



Citation: *Canada Employment Insurance Commission v CF*, 2023 SST 19

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: Canada Employment Insurance Commission
Representative: Angèle Fricker

Respondent: C. F.

Decision under appeal: General Division decision dated May 5, 2022
(GE-22-897)

Tribunal member: Janet Lew

Type of hearing: Teleconference

Hearing date: September 14, 2022

Hearing participants: Appellant's representative
Respondent

Decision date: January 3, 2023

File number: AD-22-340

Decision

[1] The appeal is allowed.

[2] The Claimant elected standard parental benefits. The election is irrevocable.

Overview

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

[4] The General Division found that the Respondent, C. F.(Claimant), selected the standard option when he applied for 10 weeks of parental benefits. He applied for benefits about a week before his child's first birthday.

[5] The General Division found that the Claimant made a mistake and intended to choose the extended option. As a result, it decided that he had elected extended parental benefits. This meant that the Claimant would receive the full number of weeks of benefits that he had requested, although at a lower weekly benefit rate.

[6] If the Claimant had remained on standard parental benefits, he would receive benefits at a higher weekly benefit rate but would be subject to what is called a parental (benefits) window. A claimant who elects to receive standard parental benefits receives parental benefits only within this parental window, which ends a year after a child's birth. The Claimant would not have received the full 10 weeks of parental benefits he had asked for if the General Division had found he had elected standard parental benefits.

[7] The Commission argues that the General Division made jurisdictional, legal, and factual errors when it found that the Claimant chose extended parental benefits. 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 had in fact elected standard parental benefits and that his election is irrevocable.

[8] The Claimant denies that the General Division made any errors or, if it did, says that the Commission misled him into believing that he had elected the more favourable option for him. He says that if he had not received erroneous advice, he would have changed his election from standard to extended parental benefits. He says the Commission's appeal should be dismissed.

Issues

[9] 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 him?
- b) Did the General Division exceed its jurisdiction by determining what option the Claimant elected?
- c) Did the General Division overlook some of the evidence?
- d) Did the General Division fail to apply the principles that ignorance of the law is not an excuse?

Analysis

[10] The Appeal Division may intervene in General Division decisions if there are jurisdictional, procedural, legal, or certain types of factual errors.¹ For factual errors, the General Division had to have based its decision on an error that it made in a perverse or capricious manner, or without regard for the evidence before it.

Background facts

[11] The Claimant applied for Employment Insurance parental benefits on January 20, 2022. His daughter was born on January 27, 2021.

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

[12] 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.

[13] The Claimant chose standard parental benefits on the application form.

[14] An applicant also must choose how many weeks of parental benefits they want. The application form asked, “How many weeks do you wish to claim?” The Claimant expected to return to work on March 28, 2022. As a result, he asked for 10 weeks of parental benefits from the drop-down menu on the application form.

[15] The application form stated that an applicant cannot not change their options— whether standard or extended— once any parent receives parental benefits.²

[16] The Claimant received confirmation of his election during the application process. The confirmation reads:

Type of parental benefits

Standard benefit: You’ve chosen to receive benefits at a rate of 55% of your weekly insurable earnings (up to a maximum amount) each week for 10 weeks.

The payable period for standard parental benefits begins the week in which the child is born or placed with you for the purpose of adoption and ends 52 weeks later.

Number of parental weeks selected

10 weeks paid at a rate of 55% of your weekly insurable earnings

² See application form at GD 3-6.

Reminder: You can't change your selection (standard or extended) once you've started receiving parental benefits.

[17] Days after the Claimant filed his application for benefits, he received an email from the Commission about reporting his hours. He called Service Canada the next day, on January 28, 2022. He spoke with an agent about the necessity of having to report his hours.

[18] During the same phone call, the Claimant also asked the agent about parental benefits. He recalls asking something along the lines of whether there were any issues or problems and if he could expect all his payments. He understood from the agent's response that there were no issues or any concerns. The agent's response did not cause him to reconsider his election of parental benefits.

[19] The Commission's reconsideration decision of March 4, 2022 refers to a decision dated January 27, 2022.³ The March 4, 2022 decision suggests that the Commission had advised the Claimant on January 27, 2022 that he could not change his election of parental benefit type because the Commission had already paid him parental benefits.⁴

[20] The Commission issued payment by direct deposit on January 30, 2022. The funds were deposited into the Claimant's bank account on February 1, 2022. So, the Claimant had until this date to change his election.⁵

[21] On February 16, 2022, the Claimant filed a request for reconsideration. He asked the Commission to reconsider its decision of January 27, 2022. The Claimant stated that the Commission sent its letter to him on that date.⁶ However, he says the January 27, 2022, letter lacked information. He states that the letter did not tell him when parental benefits would end.⁷

³ See Commission's reconsideration decision dated March 4, 2022, at GD 3-24.

⁴ See Commission's response dated September 26, 2022, at AD 5-1. Curiously, the Commission states that it did not send the Claimant a letter on January 27, 2022. The Commission states that this date represents when it input the transaction that established the claim into its benefit payment system.

⁵ See Commission's response dated September 26, 2022, at AD 5-1 to AD 5-2.

⁶ See Claimant's Request for Reconsideration at GD 3-21.

⁷ See Claimant's response of October 4, 2022, at AD 8-2.

[22] The Commission maintained its position that it could not change the Claimant's election from standard to extended parental benefits because it had already paid him.⁸

[23] The Claimant appealed the Commission's reconsideration decision to the General Division. The General Division accepted the Claimant's evidence that the application form was deficient in that it did not have any information about the parental window.⁹ The General Division accepted also that this "absence of information ... caused him to make an incorrect choice."¹⁰

[24] The General Division found that this was "a case where the Commission did not avoid providing misleading information about the Claimant's choice of parental benefit options and did not follow-up when his choice was unclear given the dates he gave and the number of weeks of benefits he wanted to claim."¹¹

[25] The General Division found that, when the Claimant spoke with the Commission, the agent did not say anything about the parental window. The General Division found that, had she done so, the Claimant could have fixed his mistake before the first payment was processed.¹²

[26] The General Division accepted that the Claimant chose extended parental benefits when he applied.

– **Benefit statement**

[27] The hearing file includes a benefit statement for the week starting January 23, 2022. The statement shows that it was the last payment of parental

⁸ See Supplementary Record of Claim dated March 4, 2022, at GD 3-23, and Commission's reconsideration decision, dated March 4, 2022 at GD 3-24.

⁹ As the General Division explained, the parental window is the timeframe within which benefits may be paid. Benefits may not be paid outside this parental window. See General Division decision at para 20, referencing section 23(2) of the *Employment Insurance Act*.

¹⁰ General Division decision, at para 26.

¹¹ General Division decision, at para 29.

¹² General Division decision, at para 32.

benefits.¹³ The document suggests the Claimant had received notice that he would not be getting 10 weeks of parental benefits.

[28] The Commission explains, however, that it does not send benefit statements to claimants. Claimants must either contact Service Canada's automated telephone information service or access their My Service Canada Accounts to view the benefit statement.¹⁴

[29] The Claimant may not have received or accessed the Benefit Statement before the payment of parental benefits. The Claimant also says that the Benefit Statement that appears in the hearing file is different from the one that he was able to view on his My Service Canada Account.

[30] In short, the existence of the Benefit Statement on file does not establish that the Claimant knew or should have known that he would not be getting the number of weeks of parental benefits that he was expecting.

– **The Claimant's My Service Canada Account**

[31] After the Appeal Division hearing, the Claimant provided screenshots of what appeared when he viewed his My Service Canada Account on January 27, 2022.¹⁵ The Claimant relies on this evidence to show that he did not receive any information that he would receive just one payment of parental benefits.

[32] The Claimant acknowledges that the screenshots represent new evidence that the General Division did not have. Generally, the Appeal Division does not accept new evidence.

[33] I am not accepting the screenshots into evidence, as it was not in evidence before the General Division.

¹³ See Benefit Statement, at GD3-20.

¹⁴ See Commission's response dated September 26, 2022, at AD 5-1 to AD 5-2.

¹⁵ See Claimant's My Service Canada Account at AD 6-4 to AD 6-5.

Did the General Division overlook some of the evidence?

[34] The Commission argues that the General Division overlooked some of the evidence. In particular, the Commission argues that the General Division ignored the information on the application form that described how long a claimant could expect to receive standard parental benefits.

[35] The General Division accepted the Claimant's evidence that "the absence of information about the parental window in the application for benefits caused him to make an incorrect choice."¹⁶

[36] The General Division found that the application form was deficient. It found that the application form did not give enough information so the Claimant would know which parental benefit option best suited his circumstances.

[37] In particular, the General Division found that the application form did not say anything about the parental window.¹⁷ In other words, it found that it did not tell the Claimant that, if he chose standard parental benefits, benefits would end 52 weeks after his child was born, i.e., he would not get 10 weeks of standard parental benefits.

[38] The Commission notes that the application form in fact clearly set out that, if the Claimant chose the standard option, benefits would end 52 weeks after the child was born. The application form reads:

The payable period for standard parental benefits begins the week in which the child is born or placed with you for the purpose of adoption and **ends 52 weeks later**.¹⁸

(My emphasis)

¹⁶ General Division decision, at para 26.

¹⁷ General Division decision, paras 23 and 26 together.

¹⁸ See application at GD 3-7.

[39] The Commission argues that this information squarely contradicts the General Division's finding that the application said nothing about the payment of standard parental benefits ending 52 weeks after the child's birth.

[40] The Claimant argues that this information should have appeared much earlier in the application form. He argues that this information should have appeared before he had to make a choice between parental benefit types. That way, he could have made a fully informed decision about which parental benefit was appropriate for his circumstances.

[41] As the Federal Court stated in a case called *Karval*,¹⁹ "More information, clearer language and better explanations can almost always be proposed in hindsight". Where and how that information is offered or can be found is also of equal importance. Undoubtedly, information about the parental window would have been more useful to the Claimant if it had appeared before he even made his election, and if the language had been clearer.

[42] Even so, information about the parental window was provided on the application form, even if it came after the Claimant had already made his choice about which parental benefit type he preferred. He could have gone back to the previous pages on his application form to change the election or changed his election at any time until he received payment of the parental benefit.

[43] Given that the application form clearly contained information about when payments would begin and end, I find that the General Division made a factual error when it found that the application form did not say anything about the parental window.

Other errors

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

¹⁹ *Karval v Canada (Attorney General)*, 2021 FC 395.

Remedy

[45] How can I fix the General Division's error? I have two choices.²⁰ 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.²¹

[46] 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 decide. There is no indication that either party did not receive a fair hearing at the General Division.

[47] This is a case where the Claimant received information in his application form about the beginning and end of the parental window for standard parental benefits. Although the form did not set out this information early on, it was still present. The Claimant's election was the choice he made on the application form.²²

[48] The Claimant still had the opportunity to change his election until February 1, 2022, when he received payment. If he had discovered his mistake and realized he should have chosen the extended option, he could have changed his election. He could have changed his election at anytime, until he began receiving parental benefits.

²⁰ Section 59 of the *Department of Employment and Social Development Act*.

²¹ *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.

²² In *Canada (Attorney General) v Hull*, 2022 FCA 82 at paras 63 and 64, the Federal Court of Appeal determined that for the purpose of subsection 23(1.1) of the *Employment Insurance Act*, "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." The Court of Appeal also confirmed that, once a claimant has chosen on the application form the parental benefit and the number of weeks they wish 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.

[49] However, the Claimant testified that, days after he submitted his application form, he received a general email. The email advised him that the Commission had approved his application form. He would need to report his hours.

[50] The Claimant testified that he contacted the Commission the following day, on January 28, 2022.²³ The Claimant contacted the Commission to clarify his reporting requirements. The Claimant testified that once the agent investigated his file, she advised him that he did not have to report any more hours.

[51] The Claimant also asked the agent about payment of parental benefits. He wanted to be confident that he would be receiving 10 weeks of parental benefits at the standard rate. He testified that he asked her, “So, all of my other payments will be okay? And they would come through? Because there shouldn’t be any problems.” And she said, “Yes, that’s correct.”²⁴ The Claimant understood from the agent’s response that there were no problems with his application and that he could expect to receive 10 weeks of benefits at the standard parental benefit rate.

[52] The Claimant acknowledges that, in hindsight, perhaps the agent had not fully looked at his file to be in a position to tell him that payments would be cut off at the 52-week mark.²⁵ But, he testified that he told the agent that he was taking 10 weeks of parental leave, that he was expecting a few payments, and that he wanted to know if those payments “would be okay”.²⁶

[53] The Commission had access to the Claimant’s application form. The Commission could have verified the child’s date of birth and could have advised him that he would not be receiving 10 weeks of parental benefits because standard parental benefits ended 52 weeks after the child’s birth. Or, failing that, the Commission could have simply restated the general information about when the parental window begins and ends.

²³ This evidence starts at approximately 7:14 of the audio recording of the General Division hearing.

²⁴ At approximately 8:10 of the audio recording of the General Division hearing.

²⁵ This evidence starts at approximately 8:19 of the audio recording of the General Division hearing.

²⁶ At approximately 9:14 of the audio recording of the General Division hearing.

[54] As it was, the Claimant was left with a false and misleading impression that he would receive 10 weeks of parental benefits at the standard rate. The Claimant relied on the Commission's advice, to his detriment. He did not seek to change his election. He testified at the General Division that, if the agent had given him accurate information, he would have immediately changed his election from standard to extended benefits. Although that would have resulted in benefits at a lower weekly rate, overall, he would have received more benefits because they would have been paid over 10 weeks.

[55] The Claimant did not realize that the payment on February 1, 2022 was the last payment of parental benefits. He did not realize this until February 15, 2022 or so.²⁷ By then, it was too late for him to change his election.

[56] Section 23(1.2) of the *Employment Insurance Act* and the Federal Court of Appeal²⁸ both make it clear that, once a Claimant chooses the parental benefit type and the number of weeks he wishes to claim, and once payments of those benefits start, they can no longer revoke, alter, or change their election.²⁹

[57] The Federal Court has left it open for legal recourse where a claimant is "actually misled by relying on official and incorrect information".³⁰ In *Karval*, the Court held:

Fundamentally it is the responsibility of a claimant to carefully read and attempt to understand their entitlement options and, if still in doubt, to ask the necessary questions. Ms. Karval deliberately selected the extended benefit option and, had she read the application, she would have understood that the parental payments would be reduced. She would also have appreciated that once parental benefits were paid her election was irrevocable. These things are clearly stated on the application and were at the heart of the General Division's dismissal of her appeal and the Tribunal's decision to deny leave to further appeal.

[58] The Claimant alleges that the agent with whom he spoke on January 28, 2022, misled him into believing that he had appropriately elected standard parental benefits.

²⁷ See Claimant's Notice of Appeal to the General Division, at GD 2-11.

²⁸ See *Canada (Attorney General) v Hull*, 2022 FCA 82.

²⁹ See *Canada (Attorney General) v Hull*, 2022 FCA 82 at paras 63 and 64.

³⁰ See *Karval v Canada (Attorney General)*, 2021 FC 395 at para 14.

[59] As the Court has held, a claimant has the foremost responsibility to carefully read and understand their entitlement options. Had the Claimant done so in this case, and carefully read the application form, he would have recognized that the payable period for standard parental benefits ends 52 weeks after the child is born.

[60] But, if he was left with any confusion or doubt about this information, he still had the responsibility to ask the necessary questions. This would involve asking specific questions about that information.

[61] Here, there is no evidence that the Claimant directed the agent to the portion of the application form that described when the payable period for standard parental benefits would begin and end. There is no evidence that the Claimant was even aware of this description on the application form or that he was confused by it.

[62] As the Claimant was unaware of the parental window, it is unlikely that he asked the agent about it. Indeed, there is no evidence that the Claimant's conversation with the agent specifically focused on the parental window, or on whether there were any factors or considerations that could limit the weeks of standard parental benefits he could expect to receive. There is no evidence either that the Claimant directed the agent to his child's birth date.

[63] Without any specific discussion with or questions to the agent about the parental window or the number of weeks of standard parental benefits, I cannot necessarily conclude that the Claimant asked the "necessary questions" or more importantly, provided all relevant information to the agent to enable her to fully appreciate the Claimant's particular circumstances.

[64] I also cannot necessarily conclude from the Claimant's questions that the Commission's agent understood the Claimant, or that she gave misleading or inaccurate advice about the parental window or about the weeks of standard parental benefits the Claimant could expect to receive.

[65] As it is, the agent may not have recognized when the Claimant's child was born. The agent may have mistakenly assumed that the Claimant applied for benefits around

the time of the child's birth. In that case, the agent's assurances that the Claimant would receive his payments would have been accurate. If the agent did not know the child's birthdate, any advice or information was not necessarily inconsistent or in conflict with the information set out on the application form.

[66] Doubtless, the agent could have delved further into the Claimant's circumstances. As it is, there are limited issues surrounding parental benefit types. The two major issues that would concern most claimants would necessarily be the benefit rate and the number of weeks of payment of benefits. It should have been evident to the agent that the Claimant—much like other claimants—was concerned about ensuring that he had chosen the most advantageous option for his circumstances.

[67] The Claimant relied on the agent's advice or information. But, for there to be any legal recourse, a claimant must establish that he was misled by relying on official and incorrect information. Without knowing the specific questions of and responses from the Commission's agent, and the agent's knowledge of the factual underpinnings for those questions, the evidence falls short of establishing that the agent gave incorrect information to the Claimant.

[68] Ultimately, the application form set out the information about the parental window and when payment of standard parental benefits would end. This information could have been better highlighted and could have appeared before the Claimant made his election. But, at the same time, the Claimant could have been more attentive to the application form too.

[69] Finally, even if it had been established that the agent had given incorrect information to the Claimant, I do not have the power or authority to grant the relief that the Claimant seeks.³¹ The Court indicated that "certain legal recourse may be available under the doctrine of reasonable expectations" so the Claimant could

³¹ See *Canada (Attorney General) v Hull*, 2022 FCA 82 at paras 63 and 64 and see also *Karval v Canada (Attorney General)*, 2021 FC 395 at para 14, where the Court indicated that certain legal recourse may be available under the doctrine of reasonable expectations, where a claimant is actually misled by relying on official and incorrect information.

Conclusion

[70] The appeal is allowed.

[71] The General Division overlooked the fact that the application form contained information about the parental window for standard parental benefits. The application form was not deficient, and it did not contain inaccurate or misleading information about the parental window.

[72] I am substituting my decision in the place of the General Division decision. The Claimant elected to receive standard parental benefits. His election is irrevocable.

[73] The Claimant relied on information from the Commission. As a result, he did not change his election before receiving payments. However, it has not been established that that information was necessarily incorrect. Even so, the agent should have fully enquired into the Claimant's circumstances, so she could have recognized the issue. But, at the same time, the Claimant should have been more attentive to the information that was on the application form, so if he was confused or unclear about the options, he could have asked the necessary questions and provided relevant information to the agent.

Janet Lew
Member, Appeal Division