



Citation: *Canada Employment Insurance Commission v NN*, 2022 SST 41

## Social Security Tribunal of Canada Appeal Division

# Decision

**Appellant:** Canada Employment Insurance Commission  
**Representative:** Anick Dumoulin

**Respondent:** N. N.

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**Decision under appeal:** General Division decision dated September 13, 2021  
(GE-21-1323)

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**Tribunal member:** Melanie Petrunia

**Type of hearing:** Teleconference

**Hearing date:** November 30, 2021

**Hearing participants:** Appellant  
Appellant's representative  
Respondent

**Decision date:** February 1, 2022

**File number:** AD-21-303

## Decision

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

## Overview

[2] The Respondent, N. N. (Claimant) applied for and received Employment Insurance (EI) parental benefits. On his application for parental benefits, he had to elect (choose) between two options: standard and extended. 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.

[3] The Claimant indicated on the application form that he wanted to receive 52 weeks of benefits. He stated that his last day of work was May 20, 2021 and he did not provide a return to work date. The Claimant received his first payment of parental benefits by direct deposit on June 24, 2020. This payment was for the periods from May 23<sup>rd</sup> to June 19<sup>th</sup>. He contacted the Commission that day and asked to switch to the standard benefit option.

[4] The Commission refused the Claimant's request. The Commission said that it was too late for the Claimant to change options because he had already received parental benefits.

[5] 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 he chose extended parental benefits. It found that he intended to choose standard parental benefits and that he planned to take 8 months off work.

[6] 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.

[7] 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

[8] 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

[9] 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>

- 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.

## Background

[10] There are two types of parental benefits:

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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).

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.

[11] The Claimant made an application for parental benefits on May 20, 2021.<sup>2</sup> In his application, the Claimant said that his last day of work was May 20, 2021 and that he did know what day he would return to work.<sup>3</sup>

[12] The Claimant chose the option for extended parental benefits. The Claimant was asked how many weeks of benefits he wished to receive and he chose 52 weeks from the drop down menu.<sup>4</sup>

[13] The first payment of extended benefits was processed on June 22, 2021 and direct deposited in the Claimant’s account on June 24, 2021.<sup>5</sup> The Claimant noticed that the amount he received was less than he was expecting. He contacted the Commission on the same day to request to change to standard parental benefits.<sup>6</sup> The Commission refused the Claimant’s request. The Commission said that it was too late for the Claimant to change options because he had already received parental benefits.

[14] The Claimant made a request for reconsideration but the Commission maintained its decision.

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<sup>2</sup> GD3-20

<sup>3</sup> GD3-9

<sup>4</sup> GD3-13

<sup>5</sup> GD3-29

<sup>6</sup> GD3-30

### **The General Division decision**

[15] The General Division allowed the Claimant's appeal. It found that the Claimant meant to elect standard parental benefits. The General Division found that standard parental benefits was consistent with the amount of time that he planned to be off work.<sup>7</sup>

[16] The General Division stated that it must consider all relevant evidence when determining which option a Claimant actually wanted when he filled out the application.<sup>8</sup>

[17] The General Division considered that the Claimant said that he wanted 52 weeks of parental benefits on the application form. He stated that he planned to take 8 months off work but didn't put a return to work date on the application form in case he decided to go back earlier. The Claimant did not have an explanation for why he chose extended parental benefits or indicated 52 weeks.<sup>9</sup>

[18] The General Division found that the Claimant wanted 35 weeks of standard parental benefits, despite the fact that he requested 52 weeks of extended parental benefits. It relied on the Claimant's testimony and an email he submitted from his employer after the hearing which stated that he was expected to return to work on February 25, 2022.<sup>10</sup>

[19] The General Division also noted that the Claimant's first language is not English. It found that it was more likely than not that the Claimant misunderstood the choices on the application form.<sup>11</sup>

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

[20] The Commission argues that the General Division made several errors in its decision. It makes the following arguments:

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<sup>7</sup> General Division decision at para 2.

<sup>8</sup> General Division decision at para 24.

<sup>9</sup> General Division decision at para 32.

<sup>10</sup> General Division decision at para 25.

<sup>11</sup> General Division decision at para 32.

- 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 matching the Claimant's intention to his election; and
- The General Division erred in law by effectively changing the Claimant's election from extended to standard after benefits had been paid to him.

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

[21] In its decision, the General Division notes that the Claimant asked for 52 weeks of extended parental benefits. The Claimant then asked to switch to standard parental benefits, wanting to change the number of weeks of benefits to 35.<sup>12</sup> At the hearing before the General Division the Claimant confirmed that he wanted 35 weeks of standard parental benefits.

[22] The General Division found that the Claimant intended to be off work for 8 months. It relied on the Claimant's testimony, which it found was supported by the email from the Claimant's employer. The General Division notes that the email confirms that the Claimant planned to return to work after eight months at the most.<sup>13</sup> The General Division also states that the Claimant had a documented return to work date that aligned with the standard benefit option.<sup>14</sup>

[23] In describing the email from the employer, the General Division says that the email confirms the Claimant was due to return to work on February 25, 2022, eight months after his claim for parental benefits began. However, the Claimant's benefits began on May 23, 2021. The return to work date is 9 months later, approximately 40 weeks. This is not consistent with the choice of 35 weeks of standard parental benefits.

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<sup>12</sup> GD3-21.

<sup>13</sup> General Division decision at para 25.

<sup>14</sup> General Division decision at para 29.

[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 his application form. The General Division also miscalculated the length of the Claimant's planned parental leave as indicated by his stated return to work date of February 25, 2022.

[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 he elected.

[26] The General Division relied on an Appeal Division decision in a case called *Employment Insurance Commission v TB*.<sup>15</sup> 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.

[27] 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 he had chosen standard parental benefits. The evidence that the General Division relied on from the Claimant's employer also does not support its finding that the Claimant planned to take an 8-month parental leave.

[28] 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**

[29] I have options for fixing the General Division's error. I can substitute my own decision or I can refer the matter back to General Division for reconsideration. If I substitute my own decision, this means I may make findings of fact.

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<sup>15</sup> *Canada Employment Insurance Commission v. T.B.*, 2019 SST 823

[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.<sup>16</sup> The Claimant did not take a position.

[31] 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.<sup>17</sup> Some of the earlier cases were also decided before the recent Federal Court decision of *Karval*.<sup>18</sup>

[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.<sup>19</sup>

[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

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<sup>16</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.

<sup>17</sup> See *Canada Employment Insurance Commission v. M.C.*, 2021 SST 598 at para 70.

<sup>18</sup> *Karval v. Canada (Attorney General)*, 2021 FC 395.

<sup>19</sup> *Karval* at para 14.



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.<sup>20</sup> Other decisions of the Appeal Division have found this to be the case in certain circumstances.<sup>21</sup> I find that the Claimant was not misled by the Commission in this case.

### **The Claimant was not misled by the application form**

[37] The Claimant argued that it was always his intention to return to work after 8 months off. The Claimant did not have an explanation for why he chose 52 weeks of benefits. He said that he made a mistake.

[38] The Claimant confirmed at the hearing that he planned to return to work in February as stated in the email from his employer. As discussed above, this return to work date is 9 months after the Claimant's parental leave began. The email from the employer states that the Claimant left work on June 25, 2021.<sup>22</sup> In the application form, the Claimant stated that his last day worked was May 20, 2021. The Claimant's benefit period began on May 23, 2021. With a return to work date of February 25, 2022, the Claimant's total period of leave will be 40 weeks, which is longer than the 35 weeks that the standard parental option allows.

[39] The only evidence of the Claimant's return to work date is in the email from his employer, which shows that the Claimant plans to return to work on February 25, 2022. There was no dispute at the General Division that the Claimant applied for benefits and a claim was established effective May 23, 2021. This parental leave period is longer

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<sup>20</sup> *Karval* at para 14.

<sup>21</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>22</sup> GD5

than the 35 weeks allowed under the standard benefit option and longer than the stated 8 months that the Claimant planned to be off work.

[40] While the Claimant was clear that he made a mistake when he indicated 52 weeks on his application form, there was no evidence that this was because he was misled by the Commission or the application form. The evidence before the General Division shows that the Claimant made a 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, there is no information on the application form that could be said to contradict the Claimant's choice of extended parental benefits.

[42] The application form provides the following information:

#### Standard option:

- The benefit rate is 55% of your weekly insurable earnings up to a maximum amount.
- One parent can receive up to 35 weeks of benefits.
- If parents share the parental benefits, they can receive up to a combined total of 40 weeks.

#### Extended option:

- The benefit rate is 33% of your weekly insurable earnings up to a maximum amount.
- One parent can receive up to 61 weeks of benefits.
- If parents share the parental benefits, they can receive up to a combined total of 69 weeks.

**All parents must chose the same option (standard or extended). This means that the option chosen by the parent who applied for benefits first is the option all parents will receive.**

To avoid delays or incorrect payments of benefits, make sure you choose the same option (standard or extended) as the other parents.

**You cannot change options (standard or extended)** once any parent has received parental benefits.

[43] 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.

[44] 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 stated return to work date of February 25, 2022 contradicts the choice of 52 weeks of parental benefits, it does not contradict the choice of extended benefits. 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?**

[45] 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.<sup>23</sup> There is a similar provision in the Quebec Insurance Plan. However, the Quebec legislation, states that the election is irrevocable, except in exceptional circumstances.<sup>24</sup>

[46] 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. However, I must apply the law as it is written.<sup>25</sup> I find that the legislation does not leave any room to revoke an election on the basis of a mistake.

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<sup>23</sup> Section 23(1.2) of the *Employment Insurance Act*.

<sup>24</sup> Quebec Insurance Plan s. 18.

<sup>25</sup> *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."

## **Summary**

[47] The Claimant elected to receive 52 weeks of extended parental benefits. His 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.

## **Conclusion**

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

Melanie Petrunia  
Member, Appeal Division