Citation: *Canada Employment Insurance Commission v FV*, 2022 SST 35

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	Canada Employment Insurance Commission
Respondent:	F. V.

Decision under appeal:	General Division decision dated December 20, 2021 (GE-21-2341)

Tribunal member:	Jude Samson
Decision date:	February 1, 2022
File number:	AD-22-22

Decision

[1] Leave (permission) to appeal is refused. The appeal will not proceed.

Overview

[2] F. V. is the Claimant in this case. He applied for and received Employment Insurance (EI) parental benefits. On his application, he had to choose between two parental benefit options: standard or extended.[1]

[3] The application form explained how 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.

[4] The Claimant's spouse had not claimed any maternity or parental benefits. He wanted 16 weeks of parental benefits, so he chose the standard option.

[5] However, the Canada Employment Insurance Commission (Commission) stopped paying benefits to the Claimant after just three weeks.[2] It said that, under the standard option, it could not pay benefits to the Claimant beyond his child's first birthday. The General Division referred to this as the "parental benefits window."

[6] So, the Claimant asked to switch to the extended option. The Commission refused the Claimant's request. The Commission said that it was too late for the Claimant to change options because it had already paid him some parental benefits.

[7] The Claimant successfully appealed the Commission's decision to the Tribunal's General Division. The General Division found that the Claimant's choice was invalid because the Commission's application form misled him into making the wrong choice.

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[1] Section 23(1.1) of the *Employment Insurance Act* (EI Act) calls this choice an "election".
[2] Service Canada delivers EI programs for the Commission.

[8] The Commission now wants to appeal the General Division decision to the Tribunal's Appeal Division. But the Commission needs permission to appeal for the file to move forward.

[9] The Commission argues that the General Division decision contains errors of law. It also argues that the General Division exceeded its powers.

[10] The Commission's appeal has no reasonable chance of success. I have no choice, then, but to refuse permission to appeal.

Preliminary matter: I am not considering the Commission's new evidence

[11] New evidence is evidence that the parties had not put in front of the General Division when it made its decision. In this case, the Commission's Application to the Appeal Division summarizes additional information available on its website, including a hyperlink to access that information.[3] This is new evidence.

[12] I cannot consider this evidence because the law limits the powers of the Appeal Division.[4] I must focus on whether the General Division made a relevant error. But I cannot fault the General Division for not considering evidence that none of the parties had put in front of it.

[13] Similarly, my power is limited to making the decision that the General Division should have made.[5] I cannot take a fresh look at the case and come to my own conclusions based on new and updated evidence.

[14] There are exceptions to the general rule against considering new evidence.[6] For example, I can consider new evidence that provides general background information

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[3] See the fourth paragraph on page AD1-9.
[4] The Appeal Division's role is mostly defined by sections 58 and 59 of the *Department of Employment and Social Development Act* (DESDA).
[5] See section 59(1) of the DESDA.
[6] Although the context is somewhat different, the Appeal Division normally applies the exceptions to considering new evidence that the Federal Court of Appeal listed in *Sharma v Canada (Attorney General)*, 2018 FCA 48 at para 8 and that the Federal Court listed in *Greeley v Canada (Attorney General)*, 2019 FC 1493 at para 28.

only, highlights findings that the General Division made without supporting evidence, or reveals ways in which the General Division acted unfairly.

[15] None of those exceptions apply in this case. Instead, the Commission's new evidence attempts to support its argument about what the Claimant knew, or should have known, when filling out his application for benefits.

[16] As a result, I have not considered the Commission's new evidence.

Issues

[17] My decision focuses on these issues:

a) Could the General Division have made an error of law when it decided that the Commission's application form misled the Claimant?

b) Could the General Division have made an error of law or exceeded its powers by considering the validity of the Claimant's election and allowing him to change options after benefits had been paid?

Analysis

[18] Most Appeal Division files follow a two-step process. This appeal is at step one: permission to appeal.

[19] The legal test that the Commission needs to meet at this step is a low one: Is there any arguable ground on which the appeal might succeed?[7] If the appeal has no reasonable chance of success, then I must refuse permission to appeal.[8]

[20] To decide this question, I considered whether the General Division could have made an error of law or jurisdiction. These are among the errors that I can consider.[9]

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[7] This legal test is described in cases like *Osaj v Canada (Attorney General)*, 2016 FC 115 at para 12 and *Ingram v Canada (Attorney General)*, 2017 FC 259 at para 16.
[8] This is the legal test described in section 58(2) of the DESDA.
[9] The relevant errors, formally known as "grounds of appeal," are listed under section 58(1) of the DESDA.

There is no arguable case that the General Division made an error of law when it decided that the Commission's application form misled the Claimant

[21] The General Division found that the Claimant chose standard parental benefits. However, it decided that his choice was invalid.

[22] To get to its conclusion, the General Division found that the Commission's application form was missing critical information, which misled the Claimant into making the wrong choice.

[23] The Commission's application form offered the Claimant up to 35 weeks of standard parental benefits paid at a higher rate. Or, he could receive up to 61 weeks of extended parental benefits paid at a lower rate. Since the Claimant wanted 16 weeks of benefits, he obviously chose the standard option.

[24] However, nowhere did the Commission's application form tell the Claimant about the parental benefits window. Nowhere did it tell the Claimant that the Commission would stop paying him standard parental benefits when his child turned one.[10]

[25] This was critical information for the Claimant because he submitted his application shortly before his child's first birthday. In contrast, by choosing the extended option, the Claimant could have received the 16 weeks of benefits that he wanted (albeit at the lower rate).

[26] The General Division concluded that this lack of critical information misled the Claimant into make the wrong choice.

[27] Regardless of the problem with its application form, the Commission argues that the General Division failed to apply legal principles that put more responsibility on applicants for parental benefits. The Commission says that, if the General Division had

[10] On page AD1-9, the Commission admits that its application form provides no information about the parental benefits window.

applied these principles, it could not have concluded that the Commission misled the Claimant.

[28] First, the Commission maintains that the Claimant needed to carefully read about his options, attempt to understand them, and ask questions when needed.[11] And second, it says that the General Division failed to apply the principle that ignorance of the law is not an excuse. The Commission argues that the General Division should have considered that the Claimant knew that his benefits would stop when his child turned a year old because it is part of the law.[12]

[29] The Commission's arguments have no reasonable chance of success.

[30] The General Division did not find that the Claimant was ignorant of the law and excuse him for this. Similarly, this is not a case about the Claimant's failure to comply with a legal requirement because of his ignorance.

[31] Instead, this case is about the validity of the Claimant's choice. Specifically, when applicants are faced with choosing between two options, the Commission should avoid misleading the applicant into making the wrong choice. If it does, the applicant's choice may be invalid.[13]

[32] Indeed, the *Karval* decision that the Commission relies on is careful to distinguish between people who lack the knowledge to answer clear questions and those who are misled by relying on incomplete information from the Commission.[14]

[33] Plus, the facts in *Karval* were different. In *Karval*, it was very clear that the applicant had chosen the extended option. As a result, the Commission no hint that she

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[11] In support of this argument, the Commission relies on *Karval v Canada (Attorney General),* 2021 FC 395 at para 14.
[12] In support of this argument, the Commission relies on the *Karval* decision and on section 23(2) of the EI Act.
[13] The Tribunal has come to this conclusion in many cases, including *Canada Employment Insurance Commission v MO*, 2021 SST 435, *ML v Canada Employment Insurance Commission*, 2020 SST 255, and *VV v Canada Employment Insurance Commission*, 2020 SST 274.
[14] See paragraph 14 of the Federal Court's decision in *Karval v Canada (Attorney General),* 2021 FC 395.

might be confused.[15] In this case, however, the Claimant asked for 16 weeks of standard parental benefits, which is something that the law didn't allow.

[34] In other words, by asking for something the Commission could not provide, the Claimant's application revealed a contradiction that cast doubt over his choice between the standard and extended options.[16] Yet the Commission never followed up to clarify his choice.

[35] There is no arguable case that the General Division failed to apply the legal principles that the Commission is alleging. Those principles do not apply to this case.

There is no arguable case that the General Division made an error by considering the validity of the Claimant's election and allowing him to change options after benefits had been paid

[36] The Commission also argues that the General Division made an error of law or went beyond its powers by:

- considering the validity of the Claimant's election; and
- effectively allowing the Claimant to change options after receiving parental benefits.[17]

[37] These arguments have no reasonable chance of success.

[38] The General Division has the power to decide any question of law or fact that is needed to resolve an appeal.[18] This includes the ability to consider all of the evidence to determine if the Claimant made a clear and valid choice.

[39] The General Division also recognized that a person can't change options after starting to receive parental benefits.[19]

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[15] See paragraph 16 of the Federal Court's decision in *Karval v Canada (Attorney General),* 2021 FC 395.
[16] Court decisions like *Semenchuck v Ruhr*, 1996 CanLII 7148 (SK QB) have emphasized the need for a choice to be clear and unequivocal.
[17] The Commission argues that section 23(1.2) of the EI Act prohibits this.
[18] See section 64(1) of the DESDA.
[19] See paragraph 5 of the General Division decision.

[40] However, the General Division decided to follow a series of Appeal Division decisions that say that, in some situations, an applicant's choice is invalid from the beginning.[20] In other words, the Claimant never validly chose between the standard and extended options. This is different from allowing the Claimant to change options.

[41] The General Division was not obliged to follow these decisions, but it found no reason to depart from them.

[42] In the circumstances, there is no arguable case that the General Division made an error of law or exceeded its powers.

[43] Aside from the Commission's arguments, I have reviewed the file and examined the General Division decision.[21]

[44] The evidence supports the General Division's decision. I did not find evidence that the General Division might have ignored or misinterpreted. Finally, the Commission has not argued that the General Division acted unfairly in any way.

Conclusion

[45] I have decided that the Commission's appeal has no reasonable chance of success. I have no choice, then, but to refuse permission to appeal. This means that the appeal will not proceed.

Jude Samson
Member, Appeal Division

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[20] Specifically, the General Division referred to *Canada Employment Insurance Commission v SA*, 2021 SST 406. The Tribunal has also reached the same conclusion in other cases that are very similar to this one, like *ML v Canada Employment Insurance Commission*, 2020 SST 255, and *SD v Canada Employment Insurance Commission*, 2020 SST 265.
[21] The Federal Court has said that I must do this in decisions like *Griffin v Canada (Attorney General)*, 2016 FC 874 and *Karadeolian v Canada (Attorney General)*, 2016 FC 615.