



Citation: *Canada Employment Insurance Commission v NM*, 2022 SST 448

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: Canada Employment Insurance Commission
Representative: A. Fricker

Respondent: N. M.

Decision under appeal: General Division decision dated January 20, 2022
(GE-21-2454)

Tribunal member: Melanie Petrunia

Type of hearing: Teleconference

Hearing date: May 24, 2022

Hearing participants: Appellant's representative
Respondent

Decision date: June 1, 2022

File number: AD-22-114

Decision

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

Overview

[2] The Respondent, N. M.(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 52 weeks of benefits. When the Claimant received her first payment of parental benefits at a lower rate, she contacted the Commission and asked 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 saying that she made a mistake when she clicked the extended option. 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 clicked the button to choose extended parental benefits. It found that she intended to choose standard parental benefits.

[6] The Commission is now appealing the General Division decision to the Tribunal's Appeal Division. It argues that the General Division made an error of law, exceeded its jurisdiction and based its decision on an important error of fact.

[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.

Preliminary matters

[8] The Commission filed supplementary submissions on the day of the hearing based on a recent decision of the Federal Court of Appeal. The Commission's representative also referred to the decision in her oral submissions. The Claimant was prepared to proceed with the hearing and I allowed her one week to file any additional written submissions. No further submissions were received from the Claimant.

Issues

[9] I have focused on the following issues:

- a) Did the General Division err in law by failing to follow binding case law?
- 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.

Background

[11] There are two types of parental benefits:

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).

- 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 applied for maternity and parental benefits on June 20, 2021. In her application, the Claimant said that that she did not know the date that she would return to work. Her Record of Employment (ROE) also did not give a date that she would return.

[13] 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 52 weeks from the drop down menu.

[14] The first payment of extended benefits was issued on October 8, 2021. The Claimant contacted the Commission on October 18, 2021 to request to change to standard parental benefits. The Commission refused the Claimant’s request. It 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**

[15] The General Division allowed the Claimant’s appeal. It found that the Claimant clicked on the extended option on the application form.² It also accepted the Claimant’s testimony that she intended to choose standard benefits and chose the extended option by mistake.³ It found that this intention was supported by documents filed by the Claimant after the hearing. The Claimant provided copies of correspondence with her

² General Division decision at para 12.

³ General Division decision at para 25.

manager showing that she was applying for 12 months of leave but was open to returning earlier.⁴ She also provided proof that she applied for daycare starting as early as eight months after she gave birth.⁵

[16] The General Division found that it must consider all relevant evidence when determining which option a Claimant chose.⁶ It found that the Claimant thought she needed to choose the extended option in order to take a one-year leave because 35 weeks of parental benefits would not be enough. She did not realize that the weeks of parental benefits does not include 15 weeks of maternity benefits.

[17] The General Division found that the Claimant intended to apply for standard parental benefits and made a mistake when she clicked on the extended option. It found that ticking a box is not sufficient proof of her election when the other evidence aligns with the standard option.⁷

– **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 erred in law by effectively changing the Claimant's election from extended to standard after benefits had been paid to her;
- The General Division exceeded its jurisdiction by determining what option the claimant elected on her application form, and the validity of that election;
- The General Division based its decision on an erroneous finding of fact made without regard to the evidence when it found that it was reasonable for the Claimant to have understood that she needed to indicate the total number of

⁴ See GD5-2 and General Division decision at para 19.

⁵ See GD5-3 and General Division decision at para 20.

⁶ General Division decision at para 17.

⁷ General Division decision at para 25.

weeks of maternity and parental benefits combined on her application form;
and

- The General Division erred in law by failing to hold the Claimant to her obligation to know her rights and entitlements under the EI Act.

The General Division erred in law by failing to apply binding case law

[19] In its decision, the General Division found that the Claimant chose the option for extended benefits on the application form, believing that the 35 weeks of benefits offered under the standard option would not be enough for a one-year leave. The General Division did not consider that the application form explains the different benefit rates for standard and extended benefits. It did not consider what led to the Claimant's mistaken belief that she had to select extended benefits in order to receive one year of combined maternity and parental benefits.

[20] The General Division mentioned the Federal Court decision of *Karval*.⁸ The *Karval* decision is binding jurisprudence. This means that the General Division was required to follow it. If the General Division chose not to follow the principles in *Karval*, it needed to explain why.⁹ The General Division found that there were significant factual differences between *Karval* and the Claimant's circumstances.

[21] The General Division considered that the Claimant in *Karval* requested 61 weeks of extended benefits, there was no evidence that she intended to take a total of one-year leave, and she waited six months to contact the Commission to ask to change her election. The General Division explained these factual differences but did not consider the Federal Court's findings on the clarity of the application form.

[22] 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

⁸ *Karval v. Canada (Attorney General)*, 2021 FC 395.

⁹ See *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para 112.

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.

[23] 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.¹⁰ The judge noted that there may be relief when a claimant is misled by the Commission by relying on official and incorrect information.

[24] The General Division did not find that the Claimant was misled. It found that the Claimant made a mistake. The General Division erred in law by failing to consider and apply the binding Federal Court decision in *Karval* when it decided that the Claimant's mistake was not her election because it did not align with her intentions.

[25] 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

[26] 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.¹¹

[27] 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.

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

[28] 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

¹⁰ See *Karval* at para 14.

¹¹ 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.

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.

[29] 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.¹² The Commission argues that the facts in *Hull* are similar to this matter. It says that this decision confirms that the Claimant's choice of extended benefits on her application form was her election, and that it was irrevocable once benefits were paid.

[30] 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.

[31] The General Division found, on a balance of probabilities, that the claimant had elected to receive standard parental benefits despite choosing extended benefits on her application form. The Appeal Division dismissed the Commission's appeal. The Federal Court of Appeal allowed the Commission's application for judicial review.

[32] 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?¹³

[33] The Court found that a claimant's election is what they choose on their application form, and not what they may have intended.¹⁴ It also found that once payment of parental benefits has started the election cannot be revoked, by the claimant, the Commission, or the Tribunal.¹⁵

¹² *Canada (Attorney General) v. Hull*, 2022 FCA 82.

¹³ See *Hull* at para 34.

¹⁴ See *Hull* at para 63.

¹⁵ See *Hull* at para 64.

[34] 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 52 weeks. This was a deliberate choice, even though it was based on a misunderstanding. The Claimant did not think that the 35 weeks of standard benefits would be enough, and so she clicked the option for extended benefits. Once the payment of those benefits began, the election was irrevocable.

[35] 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.¹⁶ I find that the legislation and the case law confirm that an election cannot be revoked on the basis of a mistake.

[36] 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.

[37] 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.

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

¹⁶ *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

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

Melanie Petrunia
Member, Appeal Division