



Citation: *Canada Employment Insurance Commission v GW*, 2022 SST 920

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: Canada Employment Insurance Commission
Representative: Angele Fricker

Respondent: G. W.

Decision under appeal: General Division decision dated May 6, 2022
(GE-22-797)

Tribunal member: Janet Lew

Type of hearing: Teleconference

Hearing date: September 14, 2022

Hearing participants: Appellant's representative
Respondent

Decision date: September 20, 2022

File number: AD-22-341

Decision

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

Overview

[2] The Appellant, the Canada Employment Insurance Commission (Commission) is appealing the General Division decision.

[3] The General Division found that the Claimant made a mistake when she applied for Employment Insurance parental benefits. The General Division found that the Claimant actually chose the standard option, although she had asked for the extended option on the application form.

[4] The 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.¹

Issues

[5] The issues in this appeal are:

- a) Did the General Division make a legal and jurisdictional error by changing the Claimant's election after benefits had been paid to her?
- b) Did the General Division exceed its jurisdiction by determining what option the Claimant elected?

¹ The Social Security Tribunal gave notice of the hearing to the Claimant. She did not attend the hearing nor file any written submissions, despite reminders and efforts to contact her.

- c) Did the General Division make a factual error?
- d) Did the General Division disregard the Claimant's obligations?

Analysis

[6] The Appeal Division may intervene in General Division decisions if there are jurisdictional, procedural, legal, or certain types of factual errors.²

Background facts

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

[8] 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 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.

[9] The Claimant chose extended parental benefits.³

[10] 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 52 on the drop-down menu in response to this question.⁴

² See section 58(1) of the *Department of Employment and Social Development Act*.

³ See application form at GD3-8.

⁴ See application form at GD3-8.

[11] The application form also stated that the options—whether standard or extended—could not be changed once a parent received parental benefits.⁵

[12] The first payment for extended parental benefits was issued to the Claimant on December 31, 2021.⁶ The Claimant noticed that the payment was lower than she expected. She thought there was an error. After receiving more payments at the lower rate, she contacted the Commission to ask about the payments.

[13] The Commission explained that she was now getting extended parental benefits. If she had asked for standard parental benefits, she would have gotten the higher benefit rate. The Claimant asked the agent to switch her to standard benefits because that is what she had intended to choose. The agent told her that her election could not be changed because parental benefits had already been paid.⁷

[14] The Claimant appealed the Commission's decision to the General Division. The General Division found that the Claimant filled out the Employment Insurance application form when she was exhausted. Mere days ago she had had an emergency caesarian section that caused trauma to her baby. Her son had to be admitted to the neonatal intensive care unit, where she visited him daily, despite her own injuries.

[15] The Claimant read the application forms and thought she understood them. She thought that, if she was going to be away from work for a year, that she had to choose extended benefits. She understood that if she chose the standard option, she would get benefits for only 35 weeks, when she wanted benefits for the year. She did not recognize that parental benefits were different from and in addition to the 15 weeks of maternity benefits she would be getting.

[16] The General Division found this was a common error that the Claimant had made. The General Division found that “the difference between maternity and parental benefits and the relationship between the two benefits was not unambiguous”⁸ on the

⁵ See application form at GD3-8.

⁶ See benefits payable to Claimant, at GD3-19.

⁷ See Supplementary Record of Claim dated January 20, 2022, at GD3-23.

⁸ General Division decision, at para 28.

application form. The General Division found that the Claimant proved that she chose standard parental benefits. Although the Claimant had chosen the extended option on the application form, the General Division found that all of the other evidence indicated that the Claimant had chosen the standard option.

Did the General Division make a legal and jurisdictional error by changing the Claimant's election after benefits had been paid to her?

[17] The Commission argues that the General Division made a legal and jurisdictional error by changing the Claimant's election after benefits had been paid to her.

[18] The Commission argues that the General Division did not have any authority to change the Claimant's election. The Commission argues that this is clear from section 23(1.2) of the *Employment Insurance Act* and from a case called *Hull*.⁹

[19] Section 23(1.2) of the *Employment Insurance Act* 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.

[20] The General Division acknowledged that, once the Commission starts paying parental benefits, a claimant cannot change their election between standard and extended options.¹⁰

[21] However, the General Division determined that, when deciding what the Claimant had elected, she could look beyond what the Claimant had chosen on the application form. The General Division found that it did not matter necessarily how the Claimant responded when she was asked to select between standard or extended parental benefits.

[22] The General Division accepted that the Claimant's intentions could define which parental benefit type the Claimant had actually elected.

⁹ *Canada (Attorney General) v Hull*, 2022 FCA 82.

¹⁰ General Division decision, at paras 6 and 11.

[23] The Court of Appeal rejected this approach. The Court said that there could be only one definition of what an election is for the purposes of choosing a parental benefit type. The Court of Appeal wrote:

[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.

(My emphasis)

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

[25] The General Division issued its decision before the Court of Appeal decided *Hull*. Even so, that does not change the interpretation of section 23(1.2) of the *Employment Insurance Act*.

[26] The Claimant argues that the application form was highly misleading. For instance, the form did not give any calculations, so she was unable to figure out how many weeks of benefits to request.

[27] The Claimant also notes the General Division member’s observations that she alone has dealt with more than 50 similar cases. The member wrote that if the application form was clear and unambiguous, there would not be that many files before the Social Security Tribunal with similar fact scenarios.

[28] In a case called *Karval*,¹¹ the Federal Court looked at the application form. The Court found that it clearly stated things such as the fact that payments would be reduced with the extended option. The form also clearly stated that once parental benefits were paid, the election was irrevocable.

[29] The General Division distinguished the *Karval* case and said it did not apply in the Claimant's case. She found that the case did not apply because the Court had not considered the fact that the form did not contain more information. The member found that the form did not explain that applicants had to subtract the number of weeks of maternity benefits from their request for parental benefits.¹²

[30] However, the General Division overlooked the Court's distinction between misleading information and insufficient information.

[31] The Court wrote:

While it may well be that Ms. Karval was uncertain about the maternity and parental leave program, it cannot fairly be said that her clear choices resulted from being misled by the Commission. It is undoubtedly the case that many government benefit programs will have complex features and strict eligibility requirements. More information, clearer language and better explanations can almost always be proposed in hindsight. Where a claimant is actually misled by relying on official and incorrect information, certain legal recourse may be available under the doctrine of reasonable expectations. However, where a claimant like Ms. Karval is not misled but merely lacks the knowledge necessary to actually answer unambiguous questions, no legal remedies are available.¹³

[32] The fact that the application form lacked information did not mean that it was misleading. The General Division should have applied *Karval* in the Claimant's circumstances. The General Division should have adopted the Court's findings and accepted that the application form—while lacking information such as calculation—was not misleading.

¹¹ *Karval v Canada (Attorney General)*, 2021 FC 395.

¹² It seems that the General Division meant that applicant

¹³ *Karval*, at para 14.

[33] The Federal Court of Appeal came to a similar conclusion in *Hull*. The Court of Appeal found that the claimant Hull had not been misdirected.

[34] Given the Court's findings in both *Karval* and then *Hull*, the Claimant was bound by her election as it appeared on her application form.

[35] 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 when it had no authority to do so.

Other errors

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

Remedy

[37] How can I fix the General Division's error? I have two choices.¹⁴ 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.¹⁵

[38] The Commission asks me to give the decision that it says the General Division should have given in the first place. That is the appropriate remedy here. There is no suggestion that there are any gaps in the evidence or any need for clarification. I have the necessary information to make a decision. There is no indication that either party did not receive a fair hearing at the General Division.

[39] 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

¹⁴ Section 59 of the *Department of Employment and Social Development Act*.

¹⁵ *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.

constitutes an election. The Claimant's election was the choice of the parental benefit on the application form.

[40] Section 23(1.2) of the *Employment Insurance Act, Hull and Karval* both make 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.

Conclusion

[41] 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