



Citation: *Canada Employment Insurance Commission v TM*, 2023 SST 105

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: Canada Employment Insurance Commission
Representative: Rachel Paquette

Respondent: T. M.

Decision under appeal: General Division decision dated October 4, 2022
(GE-22-1411)

Tribunal member: Melanie Petrunia

Type of hearing: Teleconference

Hearing date: January 18, 2023

Hearing participants: Appellant's representative
Respondent

Decision date: January 31, 2023

File number: AD-22-770

Decision

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

Overview

[2] In January 2022, the Respondent, T. M. (Claimant), applied to receive 12 weeks of standard parental benefits. He stated in his application that his child was born on February 17, 2021.

[3] The Appellant, the Canada Employment Insurance Commission (Commission), stopped paying parental benefits to the Claimant after four weeks. It said that it could not pay benefits more than 52 weeks after his child's birth.

[4] The Claimant asked to change to extended parental benefits and the Commission refused. 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 was misled by the Commission when he chose standard parental benefits on his application form. It found that his election was invalid and he could elect extended benefits.

[6] The Commission now appeals the General Division decision to the Tribunal's Appeal Division. It argues that the General Division made errors of law and jurisdiction and based its decision on an important mistake about the facts.

[7] 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 standard parental benefits and that this election was irrevocable.

Issues

[8] I have focused on the following issues in this appeal:

- a) Did the General Division err in law in its interpretation of subsection 23(1.2) of the *Employment Insurance Act* (EI Act)?
- b) If so, what is the best way to fix the General Division's error?

Analysis

[9] I can intervene in this case only if the General Division made a relevant error. So, I have to consider whether the General Division:¹

- 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

[10] 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.

¹ 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).

[11] The EI Act says that a claimant must elect to receive standard or extended parental benefits.² Subsection 23(1.2) of the EI Act says that the choice is irrevocable once parental benefits have been paid.

[12] The period during which parental benefits may be paid is referred to as the parental benefit window. The EI Act says that the parental benefit window ends 52 weeks after the child was born.³ This period can be extended in certain circumstances. When a claimant elects to receive extended parental benefits, the period is extended by 26 weeks.⁴

[13] The Claimant elected to receive 12 weeks of standard parental benefits. However, because he applied close to one year after his child's birth, the Commission only paid him four weeks of standard benefits. The Commission said that it could not pay benefits outside of the parental benefit window.

[14] In its decision, the General Division found that the Claimant elected standard parental benefits on the application form. It also found that the Claimant's election was not valid because he was misled by the Commission about how long he could claim standard parental benefits.⁵

The General Division erred in law in its interpretation of the EI Act

[15] The General Division allowed the Claimant's appeal, in part. It found that he could not be paid standard parental benefits outside of the parental benefit window. However, it also found that the Claimant's election of standard parental benefits was not valid, so he could make a new election. The General Division found that the Claimant's new election was for extended parental benefits.⁶

² See section 23(1.1) of the EI Act.

³ Section 23(2)(b) of the Act.

⁴ Section 23(3.21) extends the period by 26 weeks when no regular or other special benefits are paid to a claimant. Section 23(3.2) extends the period when a claimant was not paid regular benefits but was paid other special benefits.

⁵ General Division decision at para 26.

⁶ General Division decision at para 46.

[16] In its decision, the General Division followed an analysis set out in earlier Appeal Division decisions. These decisions looked at what kind of benefits the claimants chose and then considered whether that choice was valid.⁷ The General Division relied on these decisions and found that the Claimant's election was invalid and he could make it again.⁸

[17] The Federal Court recently considered this approach in *Canada (Attorney General) v. Variola*, 2022 FC 1402 (*Variola*). In that case, the claimant elected to receive 16 weeks of standard parental benefits. He also applied close to one year after his child's birth and the Commission only paid him three weeks of standard benefits. The General Division in *Variola* found that the Claimant had been misled by the lack of information on the application form and his election was not valid.⁹

[18] The Federal Court considered the interpretation of section 23(1.2) of the EI Act relied on by the General Division which takes into account the validity of the election. According to this interpretation a claimant's election is only irrevocable if the election is valid in the first place. The Court found that this interpretation is incorrect.

[19] The Federal Court in *Variola* found that neither the Commission nor the Tribunal should consider the context in which the claimant made an election to decide whether it was a valid choice. It also found that that Tribunal cannot substitute an invalid election with a valid one.¹⁰

[20] I find that the General Division erred in law in its interpretation of subsection 23(1.2) of the EI Act. The Claimant's election is the option chosen on the application form and it is irrevocable once benefits are paid. It is an error of law to first consider the context in which the election was made and determine whether it was valid.

⁷ *Canada Employment Insurance Commission v MO*, 2021 SST 435 and See *Canada Employment Insurance Commission v SA*, 2021 SST 406.

⁸ General Division decision at para 39.

⁹ *Variola* at para 6.

¹⁰ *Variola* at para 36.

I will make the decision that the General Division should have made

[21] The Commission argues that the General Division erred and I should give the decision the General Division should have given.¹¹

[22] 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 standard parental benefits and the election was irrevocable

[23] There is no dispute that the Claimant chose standard parental benefits on his application form. The Claimant argues that this election was invalid based on the misleading information he received from the Commission both before and after submitting the application.

[24] The General Division found that the Claimant was misled by the Commission about how many weeks of standard parental benefits he could claim. It found that the Commission failed to give him crucial information about the parental benefit window.

[25] The General Division also considered that the Claimant's My Service Canada account showed 12 weeks of parental benefits were requested and the end date of the claim was January 14, 2023. The General Division found that there was no information that would have let the Claimant know that he would only be paid four weeks of benefits.

[26] The Claimant says that his circumstances are different from those in *Variola*, and the other cases referred to in that decision. In a case called *Karval*, the Federal Court said that the onus is on claimants to seek additional information and there is recourse available if a claimant is actually misled by the Commission.¹²

¹¹ 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.

¹² See *Karval v Canada (Attorney General)*, 2021 FC 395 at para 14.

[27] The Claimant argues that he made efforts to clarify the parental benefit options both before and after he applied. He says that he was provided with incorrect and misleading information by the Commission.

[28] I find, as the General Division did, that the Claimant contacted the Commission and was provided with misleading and incorrect information. The Claimant is right that this is different from the facts in *Variola*. In *Variola*, the Court found that the claimant received incorrect information from his employer, not the Commission.

[29] The case law from the Federal Court and the Federal Court of Appeal have confirmed the following statement from *Karval*:

Where a claimant is actually misled by relying on official and incorrect information, certain legal recourse may be available under the doctrine of reasonable expectations.¹³

[30] There has not been any guidance from the Court about what the legal recourse is that is available. The Court, in those cases, found that the claimants were not actually misled by relying on official and incorrect information.

[31] It is well established that the Tribunal must apply the law as written and as intended by Parliament. The Federal Court of Appeal, in a decision that predates *Karval*, found that the law applies regardless of misinformation from the Commission. In that case, the Court stated:

It is beyond question that the commission and its representatives have no power to amend the law, and that therefore the interpretations which they may give of that law do not themselves have the force of law.¹⁴

[32] The Federal Court of Appeal has 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.¹⁵

¹³ See *Karval* at para 14.

¹⁴ *Granger v. Canada Employment and Immigration Commission*, 1986 CanLII 3962 (FCA), [1986] 3 FC 70 at para 7.

¹⁵ See *Canada (Attorney General) v. Hull*, 2022 FCA 82 (*Hull*) at para 62.

[33] 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.¹⁶ It found that section 23(1.2) is clear that the choice made by a claimant becomes irrevocable upon the payment of benefits.¹⁷

[34] 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.¹⁸ 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.¹⁹

[35] 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.²⁰

[36] 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.²¹

[37] The Court in *Variola* referred to this interpretation of sections 23(1.1) and (1.2) of the EI Act. It found that it is clear that neither the Commission nor the Tribunal should consider the context in which a claimant makes an election to determine whether it is valid. The Tribunal cannot find that an election was invalid and substitute it with a valid election.

[38] Given this clear direction from the Federal Court and the Federal Court of Appeal, I find that the Claimant elected standard parental benefits. While he was misled by representatives from the Commission about the length of time he could receive

¹⁶ See *Hull* at para 47.

¹⁷ See *Hull* at para 49.

¹⁸ 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.

¹⁹ See *Hull* at para 56.

²⁰ See *Hull* at paras 57 to 60.

²¹ See *Hull* at para 63.

standard benefits, this does not invalidate his election. Once parental benefits were paid, the election became irrevocable.

[39] The Claimant was given incorrect information from the Commission. This impacted the election that he made on his application form. However, the law is clear that the election is what he chose on the form. The misinformation that he received does not change the law. I am bound to apply the law as written and interpreted in binding precedents, despite the Claimant's reliance on incorrect and misleading information.²²

[40] I find the Claimant elected to received standard parental benefits. This election became irrevocable once benefits were paid.

Conclusion

[41] The appeal is allowed. The General Division erred in law. I have made the decision that the General Division should have made. The Claimant elected to receive standard parental benefits and this election became irrevocable once benefits were paid.

Melanie Petrunia
Member, Appeal Division

²² *Canada (Attorney General) v Knee*, 2011 FCA 301 at para 9.