



Citation: *SB v Canada Employment Insurance Commission*, 2022 SST 1391

Social Security Tribunal of Canada Appeal Division

Leave to Appeal Decision

Applicant: S. B.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated October 14, 2022
(GE-22-2962)

Tribunal member: Melanie Petrunia

Decision date: November 20, 2022

File number: AD-22-793

Decision

[1] Leave (permission) to appeal is refused. The appeal will not proceed.

Overview

[2] The Applicant, S. B. (Claimant), applied for and received Employment Insurance (EI) maternity benefits followed by parental benefits. She selected extended parental benefits on her application, which pays a lower rate of benefits over a longer period of time.

[3] The Claimant says that she wanted to receive standard parental benefits. She planned to take one year of total leave from work and chose the wrong option on her application form by mistake.

[4] When the Claimant started receiving extended parental benefits she contacted the Respondent, 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 appealed to the General Division of the Tribunal. Her appeal was dismissed. The General Division found that the Claimant chose extended parental benefits and her choice was irrevocable. The Claimant is now asking to appeal the General Division decision to the Tribunal's Appeal Division. However, she needs permission for her appeal to move forward.

[7] I have to decide whether there is some reviewable error of the General Division on which the appeal might succeed. I am refusing leave to appeal because the Claimant's appeal has no reasonable chance of success.

Issue

[8] Does the Claimant raise any reviewable error of the General Division upon which the appeal might succeed?

Analysis

[9] The legal test that the Claimant needs to meet on an application for leave to appeal is a low one: Is there any arguable ground on which the appeal might succeed?¹

[10] To decide this question, I focused on whether the General Division could have made one or more of the relevant errors (or grounds of appeal) listed in the Department of Employment and Social Development Act (DESD Act).²

[11] An appeal is not a rehearing of the original claim. Instead, I must decide whether the General Division:

- a) failed to provide a fair process;
- b) failed to decide an issue that it should have, or decided an issue that it should not have;
- c) based its decision on an important factual error;³ or
- d) made an error in law.⁴

[12] Before the Claimant can move on to the next stage of the appeal, I have to be satisfied that there is a reasonable chance of success based on one or more of these grounds of appeal. A reasonable chance of success means that the Claimant could

¹ This legal test is described in cases like *Osaj v Canada (Attorney General)*, 2016 FC 115 at para 12 and *Ingram v Canada (Attorney General)*, 2017 FC 259 at para 16.

² DESD Act, s 58(2).

³ The language of section 58(1)(c) actually says that the General Division will have erred if it bases its decision on a finding of fact that it makes in a perverse or capricious manner or without regard for the material before it. The Federal Court has defined perverse as “willfully going contrary to the evidence” and defined capricious as “marked or guided by caprice; given to changes of interest or attitude according to whim or fancies; not guided by steady judgment or intent” *Rahi v Canada (Minister of Citizenship and Immigration)* 2012 FC 319.

⁴ This paraphrases the grounds of appeal.

argue her case and possibly win. I should also be aware of other possible grounds of appeal not precisely identified by the Claimant.⁵

Background

[13] 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.

[14] The *Employment Insurance Act* (EI Act) says that a claimant must elect standard or extended benefits when they make a claim for parental benefits and that the election is irrevocable once benefits are paid.⁶

[15] The Claimant made an application for maternity and parental benefits. In her application, the Claimant said that her last day of work was October 31, 2021 and that she planned to return to work November 1, 2022.⁷ Her Record of Employment showed the same return to work date.

[16] The Claimant 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.⁸

⁵ *Karadeolian v Canada (Attorney General)*, 2016 FC 615; *Joseph v Canada (Attorney General)*, 2017 FC 391.

⁶ See Section 23(1.2) of the EI Act.

⁷ General Division decision at para 19.

⁸ GD3-9

[17] The Claimant's first payment of extended benefits was processed on March 11, 2022. The Claimant contacted the Commission on March 16, 2022 to request to change to standard parental benefits.⁹

[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 found that the Claimant elected to received extended parental benefits on her application form.¹⁰ It considered the Claimant's testimony and accepted that this choice was a mistake. The General Division acknowledged that the Claimant intended to return to work after one year of maternity leave and she never planned to take extended parental benefits.¹¹

[20] The General Division considered recent case law from the Federal Court of Appeal which made it clear that a claimant's election cannot be changed once benefits have been paid.¹² It found that the Claimant asked to change to the standard parental benefit option after she received parental benefits. Because benefits had been paid, the General Division found that the Claimant's election could not be changed, even if was chosen by mistake.¹³

There is no reviewable error of the General Division upon which the appeal might succeed

[21] The Claimant argues that the she is a first time mom and made a mistake on her application form. She says that she did not know she had made a mistake until she

⁹ GD3-22

¹⁰ General Division decision at para 18.

¹¹ General Division decision at para 22.

¹² See General Division decision at para 14 referencing *Canada (Attorney General) v Hull*, 2022 FCA 82.

¹³ General Division decision at para 25.

received a lower payment amount with her first payment of parental benefits, so she would not have been able to change her election before then.¹⁴

[22] The Claimant argues that the return to work date on her application form and her ROE clearly conflict with the choice of extended benefits and that the system is flawed and her application should have been flagged. The Claimant also argues that the election is not irreversible because she is able to appeal it.¹⁵

[23] I find that the Claimant's arguments do not have a reasonable chance of success. The Claimant argued before the General Division that she made a mistake on her application form, and the decision acknowledges this.¹⁶

[24] The General Division refers to a recent decision from the Federal Court of Appeal in *Canada (Attorney General) v. Hull* (Hull). 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 that "there is no legal remedy available to claimants who base their election on a misunderstanding of the parental benefit scheme."¹⁷

[25] 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?¹⁸

[26] The Court found that a claimant's election is what they choose on their application form, and not what they may have intended.¹⁹ It also found that once payment of parental benefits has started the election cannot be revoked, by the claimant, the Commission, or the Tribunal.²⁰

¹⁴ ADN1-7

¹⁵ ADN1-7

¹⁶ General Division decision at para 22.

¹⁷ See *Hull* at para 31.

¹⁸ See *Hull* at para 34.

¹⁹ See *Hull* at para 63.

²⁰ See *Hull* at para 64.

[27] There is no arguable case that the General Division failed to consider that the Claimant's election was a mistake. The Claimant's arguments that the system should have flagged the conflicting information on her application form does not amount to an error by the General Division. The General Division was required to apply the law, which it did.

[28] There is also no arguable case that the General Division erred in finding that the election is revocable because the Claimant is able to appeal it. The fact that the Claimant is entitled to appeal decisions of the Commission or the Tribunal that she is not satisfied with is not related to the issue in her appeal. The Federal Court of Appeal has considered an appeal with similar circumstances to the Claimant's and found that an election, if even made by mistake, is irrevocable once benefits have been paid.²¹

[29] Aside from the Claimant's arguments, I have also considered other grounds of appeal. The Claimant has not pointed to any procedural unfairness on the part of the General Division and I see no evidence of procedural unfairness. There is no arguable case that the General Division made an error of jurisdiction. I have not identified any errors of law.

[30] The Claimant has not identified any errors of the General Division upon which the appeal might succeed. As a result, I am refusing leave to appeal.

Conclusion

[31] Permission to appeal is refused. This means that the appeal will not proceed.

Melanie Petrunia
Member, Appeal Division

²¹ See *Hull* at para 64.