



Citation: *Canada Employment Insurance Commission v AM*, 2022 SST 736

## Social Security Tribunal of Canada Appeal Division

# Decision

**Appellant:** Canada Employment Insurance Commission  
**Representative:** A. Fricker

**Respondent:** A. M.

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**Decision under appeal:** General Division decision dated March 24, 2022  
(GE-22-290)

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**Tribunal member:** Melanie Petrunia

**Type of hearing:** Teleconference

**Hearing date:** June 29, 2022

**Hearing participant:** Appellant's representative

**Decision date:** August 8, 2022

**File number:** AD-22-216

## **Decision**

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

## **Overview**

[2] The Respondent, A. 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 61 weeks of benefits. The Claimant received her first payment of parental benefits around July 23, 2021. On November 20, 2021, she contacted the Applicant, the Canada Employment Insurance Commission (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 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 meant to choose standard parental benefits and that she wanted one year of maternity and parental benefits combined.

[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.

## Preliminary matters

[8] A teleconference hearing in this matter was scheduled for June 29, 2022. The Claimant did not attend the hearing. I am satisfied that she received the Notice of Hearing and was aware of the hearing date and time.<sup>1</sup> I proceeded with the hearing in the Claimant's absence.

## Issues

[9] 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

[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:<sup>2</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

[11] There are two types of parental benefits:

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<sup>1</sup> Telephone logs from May 16<sup>th</sup>, June 10<sup>th</sup> and June 22<sup>nd</sup> show that the Tribunal spoke with the Claimant and confirm that she was aware of the hearing date.

<sup>2</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).

- 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 made an application for maternity and parental benefits effective April 4, 2021.<sup>3</sup> In her application, the Claimant said that her last day of work was April 7, 2021 and that she did not know the date that she would return to work.<sup>4</sup>

[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 61 weeks from the drop down menu.<sup>5</sup>

[14] The first payment of extended benefits was issued on July 23, 2021. The Claimant contacted the Commission on November 20, 2021 to request to change to standard parental benefits.<sup>6</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**

[15] The General Division allowed the Claimant’s appeal. It found that the Claimant chose the extended option on the application form.<sup>7</sup> It also accepted that the Claimant

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<sup>3</sup> GD3-17.

<sup>4</sup> GD3-7.

<sup>5</sup> GD3-10.

<sup>6</sup> GD3-21.

<sup>7</sup> General Division decision at para 23.

wanted standard benefits. She was consistent in her statements to the Commission and in her Notice of Appeal to the General Division that she wanted one year of benefits.<sup>8</sup>

[16] 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>9</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 position in writing to the Commission that she told her employer she was planning to return to work in March 2022.<sup>10</sup> Based on evidence of the Claimant's intention, the General Division found that that she meant to chose standard parental benefits.

[17] The Claimant did not attend the hearing before the General Division. The General Division stated that the Claimant did not find the application form straightforward and contacted Service Canada for assistance. It accepted that the Claimant asked for one year but the extended option was checked off.<sup>11</sup>

[18] The General Division found that the Claimant chose standard parental benefits, not extended, because that was the option that she intended to choose. For this reason, it found there was nothing to revoke with respect to her election for benefits.<sup>12</sup>

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

[19] 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;

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<sup>8</sup> General Division decision at para 25.

<sup>9</sup> General Division decision at para 14.

<sup>10</sup> General Division decision at para 25.

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

<sup>12</sup> General Division decision at para 26.

- 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 erred in law by failing to follow guidance from the Federal Court; 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 follow binding case law**

[20] In its decision, the General Division did not consider the Federal Court decision of *Karval*.<sup>13</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>14</sup>

[21] 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>15</sup>

[22] 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>16</sup> The General Division found that the Claimant did not find the form straightforward and asked for assistance, but it did not ask the Claimant about this because she did not attend the hearing.

[23] The General Division found that the Claimant wanted to elect standard parental benefits and received assistance over the phone while completing the application. It found that the Claimant was not aware that she was electing to receive extended

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<sup>13</sup> *Karval v. Canada (Attorney General)*, 2021 FC 395.

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

<sup>15</sup> See *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para 112.

<sup>16</sup> See *Karval* at para 14.

benefits. The General Division erred in law by failing to consider and apply the binding Federal Court decision in *Karval* when making this determination.

[24] 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**

[25] At the hearing before me, the Commission argued that, if the General Division made an error, then I should give the decision the General Division should have given.<sup>17</sup>

[26] 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**

[27] 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.

[28] 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>18</sup>

[29] 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

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<sup>17</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.

<sup>18</sup> *Canada (Attorney General) v. Hull*, 2022 FCA 82.

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.

[30] 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>19</sup>

[31] The Court found that a claimant’s election is what they choose on their application form, and not what they may have intended.<sup>20</sup> It also found that once payment of parental benefits has started the election cannot be revoked, by the claimant, the Commission, or the Tribunal.<sup>21</sup>

[32] 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.

[33] Parliament chose not to include any exceptions to the irrevocability of the election. It is unfortunate for the Claimant that a 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>22</sup> I find that the legislation and the case law confirm that an election cannot be revoked on the basis of a mistake.

[34] 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

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<sup>19</sup> See *Hull* at para 34.

<sup>20</sup> See *Hull* at para 63.

<sup>21</sup> See *Hull* at para 64.

<sup>22</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.”



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.

[35] 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.

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

## **Conclusion**

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

Melanie Petrunia  
Member, Appeal Division