Citation: *Canada Employment Insurance Commission v CP*, 2022 SST 995

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	Canada Employment Insurance Commission
Representative:	A. Fricker
Respondent:	C. P.

Decision under appeal:	General Division decision dated May 12, 2022 (GE-22-1100)

Tribunal member:	Melanie Petrunia
Type of hearing:	Teleconference
Hearing date:	September 21, 2022
Hearing participants:	Appellant's representative Respondent
Decision date:	October 10, 2022
File number:	AD-22-344

Decision

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

Overview

[2] The Respondent, C. P. (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 August 13, 2021 and that she planned to return to work on July 15, 2022.

[4] The Claimant received her first payment of parental benefits around December 10, 2021. She was out of the country at the time. When she returned, she contacted the Applicant, the Canada Employment Insurance Commission (Commission) and asked to switch to the standard benefit option.

[5] 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.

[6] 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.

[7] 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 jurisdiction and based its decision on an erroneous finding of fact in allowing the appeal.

[8] 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

[9] I have focused on the following issues:

a) Did the General Division err in law by failing to follow 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:[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

[11] 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.

[12] The EI Act says that a claimant must elect to receive standard or extended parental benefits and that the choice is irrevocable once parental benefits have been paid.[2]

[13] The Claimant applied for maternity and parental benefits on August 19, 2021.[3] She 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.[4]

[14] The Claimant's first payment of extended parental benefits was issued around December 10, 2021.[5] The Claimant was out of the country at the time and contacted the Commission when she returned to request to change to standard parental benefits.[6]

[15] 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

[16] The General Division allowed the Claimant's appeal. It found that the Claimant made a mistake when she chose extended parental benefits on her application form and intended to choose the standard parental benefit.[7]

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[2] See sections 23(1.1) and 23(1.2) of the EI Act.
[3] GD3-15.
[4] GD3-8.
[5] GD3-14.
[6] GD3-19.
[7] General Division decision at paras 18 and 26.

[17] The General Division found that the Claimant chose the extended option on her application form but she actually wanted standard parental benefits.[8] It accepted the Claimant's testimony that she intended to take one year off from work and chose the extended option believing she was selecting 52 weeks of parental and maternity benefits combined.[9]

[18] The General Division found that the Claimant's intention to choose standard benefits was supported by the fact that she contacted the Commission as soon as she returned to Canada after receiving her first payment of extended benefits.[10] The General Division also found that the Claimant provided a return to work date on her application that supported her intention to return to work after about one year. This was consistent with the return to work date on her ROE.[11]

[19] The General Division found that it must consider all relevant evidence when determining which option the Claimant chose on her application for benefits.[12] The General Division found that the Claimant intended to choose standard parental benefits.[13]

[20] Based on all of the evidence, the General Division found that the Claimant intended to choose standard benefits. Because this was her intention, it found that the Claimant actually elected to receive standard parental benefits.[14]

– The Commission's appeal to the Appeal Division

[21] The Commission argues that the General Division made several errors in its decision. It makes the following arguments:

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[8] General Division decision at para 7.
[9] General Division decision at para 25.
[10] General Division decision at para 26.
[11] General Division decision at para 25.
[12] General Division decision at para 14.
[13] General Division decision at para 18.
[14] General Division decision at paras 31 and 32.

- 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 follow binding case law 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.

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

[22] The General Division found that the Claimant made a mistake when she chose extended benefits on her application form. It noted that the Claimant testified that the application form was not clear to her and she was confused when she chose extended benefits.[15]

[23] The General Division did not consider the Federal Court decision of *Karval v. Canada (Attorney General) (Karval)*.[16] 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. The Commission argues that this is an error of law.

[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.[17]

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[15] General Division decision at paras 24 and 25.
[16] *Karval v. Canada (Attorney General)*, 2021 FC 395.
[17] See *Karval* at para 11.

[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.[18]

[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.[19]

[27] The *Karval* 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.[20]

[28] In a recent decision from the Federal Court of Appeal in *Canada (Attorney General) v. Hull (Hull),* the Court found that the principles in *Karval* applied despite factual differences. In that case, the claimant also requested 52 weeks of extended parental benefits, wanting one year of maternity and parental benefits combined. The Court confirmed the principle from *Karval* that "there is no legal remedy available to claimants who base their election on a misunderstanding of the parental benefit scheme."[21]

[29] The General Division found that the Claimant mistakenly selected extended benefits wanting to claim 52 weeks of combined pregnancy and parental benefits. The General Division erred in law by failing to follow the binding Federal Court decision in *Karval* when making this determination.

[30] As I have found that the General Division erred, I do not have to address the balance of the Commission's arguments.

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[18] See *Karval* at para 14.
[19] See *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para 112.
[20] See Karval at para 14.
[21] See *Canada (Attorney General) v. Hull*, 2022 FCA 82 at para 31.

I will fix the General Division's error by giving the decision it should have given

[31] 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.[22]

[32] 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

[33] 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.

[34] The recent decision of the Federal Court of Appeal in *Hull*, considered the proper interpretation of sections 23(1.1) and 23(1.2) of the EI Act. 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.

[35] 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

[22] 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.

found, on a balance of probabilities, that she had elected to receive standard parental benefits.

[36] 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?[23]

[37] The Court found that a claimant's election is what they choose on their application form, and not what they may have intended.[24] It also found that once payment of parental benefits has started the election cannot be revoked, by the claimant, the Commission, or the Tribunal.[25]

[38] 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.

[39] The Claimant argues the evidence shows that her intention was always to take one year off work. Her ROE is clear that she was taking a one-year leave of absence. She says that she never planned to be off for a year and a half. She chose 52 weeks of benefits from the drop down menu on the application form because this aligned with the total number of weeks of leave she planned to take.

[40] The Claimant argues that the law is not clear. She says that she did not know that her choice of benefits could not be changed. She argues that she initially checked her online account and it seemed that everything was fine. She argues that she has been clear from the start that she wanted one year of total benefits. She says that she worked for these benefits, she made a mistake and she is just trying to fix it. The election of extended benefits was a mistake.

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[23] See *Hull* at para 34.
[24] See *Hull* at para 63.
[25] See *Hull* at para 64.

[41] It is clear that the Claimant did not intend to ask for 52 weeks of extended parental benefits after 15 weeks of maternity benefits. I agree with the General Division and the Claimant that the evidence suggests that it was always her intention to take a one-year leave from work. Unfortunately, the Federal Court of Appeal in *Hull* has made it clear that the box chosen on the application form, and the number of weeks, are the election regardless of what a claimant may have intended.

[42] I have considered whether the evidence from the Claimant's ROE and the return to work date on her application form, showing that the Claimant plans to return to work after one year, has any impact on her election. This evidence 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 maternity benefits for 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.[26] 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.[27]

[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 planned return to work date contradicts this choice. However, the legislation requires that a choice between standard and extended benefits be made when applying for benefits and the Federal Court of Appeal has stated that this is the Claimant's election even if it is not what she intended.[28]

[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

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[26] See *Hull* at para 42.
[27] See *Hull* at para 56.
[28] See *Hull* at para 60.

sympathetic. However, I must apply the law as it is written.[29] 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.

Melanie Petrunia
Member, Appeal Division

[29] *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."