



Citation: *Canada Employment Insurance Commission v RC*, 2022 SST 86

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: Canada Employment Insurance Commission
Representative: Julie Villeneuve

Respondent: R. C.

Decision under appeal: General Division decision dated September 20, 2021
(GE-21-1443)

Tribunal member: Melanie Petrunia

Type of hearing: Teleconference

Hearing date: December 14, 2021

Hearing participants: Appellant's representative
Respondent

Decision date: February 13, 2022

File number: AD-21-337

Decision

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

Overview

[2] The Respondent, R. C. (Claimant), applied for and received Employment Insurance (EI) maternity benefits followed by parental benefits. She selected standard parental benefits on her application for benefits, which pays a higher rate of benefits over a shorter period of time.

[3] The Claimant indicated on the application form that she wanted to receive 35 weeks of benefits. She stated that her last day of work was July 3, 2020 and that she planned to return to work on January 3, 2022. The Claimant received standard parental benefit payments from November 6, 2020 to July 2, 2021. When the payments stopped, she contacted the Commission to ask why and learned that she had elected to receive standard parental benefits for 35 weeks.

[4] The Claimant believed that she had chosen extended parental benefits and planned to be off work for 18 months. She asked the Commission to switch to the extended benefit option.

[5] The Commission refused the Claimant's request. It said that it was too late to change after parental benefits had been paid. The Claimant requested a reconsideration and the Commission maintained its decision.

[6] The Claimant successfully appealed to the General Division of the Tribunal. The General Division decided that the Claimant made a mistake when she clicked the button to choose standard parental benefits. It found that she was confused by the information on the application form. The General Division found that the Claimant intended to choose extended parental benefits, that she planned to be off work for 18 months and claim maternity and parental benefits for the length of her leave.

[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 standard 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 extended 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 July 22, 2020.² In her application, the Claimant said that her last day of work was July 3, 2020 and that she planned to return to work on January 3, 2022.³

[13] The Claimant indicated that she wanted to receive parental benefits immediately after maternity benefits. She chose the option for standard parental benefits. The Claimant was asked how many weeks of benefits she wished to receive and she chose 35 weeks from the drop down menu.⁴

[14] The first payment of parental benefits was processed on November 6, 2020. The Claimant received standard parental benefits until the final payment, issued on July 2, 2021.⁵ The Claimant contacted the Commission on July 14, 2021 to request to change to extended parental benefits.

[15] 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 GD3-18

³ GD3-7

⁴ GD3-10

⁵ GD3-21 to 22

The General Division decision

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

[17] The General Division considered that the Claimant indicated that she wanted 35 weeks of parental benefits. She had also stated that she planned to return to work on January 3, 2022, which totalled about 18 months off work. The General Division found that the Claimant's selection of 35 weeks was not consistent with the return to work date she provided.⁷

[18] The General Division accepted the Claimant's testimony that she believed that she would receive benefits for 18 months. She thought that the amount she received would go down after 12 months and that she would automatically be switch over to the lower amount after the first 12 months.⁸

[19] In its decision, the General Division notes that the Claimant was told of her mistake by a Service Canada agent. This agent explained that standard parental benefits would have paid her \$573 a week for 35 weeks totaling \$20,055 and extended benefits would have paid her \$344 a week for 61 weeks totaling \$ 20,984 which is \$929 more.⁹

[20] The General Division found that the Commission misinterpreted the choice that the Claimant made. It found that she was confused about the choice she was making and always intended to be off work for 18 months.¹⁰ The General Division determined

⁶ General Division decision at para 27.

⁷ General Division decision at para 29.

⁸ General Division decision at para 30.

⁹ General Division decision at para 19.

¹⁰ General Division decision at para 32.

that, on a balance of probabilities, the Claimant elected to receive extended parental benefits.

The Commission's appeal to the Appeal Division

[21] The Commission argues that the General Division made several errors in its decision. It says that the General Division failed to analyse the evidence in a meaningful manner and ignored relevant evidence from the application form. It also argues that the General Division erred in law by effectively changing the Claimant's election from extended to standard after benefits had been paid to her.

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

[22] In its decision, the General Division found that the Claimant was confused by the application form. It discusses the questions on the application form, noting that there is nothing in the questions on the form to indicate that parental benefits are in addition to the 15 weeks of maternity benefits. It states that the application form does not ask how many weeks of maternity and parental benefits in total a claimant is requesting. The General Division finds that it is credible that the Claimant made a mistake on the application form given her circumstances and the confusion created by the questions on the application form.¹¹

[23] The General Division also relies on the confusion created by the questions and information on the application form as evidence that the Claimant wanted extended parental benefits.¹²

[24] The Claimant's evidence at the hearing was that she thought she would receive a lower amount of benefits after 12 months. She was asked where she got this understanding and said that it was from her head.¹³ There was no evidence before the

¹¹ The General Division decision at para 31.

¹² The General Division decision at para 35.

¹³ The General Division decision at para 20.

General Division that the questions on the application form caused her confusion or misunderstanding.

[25] The General Division did not consider the recent Federal Court decision of *Karval*.¹⁴ 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.

[26] 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?”

[27] 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 the option for extended benefits pays a lower amount after 12 months. The Claimant chose 35 weeks, which is consistent with the standard option and is not consistent with her misunderstanding of how extended benefits work.

[28] The evidence before the General Division does not support the finding that the Claimant was confused by the application form and this confusion contributed to her mistake. The finding that the Claimant had chosen the standard option ignores the clear and deliberate answers that she provided to the Commission on her application form.

[29] In finding that the Claimant elected standard parental benefits, the General Division determined that it can look at all of the relevant evidence when deciding which option she elected. It was perverse for the General Division to find that the Claimant was confused by the application form and that she had chosen extended parental benefits.

¹⁴ *Karval v. Canada (Attorney General)*, 2021 FC 395.

[30] 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

[31] 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.¹⁵ The Claimant did not take a position on remedy.

[32] 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 standard parental benefits and the election was irrevocable

[33] 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.

[34] 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.¹⁶ Some of the earlier cases were also decided before *Karval*.¹⁷

[35] In *Karval*, 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. The Claimant, in this case, received standard parental benefits for the full 35 weeks that she requested before noticing her mistake and asking to switch.

¹⁵ 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.

¹⁶ See *Canada Employment Insurance Commission v. M.C.*, 2021 SST 598 at para 70.

¹⁷ *Karval v. Canada (Attorney General)*, 2021 FC 395.

Unlike Ms. Karval, the Claimant did indicate a return to work date that was inconsistent with her election. Despite this difference, I find that the comments of the Court apply to the Claimant's situation. As discussed above, the Federal Court found that it is the responsibility of claimants to carefully read and try to understand their entitlement options.

[36] The Court in *Karval* left open the possibility that a Claimant might have recourse where they are actually misled by the Commission.¹⁸ Other decisions of the Appeal Division have found this to be the case in certain circumstances.¹⁹ 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 stated that it was always her intention to return to work after 18 months off. The Claimant believed that she had chosen extended parental benefits on her application form. She did not know that she had chosen standard parental benefits until she stopped receiving benefits in July 2021.

[38] According to the evidence before the General Division, the Claimant's mistake in filling out the application form is not based on confusion created by the information and questions on the form. The Claimant also misunderstood that, if she had chosen extended benefits as she intended, she would start receiving a lower rate of benefits after 12 months and that she would automatically be switched over to this lower rate.

[39] There is nothing on the application form to suggest that the benefits a Claimant receives, if they choose extended benefits, will be reduced after 12 months. 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

¹⁸ *Karval* at para 14.

¹⁹ 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.

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**

[40] 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 January 3, 2022.

[41] This return to work date suggests that the Claimant will not be returning to work until approximately 6 months after her benefits cease, under the standard option. This is not necessarily contradictory. Because claimants will receive roughly the same amount of money over all, but spread over a longer amount of time on the extended option, it is possible claimant may provide a return to work date that is later than when their benefits will end.

[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.
- 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.

[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 standard 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 return to work date potentially is later than might be expected under the standard option, it does not clearly contradict the choice of standard parental benefits.

– **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.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

[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

²⁰ Section 23(1.2) of the *Employment Insurance Act*.

²¹ Quebec Insurance Plan s. 18.

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.

[47] 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

[48] The Claimant elected to receive standard parental benefits. Her choice of standard 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

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

Melanie Petrunia
Member, Appeal Division

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.”