



Citation: *Canada Employment Insurance Commission v AS*, 2022 SST 515

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: Canada Employment Insurance Commission
Representative: Angèle Fricker

Respondent: A. S.

Decision under appeal: General Division decision dated February 8, 2022
(GE-22-113)

Tribunal member: Janet Lew

Type of hearing: Teleconference

Hearing date: June 2, 2022

Hearing participants: Appellant's representative
Respondent

Decision date: June 13, 2022

File number: AD-22-136

Decision

[1] The appeal is allowed. The General Division erred. The Respondent, A. S. (Claimant), elected to receive Employment Insurance extended parental benefits. Her election is irrevocable.

Overview

[2] This is an appeal of the General Division decision. The General Division found that the Claimant selected the extended option when she applied for parental benefits. The General Division also found that she made a mistake and actually meant to choose the standard option. As a result, it decided that she elected standard parental benefits.

[3] The Appellant, the Canada Employment Insurance Commission (Commission), argues that the General Division made jurisdictional, legal, and factual errors. The Commission asks the Appeal Division to allow the appeal and give the decision it says the General Division should have given. The Commission says that the General Division should have found that the Claimant elected extended parental benefits and that her election is irrevocable.

[4] The Claimant argues that the application process was unclear and misleading, particularly against the backdrop of her personal circumstances. She asks the Appeal Division to dismiss the appeal.

Issues

[5] The issues in this appeal are:

- a) Did the General Division make any legal errors?
- b) Did the General Division fail to consider some of the evidence before it?
- c) Did the General Division exceed its jurisdiction? That is, did it decide something that it did not have the power to do?

Analysis

[6] The Appeal Division may intervene in General Division decisions if there are jurisdictional, procedural, legal, or certain types of factual errors.¹

Did the General Division make any legal errors?

[7] The Commission argues that the General Division made several legal errors, including the following, that it:

- i) Failed to apply a case called *Karva²* and failed to follow the principles that the Federal Court set out in it,
- ii) Misinterpreted section 23(1.2) of the *Employment Insurance Act*,
- iii) Excused the Claimant from her obligations to find out about her rights and entitlements,
- iv) Found the Claimant could be relieved of her mistake, and
- v) Changed the Claimant's election from extended to standard parental benefits after parental benefits had already been paid to the Claimant.

– Background facts

[8] The Claimant applied for Employment Insurance maternity and parental benefits in March 2021. When she filled out the application form, she answered that she wanted maternity benefits, followed by parental benefits.

[9] There are two types of parental benefits to choose between:

- 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

¹ See section 58(1) of the *Department of Employment and Social Development Act*.

² See *Karval v Canada (Attorney General)*, 2021 FC 395.

payable to one parent. If parents share the parental benefits, they can receive up to a combined total of 40 weeks.

- 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. If parents share the parental benefits, they can receive up to a combined total of 69 weeks.

[10] The application form explains that each parent has to choose the same parental benefit option. The application form also explains that the option chosen by the parent who applies for benefits first is the option both parents will receive.

[11] The Claimant chose extended over standard parental benefits.

[12] An applicant also has to choose how many weeks of parental benefits they want. The application form asked, "How many weeks do you wish to claim?" The Claimant chose the number 61 on the drop-down menu in response to this question.

[13] The Claimant began to receive extended parental benefits in late June 2021. Shortly after that, she noticed that she was getting a lower benefit rate than she had expected.

[14] The Claimant continued to receive reduced payments. In September 2021, the Claimant contacted the Commission. She explained that she had made an error and wanted to get standard benefits. The Commission said it could not grant her request.

[15] The Claimant appealed the Commission's decision to the General Division. The General Division considered the medical evidence. The General Division noted that the Claimant's medical issues at the time affected her decision-making. The General Division accepted that the Claimant was confused because of her medical state.

[16] The General Division found that the Claimant actually meant to choose the standard option, as her spouse had when he applied for parental benefits. They applied for benefits on the same day. She filed her application before her spouse did.

[17] The General Division also found that the standard option was consistent with the Claimant's intention to be off work for one year.

– **Failure to consider *Karval***

[18] The Commission argues that the General Division failed to apply *Karval*. The Commission says that, as the case directly applied to the Claimant's situation, the General Division had to follow it.

[19] The Claimant says the General Division did not have to apply *Karval* because her situation is factually distinguishable: the Claimant had mental health issues, and she completed the application form in the hospital, not long after she had given birth. She did not have any help with completing the form. On top of that, the Claimant says that the information she gave on the application form did not match the correspondence with her employer. Her employer confirmed that she was taking a year's leave of absence.

[20] The Federal Court issued *Karval* in October 2021. The Court set out some basic principles in that case, relating to the election of parental benefits. The Court determined that:

- a claimant is responsible for carefully reading and attempting to understand their entitlement options and, if still in doubt, to ask the necessary questions, and
- once parental benefits are paid, an election is irrevocable under section 23(1.2) of the *Employment Insurance Act*, and

[21] The Court also said that a claimant is without any legal remedies, unless they are misled by relying on official and incorrect information.³

[22] The Commission argues that, even if the General Division did not mention *Karval*, it still has to follow the principles that the Court laid out.

³ See *Karval*, at para 14.

[23] After all, as the Commission argues, the Federal Court of Appeal stated in *Hull*⁴ that a decision-maker has to follow binding precedent in which the same provision has been interpreted. *Hull* also dealt with the issue of parental benefits.

[24] The General Division issued its decision in February 2022, little more than three months after the Federal Court rendered *Karval*. The General Division did not refer to *Karval*, nor explain why it might have considered the decision distinguishable.

[25] More importantly, the General Division did not address any of the principles set out in *Karval*, nor explain why it might have considered them irrelevant to the Claimant's case. Although the Claimant argues that *Karval* is distinguishable on the facts, the General Division still had to follow the basic underlying principles in that decision, or at the very least, explain why the principles might not have applied in the Claimant's case. The General Division failed to do so. This represents a legal error.

– **Section 23(1.2) of the *Employment Insurance Act***

[26] The Commission argues that the General Division misinterpreted section 23(1.2) of the *Employment Insurance Act*. The section reads:

(1.2) Irrevocability of election—the election is irrevocable once benefits are paid under this section or under section 152.05 in respect of the same child or children.

[27] The General Division acknowledged that, once a claimant begins to receive parental benefits, the claimant's election cannot not be changed.⁵

[28] From the General Division's perspective, it was not changing the Claimant's election. This perspective stemmed from mistakenly believing that an election meant what the Claimant "intended" to choose, rather than what she indicated as her choice on the application form.

⁴ See *Canada (Attorney General) v Hull*, 2022 FCA 82.

⁵ See General Division decision, at para 6.

[29] The Court of Appeal found this approach unjustifiable. The Court of Appeal held:

[62] ... In my view the precise wording of the text, the surrounding context and the purpose of subsection 23(1.1) of the [*Employment Insurance*] Act leaves room for a single interpretation (*Vavilov* at paras 110 and 124).

[63] The answer to the question of law for the purposes of subsection 23(1.1) of the [*Employment Insurance*] Act is the word “elect” means what a claimant indicates as their choice on the application form. The election is the choice of the parental benefit on the form.

[64] It follows, pursuant to subsection 23(1.2) of the [*Employment Insurance*] Act, that once a claimant has chosen on the application form the parental benefit and the number of weeks she wishes to claim, and once payments of those benefits have started, it is impossible for the claimant, the Commission, the General Division or the Appeal Division to revoke, alter or change the election.

[30] In short, the Claimant’s election was what she chose on the application form.

[31] Hence, the General Division erred in law in its interpretation of section 23(1.2) of the *Employment Insurance Act*. First, it misinterpreted what constitutes an election for the purposes of section 23(1.2) and secondly, it erred in effectively changing the Claimant’s election.

[32] Because the Claimant had elected extended parental benefits on her application form, she had to accept this choice. She was unable to change her election because of section 23(1.2) of the *Employment Insurance Act*.

– **Availability of relief for a claimant**

[33] The Commission also argues that the General Division made a legal error when it found that the Claimant was entitled to some relief when the selection on her application form did not match what she intended.

[34] As the Court of Appeal said in referencing *Karval*, no legal remedy is available to claimants who based their election on a misunderstanding of the parental benefit scheme.⁶

[35] The Court of Appeal noted that the judge in *Karval* opined, in *obiter*, that there might be recourse if a claimant is misled.⁷

[36] Here, the Claimant argues that the application form was misleading, as the distinction between maternity and parental benefits, and each parental benefit type, was unclear.

[37] Ms. Karval had also asserted that the application form was confusing. The Court found otherwise. The Court found that there was nothing “very confusing about the application.”⁸ Indeed, Justice Zinn came to this same conclusion in *De Leon*, writing that he concurred with the view of Justice Barnes in *Karval* that the application form was not confusing nor lacking in information.⁹

[38] The application form that the Claimant completed is essentially identical to the forms in *Karval* and *De Leon*. Based on the findings made by the Federal Court in the two decisions, the Claimant’s application form was not confusing nor lacking in information.

[39] On top of that, the General Division did not accept any claims that the application form was confusing or misleading. If anything, the General Division found that the Claimant’s medical condition was the source of the Claimant’s confusion.

[40] Despite the Claimant’s mental health issues, no legal remedies are available to her. She was not misled by relying on official and incorrect information.

⁶ See *Hull*, at para 31.

⁷ See *Hull*, at para 32.

⁸ See *Karval*, at para 16.

⁹ See *Canada (Attorney General) v De Leon*, 2022 FC 527, at paras 28 and 29.

– **Other errors**

[41] The Commission also argues that the General Division made other errors, including factual and jurisdictional errors. Given the nature of the legal errors that I have identified, it is unnecessary to address these other arguments.

Remedy

[42] How can I fix the General Division's error? I have two choices.¹⁰ I can substitute my own decision or I can refer the matter back to the General Division for reconsideration. If I substitute my own decision, this means I may make findings of fact.¹¹

[43] I will give the decision that the General Division should have given. I have the necessary information to make a decision. The parties agree on the basic facts. Neither the Claimant nor the Commission have asked me to return this matter to the General Division for a reconsideration.

[44] I am bound to follow the decisions of the Federal Court and the Court of Appeal. Therefore, and as I have determined above, the General Division misinterpreted what constitutes an election. The Claimant's election was the choice of the parental benefit on the application form.

[45] I recognize that there are factual differences between the Claimant's case and those of the claimants in *Karval*, *De Leon*, and *Hull*. Even so, section 23(1.2) of the *Employment Insurance Act* makes it clear that, short of being misled, which was not the case here, once the Claimant chose the parental benefit type and the number of weeks she wished to claim, and once payments of those benefits started, she could no longer revoke, alter or change her election.

¹⁰ Section 59 of the *Department of Employment and Social Development Act*.

¹¹ *Weatherley v Canada (Attorney General)*, 2021 FCA 58, at paras 49 and 53, and *Nelson v Canada (Attorney General)*, 2019 FCA 222, at para 17.

Conclusion

[46] The appeal is allowed. The General Division erred. The Claimant elected to receive extended parental benefits. Her election is irrevocable.

Janet Lew
Member, Appeal Division