Citation: *Canada Employment Insurance Commission v LJ*, 2022 SST 380

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	Canada Employment Insurance Commission
Respondent:	L. J.
Representative:	J. J.

Decision under appeal:	General Division decision dated January 10, 2022 (GE-21-2338)

Tribunal member:	Jude Samson
Type of hearing:	Teleconference
Hearing date:	April 13, 2022
Hearing participants:	Appellant's representative Respondent's representative
Decision date:	May 10, 2022
File number:	AD-22-30

Decision

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

Overview

[2] L. J. is the 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.[1]

[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 selected the extended option and answered 54 to the question, "How many weeks do you wish to claim?" The Claimant says that she provided those answers because the Canada Employment Insurance Commission (Commission) misled her.[2] Specifically, one of the Commission's agents told her that she wasn't eligible for the standard option because she was planning a leave of more than 35 weeks. This misinformation was then reinforced by the questions on the application form.

[5] Later, however, the Claimant learned that she was eligible for the standard option and that choosing the extended option cost her family around $8,000 in lost benefits. So, she called the Commission and asked to change to the standard option.

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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.

[6] 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.

[7] The Claimant successfully appealed the Commission's decision to the Tribunal's General Division. When completing her application, the General Division found that the Claimant intended to choose the standard option because that best matched with her plan of taking about a year's leave from work.

[8] The Commission is now appealing the General Division decision to the Tribunal's Appeal Division.[3] It argues that the General Division exceeded its jurisdiction, made 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] On her application, the Claimant selected the extended option because of misleading information that the Commission provided. As a result, her initial choice is invalid. So, I am rescinding (cancelling) the Commission's decision to pay extended parental benefits to the Claimant. Instead, the Claimant chooses the standard option.

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

Issues

[12] My decision focuses on these issues:

a) Can I consider new evidence?

b) Did the General Division make an error of law by failing to consider if the Commission misled the Claimant?

[3] I already gave the Commission leave (permission) to appeal.

c) If so, what is the best way to fix the General Division's error?

d) Did the Commission mislead the Claimant and invalidate her choice between the standard and extended options?

Analysis

[13] I can intervene in this case only if the General Division made a relevant error.[4] This decision focuses on whether the General Division made an error of law.

I have not considered any new evidence

[14] New evidence is evidence that the General Division did not have in front of it when it made its decision.

[15] The Appeal Division's limited role normally prevents me from considering new evidence.[5] The law says that I must focus on whether the General Division made a relevant error. And that assessment is usually based on the materials that the General Division had in front of it. I cannot take a fresh look at the case and come to my own conclusions based on new and updated evidence.

[16] There are exceptions to the general rule against considering new evidence.[6] For example, I can consider new evidence that provides general background information only or that describes how the General Division might have acted unfairly.

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[4] 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).
[5] The Appeal Division's role is mostly defined by sections 58 and 59 of the DESD Act.
[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 paragraph 8 and that the Federal Court listed in *Greeley v Canada (Attorney General)*, 2019 FC 1493 at paragraph 28.

[17] Here, both parties provided new evidence:

- The Claimant filed information about the terms of her employment, length of her leave of absence from work, and correspondence with possible childcare providers.[7]

- The Commission wove new evidence into its submissions. For example, it provided an Internet link and described additional information on its website. It also described training that its agents receive.[8]

[18] None of this information falls within an exception to the general rule against considering new evidence, so I did not consider it.

[19] The Commission argued that I should consider its new evidence because it provides general background information only. In support of its argument, the Commission argues that the Federal Court considered this new evidence in a recent decision.[9]

[20] The Claimant has consistently argued that the Commission provided her with misleading information during a phone call and on its application form.[10] As a result, the Commission could have easily given the General Division additional evidence about what clarifying information was available on its website. But it chose not to do so.

[21] I'm also unable to accept that the Commission's website provides general background information only. Rather, the Commission is offering this evidence to suggest that the Claimant was careless. In other words, it wasn't enough for the Claimant to call the Commission, she should have hunted for the answers to her questions on the Commission's website too.

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[7] See pages AD4-7 and AD4-10 to 22.
[8] See page AD3-11 and AD7-2 to 3.
[9] According to the Commission, the Federal Court considered new evidence from the Commission's website in *Canada (Attorney General) v De Leon*, 2022 FC 527 at paragraph 30.
[10] See, for example, pages GD2-5 and GD3-23.

[22] Indeed, the Claimant does not claim that she scoured every inch of the Commission's website. Rather, she says that she reached out to the Commission by phone to get additional information and, in the process, received misleading information instead.

[23] I also question the reliability of the Commission's new evidence. Websites change. So, I do not know if these links would take me to the exact information that was available at the time the Claimant was applying for benefits.

[24] Finally, if the Federal Court recently accepted this new evidence, it didn't say that it was doing so, nor did it say which exception to the general rule against considering new evidence that it was applying.

[25] For all these reasons, I did not consider any of the new evidence filed in this appeal.

The General Division made an error of law by failing to consider if the Commission misled the Claimant

[26] When applying for parental benefits, the Claimant had to choose between the standard and extended options.[11] She could not change options after the Commission started paying her parental benefits.[12]

[27] The Claimant selected the extended option on her application for EI benefits. And she selected 54 in response to the question, "How many weeks do you wish to claim?"[13] This answer is consistent with the extended option, because the standard option offers no more than 35 weeks of benefits.

[28] Despite this, the General Division found that the Claimant had, in fact, chosen the standard option.

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[11] Section 23(1.1) of the EI Act sets out this requirement.
[12] Section 23(1.2) of the EI Act describes when a parent's choice becomes irrevocable (or final).
[13] See page GD3-9.

[29] The Commission says that this case is very similar to the one that the Federal Court considered in *Karval v Canada (Attorney General)*.[14] As a result, it argues that the General Division made an error of law by failing to consider *Karval*.

[30] In particular, the Commission relies on *Karval* as establishing these important principles:[15]

- No relief is available to applicants for EI benefits who lack the knowledge to accurately answer clear questions;
- The Commission's application form for parental and maternity benefits is clear and provides sufficient information to applicants;
- People applying for EI benefits need to seek information about the benefits they're applying for and ask the Commission questions if there are things they don't understand; and
- Relief is limited to applicants who are actually misled by relying on official and incorrect information that the Commission provides.

[31] Parenthetically, the Federal Court released a second decision in a case involving EI parental and maternity benefits on the day of the Appeal Division hearing: *Canada (Attorney General) v De Leon*.[16] The Commission relies on *De Leon* too, but it does not add much to the Court's decision in *Karval*. As a result, I will only refer to the *De Leon* decision when necessary.

[32] I agree that the General Division made an error of law by failing to consider if the Commission misled the Claimant in this case.

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[14] The legal citation for this decision is *Karval v Canada (Attorney General)*, 2021 FC 395.
[15] See paragraphs 14 and 16 of the Court's decision in *Karval v Canada (Attorney General)*, 2021 FC 395.
[16] The second decision is *Canada (Attorney General) v De Leon*, 2022 FC 527. After the Appeal Division hearing, I gave both parties the chance to submit additional written arguments about the decision: see documents AD5 to AD7.

[33] One of the Claimant's main arguments was that an agent of the Commission, along with its application form, misled her into making the wrong choice between the standard and extended options.

[34] However, the General Division never mentioned *Karval*. Instead, the General Division made a vague reference to the Claimant's confusion, but it did not consider the sources of her confusion or the steps that she had taken to get more information. Similarly, the General Division made no clear findings about whether the Commission misled the Claimant by providing her with wrong information.

[35] It was an error of law for the General Division to overlook the question of whether the Commission misled the Claimant, despite how the Federal Court highlighted this issue in *Karval*.

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

[36] At the hearing before me, both parties argued that, if the General Division made an error, then I should give the decision the General Division should have given.[17]

[37] I agree. This means that I can decide whether the Claimant validly chose the standard or extended option.

The Commission misled the Claimant and invalidated her choice between the standard and extended options

– The Claimant planned a leave of about 54 weeks following the birth of her child

[38] In this case, the Claimant established that her plan was to take about a year's leave from work following the birth of her child. On her application, she noted that her child was due on March 30, and she planned to return to work on April 4 of the following year.[18] This was confirmed by her employer too.[19]

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[17] 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 paragraphs 16 to 18.
[18] See pages GD3-7 to 8.
[19] See the letter from her employer on page GD2-9.

[39] At the General Division hearing, the Claimant also made plain that she intended to make the best financial decision for her family.[20]

– **The Claimant is entitled to relief because the Commission misled her**

[40] Despite her clear plans—and the return to work date on her application—the Commission says that the Claimant actually applied for 15 weeks of maternity benefits, followed by 54 weeks of extended parental benefits, for a total of 69 weeks (about a year and five months).

[41] Why the difference? Because the Commission misled the Claimant into believing that she wasn't eligible for the standard option.

[42] At the General Division hearing, the Claimant explained that she was somewhat confused about the difference between maternity and parental benefits.[21] She also said that she had claimed these benefits before, but her situation was a bit different this time because she wanted to take two extra weeks of leave to help settle her child into daycare before returning to work.

[43] For these reasons, the Claimant said that she didn't start and finish her application for benefits in one sitting. Instead, she gathered more information by calling the Commission.[22]

[44] According to the Claimant, the agent she spoke to said that she would need to choose the extended option if she wanted to claim more than 35 weeks of benefits. As a result, the Claimant understood that she didn't qualify for the standard option.

[45] As a result, the Claimant is entitled to relief under the *Karval* and *De Leon* decisions: she was actually misled by relying on official and incorrect information from the Commission.

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[20] Listen to the audio recording of the General Division hearing starting at about 31:35.
[21] Listen to the audio recording of the General Division hearing starting at about 44:50.
[22] Listen to the audio recording of the General Division hearing starting at about 27:55.

[46] First, the Commission expressed doubts about whether one of its agents would have ever provided this advice. However, despite the Claimant's request, the Commission provided no record of this conversation and didn't attend the General Division hearing.[23] So, the Commission hasn't challenged the Claimant's evidence, or her credibility, in any serious way.

[47] Second, the Commission argues that the Claimant could have gotten the correct information if she had just spent more time on its website. However, the *Karval* decision describes the Claimant's responsibility as seeking out the necessary information and, if still in doubt, asking the relevant questions.[24] The Claimant did that. She looked on the Commission's website and then phoned the Commission to discuss her remaining questions.

[48] The Federal Court in *Karval* did not say the law should deny relief whenever there is correct information, somewhere on the Commission's website, that contradicts information that a person received from one of the Commission's agents.

[49] Third, the Commission's application form reinforced the message that she received from its agent. If the Claimant chose the standard option, then only the numbers from 1 to 35 were available under the question, "How many weeks do you wish to claim?" The Claimant had to choose the extended option so that the numbers 1 to 61 were available to her.

[50] In other words, the Claimant understood the question, "How many weeks do you wish to claim?" to be the same as "How much time will you be away from work?" In my view, this is reasonable given the information the Claimant had received from the Commission's agent and the opaqueness of the application form. For example, the form did not make clear that the question, "How many weeks do you wish to claim?" referred only to parental benefits or that the Claimant should deduct 15 weeks of maternity benefits from the total length of her claim.

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[23] It's unlikely that any recording of this conversation exists: see paragraph 53 on page AD3-19.
[24] See *Karval v Canada (Attorney General)*, 2021 FC 395 at paragraph 14.

[51] In the circumstances, the Claimant is entitled to relief because she was "actually misled by relying on official and incorrect information" provided by the Commission.[25]

– I reject the Commission's other arguments

[52] The Commission highlighted how applicants for parental benefits "shall" choose between the standard and extended options.[26] Plus, the law says that an applicant's chosen option cannot be changed once benefits have been paid.[27] As a result, the Commission argues that it has no discretion in cases like this one. In its view, the Tribunal's decision indirectly allows the Claimant to change options, even though the law specifically prohibits it.

[53] 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.

[54] 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.[28]

[55] 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

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[25] See *Karval v Canada (Attorney General)*, 2021 FC 395 at paragraph 14.
[26] See section 23(1.1) of the EI Act.
[27] See section 23(1.2) of the EI Act.
[28] 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).

Commission makes these decisions, implicitly or explicitly, every time it pays benefits to an applicant.[29]

- 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.[30]

- 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, 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 when the Commission misleads an applicant.[31]

- 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.

- The Commission emphasizes how applications must be made using a form that it supplies or approves.[32] However, that same part of the law also says that applications must be completed in accordance with the Commission's instructions. The Claimant did that. But the Commission's instructions misled her to the point that she thought she had completed the form correctly, and in line with her plans of taking a year's leave.

[56] It is also worth noting that there are some important differences between the facts in this case and those that the Federal Court considered in *Karval* and *De Leon*. As a result, there are limits to the degree that I must follow those decisions in this case.

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[29] See *Canada Employment Insurance Commission v TH*, 2020 SST 800 at paragraph 29.
[30] See section 64(1) of the DESD Act.
[31] See *Karval v Canada (Attorney General)*, 2021 FC 395 at paragraph 14, *Canada (Attorney General) v De Leon*, 2022 FC 527 at paragraph 27, and *ML v Canada Employment Insurance Commission*, 2020 SST 255 at paragraphs 26-30.
[32] See section 50(3) of the EI Act.

[57] Importantly, Ms. Karval chose the extended option because she was uncertain about her return to work date.[33] Then, after receiving extended parental benefits for six months, she decided she would prefer the standard option. However, the law clearly prohibits a person from changing options in these circumstances.

[58] So, Ms. Karval was an ill-informed applicant whose circumstances later changed. Instead, the Claimant in this case had a clear plan, did her research, but made mistakes on her application form because the Commission misled her into thinking that she wasn't eligible for the standard option.

[59] I would also highlight how all the answers Ms. Karval's provided on her application form were consistent with the extended option. In this case; however, the Claimant planned to return to work within a year of her child's birth, which is more in line with the standard option. So, her return to work date was inconsistent with the number of weeks she was claiming, which should have alerted the Commission to the Claimant's confusion.

[60] As discussed above, the Court in *De Leon* relied on instructions that were provided with the application form.[34] However, the evidence in this case is different. Those instructions are not part of the record before me.

[61] Finally, I do not accept that the judges in *Karval* and *De Leon* were making binding pronouncements about the clarity of the application form. The decisions simply review whether the Appeal Division reasonably decided that the appeals had no reasonable chance of success.[35] As the Claimant argued, the number of Tribunal decisions on this issue contradicts the Commission's assertion that its application form is clear and simple.

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[33] See paragraph 8 in *Karval v Canada (Attorney General)*, 2021 FC 395.
[34] See *Canada (Attorney General) v De Leon*, 2022 FC 527 at paragraph 30
[35] In *Canada (Attorney General) v Redman*, 2020 FCA 209 at paragraph 19, the Federal Court of Appeal reminded the Tribunal to distinguish between the parts of a court decision that are "binding" and those that are not.

[62] In this case, the question, “How many weeks do you wish to claim?” is especially problematic. And while the form does tell applicants that the Commission will pay benefits at a higher rate under the standard option than under the extended option, it does not tell applicants at what rate the Commission pays maternity benefits. So, applicants do not know if their benefit rate will go up or down when they switch from one benefit to the other.

[63] 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 show that they relied on misleading information from the Commission.

Conclusion

[64] The General Division decision contains an error of law. This error allows me to intervene in this case and to give the decision the General Division should have given.

[65] 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 she wasn’t eligible for the standard option. As a result, the Claimant’s choice between the standard and extended options is invalid and I am rescinding the Commission’s decision to pay extended parental benefits to the Claimant.

[66] So, to complete her claim, the Claimant needs to choose between the standard and extended options. I understand from her appeal and the information in the record that she chooses the standard option.

[67] In the circumstances, I am dismissing the Commission’s appeal.

Jude Samson
Member, Appeal Division