



Citation: *Canada Employment Insurance Commission v ML*, 2022 SST 800

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: Canada Employment Insurance Commission
Representative: A. Fricker

Respondent: M. L.

Decision under appeal: General Division decision dated April 6, 2022
(GE-22-822)

Tribunal member: Melanie Petrunia

Type of hearing: Teleconference

Hearing date: July 13, 2022

Hearing participants: Appellant's representative
Respondent

Decision date: August 23, 2022

File number: AD-22-255

Decision

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

Overview

[2] The Respondent, M. L. (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. She stated that her last day of work was September 30, 2021 and that she planned to return to work on October 1, 2022. The Claimant received her first payment of parental benefits around February 4, 2022. On February 8, 2022, she contacted the Appellant, 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 options 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 clicked the button to choose extended parental benefits. It found that she 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 exceeded its jurisdiction, 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: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

[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.

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).

- 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.

[11] The Claimant made an application for maternity and parental benefits effective October 3, 2021. In her application, the Claimant said that her last day of work was September 30, 2021 and that she planned to return to work on October 1, 2022.²

[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 52 weeks from the drop down menu.³

[13] The Claimant's first payment of extended parental benefits was issued on February 4, 2022.⁴ The Claimant contacted the Commission on February 8, 2022 to request to change to standard parental benefits.⁵

[14] 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 Claimant appealed this decision to the Tribunal's General Division.

– **The General Division decision**

[15] The General Division allowed the Claimant's appeal. It found that the only evidence that the Claimant intended to choose the extended option was her selection of that option on the application form.⁶ It also accepted the Claimant's testimony that she intended to take one year off from work and thought she had to choose the extended option to select 52 weeks.⁷ She made a mistake when she asked for 52 weeks of

² GD3-7

³ GD3-10

⁴ GD3-25

⁵ GD3-26

⁶ General Division decision at para 22.

⁷ General Division decision at para 22.

parental benefits because she wanted 52 weeks of parental and maternity benefits combined.⁸

[16] The General Division found that it must consider evidence about what type of parental benefit the Claimant wanted when determining which option she chose. It said that the option the Claimant chose on the application form is only one thing it has to consider, and that it must also look at other evidence.⁹

[17] The General Division found that the Claimant intended to choose standard parental benefits. It relied on the fact that the Claimant provided the dates of her planned absence from work, which supported that she wanted 52 weeks of pregnancy and maternity benefits combined.¹⁰

[18] The General Division noted that the Claimant first received maternity benefits at a rate of 55% of her weekly earnings. This is what she expected to receive for her parental benefits as well, but her benefit rate decreased to 33% of her weekly earnings when her maternity benefits ended.¹¹ The Claimant contacted the Commission to find out why she was receiving less money and this was when she realized her mistake.¹²

[19] The General Division found that the Claimant did not understand that parental and maternity were separate benefits when she filled out the application form.¹³ It decided that the form does not clearly communicate that the weeks of maternity benefits a claimant is requesting should not be included in the number of weeks of parental benefits requested on a form.¹⁴

[20] The General Division found that the Claimant thought she had completed the application form correctly and did not know to contact the Commission and ask questions. The General Division determined that the Claimant relied on misleading

⁸ General Division decision at para 19.

⁹ General Division decision at para 13.

¹⁰ General Division decision at para 20.

¹¹ General Division decision at para 20.

¹² General Division decision at para 21.

¹³ General Division decision at para 25.

¹⁴ General Division decision at para 24.

information from the Commission when she elected extended benefits, because the application form is missing critical and timely information.¹⁵

[21] Based on evidence of the Claimant's intention and its finding that the Claimant was misled by the Commission, the General Division found that that she elected to receive standard parental benefits.¹⁶

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

[22] 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;
- The General Division erred in law by failing to consider relevant case law from the Federal Court; and
- The General Division erred in law by failing to hold the Claimant to her obligation to now her rights and entitlements under the EI Act.

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

[23] In its decision, the General Division did not follow the Federal Court decision of *Karval v. Canada (Attorney General)*, (*Karval*).¹⁷ The General Division referenced the *Karval* decision in a footnote when it found that there is some relief available to claimants who can establish that they were misled by the Commission.¹⁸ However, it did not refer to or apply the Federal Court's findings regarding the clear references to benefit rate and irrevocability of an election on the application form.

¹⁵ General Division decision at para 26.

¹⁶ General Division decision at para 26.

¹⁷ *Karval v. Canada (Attorney General)*, 2021 FC 395.

¹⁸ General Division decision at para 26.

[24] 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 questions on the application form are not objectively confusing and the explanations on the form are not lacking in information.¹⁹

[25] The Federal Court in *Karval* stated that the different benefit rates (55% of weekly earnings for standard and 33% for extended) and the irrevocability of the election are both clearly stated on the application form.²⁰

[26] 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.²¹

[27] The General Division found that the Claimant was misled by the Commission when she chose extended benefits. It referenced the *Karval* decision when it relied on the finding that the Claimant was misled and decided that she actually elected standard benefits.

[28] The *Karval* decision does say that some recourse may be available to claimants who are “actually misled by relying on official and incorrect information.” However, the Federal Court also found that there is no remedy for claimants who make a mistake and base their election on a misunderstanding.²²

[29] The General Division found that the application form is missing critical information and does not clearly communicate that pregnancy benefits are separate from parental benefits. However, the form missing information or not explaining the different benefits clearly is not the same as finding that it contains incorrect information.

¹⁹ See *Karval* at para 11.

²⁰ See *Karval* at para 14.

²¹ See *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para 112.

²² See *Karval* at para 14.

[30] The General Division did not consider the comments in *Karval* that it is fundamentally the responsibility of a claimant to carefully read and try to understand their entitlement options. The decision states that a claimant who carefully reads the application form would see that the benefit rate for extended benefits will be reduced to 33% of weekly earnings. The claimant would also read that their choice is irrevocable once benefits have been paid.²³

[31] The General Division found that the Claimant did not understand the difference between maternity and parental benefits and she selected extended benefits believing that she needed to in order to claim 52 weeks of total benefits. It found that she was misled by the Commission when she made this choice. The General Division erred in law by failing to consider and apply the binding Federal Court decision in *Karval* when making this determination.

[32] 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

[33] 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.²⁴

[34] 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

[35] 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

²³ See *Karval* at para 14.

²⁴ 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.

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.

[36] 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.²⁵ Section 23(1.1) is the section that says a claimant must elect standard or extended benefits when they make a claim for parental benefits. Section 23(1.2) says that the election is irrevocable once benefits are paid.

[37] 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.

[38] 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?²⁶

[39] The Court found that a claimant's election is what they choose on their application form, and not what they may have intended.²⁷ It also found that once payment of parental benefits has started the election cannot be revoked, by the claimant, the Commission, or the Tribunal.²⁸

²⁵ *Canada (Attorney General) v. Hull*, 2022 FCA 82.

²⁶ See *Hull* at para 34.

²⁷ See *Hull* at para 63.

²⁸ See *Hull* at para 64.

[40] 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. Once the payment of those benefits began, the election was irrevocable.

[41] The Claimant says that she made a mistake on her application form. She meant to choose standard parental benefits. This was the choice that she always wanted. She says that she has paid for her mistake and the reduced benefit rate is not enough to support her family. She would never choose extended parental benefits intentionally because she has to return to work after one year.

[42] I have considered whether the return to work date that the Claimant provided on the application form has any impact on her election. She provided a return to work date that is one year after she left work. This supports that she wanted one year of maternity and parental benefits combined. It also conflicts with the choice to receive 52 weeks of extended benefits after pregnancy benefits, which would be a total of 67 weeks.

[43] In *Hull*, the Court stated that there is only one reasonable interpretation of section 23(1.1) of the EI Act. It found that the choice of standard or extended on the application form, along with the number of weeks a claimant wants to claim, is the election. It found that this is the evidence of the election a claimant makes and the Commission is not involved in determining whether a claimant has selected the right option.²⁹

[44] The Court in *Hull* stated that the election is the choice that the Claimant makes on their application, for standard or extended parental benefits. I understand that the Claimant's return to work date contradicts this choice. However, it is not required that a claimant provide a return to work date, and this date may be subject to change. The legislation does require that a choice between standard and extended benefits be made and the Federal Court of Appeal has stated that this is a claimant's election, even if it is not what was intended.³⁰

²⁹ See *Hull* at para 56.

³⁰ See *Hull* at para 60.

[45] 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.³¹ I find that the legislation and the case law confirm that an election cannot be revoked on the basis of a mistake.

[46] 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.

[47] 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.

[48] 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

[49] The appeal is allowed. The Claimant elected extended parental benefits and the election was irrevocable once those benefits were paid.

Melanie Petrunia
Member, Appeal Division

³¹ *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."