal had to look at all the evidence and decide which option TB was mostly likely to have chosen. In other words, the facts in this case and in *TB* are quite different.

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<sup>18</sup> Section 23(1.1) of the EI Act sets out this requirement.

<sup>19</sup> Section 23(1.2) of the EI Act describes when a parent’s choice becomes irrevocable (or final).

<sup>20</sup> *Employment Insurance Commission v TB*, 2019 SST 823.

[35] 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.

[36] Although the Claimant chose the extended option on her application form, it is still possible for the Tribunal to find that her choice was invalid. One way she can do that is by showing that she based her choice on misleading information from the Commission. For the reasons below, I find that that is what happened here.

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

[37] 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.<sup>21</sup>

[38] 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's election of extended parental benefits was not valid**

[39] 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.

[40] 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

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<sup>21</sup> 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.



the benefit rate.<sup>22</sup> Some of the earlier cases were also decided before the recent Federal Court decision of *Karval*.<sup>23</sup>

[41] 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.<sup>24</sup>

[42] 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.

[43] The Court in *Karval* left open the possibility that a Claimant might have recourse where they are actually misled by the Commission.<sup>25</sup> Other decisions of the Appeal Division have found this to be the case in certain circumstances.<sup>26</sup> I find that the Claimant was misled in this case.

– **The Claimant made a clear election**

[44] Other decisions of the Appeal Division have taken a two-step approach to deciding similar cases. This two-step approach considers, first, whether the Claimant made a clear election. Then, the Tribunal looks at whether or not this election was valid.<sup>27</sup>

[45] 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,

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<sup>22</sup> See *Canada Employment Insurance Commission v. M.C.*, 2021 SST 598 at para 70.

<sup>23</sup> *Karval v. Canada (Attorney General)*, 2021 FC 395.

<sup>24</sup> *Karval* at para 14.

<sup>25</sup> *Karval* at para 14.

<sup>26</sup> 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.

<sup>27</sup> *Canada Employment Insurance Commission v MO*, 2021 SST 435 at para 39.

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.

[46] The standard option only allows for up to 35 weeks of parental benefits. When combined with maternity benefits, the total weeks of benefits is almost one year. While the Claimant may have thought she was indicating the combined number of weeks of benefits she wanted, the choice of 52 weeks of parental benefits on the form is only possible when a Claimant chooses extended benefits.

[47] 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.

[48] 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.

– **The Claimant was misled by the Commission**

[49] The Claimant argues that she was misinformed by the Commission. At the hearing before the General Division, she stated that she spoke to a Service Canada agent before filling out the application for benefits. She said that she wanted to take a year off and was told to apply for extended benefits and select 52 weeks.

[50] At the hearing before the General Division, the Claimant was asked why she chose the option for extended parental benefits. She explained that she wanted 52 weeks off in total, and standard benefits wasn't enough.<sup>28</sup> She told the General Division that she phoned Service Canada and explained that she wanted to take a year off. The Claimant was told that she needed to choose extended and the agent she spoke with didn't explain the difference between parental and maternity benefits.<sup>29</sup>

[51] The evidence before the General Division shows that the Claimant thought that she was asking for a total number of weeks of benefits, including both maternity and parental, 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 because she was misinformed by the Commission.

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<sup>28</sup> Recording of General Division Hearing at 17:00.

<sup>29</sup> Recording of General Division Hearing at 20:25.

[52] The Commission argues that the Claimant was not misled by the Service Canada agent. It says that the notes indicate the Claimant was told she had to apply for extended parental benefits because her application was late.<sup>30</sup>

[53] The Claimant was clear in her testimony before the General Division that these notes do not accurately report the conversation that she had.<sup>31</sup> She said that she explained to the agent that she wanted to take a year off work and that she was told she needed to choose extended benefits and select 52 weeks. She was not told that there is a difference between maternity and parental benefits.

[54] I find that the Claimant's testimony is consistent with what she chose on the application form. If the Claimant was told to select extended benefits because her application was 2 weeks late, she would not have been advised to choose 52 weeks of parental benefits.

[55] The Claimant also provided a return to work date of October 25, 2021 on her application form. This is the same date that her ROE indicates she will return to work. This is consistent with the Claimant's position that she was not told that there was a difference between maternity and parental benefits on the application form. It is also consistent with her position that she was told to select extended benefits and choose 52 weeks if she wanted to take a year off. This return to work date is much earlier than would be expected if she were to take 52 weeks of parental leave, in addition to the 15 weeks of maternity leave.

[56] I find that the Claimant was misinformed by a Service Canada agent that she should select extended parental benefits for 52 weeks if she wanted to take a year off of work.

[57] As discussed above, the Federal Court in *Karval* did not rule out the availability of legal recourse for a claimant, "[w]here a claimant is actually misled by relying on official

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<sup>30</sup> AD2-4

<sup>31</sup> Recording of General Division Hearing at 19:50 to 20:10.

and incorrect information.”<sup>32</sup> I find that the Claimant was misled by relying on official and incorrect information when she applied for benefits and made her election.

[58] 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.

[59] I have found that the General Division’s made an error, but I reached the same result using a different approach. The Claimant has shown that she was misled into answering the questions on the application form in the wrong way. As a result, the Claimant’s choice between the standard and extended options is invalid and I am rescinding the Commission’s decision to pay extended parental benefits to the Claimant.

## **Conclusion**

[60] The appeal is allowed in part. The Claimant needs to choose between standard and extended parental benefits. I understand from her appeal and the information in the record that she chooses the standard option.

Melanie Petrunia  
Member, Appeal Division

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<sup>32</sup> Karval at para 14.