



Citation: *AH v Canada Employment Insurance Commission*, 2023 SST 1149

**Social Security Tribunal of Canada
Appeal Division**

Leave to Appeal Decision

Applicant: A. H.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated February 1, 2023
(GE-22-3769)

Tribunal member: Solange Losier

Decision date: August 23, 2023

File number: AD-23-208

Decision

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

Overview

[2] A. H. is the Claimant in this case. She applied for EI maternity benefits and parental benefits on April 28, 2021.¹ She elected for the extended option and asked for 61 weeks of parental benefits in her application form.²

[3] The Claimant returned to work the following year, on April 18, 2022. However, she continued to receive parental benefit payments for several months while she worked. She contacted the Commission on August 10, 2022 to stop the payments. However, the extra parental benefit payments she got after returning to work ended up creating an overpayment.

[4] The Claimant asked the Commission to reconsider the overpayment and explained that she picked the standard option for parental benefits and expected it to end after 52 weeks.³

[5] The Commission decided that the Claimant could not change her parental benefit election after parental benefits had been paid.⁴ The Claimant appealed that decision to the General Division.⁵

[6] The General Division came to the same conclusion.⁶ The Claimant is now asking for permission to appeal the General Division decision to the Appeal Division.⁷ She argues that the General Division made an error of fact.⁸

¹ See application for EI benefits at pages GD3-3 to GD3-GD3-18.

² See sections 14(1) and 23 of the EI Act. If a Claimant elects the extended option for parental benefits, they get 33% of their weekly insurable earnings; if they elected the standard option for parental benefits, they get 55% of their weekly insurable earnings, subject to the maximums set out.

³ See request for reconsideration at pages GD3-26 to GD3-28.

⁴ See reconsideration decision at pages GD3-32 to GD3-34.

⁵ See appeal to the General Division at pages GD2-1 to GD2-21.

⁶ See General Division decision at AD1A-1 to AD1A-5.

⁷ See application to the Appeal Division at AD1-1 to AD1-12.

⁸ See pages AD1-5 to AD1-6.

[7] I am denying the Claimant's request for permission to appeal because it has no reasonable chance of success.⁹

Issue

[8] Is there an arguable case that the General Division based its decision on an error of fact or error of law when it decided that the Claimant could not change her parental benefits election?

I am not giving the Claimant permission to appeal

[9] An appeal can proceed only if the Appeal Division gives permission to appeal.¹⁰

[10] I must be satisfied that the appeal has a reasonable chance of success.¹¹ This means that there must be some arguable ground upon which the appeal might succeed.¹²

[11] I can only consider certain types of errors. I have to focus on whether the General Division could have made one or more of the relevant errors (the relevant errors are also known as "grounds of appeal").¹³

[12] The possible grounds of appeal to the Appeal Division are that the General Division:¹⁴

- proceeded in a way that was unfair
- acted beyond its powers or refused to exercise those powers
- made an error of law
- based its decision on an important error of fact

⁹ See section 58(2) of the *Department of Employment and Social Development Act* (DESD Act).

¹⁰ See section 56(1) of the DESD Act.

¹¹ See section 58(2) of the DESD Act.

¹² See *Osaj v Canada (Attorney General)*, 2016 FC 115.

¹³ See section 58(1) of the DESD Act.

¹⁴ See section 58(1) of the DESD Act.

[13] For the appeal to proceed, I have to find that there is a reasonable chance of success on one of the grounds of appeal.

[14] An error of fact happens when the General Division has “based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it”.¹⁵

[15] This means that I can intervene if the General Division based its decision on an important mistake about the facts of the case. This involves considering some of the following questions:¹⁶

- Does the evidence squarely contradict one of the General Division’s key findings?
- Is there no evidence that could rationally support one of the General Division’s key findings?
- Did the General Division overlook critical evidence that contradicts one of its key findings?

[16] An error law happens when the General Division does not apply the correct law or uses the correct law but misunderstands what it means or how to apply it.¹⁷

– **The Claimant says that the General Division made an important error of fact**

[17] In her application to the Appeal Division, the Claimant argues that the General Division made an error of fact.¹⁸ She doesn’t point to a specific fact or facts, but her written arguments say the following:

- She was underpaid and did not receive the full amount of EI parental benefits

¹⁵ See section 58(1)(c) of the DESD Act.

¹⁶ This is a summary of the Federal Court of Appeal's decision in *Walls v Canada (Attorney General)*, 2022 FCA 47 at paragraph 41.

¹⁷ See section 58(1)(b) of the DESD Act.

¹⁸ See application to the Appeal Division at pages AD1-1 to AD1-10.

- Since she received less than a full year of EI parental benefit payments, she should not be considered overpaid
- Her intention is to be absolved of the \$5,712.00 overpayment debt

– **The General Division decided that the Claimant could not change her parental benefit election**

[18] The Commission decided that the Claimant could not change her election and this what the Claimant appealed to the General Division.¹⁹

[19] This means that the General Division had to decide whether the Claimant could change her parental benefits election from extended to the standard option.²⁰

[20] The General Division made the following key findings in its decision:

- The Claimant elected for the extended parental benefits on her application form for EI parental benefits²¹
- The first payment of extended parental benefits was paid to the Claimant by August 6, 2021²²
- The Claimant asked the Commission to change her election from extended parental benefits to standard parental benefits on August 10, 2022²³
- The Claimant cannot change her election after parental benefits have been paid because it is irrevocable²⁴
- The Claimant's appeal was dismissed²⁵

¹⁹ See reconsideration decision at pages GD3-32 to GD3-34 and section 113 of the EI Act.

²⁰ See sections 23(1.1) and 23(1.2) of the EI Act.

²¹ See paragraph 17 of the General Division decision.

²² See paragraph 10 of the General Division decision.

²³ See paragraph 10 of the General Division decision.

²⁴ See paragraph 17 of the General Division decision.

²⁵ See paragraphs 1, 2 and 20 of the General Division decision.

– **There is no arguable case that the General Division made an error of fact**

[21] The Claimant is arguing that the General Division made an error of fact, but the essential facts do not appear to be in dispute between the parties.

[22] The General Division's key findings are consistent with the evidence.

[23] First, the application for EI benefits dated April 28, 2021 shows that the Claimant applied for maternity benefits and elected for the extended parental benefit option asking for 61 weeks.²⁶

[24] Second, the payment chart shows that she got her first parental benefit payment the first week of August 2021.²⁷

[25] Third, the Claimant's summary of the telephone discussion with Service Canada on August 10, 2022 confirms that she returned to work on April 18, 2022; she selected extended parental benefits and not standard; she will receive a notice of debt for the overpayment and they would turn off the parental benefits payments effective August 11, 2022.²⁸

[26] Lastly, the Commission's reconsideration decision maintains that the parental benefit election could not be changed.²⁹

[27] It is not arguable that the General Division made a mistake about any of the facts in this case. Its key findings were consistent with the evidence. There is no reasonable chance of success on this ground.

– **There is no arguable case that the General Division made an error of law**

[28] I have also considered whether the General Division made an error of law, but there is no arguable case on this ground either.³⁰

²⁶ See page GD3-9.

²⁷ See payment chart at GD3-21 to GD3-23.

²⁸ See page GD3-27.

²⁹ See pages GD3-32 to GD3-34.

³⁰ See section 58(1)(b) of the DESD Act.

[29] The General Division relied on the relevant sections of the law to support its decision. The law is clear, a person cannot change their election once parental benefits have been paid.³¹

[30] The General Division relied on three decisions from the Federal Court and the Federal Court of Appeal that confirm the parental benefit election is the one you make on your application form and it cannot be changed after benefits are paid.³²

[31] The Claimant provided some calculations in her application to the Appeal Division to show that she was underpaid as she received less than a full year of benefit payments.³³ The General Division acknowledged that argument in its decision, but properly stated that there was no legal basis to change the election she made in her application form.³⁴

[32] Also, in 2023, the Federal Court of Appeal confirmed that “neither the Commission nor the Tribunal has the jurisdiction to decide an election is invalid or change an election after it is made and parental benefits have been paid”.³⁵

[33] This means that the General Division does not have the authority to change the Claimant’s parental benefit election to the standard option because parental benefits under the extended option were paid to her by August 6, 2021.

[34] Essentially, the Claimant is re-arguing that she should be able to receive the money that she would have been entitled to under the standard option as she was only off for one year. But in order to do that, she would have to change her election, which is not possible when parental benefits have been paid. An appeal to the Appeal Division is not a new hearing. I cannot reweigh the evidence in order to come to a different conclusion that is more favourable for the Claimant.³⁶

³¹ See sections 23(1.2) and 23(1.3) of the EI Act.

³² See *Karval v Canada (Attorney General)*, 2021 FC 395; *Canada (Attorney General) v Hull*, 2022 FCA 82 and *Canada (Attorney General) v Variola*, 2022 FC 1402.

³³ See page GD2-6 and hearing recording at 32:10 to 34:30.

³⁴ See paragraphs 18 and 19 of the General Division decision.

³⁵ See *Canada (Attorney General) v Johnson*, 2023 FCA 49 at paragraph 15.

³⁶ See *Garvey v Canada (Attorney General)*, 2018 FCA 118.

[35] It is not arguable that the General Division made an error of law when it decided that the parental benefit election could not be changed after parental benefits had been paid. There is no reasonable chance of success on this ground.

– **There are no other reasons to give permission to appeal**

[36] I reviewed the file, listened to the audio recording of the General Division hearing, and examined the General Division decision.³⁷ I did not find relevant evidence that the General Division might have ignored or misinterpreted.

– **The Claimant's overpayment**

[37] The Claimant is asking to be absolved of the \$5,712.00 overpayment debt she incurred.³⁸ However, only the Commission has the authority to write-off overpayments in specific circumstances (one of them is financial hardship, but there are other reasons too).³⁹

[38] Neither the General Division nor the Appeal Division has the authority in law to write-off an overpayment.⁴⁰

[39] This means that if the Claimant wants a “write off” of the overpayment debt, she has to make that request directly to the Commission and they will render a decision about that issue.

Conclusion

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

Solange Losier
Member, Appeal Division

³⁷ The Federal Court recommends doing such a review in decisions like *Griffin v Canada (Attorney General)*, 2016 FC 874 and *Karadeolian v Canada (Attorney General)*, 2016 FC 615.

³⁸ See AD1-6.

³⁹ See sections 56(1) and 56(2) of *Employment Insurance Regulations*.

⁴⁰ See section 112.1 of EI Act.