



Citation: *AW v Canada Employment Insurance Commission*, 2022 SST 1478

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: Canada Employment Insurance Commission
Representative: Suzette Bernard

Respondent: A. W.

Decision under appeal: General Division decision dated July 13, 2022
(GE-22-1623)

Tribunal member: Melanie Petrunia

Type of hearing: Teleconference
Hearing date: October 19, 2022
Hearing participant: Appellant's representative
Decision date: December 12, 2022
File number: AD-22-476

Decision

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

Overview

[2] The Respondent, A. W. (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 53 weeks of parental benefits. She stated that her last day of work was October 12, 2021 and that she planned to return to work on October 17, 2022. The Claimant received her first payment of parental benefits around February 27, 2022. On March 23, 2022, she contacted the Appellant, the Canada Employment Insurance Commission (Commission) and asked to switch to the standard benefit option.

[4] 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.

[5] 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 the Claimant contacted the Commission after applying and was given incorrect information, which misled her to believe that she would receive one year of combined maternity and parental benefits. The General Division found that she elected standard parental benefits.

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

[7] I have decided that the General Division based its decision on an important error of fact. 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 this election was irrevocable.

Preliminary matters

[8] The Claimant did not attend the hearing. I am satisfied that she received the Notice of Hearing and was aware of the hearing date. The Claimant spoke with a navigator with the Tribunal and said that she would not be attending.¹ I proceeded with the hearing without the Claimant.

Issues

[9] I have focused on the following issues:

- a) Did the General Division base its decision on an important mistake about the facts of the case?
- 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: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

¹ Telephone log dated October 12, 2022.

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).

- 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.
- 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 Claimant made an application for maternity and parental benefits effective October 18, 2021.³ In her application, the Claimant said that her last day of work was October 12, 2021 and that she would return to work on October 17, 2022.⁴

[13] 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 53 weeks from the drop down menu.⁵

[14] The first payment of extended benefits was issued on February 27, 2022.⁶ The Claimant contacted the Commission on March 23, 2022 to request to change to standard parental benefits.⁷ 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.

³ GD3-17

⁴ GD3-7

⁵ GD3-9 to GD3-11

⁶ GD3-21

⁷ GD3-22

– **The General Division decision**

[15] The General Division allowed the Claimant's appeal. It found that the Claimant chose the extended option on the application form and asked for 53 weeks of extended parental benefits.⁸ It also found that the Claimant planned to take one year off work.⁹

[16] The General Division accepted that the Claimant was confused by the application form and worried that she had not filled it out correctly.¹⁰ It found that she contacted the Commission a few days after submitting her application and was assured by an agent that she had filled out the application form correctly.¹¹ The General Division found that this agent misled the Claimant.¹²

[17] The General Division found that the Claimant contacted the Commission to ensure that she would receive benefits for one year and was told that she would.¹³ It found that this call was within the period of time when it was possible for the Claimant to modify her election. For this reason, the General Division determined that the Claimant elected to receive standard parental benefits.¹⁴

[18] The General Division found that the Claimant asked for her election to be amended and was assured that it was done. It noted that the change was not made on her file and she was paid extended benefits.¹⁵

– **The Commission's appeal to the Appeal Division**

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

⁸ General Division decision at para 11.

⁹ General Division decision at para 12.

¹⁰ General Division decision at para 19.

¹¹ General Division decision at para 18.

¹² General Division decision at para 24.

¹³ General Division decision at para 30.

¹⁴ General Division decision at para 32.

¹⁵ General Division decision at para 25.

- The General Division based its decision on an erroneous finding of fact made in a perverse or capricious manner when it found that the Claimant contacted the Commission and asked to modify or amend her election;
- The General Division erred in law in its interpretation of section 23 of the EI Act; and
- The General Division erred in law in its interpretation of case law from the Federal Court.

The General Division based its decision on an important factual error

[20] In its decision, the General Division found that the Claimant contacted the Commission after submitting her application for benefits because she had been confused about the parental benefit options on the form. She recognized that she may have made a mistake and wanted ensure that the application form matched her intention to claim one year of benefits.¹⁶

[21] The General Division found that a Commission officer reviewed the Claimant's application and gave her incorrect information confirming that she would receive one year of benefits in total.¹⁷ The General Division concludes that the Claimant asked for her election to be amended before she was paid benefits and was assured that it was done.¹⁸

[22] I find that the evidence does not support the General Division's conclusion that the Claimant asked for her election to be amended before benefits were paid. This is an important factual error made without regard for the record. The General Division based its decision that the Claimant elected to receive standard benefits on this finding of fact.

[23] I have listened to the hearing before the General Division. The Claimant testified that she did not understand the wording on the application form about standard and

¹⁶ General Division decision at para 18.

¹⁷ General Division decision at para 30.

¹⁸ General Division decision at para 25.

extended parental benefits.¹⁹ She stated that she didn't understand the differences between the two options based on the number of weeks allotted to each and made an honest mistake.²⁰

[24] The Claimant explained in her testimony that she thought the standard option on the form was for someone who didn't want to take a whole year off.²¹ She confirmed that she read on the application form that the choice of benefits cannot be changed after benefits are paid.²²

[25] The Claimant stated that she called someone a couple days after submitting her application. She said that the person she spoke with told her that she would "get what [she] wanted."²³ This individual told her that she filled out the form correctly.²⁴

[26] The Claimant stated again later in the hearing before the General Division that she called someone at Service Canada who verified that she filled out the form correctly.²⁵ The General Division member asked the Claimant whether she told the agent she spoke to that she wanted a year off in total. She Claimant replied that she doesn't remember but assumed she said that she only wanted to be off for year.²⁶

[27] I find that the Claimant's evidence does not support the General Division's finding that a Commission officer reviewed the Claimant's application and gave her incorrect information confirming that she would receive one year of benefits in total. The Claimant was unclear as to whether or not she asked the agent if she would receive one year of maternity and parental benefits.

[28] The Claimant requested 53 weeks of parental benefits on her application form. If she had wanted to receive benefits at the standard rate for approximately one year, the total weeks of parental and maternity benefits combined would be 50. If the 15 weeks of

¹⁹ Recording of General Division hearing at 5:30.

²⁰ Recording of General Division hearing at 8:15.

²¹ Recording of General Division hearing at 8:50.

²² Recording of General Division hearing at 9:20.

²³ Recording of General Division hearing at 9:35.

²⁴ Recording of General Division hearing at 10:45.

²⁵ Recording of General Division hearing at 13:55.

²⁶ Recording of General Division hearing at 14:20.

maternity benefits are excluded from the number of weeks requested by the Claimant, 38 weeks of parental benefits remain, which is more than allowed under the standard option.

[29] It is unclear from the Claimant's testimony whether she asked an agent to confirm that she would receive maternity and parental benefits for one year, or that she would receive only parental benefits for one year. The evidence before the General Division does not support the finding that the Claimant asked for her election to be amended before she was paid benefits and was assured that it was done.

[30] The General Division based its decision on an important factual error, made without regard for the material before it. This factual error was material to the General Division's determination that the Claimant was misdirected by the Commission and changed her election to standard parental benefits before benefits were paid.

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

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

[32] The Commission argues that the General Division erred and I should give the decision the General Division should have given.²⁷

[33] 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

[34] 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

²⁷ 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.

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.

[35] A recent decision of the Federal Court of Appeal, *Canada (Attorney General) v. Hull* (Hull), considered the proper interpretation of sections 23(1.1) and 23(1.2) of the EI Act.²⁸ 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.

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

[37] 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?²⁹

[38] The Court found that a claimant's election is what they choose on their application form, and not what they may have intended.³⁰ It also found that once payment of parental benefits has started the election cannot be revoked, by the claimant, the Commission, or the Tribunal.³¹

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

²⁹ See *Hull* at para 34.

³⁰ See *Hull* at para 63.

³¹ See *Hull* at para 64.

[39] 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 53 weeks. Once the payment of those benefits began, the election was irrevocable.

[40] I accept that the Claimant contacted the Commission after submitting her application to confirm her election. The evidence does not support a finding that the Claimant modified or amended her election during this phone call.

[41] It is clear that the Claimant did not intend to ask for 53 weeks of extended parental benefits after 15 weeks of maternity benefits. The return to work date provided by the Claimant, and her evidence before the General Division, show 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] In *Hull*, the Court stated that there is only one reasonable interpretation of section 23(1.1) of the EI Act.³² 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.³³

[43] 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.³⁴

³² See *Hull* at para 42.

³³ See *Hull* at para 56.

³⁴ See *Hull* at para 60.

[44] 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 sympathetic. However, I must apply the law as it is written.³⁵ I find that the legislation and the case law confirm that an election cannot be revoked on the basis of a mistake.

[45] The Claimant contacted the Commission after submitting her application. She may have received unclear information about the effect of the election she made for extended parental benefits. However, her evidence does not support that she was misled by relying on official and incorrect information.

[46] 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.

[47] 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

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

Melanie Petrunia
Member, Appeal Division

³⁵ *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."