



Citation: *Canada Employment Insurance Commission v JH*, 2022 SST 954

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: Canada Employment Insurance Commission
Representative: Tiffany Glover

Respondent: J. H.

Decision under appeal: General Division decision dated
(GE-21-251)

Tribunal member: Melanie Petrunia

Type of hearing: On the Record

Decision date: October 3, 2022

File number: AD-22-285

Decision

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

Overview

[2] The Respondent, J. H. (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] On her application for benefits, the Claimant chose to receive parental benefits for 52 weeks, but she planned to take one year of maternity and parental leave combined. The Claimant returned to work after one year and received another payment of parental benefits that she was not expecting.

[4] The Claimant contacted the Appellant, the Canada Employment Insurance Commission (Commission) to ask why she was receiving parental benefits after her parental leave had ended. The Claimant learned that she had elected to receive 52 weeks of parental benefits in addition to the 15 weeks of maternity benefits she received.

[5] The Claimant asked the Commission to change her election to standard parental benefits. 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 chose extended parental benefits on her application. It found that she meant to choose standard parental benefits and that she wanted one year of maternity and parental benefits combined. Because this is what she intended, the General Division found that she elected standard parental benefits.

[7] The Commission appealed this decision to the Tribunal's Appeal Division. The Appeal Division dismissed the appeal. It found that the General Division did not exceed its jurisdiction. It also found that the General Division did not err in law when it found that the Claimant elected standard parental benefits despite selecting extended parental benefits on her application form.

[8] The Commission then asked the Federal Court of Appeal to review the Appeal Division's decision. The Court found the Appeal Division's decision unreasonable and returned the matter to the Appeal Division to be decided in accordance with its reasons.¹

[9] 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.

Preliminary matters

[10] I invited the parties to make additional submissions in light of the decision from the Federal Court of Appeal. I stated that I would decide whether another hearing was needed after reviewing the submissions from the parties.

[11] The Commission filed submissions arguing that there are no further issues to be determined because the Federal Court of Appeal decision is binding. The Claimant did not file any submissions. I decided that another hearing was not needed and advised the parties that I would decide the appeal on the record.

Issues

[12] The issues in this appeal are:

- a) Did the General Division err in law in its interpretation of subsection 23(1.1) of the EI Act?

¹ *Canada (Attorney General) v. Hull*, 2022 FCA 82.

b) If so, what is the best way to fix the General Division's error?

Analysis

[13] I can intervene in this case only if the General Division made a relevant error. So, I have to consider whether the General Division:²

- 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

[14] 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.
- 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.

[15] 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.³

² 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).

³ See sections 23(1.1) and 23(1.2) of the EI Act.

[16] The Claimant applied for maternity and parental benefits on November 17, 2019.⁴ 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.⁵

[17] The Claimant's first payment of extended parental benefits was processed on March 20, 2020.⁶ She contacted the Commission on December 5, 2020 to request to change to standard parental benefits.⁷

[18] 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**

[19] The General Division allowed the Claimant's appeal. It found that the Claimant chose extended parental benefits on her application form but intended to choose the standard parental benefit.⁸

[20] The General Division found that the Claimant was confused by the information on the application form.⁹ 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.¹⁰

[21] The General Division found that the Claimant's intention to choose standard benefits was supported by the fact that she told her employer she only planned to take one year off, and this is reflected on her Record of Employment. The General Division

⁴ GD3-3 to GD3-16.

⁵ GD3-9

⁶ GD3-22

⁷ GD3-17

⁸ General Division decision at para 18.

⁹ General Division decision at para 16.

¹⁰ General Division decision at para 21.

also noted that the Claimant contacted the Commission as soon as she received an unexpected benefit payment after returning to work.¹¹

[22] The General Division followed earlier decisions of the Appeal Division. These decisions found that the Tribunal can consider all relevant evidence when determining which option the Claimant chose on her application for benefits.¹² The General Division found that there could be contradictory answers on an application form. It found that the onus is on the Claimant to show, on a balance of probabilities, which option she actually chose.¹³

[23] The General Division found that the Claimant chose extended benefits on her application form.¹⁴ It considered the Claimant's personal circumstances at the time that she filled out the application form. The General Division found that the Claimant reasonably interpreted the question on the application form: "[h]ow many weeks do you wish to claim?" as asking for the total weeks she wanted to take off work. It found that the Claimant made a mistake because she was confused.¹⁵

[24] Based on all of the evidence, the General Division found that the Claimant wanted to receive standard parental benefits. Because this was her intention, it found that the Claimant actually elected to receive standard parental benefits.¹⁶

– The Commission's appeal

[25] The Commission argues that the General Division made errors of fact and law in its decision when it found that the Claimant intended to elect standard parental benefits, invalidating the election on her application form. It makes the following arguments:

¹¹ General Division decision at para 17.

¹² *T. B. v Canada Employment Insurance Commission*, AD-19-426; *M. H. v Canada Employment Insurance Commission*, AD-19-503.

¹³ General Division decision at para 13.

¹⁴ General Division decision at para 15.

¹⁵ General Division decision at para 16.

¹⁶ General Division decision at para 18.

- The General Division erred in law by effectively changing the Claimant's election from extended to standard after benefits had been paid to her; and
- The General Division erred in law in its interpretation of sections 23(1.1) and 23(1.2) of the EI Act.

The General Division erred in law in its interpretation of sections 23(1.1) and 23(1.2) of the EI Act

[26] In its decision, the General Division acknowledged that a claimant cannot change their election after any amount of parental benefits have been paid.¹⁷ It stated that sections 23(1.1) and 23(1.2) of the EI Act prevent claimants from switching back and forth between standard and extended parental benefits.¹⁸

[27] The General Division found that the Claimant's intention when applying for benefits is relevant to determining which type of benefits she elected. It decided that the election is not just the option selected on the application form. The General Division accepted that a claimant's election is irrevocable once benefits are paid, but decided that an election can be what a claimant intends, rather than the option chosen on the form.

[28] The General Division did not undertake a formal statutory interpretation exercise when it found that a claimant's election could be different from the option chosen on the application form. Section 23(1.1) requires claimants to elect either standard or extended benefits in their claim for benefits. Section 23(1.2) makes that choice irrevocable once benefits are paid.

[29] On judicial review of the previous Appeal Division decision in this matter, the Federal Court of Appeal interpreted the meaning of "elect" in section 23(1.1) of the EI Act. It considered the text, context and purpose of sections 23(1.1) and 23(1.2) and determined that there is only one reasonable interpretation of the section.¹⁹

¹⁷ General Division decision at para 6.

¹⁸ General Division decision at para 12.

¹⁹ See *Hull* at para 62.

[30] The Court found that the ordinary meaning of the text supports that the choice made on the application form, for standard or extended benefits, along with the specific number of weeks is the claimant's election.²⁰ It found that section 23(1.2) is clear that the choice made by a claimant becomes irrevocable upon the payment of benefits.²¹

[31] The Court considered the context of these provisions. It looked at the sections of the EI Act that provide for parental benefits, the application process and the form of the application.²² The Court found that this context also supported the interpretation that the act of selecting the option for standard or extended benefits and the number of weeks on the application is the election.²³

[32] The Court examined the purpose of sections 23(1.1) and 23(1.2) of the EI Act. It found that Parliament chose to make a claimant's election irrevocable to allow for certainty and efficiency for other parties affected by a claimant's choice.²⁴

[33] The Court concluded that the text, context and purpose support only one interpretation of "elect" in section 23(1.1): a claimant's election is the choice that they make on the application form.²⁵ The General Division erred in law when it found that the Claimant elected standard benefits because that was the option that she intended to choose, rather than what she chose on the application form.

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

[34] The Commission argues that the General Division erred and I should give the decision the General Division should have given.²⁶ It says that the decision of the Federal Court of Appeal is binding and there are no further issues to be determined.

²⁰ See *Hull* at para 47.

²¹ See *Hull* at para 49.

²² See *Hull* at paras 50 and 53 to 56 where the Court considered sections 22(2), 48(1), 48(2), 48(3) and 50(3) of the EI Act.

²³ See *Hull* at para 56.

²⁴ See *Hull* at paras 57 to 60.

²⁵ See *Hull* at para 63.

²⁶ 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.

[35] 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 allow me to make a decision.

The Claimant elected to receive extended parental benefits and the election was irrevocable

[36] As discussed above, the Federal Court of Appeal considered the proper interpretation of sections 23(1.1) and 23(1.2) of the EI Act. It found that there is only one reasonable interpretation of these provisions.

[37] The choice that a claimant makes on their application form, along with the specific number of weeks that they wish to receive benefits, is their election. Once the payment of parental benefits begins, the election they made becomes irrevocable. This means it cannot be changed. The Claimant's intention when filling out the application form is not relevant.

[38] In this matter, the Claimant elected to receive extended benefits for 52 weeks. She was paid benefits in accordance with this choice beginning on March 20, 2020 and the election then became irrevocable. As the Federal Court of Appeal stated, this means that it became "impossible for the claimant, the Commission, the General Division or the Appeal Division to revoke, alter or change the election."²⁷

[39] I understand that the Claimant's election of extended benefits was a mistake. The evidence is clear that she intended to, and did, return to work after one year of maternity and parental leave combined. However, the legislation is clear, as confirmed by the Federal Court of Appeal. I find that the Claimant elected extended parental benefits and this election was irrevocable once benefits were paid.

²⁷ See *Hull* at para 64.

Conclusion

[40] The appeal is allowed.

Melanie Petrunia
Member, Appeal Division