Citation: *Canada Employment Insurance Commission v LB*, 2022 SST 30

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	Canada Employment Insurance Commission
Representative:	Isabelle Thiffault
Respondent:	L. B.
Representative:	Greg Rideout

Decision under appeal:	General Division decision dated August 6, 2021 (GE-21-1173)

Tribunal member:	Melanie Petrunia
Type of hearing:	Teleconference
Hearing date:	November 29, 2021
Hearing participants:	Appellant's representative Respondent Respondent's representative
Decision date:	January 26, 2022
File number:	AD-21-279

Decision

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

Overview

[2] The Respondent, L. B. (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 indicated on the application form that she wanted to receive 56 weeks of benefits. She stated that her last day of work was October 15, 2020 and that she planned to return to work on November 17, 2021. The Claimant received her first payment of parental benefits by cheque in late February, 2021. In March 2021, she asked the Commission to switch to the standard benefit option.

[5] 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.

[6] The Claimant appealed the Commission's decision to the Tribunal's General Division and won. The General Division decided that the Claimant made a mistake when she clicked the button to choose extended parental benefits. It found that she intended to choose standard parental benefits and that she wanted one year of maternity and parental benefits combined.

[7] The Commission is now appealing the General Division decision to the Tribunal's Appeal Division. It argues that the General Division exceeded its jurisdiction, made

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

[8] 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

[9] 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

[10] 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]

- 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.

[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

[11] 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.

[12] The Claimant made an application for maternity and parental benefits on October 19, 2020.[2] In her application, the Claimant said that her last day of work was October 15, 2020 and that she planned to return to work November 17, 2021.[3]

[13] 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 56 weeks from the drop down menu.[4]

[14] The first payment of extended benefits was processed on February 5, 2021. The Claimant did not receive the cheque until late February and contacted the Commission on March 18, 2021 to request to change to standard parental benefits.[5] 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.

[2] GD3-16
[3] GD3-7
[4] GD3-8 to GD3-10
[5] GD3-21

– The General Division decision

[15] The General Division allowed the Claimant's appeal. It found that the Claimant elected standard parental benefits. The General Division found that it must consider all relevant evidence when determining which option a Claimant chose.[6]

[16] The General Division considered that the Claimant indicated that she wanted 56 weeks of parental benefits. She had also stated that she planned to return to work on November 17, 2021, which totalled about 13 months off work. The General Division found that the Claimant was indicating the total number of weeks she planned to be off, including the 15 weeks of maternity, when she requested 56 weeks of parental benefits.[7]

[17] The General Division found that the Claimant wanted one year of maternity and parental benefits combined, despite the fact that she requested 56 weeks of parental benefits. It decided that the Claimant misunderstood the choices on the application form and had a clear intention to elect standard parental benefits.[8]

– The Commission's appeal to the Appeal Division

[18] 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 determined that the Claimant had not elected extended parental benefits;
- The General Division exceeded its jurisdiction by determining what option the Claimant had elected on her application form and the validity of that election;
- The General Division erred in law by effectively changing the Claimant's election from extended to standard after benefits had been paid to her; and

[6] General Division decision at para 20.
[7] General Division decision at para 42.
[8] General Division decision at para 45.

- The General Division erred in law by failing to hold the Claimant to her obligation to know her rights and entitlements under the *Employment Insurance Act.*

The General Division based its decision on a factual error when it found that the Claimant chose standard parental benefits

[19] In its decision, the General Division notes that the Claimant initially asked for 56 weeks of parental benefits, believing that this number of weeks included the 15 weeks of maternity benefits. The Claimant then asked to switch to standard parental benefits, wanting to change the number of weeks of benefits to 41, which would still provide benefits for the full 13 months that the Claimant intended to be off work.[9] At the hearing before the General Division the Claimant confirmed that she wanted 35 weeks of standard parental benefits.

[20] The General Division acknowledges that the Claimant intended to be off work for 13 months. In both her initial application for benefits and her later request to switch, the Claimant wanted to receive benefits for the full 13 months that she was off work. The Claimant explained that she believed that the benefits would be pro-rated so that she would receive her full benefit entitlement over the 13-month period.[10]

[21] The General Division found that the application form does not clearly explain that the maternity benefits are a wholly separate type of benefits and are not part of the parental benefit election.[11] For this reason, the General Division accepted that the Claimant thought that she was stating the total number of weeks of benefits she wanted to receive when she stated 56 weeks.

[22] The General Division also found that the Claimant was experiencing significant stress at the time that she completed her application for benefits. This caused her to

[9] GD3-21.
[10] General Division decision at para 14.
[11] General Division decision at para 30.

mistakenly believe that the benefits would be pro-rated over the 13 months that she was off work.

[23] 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?”

[24] 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. The Claimant chose 56 weeks, which is consistent with the extended option.

[25] 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.

[26] In finding that the Claimant elected standard parental benefits, the General Division determined that it can look at all of the relevant evidence, including the Claimant’s intention, when deciding which option she elected.

[27] The General Division relied on an Appeal Division decision in a case called *Employment Insurance Commission* v *TB*.[12] In that case, there were clear contradictions on the claimant’s application form, which meant that it revealed no clear choice between the standard and extended options. The Tribunal had to look at all the evidence and decide which option TB was mostly likely to have chosen. The facts in this case and in *TB* are quite different.

[28] Here, there were no contradictions on the Claimant’s application form. It was perverse for the General Division to ignore the clear answers that the Claimant provided on the application form and find that she had chosen standard parental benefits.

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[12] *Canada Employment Insurance Commission v. T.B.,* 2019 SST 823

[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.[13]

[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.[14] Some of the earlier cases were also decided before the recent Federal Court decision of *Karval*.[15]

[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

[13] 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.
[14] See Canada Employment Insurance Commission v. M.C., 2021 SST 598 at para 70.
[15] *Karval v. Canada (Attorney General)*, 2021 FC 395.

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.[16]

[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.

[36] The Court in *Karval* left open the possibility that a Claimant might have recourse where they are actually misled by the Commission.[17] Other decisions of the Appeal Division have found this to be the case in certain circumstances.[18] I find that the Claimant was not misled by the Commission 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 13 months off. The Claimant chose 56 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. She always wanted to maximize the amount of benefits that she would receive.[19]

[38] The Claimant argues that the application form is not clear and does a poor job differentiating between maternity and parental benefits. She states that the form is misleading and does not clearly indicate that the 15 weeks of maternity benefits are not included in the total number of weeks of benefits that a Claimant is requesting.

[39] The Claimant's mistake in filling out the application form is not entirely explained by the argument that the application form does clearly distinguish maternity and

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[16] *Karval* at para 14.
[17] *Karval* at para 14.
[18] 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.
[19] AD2-4.

parental benefits. The Claimant also misunderstood that, in choosing extended parental benefits, she would receive the same amount of total benefits but pro-rated over 13 months. She did not realize that she would receive a lower total amount of benefits than if she had chosen standard benefits, and stopped receiving benefits one month before returning to work.

[40] There is nothing on the application form to suggest that benefits are pro-rated for the number of weeks a claimant is off work. The application form clearly states that the benefit rate under the standard option is 55% of a claimant's weekly insurable earnings, and the rate for the extended option is 33% of weekly insurable earnings. It cannot be said that the Claimant's misunderstanding in this respect was because she was misled by the Commission or the application form. The evidence before the General Division shows that the Claimant made an unfortunate mistake.

– **The Claimant made a clear election**

[41] 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 on the application form that could be said to contradict the Claimant's choice of extended parental benefits is her return to work date of November 17, 2021. This return to work date is earlier than it would be if the Claimant were to take 15 weeks of maternity benefits, followed by 56 weeks of parental benefits.

[42] However, as discussed above, this return to work date implies 41 weeks of parental benefits which is more than the standard option allows. The request for 56 weeks of parental benefits is also consistent with the choice of extended parental benefits, though I understand this number was mistakenly stated.

[43] 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.

[44] 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.

[45] A return to work date is not required on an application for benefits and does not determine a Claimant's eligibility. While the Claimant's return to work date contradicts the choice of 56 weeks of parental benefits, it does not contradict the choice of extended benefits. If she had understood that the number of weeks does not include 15 weeks of maternity benefits, she would still have been asking for more than the 35 weeks allowed under the standard option. 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?**

[46] 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.[20] There is a similar provision in the Quebec Insurance Plan. However, the Quebec legislation, states that the election is irrevocable, except in exceptional circumstances.[21]

[47] 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.[22] I find that the legislation does not leave any room to revoke an election on the basis of a mistake.

[48] 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

[49] The Claimant elected to receive 56 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.

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[20] Section 23(1.2) of the *Employment Insurance Act*.
[21] Quebec Insurance Plan s. 18.
[22] *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

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

Melanie Petrunia
Member, Appeal Division