



Citation: *Canada Employment Insurance Commission v JJ*, 2022 SST 202

## Social Security Tribunal of Canada Appeal Division

# Decision

**Appellant:** Canada Employment Insurance Commission  
**Representative:** J. Villeneuve

**Respondent:** J. J.

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**Decision under appeal:** General Division decision dated December 6, 2021  
(GE-21-2080)

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**Tribunal member:** Jude Samson

**Type of hearing:** Teleconference

**Hearing date:** March 23, 2022

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

**Decision date:** March 25, 2022

**File number:** AD-21-437

## Decision

[1] The appeal is dismissed. Although I have found that the General Division made an error in this case, I agree with the outcome that it reached: J. J. is entitled to receive parental benefits under the extended option.

## Overview

[2] J. J. is Claimant in this case. She established a claim for Employment Insurance (EI) maternity and parental benefits. On her application form, the Claimant had to choose between two parental benefit options: standard or extended.<sup>1</sup>

[3] The standard option offers a higher rate of parental benefits, paid for up to 35 weeks. The extended option offers a lower 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, and the extended option provides EI benefits for about 18 months.

[4] On her application, the Claimant said that she was claiming 35 weeks of parental benefits under the standard option. Later, however, the Claimant called the Canada Employment Insurance Commission (Commission) and asked to change to the extended option.<sup>2</sup>

[5] 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 her some parental benefits.

[6] The Commission's decision surprised the Claimant because she had spoken to one of the Commission's agents just before submitting her application for benefits. According to the Claimant, this agent reassured her that she could change options at any time.

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<sup>1</sup> Section 23(1.1) of the *Employment Insurance Act* (EI Act) calls this choice an "election."

<sup>2</sup> Service Canada delivers EI programs for the Commission.

[7] The Claimant successfully appealed the Commission's decision to the Tribunal's General Division. According to the General Division, the Claimant chose the standard option as a "placeholder," whereas the extended option was her "true choice."<sup>3</sup>

[8] The Commission is now appealing the General Division decision to the Tribunal's Appeal Division.<sup>4</sup> It argues that the General Division decision contains errors of law, and that it based its decision on an important mistake about the facts of the case.

[9] I am dismissing the Commission's appeal. Although I found that the General Division made an error in this case, I agree with the conclusion that it reached.

[10] I find that the Claimant chose the standard option on her application form. However, she based her choice on misleading information that the Commission provided to her. As a result, her initial choice is invalid. So, I am rescinding (cancelling) the Commission's decision to pay standard parental benefits to the Claimant. Instead, the Claimant chooses the extended option.

[11] In the circumstances, I am dismissing the Commission's appeal.

## **Issues**

[12] My decision focuses on these 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?
- c) Did the Claimant validly choose between the standard and extended options?

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<sup>3</sup> See paragraphs 31 and 32 of the General Division decision.

<sup>4</sup> I already gave the Commission leave (or permission) to appeal.

## Analysis

[13] I can intervene in this case only if the General Division made a relevant error.<sup>5</sup> In this decision, I focused on whether the General Division based its decision on an important mistake about the facts of the case.

### **The General Division based its decision on an important mistake about the facts of the case**

[14] When applying for parental benefits, the Claimant had to choose between the standard and extended options.<sup>6</sup> She could not change options after receiving parental benefits from the Commission.<sup>7</sup>

[15] The Claimant selected the standard option on her application for EI benefits.<sup>8</sup> And she selected 35 in response to the question, “How many weeks do you wish to claim?” This is the maximum number of weeks available under the standard option.

[16] From the Claimant’s evidence during the General Division hearing, it is clear that she made these choices intentionally. She knew that, in all, she was claiming about a year’s worth of EI benefits.

[17] Regardless, the General Division found that the Claimant had, in fact, chosen the extended option.

[18] The General Division defined the issue in the case as being the type of parental benefits the Claimant actually wanted at the time of completing her application form. Nevertheless, the General Division went on to find that the deliberate choice made by the Claimant in April 2021 was just a placeholder. Instead, her real choice was made in October 2021, when the Claimant finally settled on taking an extended leave and called the Commission to change options.

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<sup>5</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).

<sup>6</sup> Section 23(1.1) of the EI Act sets out this requirement.

<sup>7</sup> Section 23(1.2) of the EI Act describes when a parent’s choice becomes irrevocable (or final).

<sup>8</sup> The relevant part of the Claimant’s application is on page GD3-9.

[19] The law says that an applicant for parental benefits must choose between the standard and extended options.<sup>9</sup> The law does not provide for “placeholder” choices and “real” choices.

[20] The General Division based its decision on an important mistake about the facts of the case when it found that the Claimant chose the extended option. The evidence clearly says the opposite. The Claimant communicated a clear choice to the Commission: she chose the standard option. Plus, her evidence at the General Division hearing confirmed that her choice was made deliberately.

[21] I can intervene here because the General Division based its decision on an important mistake about the facts of the case.

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

[22] At the hearing before me, the parties agreed that, if the General Division made an error, then I should give the decision the General Division should have given.<sup>10</sup>

[23] I agree. The parties are not arguing that the General Division prevented them from fully presenting their cases. In fact, most of the important facts are not in dispute.

[24] This means that I can decide whether the Claimant is entitled to parental benefits under the standard or extended option.

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<sup>9</sup> See section 23(1.1) of the EI Act.

<sup>10</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.

## **The Claimant is entitled to parental benefits under the extended option**

[25] I use a two-step approach when deciding cases like this one:

- a) What option did the applicant choose on her application form? The applicant's choice must be clear.<sup>11</sup>
- b) Was the applicant's choice valid? In several cases, the Tribunal has found the applicant's choice to be invalid because it was based on misleading information from the Commission.<sup>12</sup> In these cases, applicants need to make their choice again.

### **– The Claimant chose the standard option on her application form**

[26] Here, the Claimant's application form clearly communicates to the Commission that she was choosing the standard option. There are no glaring contradictions on her application form. Although the Claimant's record of employment noted that the Claimant was planning to take an extended leave, all the answers the Claimant provided to the Commission are consistent with the standard option.<sup>13</sup>

### **– The Claimant's choice is invalid because the Commission provided her with misleading information**

[27] The Claimant is a planner. She provided evidence to show that she is a careful and deliberate person who thought carefully about the choices she was making.

[28] The Claimant took a long time to decide how much leave she would take from her job after the birth of her child. For example, she was trying to balance childcare with financial considerations, all of which was set against the backdrop of a global pandemic.

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<sup>11</sup> Cases like *Semenchuck v Ruhr*, 1996 CanLII 7148 (SK QB) have emphasized the need for a choice to be clear and unequivocal.

<sup>12</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*, 2021 SST 182; and *VV v Canada Employment Insurance Commission*, 2020 SST 274. To the best of my knowledge, the Commission has not applied to judicially review any of these decisions.

<sup>13</sup> The Claimant's record of employment is on page GD3-17.

[29] The Claimant's employer was very flexible about the length of her leave, and offered a top-up of her salary while she was receiving Employment Insurance benefits.

[30] Like with other things in her life, the Claimant stepped cautiously when applying for EI benefits. She called Service Canada and understood the difference between the standard and extended options. The Claimant has been consistent about the advice she received during this call: the agent reassured her that she was free to change options at any time. This evidence is uncontradicted.

[31] The Claimant completed her application for EI benefits shortly after this call.

[32] I recognize that the Claimant's application specifies that she could not change options after any parent had received parental benefits.<sup>14</sup> However, the agent the Claimant had just spoken to provided contradictory information. And the Claimant clearly relied on the agent's advice to her detriment. Specifically, she risks losing the full top-up amount that her employer provides.

[33] Because of the agent's advice, the Commission misled the Claimant into thinking that her choice between the standard and extended options was of little importance: she could change options at any time. If the agent had given the Claimant the correct information, the Claimant would have been more careful about her choice, or would have changed it in a timely way.

[34] The Claimant based her choice between the standard and extended options on misleading information that the Commission provided to her. As a result, her choice is invalid. If allowed to make her choice again, the Claimant has made clear that she would choose the extended option.

**– I reject the Commission's arguments**

[35] The Commission highlighted how applicants for parental benefits "shall" choose between the standard and extended options.<sup>15</sup> Plus, the law says that an applicant's

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<sup>14</sup> See the Claimant's application form on page GD3-9.

<sup>15</sup> See section 23(1.1) of the EI Act.

chosen option cannot be changed once benefits have been paid.<sup>16</sup> As a result, the Commission argues that it has no discretion in cases like this one. Plus, the Tribunal's decision indirectly allows the Claimant to change options, even though the law specifically prohibits it.

[36] The Commission also argues that its only decision concerns whether the Claimant is qualified to receive benefits. According to the Commission, applicants must choose between the two options and the Commission has no power to interpret or assess the validity of their choice.

[37] Finally, the Commission maintains that the application for parental benefits form is clear and that any misinformation the Commission might have provided does not allow the Tribunal to ignore the law.<sup>17</sup>

[38] I disagree with the Commission's arguments for the following reasons:

- Nowhere in the law does it say precisely how a person's choice is to be made or that it must always be determined based on just one tick on an application form.
- The Commission interprets every application form to assess the applicant's choice and determine the rate at which it should pay their benefits. The Commission makes these decisions, implicitly or explicitly, every time it pays benefits to an applicant.<sup>18</sup>
- Did the applicant make a clear choice? Was it validly made? These are questions of law and fact that the Tribunal has the power to decide.<sup>19</sup>
- While I recognize that the Commission's agents cannot change the law and that the Commission is not bound by incorrect information an agent provides,

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<sup>16</sup> See section 23(1.2) of the EI Act.

<sup>17</sup> In support of these arguments, the Commission relies on *Karval v Canada (Attorney General)*, 2021 FC 395 and *Granger v Canada Employment and Immigration Commission*, 1986 CanLII 3962 (FCA).

<sup>18</sup> See *Canada Employment Insurance Commission v TH*, 2020 SST 800 at para 29.

<sup>19</sup> See section 64(1) of the DESD Act.



there is a difference between that situation and assessing the validity of the Claimant's choice. The Tribunal has been drawing this distinction for some time and the courts have recognized that some relief may be available in this situation.<sup>20</sup>

- The Tribunal is not changing the Claimant's choice after she started to receive benefits. Instead, it is assessing whether her choice was valid from the start. If not, the Claimant must choose again. The Tribunal is not making the choice for her.

[39] Importantly, the Tribunal decides every case based on its facts. Clearly, the law prohibits applicants from switching options because of changed circumstances. However, some relief is available to applicants, like the Claimant, who can establish that they received misleading information from the Commission, and that they relied on that information.

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<sup>20</sup> See *Karval v Canada (Attorney General)*, 2021 FC 395 at para 14 and *ML v Canada Employment Insurance Commission*, 2020 SST 255 at paras 26-30.

## **Conclusion**

[40] The General Division based its decision on a serious mistake about the facts of the case. This error allows me to intervene in this case and to give the decision the General Division should have given.

[41] Although I disagree with part of the General Division's reasoning, I reached the same result using a different approach. The Claimant has shown that the Commission misled her into thinking that her choice was unimportant because it could be changed at any time. As a result, the Claimant's choice between the standard and extended options is invalid. I am rescinding the Commission's decision to pay standard parental benefits to the Claimant.

[42] So, to complete her claim, the Claimant needs to choose between the standard and extended options. Throughout these proceedings, the Claimant has made clear that she chooses the extended option.

[43] In the circumstances, I am dismissing the Commission's appeal.

Jude Samson  
Member, Appeal Division