



Citation: *Canada Employment Insurance Commission v RY*, 2022 SST 40

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: Canada Employment Insurance Commission
Representative: Anick Dumoulin

Respondent: R. Y.

Decision under appeal: General Division decision dated September 1, 2021
(GE-21-1420)

Tribunal member: Melanie Petrunia

Type of hearing: Teleconference

Hearing date: November 29, 2021

Hearing participants: Appellant's representative
Respondent

Decision date: February 1, 2022

File number: AD-21-292

Decision

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

Overview

[2] The Respondent, R. Y. (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 61 weeks of parental benefits. The Claimant received her first payment of parental benefits in July 2021. Shortly after she received the payment, she contacted 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 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:

- 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?
- 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 April 6, 2021.² She was in receipt of regular EI benefits at the time that she made her application.

[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 61 weeks from the drop down menu.³

[14] The first payment of extended benefits was processed on July 16, 2021. The Claimant contacted the Commission on July 20, 2021 to request to change to standard parental benefits.⁴ 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

[15] The General Division allowed the Claimant’s appeal. It found that the Claimant intended to elect standard parental benefits. The General Division found that it must

² GD3-13

³ GD3-8 to GD3-8

⁴ GD3-17

consider all relevant evidence when determining which option the Claimant meant to choose when she filled out the application for benefits.⁵

[16] The General Division relied on the Claimant's testimony that she always intended to choose standard benefits and planned to return to work in November 2021. The Claimant believed she had clicked on the standard option and chosen 35 weeks when she submitted her application.⁶

[17] The General Division found that the Claimant made a mistake when she chose the option for extended parental benefits. It decided that the Claimant always intended to elect standard parental benefits. In support of this finding, the General Division relied on the Claimant's testimony and the fact that she contacted the Commission shortly after she received the first payment of parental benefits and realized her error.⁷

[18] The General Division also notes that the Claimant was receiving regular EI benefits before her maternity and parental benefits began and her benefit period was ending in December 2021.⁸

The Commission's appeal to the Appeal Division

[19] 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 meant to choose standard parental benefits;
- The General Division erred in law by changing the Claimant's election to match her intentions.

⁵ General Division decision at para 11.

⁶ General Division decision at para 15.

⁷ General Division decision at para 20.

⁸ General Division decision at para 22.

- 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 permitting the Claimant to revoke her election after benefits had been paid to her; and

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

[20] In its decision, the General Division found that the Claimant always intended to choose standard parental benefits.⁹ The General Division accepted the Claimant's testimony that she made a mistake when she clicked on the extended option. It also accepted her testimony that she planned to return to work in November 2021.¹⁰

[21] The General Division found that the Claimant intended to choose standard parental benefits when she applied and therefore she did choose standard parental benefits.

[22] The Commission argues that the General Division's finding that the Claimant chose standard parental benefits is unsupported by the information provided on the application form. 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?"

[23] The question on the application form is clear. The Claimant was asked how many weeks she wished to claim. The Claimant's application form shows that she selected the option for extended parental benefits and chose 61 weeks from the drop-down menu as the number of weeks she wished to claim.

⁹ General Division decision at para 23.

¹⁰ General Division decision at paras 20 and 22.

[24] 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.

[25] 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.

[26] The General Division cited a number of decisions of both the Appeal Division and the General Division. However, the cases cited do not support the General Division's approach. In some of the cases cited 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 in those cases had to look at all the evidence and decide which option the claimants were mostly likely to have chosen.¹¹

[27] In other cases cited by the General Division, the Tribunal found that claimants were unable to make an informed election because the application form was misleading, incomplete or ambiguous.¹²

[28] Here, there were no contradictions on the Claimant's application form. The Claimant did not claim to have been misled by the 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.

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

¹¹ *Canada Employment Insurance Commission v TB*, 2019 SST 823; *MH v Canada Employment Insurance Commission*, 2019 SST 1385

¹² *ML v Canada Employment Insurance Commission*, 2020 SST 255; *VV v Canada Employment Insurance Commission*, 2020 SST 274.

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

[30] At the hearing before me, the Commission argued that, if the General Division made an error, then I should give the decision the General Division should have given.¹³ The Claimant did not take a position with respect to remedy.

[31] I agree with the Commission. 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.

[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 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

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.

¹⁶ *Karval* at para 14.

[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 in November 2021. The Claimant believed that she had chosen to receive 35 weeks of standard parental benefits.¹⁹

[38] It cannot be said that the Claimant's mistake 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 error.

– 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. She testified before the General Division that she planned to return to work in November but did not put down a date for her return to work because she did not know the exact date.²⁰

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 General Division decision at para 15.

²⁰ General Division decision at para 15.

[40] 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.

[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 and indicated that she wished to claim 61 weeks.

[42] 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.²¹ There is a similar provision in the Quebec Insurance Plan. However, the Quebec legislation, states that the election is irrevocable, except in exceptional circumstances.²²

[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.²³ I find that the legislation does not leave 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 61 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.

²¹ Section 23(1.2) of the *Employment Insurance Act*.

²² Quebec Insurance Plan s. 18.

²³ *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