



Citation: *Canada Employment Insurance Commission v JK*, 2022 SST 458

## Social Security Tribunal of Canada Appeal Division

# Decision

**Appellant:** Canada Employment Insurance Commission  
**Representative:** L. LaViolette

**Respondent:** J. K.

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**Decision under appeal:** General Division decision dated January 5, 2022  
(GE-21-2461)

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**Tribunal member:** Melanie Petrunia

**Type of hearing:** Teleconference

**Hearing date:** May 18, 2022

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

**Decision date:** May 31, 2022

**File number:** AD-22-52

## Decision

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

## Overview

[2] The Respondent, J. K. (Claimant), applied for and received Employment Insurance (EI) maternity benefits followed by parental benefits. She selected extended parental benefits on her application for benefits, which pays a lower rate of benefits over a longer period of time.

[3] The Claimant indicated on the application form that she wanted to receive 61 weeks of benefits. She stated that her last day of work was April 17, 2021 and that she did not know the date that she would return to work. The Claimant received her first payment of parental benefits the week of August 8, 2021. On October 25, 2021, she asked the Commission to switch to the standard benefit option.

[4] 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.

[5] The Claimant successfully appealed to the General Division of the Tribunal. The General Division decided that the Claimant made a mistake when she chose extended parental benefits. It found that she meant to choose standard parental benefits when she applied.

[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 erred in law. 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 err in law by failing to consider and apply binding case law?
- 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:

- 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.

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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).

[11] The Claimant made an application for maternity and parental benefits effective April 18, 2021.<sup>2</sup> In her application, the Claimant said that her last day of work was April 17, 2021 and that she did not know the date that she would return to work.<sup>3</sup>

[12] The Claimant indicated that she wanted to receive parental benefits immediately after maternity benefits. She chose the option for extended parental benefits. The Claimant was asked how many weeks of benefits she wished to receive and she chose 61 weeks from the drop down menu.<sup>4</sup>

[13] The first payment of extended benefits was issued on August 6, 2021. The Claimant contacted the Commission on October 25, 2021 to request to change to standard parental benefits.<sup>5</sup> 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.

– **The General Division decision**

[14] The General Division allowed the Claimant's appeal. It found that the Claimant chose the extended option on the application form.<sup>6</sup> It also accepted the Claimant's testimony that she made a mistake when she selected extended benefits. She was sleep deprived and thought that extended referred to extending her maternity benefits.<sup>7</sup>

[15] The General Division found that it must consider all relevant evidence when determining which option a Claimant chose, including evidence of the Claimant's intention.<sup>8</sup> It found that the Claimant planned to be off work for a year, which supported an intention to choose standard parental benefits. The General Division accepted the Claimant's testimony that she told her employer she would return to work sometime in

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<sup>2</sup> GD3-24.

<sup>3</sup> GD3-14.

<sup>4</sup> GD3-13.

<sup>5</sup> GD3-33.

<sup>6</sup> General Division decision at para 18.

<sup>7</sup> General Division decision at para 18.

<sup>8</sup> General Division decision at para 13.

April 2022.<sup>9</sup> Based on evidence of the Claimant's intention, the General Division found that that she intended to chose standard parental benefits.

[16] The General Division also considered that the Claimant was sleep deprived when she filled out the application form. She checked her online account later and saw that her benefits were to end in April 2022 and she assumed she had filled out the form correctly. When she started to receive benefits at a lower rate, she decided to wait to see if anything changed. She testified that her pay cheques were sometimes of varying amounts so she thought it was normal.<sup>10</sup>

[17] The General Division found that the Claimant intended to apply for standard parental benefits and made a mistake. It found that she acted reasonably once she realized her mistake.<sup>11</sup>

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

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

- The General Division based its decision on an erroneous finding of fact made in a perverse or capricious manner by failing to consider evidence of the extended parental benefit rate available to the Claimant;
- The General Division erred in law by effectively changing the Claimant's election from extended to standard after benefits had been paid to her; and
- The General Division erred in law by failing to consider relevant case law from the Federal Court.

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<sup>9</sup> General Division decision at para 25.

<sup>10</sup> General Division decision at para 24.

<sup>11</sup> General Division decision at para 25.

## **The General Division erred in law by failing to follow binding case law**

[19] In its decision, the General Division did not consider the Federal Court decision of *Karval*.<sup>12</sup> 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>13</sup>

[20] The *Karval* decision is binding jurisprudence. This means that the General Division was required to consider it. If the General Division chose not to follow the principles in *Karval*, it needed to explain why.<sup>14</sup>

[21] The Federal Court judge in *Karval* found that there is no remedy for claimants who make a mistake and base their election on a misunderstanding.<sup>15</sup> The General Division found that the Claimant made a mistake and later tried to correct the mistake. The General Division erred in law by failing to consider and apply the binding Federal Court decision in *Karval* when making this determination.

[22] 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**

[23] 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.<sup>16</sup>

[24] I agree. 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.

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<sup>12</sup> *Karval v. Canada (Attorney General)*, 2021 FC 395.

<sup>13</sup> See *Karval* at para 14.

<sup>14</sup> See *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para 112.

<sup>15</sup> See *Karval* at para 14.

<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.

## **The Claimant elected to receive extended parental benefits and the election was irrevocable**

[25] The Appeal Division and the General Division have issued a number of decisions concerning the election of standard or extended 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.

[26] A recent decision of the Federal Court of Appeal, *Canada (Attorney General) v. Hull* (Hull), considered the proper interpretation of sections 23(1.1) and 23(1.2) of the EI Act.<sup>17</sup>

[27] In *Hull*, the claimant had selected the option of extended parental benefits on her application form and requested 52 weeks of parental benefits, following maternity benefits. The claimant received extended parental benefits for several months before realizing her mistake. She had been confused by the application form and had intended to receive one year of maternity and parental benefits combined. The General Division found, on a balance of probabilities, that she had elected to receive standard parental benefits.

[28] The Court in *Hull* stated:

The question of law for the purpose of subsection 23(1.1) of the EI Act is: does the word "elect" mean what a claimant indicates as their choice of parental benefit on the application form or does it mean what the claimant "intended" to choose?<sup>18</sup>

[29] The Court found that a claimant's election is what they choose on their application form, and not what they may have intended.<sup>19</sup> It also found that once

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<sup>17</sup> *Canada (Attorney General) v. Hull*, 2022 FCA 82.

<sup>18</sup> See *Hull* at para 34.

<sup>19</sup> See *Hull* at para 63.

payment of parental benefits has started the election cannot be revoked, by the claimant, the Commission, or the Tribunal.<sup>20</sup>

[30] Applying the Court's decision in *Hull* to the Claimant's circumstances, it is clear that she elected to receive extended parental benefits. This was the option chosen on the application form. She chose to receive extended parental benefits for 61 weeks. Once the payment of those benefits began, the election was irrevocable.

[31] 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 for her. Her circumstances are sympathetic. However, I must apply the law as it is written.<sup>21</sup> I find that the legislation and the case law confirm that an election cannot be revoked on the basis of a mistake.

[32] 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.

[33] I understand that the Claimant's election of extended parental benefits was a mistake. She intended to choose standard parental benefits. However, the Federal Court of Appeal has made it clear that her intention at the time that she filled out the form is not relevant to her election.

[34] The Claimant chose extended parental benefits on her application form. This was her election and, after benefits were paid to her, it became irrevocable.

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<sup>20</sup> See *Hull* at para 64.

<sup>21</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."



## **Conclusion**

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

Melanie Petrunia  
Member, Appeal Division