



Citation: *Canada Employment Insurance Commission v LM*, 2023 SST 1299

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: Canada Employment Insurance Commission
Representative: Isabelle Thiffault

Respondent: L. M.

Decision under appeal: General Division decision dated April 6, 2023
(GE-22-3869)

Tribunal member: Melanie Petrunia

Type of hearing: Teleconference

Hearing date: September 13, 2023

Hearing participant: Appellant's representative

Decision date: September 27, 2023

File number: AD-23-374

Decision

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

Overview

[2] The Respondent, L. M. (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 her application form that she wanted to receive 52 weeks of parental benefits. The Claimant's first payment of parental benefits was issued on September 24, 2021. The Claimant returned to work after about one year of maternity leave and continued to receive benefits.

[4] The Claimant contacted the Appellant, the Canada Employment Insurance Commission (Commission) and asked to switch to the standard benefit option. 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 meant to choose standard parental benefits and that she wanted one year of maternity and parental benefits combined. Because this is what she intended, the General Division found that she elected standard parental benefits.

[6] The Commission appealed the General Division decision to the Tribunal's Appeal Division. It argues that the General Division made errors of law and based its decision on important factual errors in allowing the appeal.

[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 extended parental benefits and that this election was irrevocable.

Issues

[8] I have focused on the following issues:

- a) Did the General Division err in law by failing to follow binding case law?
- 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.

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.

[11] The Claimant filed an application for maternity and parental benefits on June 9, 2021.²

[12] 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.³

[13] The Claimant's first payment of extended parental benefits was issued on September, 2021.⁴ The Claimant returned to work on June 1, 2022 but continued to receive benefits. On September 8, 2022, the Claimant advised the Commission that she had returned to work. This resulted in an overpayment of benefits.⁵

[14] The Claimant requested a reconsideration and said that she intended to take one year of maternity leave. She made a mistake on the application when she chose extended parental benefits.⁶

[15] The Commission said that it was too late for the Claimant to change options because she had already received parental benefits. The Claimant appealed to the Tribunal's General Division.

² GD3-3 to GD3-16

³ GD3-6

⁴ GD3-18

⁵ GD3-19

⁶ GD3-26

– **The General Division decision**

[16] The General Division allowed the Claimant's appeal. It found that the Claimant made a mistake when she chose extended parental benefits on her application form and intended to choose the standard parental benefit.⁷

[17] The General Division found that the Claimant chose the extended option on her application form. It also found that it had to consider all of the relevant evidence to determine which option for parental benefits the Claimant likely elected to receive.⁸

[18] Based on the evidence, it determined that it was more likely that the Claimant chose standard benefits because she intended to take one year off work. Because this was her intention, it found that the Claimant actually elected to receive standard parental benefits.⁹

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

[19] The Commission argues that the General Division made several errors in its decision. It says that the General Division erred in law by failing to follow relevant case law from the Federal Court and the Federal Court of Appeal. The Commission argues that the General Division erred in law when it decided that the Claimant elected to receive standard parental benefits because that was what she intended.

[20] The Claimant did not attend the hearing or file written submissions.

The General Division erred in law by failing to follow binding case law

[21] In its decision, the General Division did not reference or consider the Federal Court decision of *Karval v. Canada (Attorney General) (Karval)*.¹⁰ Specifically, it did not refer to or apply the Federal Court's findings regarding the clear references to benefit rate and irrevocability of an election on the application form.

⁷ General Division decision at para 19.

⁸ General Division decision at para 22.

⁹ General Division decision at para 22.

¹⁰ *Karval v. Canada (Attorney General)*, 2021 FC 395.

[22] In the *Karval* decision, the Federal Court found that it is the responsibility of claimants to carefully read and try to understand their entitlement options. If they are unclear, they should ask the Commission. It found that the questions on the application form are not objectively confusing and the explanations on the form are not lacking in information.¹¹

[23] The Federal Court in *Karval* stated that the different benefit rates (55% of weekly earnings for standard and 33% for extended) and the irrevocability of the election are both clearly stated on the application form.¹²

[24] The *Karval* decision is binding jurisprudence. This means that the General Division was required to consider it. If the General Division chose not to follow the principles in *Karval*, it needed to explain why.¹³

[25] The *Karval* decision states that a claimant who carefully reads the application form would see that the benefit rate for extended benefits will be reduced to 33% of weekly earnings. The claimant would also read that their choice is irrevocable once benefits have been paid.¹⁴

[26] In a recent decision from the Federal Court of Appeal in *Canada (Attorney General) v. Hull (Hull)*, the Court found that the principles in *Karval* applied despite factual differences. 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 from *Karval* that “there is no legal remedy available to claimants who base their election on a misunderstanding of the parental benefit scheme.”¹⁵

[27] The General Division found that the Claimant mistakenly selected extended benefits wanting to claim 52 weeks of combined pregnancy and parental benefits. The

¹¹ See *Karval* at para 11.

¹² See *Karval* at para 14.

¹³ See *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para 112.

¹⁴ See *Karval* at para 14.

¹⁵ See *Canada (Attorney General) v. Hull*, 2022 FCA 82 at para 31.

General Division erred in law by failing to follow the binding decisions of the Federal Court and the Federal Court of Appeal when making this determination.

[28] 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

[29] At the hearing before me, the Commission argued that I should give the decision the General Division should have given.¹⁶

[30] 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 enable me to make a decision.

The Claimant elected to receive extended parental benefits and the election was irrevocable

[31] 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 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.

[32] The recent decision of the Federal Court of Appeal in *Hull* considered the proper interpretation of sections 23(1.1) and 23(1.2) of the EI Act. 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.

¹⁶ 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.

[33] 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.

[34] 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?¹⁷

[35] The Court found that a claimant’s election is what they choose on their application form, and not what they may have intended.¹⁸ It also found that once payment of parental benefits has started the election cannot be revoked, by the claimant, the Commission, or the Tribunal.¹⁹

[36] 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 52 weeks. Once the payment of those benefits began, the election was irrevocable.

[37] It is clear that the Claimant did not intend to ask for 52 weeks of extended parental benefits after 15 weeks of maternity benefits. I agree with the General Division and the Claimant that the evidence suggests that it was always her intention to take a one-year leave from work.

¹⁷ See *Hull* at para 34.

¹⁸ See *Hull* at para 63.

¹⁹ See *Hull* at para 64.

[38] 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.

[39] 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 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.²⁰

[40] 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.²¹ I find that the legislation and the case law confirm that an election cannot be revoked on the basis of a mistake.

[41] In *Hull*, the Court stated:

[...] once the choice of parental benefit and the number of weeks are chosen on the application form, *and upon payment of those benefits*, it is impossible to change, alter, undo or revoke the choice. Therefore, the act of the payment of benefits renders the election irrevocable.²²

[42] A claimant is permitted to change their election after the application form is submitted but before parental benefits have been paid. Claimants can create an account with Service Canada to review the start date and the benefit rate of their maternity and parental benefits. This does provide the ability for claimants to ensure that the choice they made on their application form was the choice that they intended.

²⁰ See *Hull* at para 60.

²¹ *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."

²² See *Hull* at para 49.

[43] 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.

[44] 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

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

Melanie Petrunia
Member, Appeal Division