



Citation: *Canada Employment Insurance Commission v FV*, 2023 SST 104

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: Canada Employment Insurance Commission
Representative: Tiffany Glover

Respondent: F. V.

Decision under appeal: General Division decision dated December 20, 2021
(GE-21-2341)

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-22-815

Decision

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

Overview

[2] The Respondent, F. V. (Claimant), applied for and received Employment Insurance (EI) parental benefits. On his application form, the Claimant said that his child was born September 20, 2020. He selected standard parental benefits and said that he wished to claim 16 weeks of benefits.

[3] The Claimant was issued his first payment of parental benefits the week of August 29, 2021. The Appellant, the Canada Employment Insurance Commission (Commission) stopped paying benefits on September 24, 2021, because it said it could only pay benefits within the 52 weeks after the Claimant's child was born.

[4] The Claimant asked to switch to the extended benefit option, but the Commission refused. 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's election of standard parental benefits was invalid. It found that the application form did not provide all the information needed to make a valid election. It decided that the Claimant could choose extended benefits.

[6] The Commission requested leave to appeal the General Division decision to the Tribunal's Appeal Division. The Appeal Division refused leave and the Commission then asked the Federal Court to review the Appeal Division's decision.

[7] The Federal Court found the Appeal Division decision unreasonable and returned the matter to the Appeal Division to be decided in accordance with its reasons.

[8] 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

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

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

[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.

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).

- 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 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.

[13] 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

[14] The Claimant elected to receive 16 weeks of standard parental benefits. However, because he applied close to one year after his child's birth, the Commission only paid him 3 weeks of standard benefits. The Commission said that it could not pay benefits outside of the parental benefit window.

[15] In its decision, the General Division found that the Claimant's election of standard parental benefits was clear on the application form.⁵ It also found that the Claimant was misled by the lack of information on the application form and the election he made was not valid.⁶

[16] The Commission applied for leave to appeal the General Division decision.⁷ The Appeal Division refused leave to appeal, finding that the appeal did not have a

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 23.

⁶ General Division decision at para 24.

⁷ AD1

reasonable chance of success on any of the grounds of appeal raised by the Commission.

[17] The Commission applied to the Federal Court for judicial review of the Appeal Division decision. The Federal Court, in *Canada (Attorney General) v. Variola*, 2022 FC 1402 (*Variola*) found that the decision not to grant leave to appeal was unreasonable.

[18] The Federal Court found that the General Division erred when it found that the application form misled the Claimant.⁸ The Court also found that the General Division erred in law by failing to apply subsection 23(1.2) of the EI Act.⁹ The Court concluded that the Claimant elected to receive standard parental benefits and this election cannot be changed because benefits have been paid.¹⁰

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

[19] In its decision, the General Division followed an approach set out in earlier Appeal Division decisions. It looked at what kind of benefits the Claimant chose and then considered whether that choice was valid.¹¹

[20] Following this approach, the General Division found that the Claimant clearly chose standard parental benefits.¹² However, it decided that this choice was not valid because the application form did not provide all the information needed to make a valid election. Specifically, there was no information on the form about the parental benefit window.¹³

[21] The Federal Court considered this analysis in its decision on the judicial review of this matter. It found that the General Division erred in fact and law by finding that the Claimant was misled by the application form.¹⁴

⁸ *Variola* at para 23.

⁹ *Variola* at para 23.

¹⁰ *Variola* at para 38.

¹¹ General Division decision at para 15.

¹² General Division decision at para 23.

¹³ General Division decision at para 26.

¹⁴ *Variola* at para 23.

[22] Following another decision of the Federal Court, the Court found that the absence of information on the application form does not constitute misleading information.¹⁵ It also found that the onus is on claimants to seek additional information when applying for benefits and the Service Canada website provides the necessary information about the parental benefit window.¹⁶

[23] 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. The Court found that this interpretation is incorrect. A recent decision of the Federal Court of Appeal confirmed that a claimant's election is the choice made on the application form and it is irrevocable once payments have started.¹⁷

[24] The Claimant argues that there is a disconnect between the Federal Court decision and the root issue, which is that the onus is on Service Canada to provide clear information, and they did not. He argues that it isn't about changing the law but improving the website and the application form.

[25] The Claimant says that subsection 23(1.2) cannot apply when the information provided by Service Canada leaves the options up to interpretation. He argues that no one should face confusion and have to appeal only because they didn't understand the application form.

[26] The Claimant says that the General Division did not make a mistake, it understood his appeal. The issue is that guidelines for choosing between the parental benefits options need to be made less ambiguous. He says he shouldn't be penalized for making a decision based on ambiguous guidelines.

[27] I understand the Claimant's frustration. He tried to make an informed decision and feels that the information he was given was lacking. I am sympathetic to his request

¹⁵ *Variola* at para 26.

¹⁶ *Variola* at paras 27 and 29.

¹⁷ See *Variola* at para 35 citing *Canada (Attorney General) v. Hull (Hull)*, 2022 FCA 82.

that the Service Canada website and application form provide clear and unambiguous information about parental benefits.

[28] The Federal Court considered the information that the Claimant had available to him.¹⁸ It found that he was not misled. More importantly, it found that the Claimant clearly elected to receive standard parental benefits. This election was irrevocable once benefits payments started. The Court confirmed that the context in which the Claimant made his election is not relevant. It also confirmed that the Tribunal cannot invalidate an election.¹⁹

[29] I find that the General Division erred in law in its interpretation of subsection 23(1.2) of the EI Act.

I will make the decision the General Division should have made

[30] The Commission argues that the General Division erred and I should give the decision the General Division should have given.²⁰ It says that the decision of the Federal Court is binding and there are no further issues to be determined.

[31] 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

[32] The Federal Court and Federal Court of Appeal have confirmed that, once payment has started, a claimant's election (the choice on the application form) cannot be changed.²¹ These decisions are binding.

¹⁸ *Variola* at paras 30 and 32.

¹⁹ *Variola* at para 36.

²⁰ 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.

²¹ See *Hull*; *Karval v Canada (Attorney General)*, 2021 FC 395; *Canada (Attorney General) v De Leon*, 2022 FC 527; and, *Variola*.

[33] The Federal Court, in the judicial review of this matter, found that the Claimant elected to receive parental benefits under the standard option when he submitted his application form and he cannot change this election now that he has received the parental benefits payments.²²

[34] As found by the General Division, the Claimant clearly chose standard parental benefits on his application form. Following the binding precedent from the Federal Court, and for the reasons above, I find the Claimant elected to received standard parental benefits. This election became irrevocable once benefits were paid.

Conclusion

[35] 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 *Variola* at para 38.