



Citation: *Canada Employment Insurance Commission v KK*, 2024 SST 23

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: Canada Employment Insurance Commission
Representative: Nikkia Janssen

Respondent: K. K.

Decision under appeal: General Division decision dated July 3, 2023
(GE-22-4079)

Tribunal member: Glenn Betteridge

Type of hearing: Videoconference

Hearing date: November 29, 2023

Hearing participants: Appellant's representative
Respondent

Decision date: January 8, 2024

File number: AD-23-715

Decision

[1] I am allowing the Canada Employment Insurance Commission's (Commission) appeal.

[2] K. K. chose to get extended Employment Insurance (EI) parental benefits. The General Division made a legal error when it allowed her to change her choice from extended to standard parental benefits after she had started to receive benefits. The law doesn't allow that. So, I have made the decision the General Division should have made.

Overview

[3] K. K. made a claim for EI maternity benefits followed by parental benefits. So, I will call her the Claimant.

[4] The Commission paid the Claimant maternity benefits and started to pay her parental benefits. She says she realized then she accidentally chose extended parental benefits. She says she intended to apply for standard parental benefits.

[5] Once she realized her mistake, she contacted the Commission and asked to change to standard parental benefits. The Commission refused.

[6] Then the Claimant appealed to this Tribunal's General Division, which allowed her appeal. The General Division decided her application didn't clearly show she elected (chose) extended parental benefits. So, she was entitled to amend her application to clarify her election. In other words, the General Division let her change her election to standard benefits.

[7] The Commission appealed the General Division's decision. It argues the General Division made a legal error when it didn't follow court decisions it was bound to follow. I agree with the Commission for the reasons that follow.

Issues

[8] This appeal raises two issues:

- Did the General Division make a legal error when it didn't follow Federal Courts' decisions it had to follow, in particular, the Federal Court of Appeal's decision in *Hull*?¹
- If the General Division made an error, how should I fix it?

Analysis

[9] The Tribunal's General Division and Appeal Division have different roles. If the Commission shows the General Division made an error, then I have the power to step in and fix the General Division's error.²

[10] In this appeal I have to decide whether the Commission has shown the General Division:

- made a legal error in its decision
- based its decision on a serious mistake about a key fact (what I call a "serious factual error")³

[11] If the Commission doesn't show the General Division made an error, I have to dismiss its appeal. If the Commission shows the General Division made an error, then I can fix the error as simply and quickly as fairness allow.

¹ See *Canada (Attorney General) v Hull*, 2022 FCA 82.

² I get this power from sections 58 and 59 of the *Department of Employment and Social Development Act* (DESD Act). This Act created the Social Security Tribunal.

³ Section 58(1) of the DESD Act sets out these grounds of appeal, and two more grounds I don't have to consider in this appeal. In its written documents and at the appeal hearing, the Commission argued the General Division made an error of law and based its decision on an erroneous finding of fact. See pages AD1-7 and AD4-1, 4-4, and 4-5.

The General Division didn't follow the Federal Courts' decisions it was bound to follow

[12] The *Employment Insurance Act* (EI Act) creates two types of parental benefits. A person who applies for parental benefits has to choose standard **or** extended benefits:

- Standard parental benefits: a person gets 55% of their weekly insurable earnings (up to a maximum amount) for up to 35 weeks
- Extended parental benefits: a person gets 33% of their weekly insurable earnings (up to a maximum amount) for up to 61 weeks

[13] The EI Act calls this choice an “election.”⁴

[14] A person can change their election before the Commission pays them parental benefits. Once the Commission pays them, they can't change their election. In legal terms, their election becomes irrevocable.⁵

[15] There is no dispute about the Claimant's answers—what she marked—on her EI application.

- She wanted to receive parental benefits immediately after maternity benefits.⁶
- She selected “extended option” as the type of parental benefits she was applying for.⁷

[16] There is also no dispute the Claimant started to receive the extended parental benefit.

[17] The General Division decided the Claimant's EI application didn't clearly show whether she elected extended parental benefits.⁸ It found she didn't make a **deliberate**

⁴ See section 23(1.1) of the *Employment Insurance Act* (EI Act).

⁵ See section 23(1.2) of the EI Act.

⁶ See page GD3-8.

⁷ See page GD3-9.

⁸ See the General Division's Decision at paragraph 2.

choice—meaning she didn’t elect—to receive extended benefits.⁹ Based on her return-to-work date, the number of weeks of benefits she asked for, and her documents and testimony, the General Division decided she **accidentally selected** extended benefits.¹⁰

[18] The General Division decided she should be allowed to amend her application to reflect her true election of standard benefits.¹¹ In other words, the Commission should change her election to standard benefits.

[19] But the General Division could only arrive at that decision by not following court decisions it was bound to follow, including the Federal Court of Appeal’s decision in *Hull*. And the General Division made a legal error when it didn’t follow Federal Courts’ decisions about EI parental benefits election.

[20] The Tribunal’s General Division and Appeal Division have to follow decisions of the Federal Courts that interpret the EI Act, unless they can show a good legal or factual reason they don’t have to. In legal terms, we say the decisions of the Federal Courts are binding on the Tribunal unless the Tribunal can distinguish the appeal it is deciding. The General Division makes a legal error if it doesn’t follow a decision of the Federal Courts it is bound to follow.

[21] *Hull* is the leading decision from the Federal Courts about parental benefits election. In *Hull* the Federal Court of Appeal decided the word “elect” in section 23(1.1) of the EI Act means what a claimant indicates as their choice on their application form.¹² It also decided that under section 23(1.2) of the EI Act, once a claimant has chosen on the application form the type of parental benefits, and has started to receive those benefits, it is impossible for the Commission, the General Division or the Appeal Division to revoke, alter or change their election.¹³

⁹ See the General Division’s Decision at paragraph 17.

¹⁰ See the General Division’s Decision at paragraphs 14 and 19.

¹¹ See the General Division’s Decision at paragraph 37.

¹² See *Canada (Attorney General) v Hull*, 2022 FCA 82 at paragraphs 62 and 63.

¹³ See *Canada (Attorney General) v Hull*, 2022 FCA 82 at paragraph 64.

[22] The Federal Courts have followed *Hull* in every case they have decided after *Hull*.¹⁴ In *Variola* the Federal Court added an important point that is relevant to the Claimant's appeal. The Tribunal can't consider the context in which a claimant made their election, including stress or emotional state, health, or intention to choose one type of benefit.¹⁵

[23] The Commission argues the General Division made a legal error when it didn't follow the Federal Courts' decisions it was bound to follow.¹⁶ The Commission says the General Division misapplied the *Hull* case about what "election" means. And it says the General Division didn't follow the *Johnson* case when it changed the Claimant's election.

[24] The Claimant says the General Division didn't make a legal error or serious factual error.¹⁷ The General Division had the authority to decide what kind of parental benefits she elected to receive, based on all the relevant evidence. That is what it did in her case. The General Division asked all the questions it had for her. The Claimant answered them honestly and without hesitation. The General Division carefully reviewed the documents and followed the law.

[25] The Claimant also relies on the Tribunal's decisions where it says it has the power to look at all the relevant circumstances and decide whether a claimant in fact chose standard or extended benefits.¹⁸

[26] I have considered the Claimant's arguments, but I agree with the Commission.

¹⁴ See *Canada (Attorney General) v Variola*, 2022 FC 1402; *Canada (Attorney General) v Johnson*, 2023 FCA 49; *Canada Attorney General v Pettinger*, 2023 FCA 51; and *Canada (Attorney General) v Jeffers*, 2023 FCA 52.

¹⁵ The Federal Court, referring to *Hull*, says this at paragraphs 17 and 36 in *Canada (Attorney General) v Variola*, 2022 FC 1402.

¹⁶ The Commission makes this argument in their representations at page AD4-4.

¹⁷ This is what she said in her submissions at page AD5-2, and what she said at the hearing.

¹⁸ The Claimant makes this argument at her submissions at pages AD5-6 and AD5-7.

[27] The General Division went into detail trying to distinguish the Claimant's case from *Hull*. It decided the Claimant's case was distinguishable on the facts and the law.¹⁹

[28] But the General Division made a legal error when it decided the Claimant's case could be distinguished from *Hull*. The General Division had to follow the Federal Courts' decisions interpreting the parental benefits election section of the EI Act. The General Division had no valid factual or legal basis to distinguish the Claimant's case from the *Hull* decision. It should not have interpreted "election" to mean "deliberate choice." It should not have decided the Claimant accidentally (in other words, didn't deliberately) choose extended benefits based on her evidence. And it should not have based its decision on the Claimant's personal circumstances at the time she made her election or after she realized her mistake.²⁰

[29] The General Division made another legal error. It was wrong to say the *Hull* decision requires the Commission to review a person's entire parental benefits application.²¹ It said the Commission has to investigate and fully determine whether a person's election fits with the rest of the information they gave on their application.

[30] But the *Hull* decision says it's the Commission's responsibility to decide whether a person is eligible for parental benefits, not to review their election.²² It suggests it would be useful if the Commission sent a statement to each claimant before it sent their first parental benefit payment, as a **matter of practice**.²³ Finally, it says the EI scheme gives claimants a window of opportunity to verify and change their parental benefits election, which they can do in their online EI account.²⁴ These three parts of the *Hull*

¹⁹ The General Division tried to distinguish the facts at paragraphs 12 to 14 and 36 of its Decision. The General Division set out its own, incorrect interpretation of *Hull* at paragraphs 15 to 35 of its Decision.

²⁰ At paragraph 35 of its Decision, the General Division considered the Claimant's health issues, her baby's health issues, and her short delay in contacting the Commission after she realized she made a mistake on her EI application.

²¹ See the General Division's decision at paragraph 19.

²² In *Canada (Attorney General) v Hull*, 2022 FCA 82, the Court says the Commission has to decide whether a person is eligible (qualifies) for parental benefits, based on the information they provide. The Commission doesn't have to review their election of extended versus standard benefits. See paragraphs 55 and 56.

²³ See paragraph 25 in *Canada (Attorney General) v Hull*, 2022 FCA 82.

²⁴ See paragraph 25 in *Canada (Attorney General) v Hull*, 2022 FCA 82.

decision strongly suggest the Claimant, not the Commission, was responsible for verifying her election.

[31] So, the General Division made two legal errors in its decision. It didn't follow the Federal Courts' decisions it had to follow, in particular, the *Hull* decision. And it misinterpreted the *Hull* decision to say the Commission has to investigate and verify a person's election.

[32] Because I have found the General Division made legal errors, I don't have to consider whether it also made serious factual errors. And I can now decide how to fix the legal errors.

I will fix the General Division's error by giving the decision it should have given

[33] The Commission and the Claimant agree that I should make the decision the General Division should have made. The law gives the Appeal Division the power to do this.²⁵

[34] I agree with the parties. This is the type of case where I should substitute my own decision. The facts I have to consider, based on the law I have to apply, aren't in dispute. The Commission and the Claimant had a full opportunity to present their evidence at the General Division. The law about parental benefits election is clear. So, I will apply the law to the facts to make the decision the General Division should have made.

[35] There is only one reasonable conclusion open to me.²⁶

[36] On her EI application, the Claimant marked she wanted to receive extended parental benefits. The Commission started to pay her those benefits. Then she asked the Commission to change her election.

²⁵ See section 59(a) of the DESD Act.

²⁶ See *Canada (Attorney General) v Hull*, 2022 FCA 82, at paragraphs 62 and 63. See also paragraph 18 in *Canada (Attorney General) v Johnson*, 2023 FCA 49; paragraph 14 in *Canada Attorney General v Pettinger*, 2023 FCA 51; and paragraph 14 in *Canada (Attorney General) v Jeffers*, 2023 FCA 52.

[37] Given these undisputed facts and the law I reviewed above, I find the Claimant elected to get extended parental benefits. I have no power to find her election was invalid or to change her election. It doesn't matter that she made a mistake on her application, or that her true intention might have been different. And I can't consider other personal circumstances.

[38] I sympathize with the Claimant. I have no doubt she made a mistake on her application, which led to financial and other challenges for her and her family. But I have to apply the law—I can't change it.²⁷ So I can't make my decision based on fairness, compassion, or financial hardship.

Conclusion

[39] I am allowing the Commission's appeal.

[40] I am giving the decision the General Division should have given. The Claimant elected to get extended parental benefits, and that election was irrevocable.

Glenn Betteridge
Member, Appeal Division

²⁷ See *Canada (Attorney General) v Knee*, 2011 FCA 301 at paragraph 9.