Citation: *AC v Canada Employment Insurance Commission*, 2022 SST 1811

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant: A. C.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (540483) dated October 17, 2022 (issued by Service Canada)

Tribunal member: Candace R. Salmon

Decision date: November 10, 2022

File number: GE-22-3391

Introduction

[1] The Appellant is asking to receive extended parental employment insurance (EI) benefits instead of standard parental EI benefits.

[2] The Appellant initially applied for 35 weeks of standard parental benefits.[1] The Canada Employment Insurance Commission (Commission) started paying standard parental benefits to him on January 21, 2022. On August 11, 2022, the Appellant told a Commission officer that he sent a reconsideration request to the Commission in June 2022. It wasn't received, so he re-sent it.

[3] The Commission received the request on August 17, 2022. The Appellant asked the Commission to change his parental benefit election from standard to extended. The Commission refused to make the change.

Issue

[4] I must decide whether the appeal should be summarily dismissed.

The law

[5] I must summarily dismiss an appeal if I am satisfied that the appeal has no reasonable chance of success.[2]

[6] Before summarily dismissing an appeal, I must give notice in writing to the Appellant and allow the Appellant a reasonable period to make submissions.[3]

[7] The Appellant appealed to the Tribunal on October 18, 2022. After reviewing the file, I determined that the appeal had no reasonable chance of success. I sent a letter to the Appellant on October 31, 2022, advising that I intended to summarily dismiss the appeal. I provided until November 17, 2022, for the Appellant to submit any further information that may be relevant to his appeal.

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[1] See GD3-9. This document is an initial claim form, but I will refer to it as an application for EI benefits.
[2] See section 53(1) of the *Department of Employment and Social Development Act* (DESD Act).
[3] See section 22 of the *Social Security Tribunal Regulations*.

[8] On November 2, 2022, the Appellant replied to my October 31, 2022, letter. I find the requirements of the *Social Security Tribunal Regulations* in relation to summary dismissal were met because the Appellant had an opportunity to make submissions.

Evidence

[9] On the EI application form, the Appellant chose to receive 35 weeks of standard parental benefits. The first payment of standard parental benefits was paid to him on January 21, 2022.

[10] On August 11, 2022, the Appellant spoke to two Commission officers. In the first call, he asked for an update to the reconsideration request he submitted on June 1, 2022. The officer said the request was not received. The second officer called the Appellant, and explained that he would have to submit another request for reconsideration. He did so, on the same day.

[11] The Appellant said that when he applied for EI benefits, the Commission[4] officer gave him incorrect information. He said he was advised to choose standard benefits instead of extended benefits, but the result is that he cannot claim benefits after his child turns one year old. He said he wanted to be off work until his child was 18 months old.

[12] The Commission declined to make this change, because standard parental benefits had already been paid to the Appellant.

Submissions

[13] On the Notice of Appeal, the Appellant said that he received assistance from a Commission officer when he applied for EI benefits. He said that he applied for EI when his child was eight months old, and wanted to be on leave until she was 18 months old. He says that because he wanted a year or less of leave, the EI officers told him to select standard benefits. The officers did not explain that he would stop being able to collect this

[4] The Appellant refers to a "CRA representative" on the request for reconsideration. I presume that he means a Service Canada officer, as they are the people who would give advice about EI benefits. However, this detail is not vital to determining the decision, but something to note for consistency. See GD3-26.

type of benefit when his child turned one year old. He also said that people should be able to rely on advice from Commission officers, who should be experts in their own program.

[14] In the November 2, 2022, letter, the Appellant reiterated that he did not spontaneously ask to change benefit types, but wanted to get the type of benefit he intended to receive from the beginning. He recounted numerous phone calls with the Commission, including phone records, to support that he spoke to Commission agents. He again said that he was told to choose standard benefits, and did not know that he chose the incorrect option until he received a partial payment in April 2022 and contacted the Commission to find out why the payment was lower than expected.

[15] A significant amount of the Appellant's submissions relate to his intention: that it is obvious that he meant to claim extended parental benefits because standard benefits do not make sense in his situation and will cause him to lose thousands of dollars in benefits.

[16] The Commission submitted that the Appellant cannot change his benefit election from standard to extended parental benefits because benefits have already been paid on the claim. It added that the Appellant was informed about the difference between standard and extended parental benefits on the initial application for benefits, and was told that the decision between the two types was irrevocable after benefits were paid. Since the first payment of parental benefits was made on January 21, 2022, and the Appellant did not start trying to change his election until June 2022, the Commission submits his election cannot be changed.

[17] The Commission adds that the law is clear that misinformation from a Commission agent, or the misinterpretation of information provided, does not override the obligation to follow the law as it is written.

Analysis

[18] When a person applies for parental benefits, they have to choose between two options: the "standard option" and the "extended option."[5] The standard option pays benefits at the normal rate for up to 35 weeks. The extended option pays almost the same amount of benefits at a lower rate for up to 61 weeks. Overall, the amount of money stays nearly the same, it is just stretched over a different number of weeks.

[19] Once you start receiving parental benefits, you can't change options.[6] The Appellant was advised of this on the application form.[7]

[20] I must decide whether the appeal should be summarily dismissed.

[21] To summarily dismiss the appeal, the law says I must be satisfied that the appeal has no reasonable chance of success.[8] The question is **not** whether the appeal must be dismissed after considering the facts, the case law and the parties' arguments. Rather, the question is whether the appeal is destined to fail regardless of the evidence or arguments that could be presented at a hearing.[9]

[22] The Appellant was paid the first payment of extended parental benefits on January 21, 2022. He first asked to change his benefit election in June 2022, though the request for reconsideration wasn't received until August 2022. The law is clear that once parental benefits are paid on a claim, the decision between standard and extended benefits becomes irrevocable.

Misinformation from the Commission

[23] In Federal Court decision *Karval*,[10] the Court confirmed that the application for EI benefits states that once parental benefits are paid on a claim, the choice between

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[5] Section 23(1.1) of the *Employment Insurance Act* calls this choice an "election."
[6] Section 23(1.2) of the *Employment Insurance Act* says that the election is irrevocable (that is, final) once you receive benefits.
[7] See GD3-9. The application form states in bold, **"You cannot change options (standard or extended)** once any parent has received parental benefits**."**
[8] See subsection 53(1) of the DESD Act.
[9] The Tribunal explained this in *AZ v. Minister of Employment and Social Development*, 2018 SST 298.
[10] *Karval v The Attorney General of Canada,* 2021 FC 395.

standard and extended is irrevocable. Ms. Karval chose the extended option and, "cannot complain that the Commission somehow misled her or should have told her again that she could not change her election once benefits had been paid."[11] The Court commented that the questions on the application form are "not objectively" confusing, and "the explanations provided to claimants are not particularly lacking in information."

[24] In *De Leon,*[12] the Tribunal's Appeal Division overturned a General Division decision, finding the Commission's application form was inconsistent and "misled the [appellant], preventing her from making a valid choice."[13] The Appeal Division also found the General Division was, "required to look at the evidence and determine which [benefit] option had been chosen."[14] While the Court was sympathetic to the appellant, it disagreed with the Appeal Division and found that the application form was not "confusing, nor lacking in information."[15]

[25] In *Hull,*[16] a case decided shortly after *De Leon*, the Court confirmed that, "*Karval* determined that there is no legal remedy available to claimants who based their election on a misunderstanding of the parental benefit scheme."[17]

[26] In this case, the Court also addressed the meaning of the term "election." It considered, "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?"[18] The Court noted that the Appeal Division supported the General Division's finding that it could assess whether the claimant made a deliberate choice to elect extended parental benefits. The Appeal Division also found this was appropriate, and that:

> it was open to the General Division to find that the [appellant] was confused by the information on the application form, had made a mistake, and had not intended to

[11] See *Karval,* at paragraph 10.
[12] *Attorney General of Canada v De Leon*, 2022 FC 527.
[13] See *De Leon,* at paragraph 14.
[14] See *De Leon,* at paragraph 15.
[15] See *De Leon,* at paragraph 29.
[16] *Attorney General of Canada v Hull,* 2022 FCA 82.
[17] See *Hull* at paragraph 31.
[18] See *Hull*, at paragraph 34.

> elect extended parental benefits. It reasoned… that the General Division did not decide that the respondent should be permitted to change her mind nor did it find that her election was "invalid". Rather, the General Division found that the respondent had never intended to make the election of extended parental benefits.[19]

[27] The Court rejected this interpretation of the term "election." It found:

> The answer to the question of law for the purpose of subsection 23(1.1) of the *Employment Insurance Act* is the word "elect" means what a claimant indicates as their choice on the application form. The election is the choice of the parental benefit on the form.[20]

[28] The Court confirmed that once a claimant chooses the type of benefit and number of weeks they want to receive on the application for EI benefits, and once payments of those benefits start, it is impossible for the claimant, the Commission, or the Tribunal to revoke, alter, or change the election.

[29] Considering the decision in *Hull*, it is clear that I cannot consider what the Appellant may have intended to elect, and must find the parental benefit option that he chose on the application form is his election.

[30] I also considered that in *Karval,* the Court found that there may be some remedy available for claimants who are misled by the Commission.[21] *De Leon* clarified that being mislead occurs when a claimant relies, "on official and incorrect information."

[31] The Tribunal has an Appeal Division. In one of its decisions, a claimant argued that a Commission officer misled her into making the wrong choice between standard and extended parental benefits. She said she was confused by the application form, so she called the Commission for assistance. She stated that the officer told her she had to choose extended benefits if she wanted to claim more than 35 weeks of benefits, which caused her to believe she wasn't entitled to standard parental benefits.

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[19] See *Hull*, at paragraph 39.
[20] See *Hull*, at paragraph 63.
[21] *Karval* at paragraph 14 found that, "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." However, when a claimant is merely lacking in the "knowledge necessary to accurately answer unambiguous questions, no legal remedies are available."

[32] In that case, the Appeal Division found the claimant was entitled to relief under *Karval* and *De Leon*, because she was actually misled by relying on official and incorrect information from the Commission.[22] The Tribunal Member noted that in *Karval*, the Court described the claimant's responsibility as, "seeking out the necessary information and, if still in doubt, asking the relevant questions."[23] In this case, the Claimant did that and was given incorrect information.

[33] In another recent case, the Court considered what it means to mislead a claimant, and said:

> Although a claimant can be mislead by relying on "official and incorrect information" (*Karval* at para 14), the information Mr. Variola relied on was not official information as it was provided to him by his employer. The Commission cannot be held responsible for information provided by an employer to their employees.[24]

[34] The case law supports that in cases where a claimant was actually misled by relying on official and incorrect information, "certain legal recourse may be available under the doctrine of reasonable expectations."[25] *Variola* suggests that a claimant can be misled by information given by a Commission officer.

[35] I have grappled with what it means to be officially misled, in relation to reasonable expectations and what happened in this case. There isn't a significant amount of Canadian law relating to the doctrine of reasonable expectations in situations of an individual dealing with a government institution. There are many cases relating to reasonable expectations in privacy and in a variety of commercial contexts. Academics have raised the possibility that good faith and reasonable expectations are comparable tools.[26]

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[22] *Canada Employment Insurance Commission v LJ,* 2022 SST 380 at paragraph 45.
[23] See *Karval*, at paragraph 14.
[24] *Attorney General of Canada v Variola*, 2022 FC 1402, issued on October 14, 2022, at paragraph 32.
[25] See *Karval,* at paragraph 14.
[26] Sébastien Grammond, "Reasonable Expectations and the Interpretation of Contracts Across Legal Traditions" (2010) 48:3 Can Bus LJ 345, at pages 362-363. Other academics have noted that "the use of the term "reasonable expectations" in defining duties of good faith is neither appropriate nor desirable because it introduces too much uncertainty and inconsistency into future doctrinal developments." See

[36] There is a doctrine of legitimate expectations, more widely used in the United Kingdom, which may form the basis of the Court's comments in *Karval*. It is a doctrine developed as a ground of judicial review to protect an interest when a public authority doesn't uphold a representation it made to a person. It developed from natural justice, where the duty to act fairly is a central requirement. Remedies may include damages, or an order to fulfill the legitimate expectation. In these cases, "courts intervene to provide fair outcomes rather than fair procedures alone."[27] Academics note that this doctrine developed to address the, "great unfairness [that] may be done to an individual who relied on an official representation whose validity he or she had no reason to doubt.[28]"

[37] This means that being misled by an official source may give a claimant "legal recourse" under the doctrine of reasonable expectations, but legal recourse does not mean that I can override the *Employment Insurance Act*. The law says that once parental benefits are paid on a claim, the choice between standard and extended benefits is irrevocable. The Appellant may therefore have some recourse through the courts, but that is not within my jurisdiction.

[38] It's also important to recognize that even if the Appellant did receive misinformation from the Commission, sometimes Commission officers make mistakes. They might give a person incorrect or misleading information about their benefits. Even if a Commission officer makes a mistake, this does not mean that a person can receive benefits. The Commission can only pay benefits if the law allows them to pay benefits. A Commission officer's mistake does not override the Commission's obligation to follow the law.[29]

Nicholas Reynolds, "Two Views of the Cathedral: Civilian Approaches, Reasonable Expectations, and the Puzzle of Good Faith's Past and Future," 44:2 Queen's LJ, at page 391.

[27] Paul Daly, "A Pluralist Account of Deference and Legitimate Expectations," 2016 CanLiiDocs 267 at page 5.

[28] Daly, at page 17.

[29] In *Canada (Attorney General) v Shaw*, 2002 FCA 325 at paragraph 1 the Federal Court of Appeal explains that misinformation from the Commission does not give a claimant relief from the provisions of the *Employment Insurance Act*. Similarly, in *Granger v Canada Employment Insurance Commission*, A-684-85, the Federal Court of Appeal explains that Commission agents do not have the power to amend the law. An individual Commission agent cannot promise to pay benefits in a way that is contrary to the law.

[39] When I apply the law and the legal tests described above, I can only conclude that the Appellant's appeal has no reasonable chance of success. It is bound to fail. The Appellant received parental benefits before he asked to change his election from standard to extended. The law is clear that this is not allowed. Additionally, Courts have confirmed that the application for EI benefits is clear. This means the Appellant's understanding of the form is irrelevant because he cannot be successful in arguing that the form and application was unclear. Additionally, even if he was misled by a Commission officer, his potential remedy lay with the courts. Having legal recourse through the doctrine of reasonable expectations does not mean I can ignore the provisions of the *Employment Insurance Act.*

[40] The Appellant also submitted that he is entitled to these benefits as a taxpayer. There is no automatic entitlement to EI benefits solely based on paying taxes. Even though the Appellant contributed to the EI program, this does not automatically entitle him to receive benefits. The *Employment Insurance Act* is an insurance plan and, like other insurance plans, claimants must meet the conditions of the plan to obtain benefits.[30]

[41] The Courts have recognized that the outcome of their decisions in this area may be financially harsh for claimants. Similarly, I recognize there is a harsh financial repercussion to this decision. I am sympathetic to the Appellant's situation. However, there is no legal basis for me to order that he may change his claim to extended parental benefits. In dealing with cases where the resulting decision may seem unfair on its face, the Federal Court of Appeal has found:

> …rigid rules are always apt to give rise to some harsh results that appear to be at odds with the objectives of the statutory scheme. However, tempting as it may be in such cases (and this may well be one), adjudicators are permitted neither to re-write legislation nor to interpret it in a manner that is contrary to its plain meaning.[31]

[30] *Pannu v. Canada (Attorney General*), 2004 FCA 90, at paragraph 3.
[31] *Canada (Attorney General) v Knee*, 2011 FCA 301 at paragraph 9.

[42] I find that this appeal is bound to fail. Even if the Appellant was misled by the Commission, it would not result in a successful appeal because he has already been paid standard parental benefits.

Conclusion

[43] I find the appeal has no reasonable chance of success; therefore, it is summarily dismissed.

Candace R. Salmon

Member, General Division – Employment Insurance Section