



Citation: *Canada Employment Insurance Commission v MO*, 2022 SST 924

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: Canada Employment Insurance Commission
Representative: Angèle Fricker

Respondent: M. O.

Decision under appeal: General Division decision dated April 28, 2022
(GE-22-819)

Tribunal member: Janet Lew

Type of hearing: Teleconference
Hearing date: September 14, 2022
Hearing participants: Appellant's representative

Decision date: September 20, 2022
File number: AD-22-321

Decision

[1] The appeal is allowed. The General Division erred. The Respondent, M. O. (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 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.

[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 make an error of law by relieving the Claimant of her obligations to act diligently to try to understand her entitlement options?

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 over standard parental benefits.

[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.

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

[11] The application form also stated that the options—whether standard or extended—could not be changed once a parent received parental benefits.³

[12] The Commission issued the first payment for extended parental benefits to the Claimant on January 9, 2022.⁴ The Claimant noticed that the payment was lower than she had been getting. She thought it was due to the holidays. But, the next payment was also lower than she expected.

[13] The Claimant immediately called the Commission to find out why the payments were lower. The Commission explained to her that she was now getting extended parental benefits. If she had asked for standard parental benefits, she would have gotten the higher rate.

[14] The Claimant asked for an amendment of the parental benefits option. The Commission said it could not grant her request because she had already been paid benefits.⁵

[15] The Claimant appealed the Commission's decision to the General Division. The General Division found "a clear conflict between the Claimant's choice on the application form of extended parental benefits for 52-weeks and the plans she made with her employer before she gave birth".⁶

[16] The application form showed that the Claimant chose the extended option. But, the General Division found that this was outweighed by the evidence that she intended to be off work for one year. It found that the Claimant's intention to be off work for one year supported a finding that she elected to receive the standard parental benefit option.

³ See application form at GD3-6.

⁴ See Benefit Statement, at GD3-19.

⁵ See Supplementary Record of Claim dated January 25, 2022, at GD3-20.

⁶ General Division decision, at para 29.

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*.

[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.⁷

[21] However, the General Division found that there was nothing to revoke. In other words, it denied that it was changing the Claimant's election at all. It explained that it was instead putting the Claimant "in a position consistent with her choice of standard parental benefits."⁸ The General Division saw the Claimant's election as what she "intended" to choose, rather than what she indicated as her choice on the application form.

[22] In *Hull*, the Court of Appeal found this approach unjustifiable. The Court of Appeal held:

⁷ General Division decision, at paras 11 and 31.

⁸ General Division decision, at para 31.

[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.⁹

(My emphasis)

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

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

Other errors

[25] 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

[26] 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

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

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

reconsideration. If I substitute my own decision, this means I may make findings of fact.¹¹

[27] 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.

[28] I am bound to follow the decisions of the Federal 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.

[29] Section 23(1.2) of the *Employment Insurance Act* and *Hull* 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

[30] 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

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.