



Citation: *Canada Employment Insurance Commission v NR*, 2022 SST 1058

## Social Security Tribunal of Canada Appeal Division

# Decision

**Appellant:** Canada Employment Insurance Commission  
**Representative:** Angèle Fricker

**Respondent:** N. R.

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**Decision under appeal:** General Division decision dated May 13, 2022  
(GE-22-993)

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**Tribunal member:** Janet Lew

**Type of hearing:** Teleconference

**Hearing date:** October 11, 2022

**Hearing participants:** Appellant's representative  
Respondent

**Decision date:** October 18, 2022

**File number:** AD-22-346

## **Decision**

[1] The appeal is allowed. The General Division erred. The Respondent, N. R. (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 meant to and actually chose the standard option, although she had initially 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 of these benefits is irrevocable.

## **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?
- c) Did the General Division make a factual error by overlooking some of the evidence?

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.<sup>1</sup>

## Background facts

[7] The Claimant applied for Employment Insurance maternity and parental benefits in September 2021.<sup>2</sup> 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 application form shows that 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 61 weeks.

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<sup>1</sup> See section 58(1) of the *Department of Employment and Social Development Act*.

<sup>2</sup> See Claimant's application for benefits, filed September 20, 2021, at GD3-3 to GD3-14.

[11] In the hearing before me, the Commission says that there is a drop-down menu for each option. The Commission claims that when a claimant chooses the standard option, the drop-down menu offers from one to 35 weeks, and for the parental option, from one to 61 weeks. The Commission also claims that the default setting is one week for both options, so a claimant wishing more than one week would need to scroll through the drop-down menu. The Claimant disputes that there was a drop-down menu in her case.

[12] The Claimant received maternity benefits. Once these were exhausted, she began to receive extended parental benefits. She noticed that the payments for parental benefits were considerably lower than she had expected. She immediately contacted the Commission and asked for a correction, as she claims that she chose the standard option. The Commission said it could not change her election, since it had already paid her parental benefits.

[13] The Claimant appealed the Commission's decision to the General Division. The General Division examined the evidence. The General Division found that the Claimant had always intended on returning to work after a year. She testified that she recognized that she wanted standard parental benefits, so went back to the application form and changed her election to the standard option.<sup>3</sup> The General Division wrote that the Claimant testified that, when she changed options, she did not see a change in the number of weeks of benefits.<sup>4</sup>

[14] The Claimant believed that she had successfully switched options. The General Division found that this belief was reinforced by her employer's letter, which stated that she requested "standard leave" in September 2021, rather than an "extended leave," and was scheduled to return to work in September 2022.<sup>5</sup>

[15] The General Division rejected the Commission's arguments that the Claimant should have known that she would be getting a reduced rate. Her My Service Canada

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<sup>3</sup> See General Division decision, at para 24.

<sup>4</sup> See General Division decision, at para 25.

<sup>5</sup> See General Division decision, at para 27, and employer's letter dated April 22, 2022, at GD6-2.

Account (“MSCA”) set out the benefit rates she could expect to receive for maternity benefits and for parental benefits. By viewing her MSCA, she would have seen that the extended parental benefit rate was lower than the maternity benefit rate.<sup>6</sup> The Claimant acknowledged that if she had looked at her MSCA, she would have seen the reduced parental benefits.

[16] However, the Claimant found that there was no reason for her to check her account, as she understood that she had chosen the standard option.<sup>7</sup> The General Division accepted this evidence and found that it was reasonable that the Claimant did not check her MSCA.

[17] The General Division found that the Claimant actually meant to choose the standard option. The General Division also found that the standard option was consistent with the Claimant’s intention to be off work for one year.

### **Did the General Division make 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 made a legal and jurisdictional error by changing the Claimant’s election after benefits had been paid to her.

[19] The Commission argues that 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*<sup>8</sup> that once parental benefits have been paid, the election cannot be changed.

[20] 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.

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<sup>6</sup> See Representations of the Commission to the Social Security Tribunal-employment Insurance Section, filed April 6, 2022, at GD4.

<sup>7</sup> See General Division decision, at para 31.

<sup>8</sup> *Canada (Attorney General) v Hull*, 2022 FCA 82.

[21] The General Division acknowledged that, once the Commission starts paying parental benefits, a claimant cannot change their election between standard and extended options.<sup>9</sup>

[22] However, the General Division determined that it could effectively skirt section 23(1.2) of the *Employment Insurance Act*. The General Division found that it could do this by looking at all of a claimant's factual circumstances—beyond what a claimant had chosen on the application form—to decide what that claimant had elected.

[23] So, in the Claimant's case, the General Division found that it did not matter necessarily how the Claimant responded when she was asked to make an election between standard or extended parental benefits.

[24] The General Division accepted that the Claimant's intentions represented which parental benefit type the Claimant actually elected. The General Division found that the Claimant proved that "she meant to choose standard parental benefits when she applied."<sup>10</sup> Based on what the Claimant meant to choose, the General Division concluded that the Claimant chose standard parental benefits.

[25] The Federal Court of Appeal rejected this approach in *Hull*. The Court said that there is only one definition of an election, 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 purposes 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

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<sup>9</sup> See General Division decision, at paras 6 and 13.

<sup>10</sup> See General Division decision, at paras 3, 19, 28, 32 and 33.

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.<sup>11</sup>

(My emphasis)

[26] The Federal Court recently affirmed this position in *Variola*.<sup>12</sup> The Court said *Hull* removes any doubt as to whether the Commission and Tribunal should consider the context in which a claimant made an election to determine whether the election was invalid, or whether the Commission and Tribunal can substitute an invalid election with a valid alternative.

[27] In short, the Claimant's election was what she chose on the application form, irrespective of what she intended.

[28] The Claimant says that she recognized that she wanted the standard option because the benefit rate was at 55%. She also says that, after initially selecting the extended option, she went back and changed to the standard option.<sup>13</sup> There is no evidence as to when this purportedly occurred, whether before or after the Claimant had already submitted and filed her application. There is no evidence either that the Claimant changed the number of weeks of benefits from 61 to another number.<sup>14</sup> She testified that she did not see a change in the number of weeks.<sup>15</sup>

[29] The Claimant states that she checked her MSCA in December 2021 and confirmed that the end date of her claim was September 2022.<sup>16</sup> From this, she assumed that she had chosen standard parental benefits because if she had chosen extended parental benefits, she would have expected the claim to end well after September 2022.

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<sup>11</sup> See *Hull*, at paras 62 to 64.

<sup>12</sup> See *Canada (Attorney General) v Variola*, 2022 FC 1402 at paras 35 to 36.

<sup>13</sup> At approximately 8:14 of the audio recording of the General Division hearing.

<sup>14</sup> Audio recording of General Division hearing.

<sup>15</sup> At approximately 8:50 of the audio recording of the General Division hearing.

<sup>16</sup> See screenshot capture of Claimant's MSCA, at GD6-3. The Commission explained that there is an imperfection in the system. Usually a benefit period is 52 weeks so this is what is reflected in the MSCA. However, there can be extensions to the benefit period. The Commission suggested that the extension would be reflected after payment of parental benefits, but that was not the case here when the Claimant provided a screenshot of her MSCA at GD6-3.

[30] However, the MSCA does not help the Claimant's case because it also showed the benefit rate that she could expect for extended parental benefits. The benefit rate of \$357 for extended parental benefits was appreciably less than the \$595 she had been receiving for maternity benefits.<sup>17</sup>

[31] The General Division accepted that the Claimant truly believed that she changed her election on the application form. However, the General Division found that she chose the extended option, as reflected in the application form.<sup>18</sup> There is no basis for me to interfere with the General Division's findings, as the evidence shows that the Claimant chose the extended option.

[32] The General Division issued its decision on the same day that the Court of Appeal decided *Hull*. So, the General Division could not have known about *Hull*. Even so, that does not change the interpretation of section 23(1.2) of the *Employment Insurance Act*. Besides that, the Federal Court had already come to the same conclusion in *Karval*, that once parental benefits are paid, the election is irrevocable.<sup>19</sup>

[33] The General Division was required to follow *Karval* and come to the same conclusion, that the Claimant's election was not only what she had chosen on the application form, but that it was also irrevocable. It could not be changed once parental benefits were paid.

[34] 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.

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<sup>17</sup> See attestation certificate and sample MSCA, at GD3-26 to GD3-28.

<sup>18</sup> See General Division decision, at paras. 2, 7, 8, 20,

<sup>19</sup> See *Karval v Canada (Attorney General)*, 2021 FC 395 at para 14.



## Other errors

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

## Remedy

[36] How can I fix the General Division's error? I have two choices.<sup>20</sup> 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.<sup>21</sup>

[37] 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.

[38] I am bound to follow decisions of the Federal Court and the 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 that appears on the application form.

[39] Section 23(1.2) of the *Employment Insurance Act*, *Hull*, *Karval*, and, more recently, *Variola* make it clear. 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.

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<sup>20</sup> Section 59 of the *Department of Employment and Social Development Act*.

<sup>21</sup> *Weatherly versus Canada (Attorney General)*, 2021 FCA 58, at paras 49 and 53, and *Nelson v (Canada Attorney General)*, 2019 FCA 222, at para 17.

## **Conclusion**

[40] 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