Citation: *WG v Canada Employment Insurance Commission*, 2024 SST 467

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	W. G.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated March 8, 2024 (GE-24-8)

Tribunal member:	Stephen Bergen
Decision date:	**May 2, 2024**
File number:	AD-24-261

Decision

[1] I am refusing leave (permission) to appeal. The appeal will not proceed.

Overview

[2] W. G. is the Applicant. I will call him the Claimant because this application is about the claim for Employment Insurance (EI) parental benefits that he and his wife made.

[3] The Claimant's child was born on December 30, 2022. His wife applied to the Respondent, the Canada Employment Insurance Commission (Commission), for maternity and parental benefits. She chose the extended parental benefit.

[4] The *Employment insurance Act* (EI Act) allows parents to share the available weeks of parental benefits. 69 weeks are available when parents share the extended benefit. The Claimant's wife asked for 35 weeks of the extended parental benefit in her January 10, 2023, application. The Claimant applied for the remaining 34 weeks of parental benefits on January 12, 2023.

[5] The Claimant planned to take his 35 weeks in two installments. He went on an initial parental leave of 10 weeks from January 8, 2023, to March 18, 2023. He intended to take the other 24 weeks later on.

[6] When he asked his employer for his second parental leave to start in January 2024, his employer informed him that he could not do so. This was because provincial employment standards legislation prevented him from dividing his parental leave into non-consecutive periods. That meant he could not receive all the weeks of extended benefits that he had anticipated. Because of this, he and his wife asked the Commission to change their election from the extended benefit rate to the higher standard benefit rate. The Commission refused to do so. When the Claimant asked the Commission to reconsider, it would not change its decision.

[7] The Claimant appealed to the General Division of the Social Security Tribunal (Tribunal), but the General Division dismissed his appeal. He is now asking for permission to appeal to the Appeal Division of the Tribunal.

[8] I am refusing permission to appeal. The Claimant has no arguable case that the General Division made an error of procedural fairness or an error of law.

Preliminary matters

[9] When parents share parental benefits, the parent who applies first can choose whether they want to receive the standard or the extended parental benefit. The first parent's choice (election) is binding on the other parent.

[10] In this case, the Claimant`s wife applied first and selected the extended benefit. However, the Claimant was the one who found he could not receive the full complement of extended benefits. Both the Claimant and his wife decided they wanted to change the election to have all the benefits paid at the standard benefit rate. Both appealed to the General Division when the Commission refused, and both have appealed their respective General Division decisions to the Appeal Division.

[11] However, the evidence, law, issues, and analysis are essentially the same in both appeals.

[12] I have issued a separate decision for each appeal, but the decision and reasons are identical—except those modifications necessary to correctly address the decision to the proper applicant.

Issue

[13] Is there an arguable case that the General Division made an error of procedural fairness by deciding this case differently than it decided similar cases?

[14] Is there an arguable case that the General Division made an error of law when it held that the Claimant could not change his election?

[15] Is there an arguable case that the General Division made an error of fact by not considering what others told the Claimant about exceptions by which the election may be revoked?

I am not giving the Claimant permission to appeal

General Principles

[16] For the Claimant's application for leave to appeal to succeed, his reasons for appealing would have to fit within the "grounds of appeal." The grounds of appeal identify the kinds of errors that I can consider.

[17] I may consider only the following errors:

a) The General Division hearing process was not fair in some way.
b) The General Division did not decide an issue that it should have decided. Or, it decided something it did not have the power to decide (error of jurisdiction).
c) The General Division based its decision on an important error of fact.
d) The General Division made an error of law when making its decision.[1]

[18] To grant this application for leave and permit the appeal process to move forward, I must find that there is a reasonable chance of success on one or more grounds of appeal. Other court decisions have equated a reasonable chance of success to an "arguable case."[2]

Procedural Fairness

[19] The only ground of appeal that the Claimant selected in completing his Application to the Appeal Division was the ground of appeal concerned with procedural fairness.

---

[1] This is a plain-language version of the grounds of appeal. The full text is in section 58(1) of the *Department of Employment and Social Development Act* (DESDA).
[2] See *Canada (Minister of Human Resources Development) v Hogervorst*, 2007 FCA 41; and *Ingram v Canada (Attorney General)*, 2017 FC 259.

[20] However, he has not made out an arguable case that the General Division acted in a way that was procedurally unfair.

[21] Procedural fairness is concerned with the fairness of the process. Parties before the General Division have a right to certain procedural protections such as the right to be heard and to know the case against them, and the right to an unbiased decision-maker. Procedural fairness is not concerned with whether a party feels that the decision **result** is fair.

[22] The Claimant attended his General Division hearing. He has not said that he did not have a fair chance to prepare for the hearing or that he did not know what was going on in the hearing. He has not said that the hearing did not give him a fair chance to present his case or to respond to the Commission's case. He has not complained that the General Division member was biased or that she had already prejudged the matter.

[23] When I read the decision and review the appeal record, I do not see that the General Division did anything, or failed to do anything, that causes me to question the fairness of the process.

[24] The Claimant heard that exceptions have been made to allow claimants to change their parental benefit election. He expressed concern about the unfairness of a process that would permit this for some claimants – but not for him and his wife.

[25] If he is talking about the Commission's processes, these are not at issue in this appeal. I cannot comment on whether or not the Commission sometimes permits claimants to revoke their election.

[26] The General Division found that the Claimant and his wife could not revoke their election **as a matter of law**. The Tribunal may make mistakes, but it is required to follow the law.

[27] The question is whether the General Division made a mistake of law when it said that claimants are not permitted to change their benefit election once benefits have been paid.[3]

Error of law

[28] The Application to the Appeal Division form asked the Claimant to explain why he believed the General Division made an error. Although he selected the error concerned with procedural fairness, his explanation suggests that he believed the General Division made other errors. One of those errors is an error of law.

[29] The Claimant appears to believe that the law permits claimants to revoke their election in certain circumstances. I will consider whether the General Division made an error of law when it said that claimants cannot revoke their election.

[30] There is no arguable case that the General Division made an error of law.

[31] The EI Act is clear that a claimant cannot revoke their election after they receive their first parental benefit payment.[4] I am unaware of any Tribunal or court decision that has found otherwise.

[32] The Claimant may be thinking of those decisions in which the Tribunal considered whether the claimant actually elected the benefit that they appeared to have elected. In those decisions, the Tribunal accepted that the election depended on the claimant's understanding of the benefit choices and on what they intended by their choice. In certain circumstances, the Tribunal considered the claimant's mistake to be such that they had not actually elected the benefit they selected in their application.

[33] However, the Tribunal could not reach that decision today. The courts have rejected this approach and clarified the meaning of "election." The Federal Court of Appeal states that a Claimant's "election" is the benefit they select when they complete the application form, regardless of whether they made a mistake based on incorrect

---

[3] See par 24 of the General Division decision.
[4] See section 23(1.2) of the EI Act,

information or originally intended to select the other benefit.[5] It also confirmed that an earlier Federal Court case meant that there is no legal remedy when a claimant makes an election based on their misunderstanding of the parental benefit scheme.[6]

[34] In any event, the Claimant's circumstances are different. The basis for the Claimant's appeal to the General Division was that his employer had misled him to think it would be okay to take a second parental leave. He and his wife did not choose the wrong benefit because they misunderstood the benefit scheme. Their choice of benefit actually made sense within the benefit scheme, based on what the Claimant knew of his employment situation. Unfortunately, they misunderstood his situation – which does not help them to show that they should be able to change their parental benefit election. As the General Division noted in its reasons, the Federal Court has said that the Commission is not responsible for information provided by an employer to their employees.[7]

[35] I note that the Claimant also argued to the General Division that the Commission had an obligation to advise him or his wife that their plan to split his leave into two periods might conflict with other provincial legislation.

[36] In my view, Claimants might reasonably expect agents of the Commission to know what choices are available within the benefit scheme. At the same time, I doubt that the Commission has an obligation to know, or advise on, the legal or financial implications of those choices.

[37] But, regardless of what the Commission can or should tell claimants, the Federal Court of Appeal's decisions in *Pettinger*, *Johnson*, and *Jeffers* leaves no doubt that the rule against revocation is absolute.[8] In *Jeffers*, the claimant's argument was that she based her election on misleading information from the Commission. In that case, the

---

[5] See *Canada (Attorney General) v Hull*, 2022 FCA 82, para 47.
[6] Ibid. at para 31 (citing *Karval v Canada (Attorney General),* 2021 FC 395).
[7] *Canada (Attorney General) v Variola*, 2022 FC 1402.
[8] *Canada (Attorney General) v Pettinger*, 2023 FCA 51; *Canada (Attorney General) v Johnson,* 2023 FCA 49; *Canada (Attorney General) v Jeffers,* 2023 FCA 52.

alleged misinformation concerned the operation of the benefit scheme itself. Even so, the court found that the claimant could not revoke her election.

[38] I appreciate that the Claimant and his wife would have made a different choice of benefit if they had more information when his wife made the election. I also appreciate that it does not seem fair to the Claimant that they did not receive all the benefits they could have received.

[39] However, decisions of the Federal Court and Federal Court of Appeal decisions are binding on both the General Division and the Appeal Division. This means that the Tribunal has no choice but to follow their lead. The law is now very clear. When a claimant chooses a parental benefit type on their application, that choice is their election. And once they receive the first parental benefit payment, there is no way to revoke that election and no way that the Commission or this Tribunal can change their parental benefit type.

[40] There is no arguable case that the General Division made an error of law.

Error of fact

[41] When the Claimant explained why he was appealing, he also said that the General Division ignored some of their evidence. He noted that its decision did not include details of what he heard from others. He or his wife had spoken to the Office for Client Satisfaction and to a Service Canada Benefits Officer from the Regional Enquires Unit. The Claimant says they were told that exceptions may be made to allow claimants to revoke their election and change their benefits.

[42] The General Division makes an important error of fact when it bases its decision on a finding that ignores or misunderstands relevant evidence, or on a finding that does not follow rationally from the evidence.[9]

---

[9] I have tried to make this error more understandable. This ground of appeal is defined in section 58(1)(c) of the DESDA. The General Division will have made an error of fact where it, "based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it."

[43] However, there is no arguable case that the General Division ignored the Claimant's evidence.

[44] The law says that elections are not revocable. It does not give the Commission or anyone else the discretion to permit claimants to revoke their election. Whatever the Claimant says he heard about "exceptions" from a representative of the Office for Client Satisfaction and the Service Canada Benefits Officer, this can only be an opinion on the interpretation of the law. It may have been "argument," but it was not evidence.

[45] The General Division was not obligated to refer to whatever the Claimant heard about the law from other sources. It reached its own conclusion on what the law says, and I have found no error in its interpretation.

[46] The Claimant's appeal has no reasonable chance of success.

Conclusion

[47] I am refusing permission to appeal. This means that the appeal will not proceed.

Stephen Bergen
Member, Appeal Division