Citation: *Canada Employment Insurance Commission v MM*, 2024 SST 750

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	Canada Employment Insurance Commission
Representative:	Ian McRobbie
Respondent:	M. M.

Decision under appeal:	General Division decision dated December 22, 2023 (GE-23-1825)

Tribunal member:	Melanie Petrunia
Type of hearing:	Teleconference
Hearing date:	April 10, 2024
Hearing participants:	Appellant's representative Respondent
Decision date:	**June 30, 2024**
File number:	AD-24-52

Decision

[1] The appeal is allowed. The General Division made an error of law in its interpretation of the legislation. I am returning the matter to the General Division for reconsideration.

Overview

[2] Parental benefits provide support for claimants while they take time off work to care for their newborn child or a child who was placed with them for the purpose of adoption under the provincial adoption laws.[1] The Respondent is the Claimant in this matter. Her grandson was placed with her on a temporary basis after he was born, and she applied for parental benefits.

[3] The Appellant, the Canada Employment Insurance Commission (Commission), decided that the Claimant was not entitled to parental benefits because the child was not placed with her for the purpose of adoption under the laws governing adoption in the province in which the claimant resides.

[4] The Claimant successfully appealed to the Tribunal's General Division. The General Division accepted that the Claimant now intends to retain permanent custody of her grandson. It found that this was equivalent to being placed for the purposes of adoption and the Claimant was entitled to benefits.

[5] The Commission is now appealing 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 an important factual error.

[6] I find that the General Division erred in law in its interpretation of the legislation. Given inconsistencies in the evidence, I am returning the matter to the General Division for reconsideration.

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[1] See *Employment Insurance Act*, SC 1996, c. 23, s. 23

Issues

[7] The issues in this appeal are:

a) Did the General Division err in law when it found that an intention to provide permanent care is equivalent to adoption for the purposes of section 23 of the EI Act?

b) If so, how should the error be fixed?

Analysis

[8] I can intervene in this case only if the General Division made a relevant error. So, I have to consider whether the General Division:[2]

- 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;
- made an error of law in making its decision; or
- based its decision on an important mistake about the facts of the case.

[9] In this matter, the General Division found that the placement of a child in a permanent care situation is equivalent to being placed "for the purposes of adoption" as it relates to parental benefits.[3] This determination required an interpretation of section 23 of the EI Act, which is a question of law. This means that I have to decide whether the General Division's interpretation of the legislation is right or wrong.

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[2] 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).
[3] General Division decision at para 13.

[10] Section 23 of the EI Act states:

> **Parental benefits**
>
> 23 (1) Despite section 18, but subject to this section, benefits are payable to a major attachment claimant to care for one or more new-born children of the claimant or one or more children placed with the claimant for the purpose of adoption under the laws governing adoption in the province in which the claimant resides.

– The General Division decision

[11] The General Division considered the leading case from the Federal Court of Appeal, *Canada (AG) v. Hunter.*[4] In *Hunter*, the Federal Court of Appeal stated that Parliament must have recognized that placement of a child for the purpose of adoption may arise in a variety of circumstances.[5]

[12] The General Division found that the placement of the Claimant's grandson was initially a temporary measure, but she now intends to retain permanent custody. It determined that this falls under the "variety of circumstances" referred to by the majority in *Hunter*. On that basis, it determined that the placement of the Claimant's grandson was equivalent to being placed for adoption.[6]

[13] The General Division considered that the statute requires that the placement be for the purposes of adoption under the laws governing adoption in the province in which the claimant resides. In this case, the relevant province is Ontario. It found that there are only two requirements for a valid adoption according to the law in Ontario:

- the child must be placed by a recognized authority; and
- a recognized authority must conduct a home study to ensure that the child is being placed in a safe and secure environment.[7]

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[4] *Canada (AG) v. Hunter,* 2013 FCA 12.
[5] See Hunter at para 6.
[6] General Division decision at para 13.
[7] General Division decision at para 14, citing *Child, Youth and Family Services Act*, 2017, S.O. 2017, c.14, Sched 1, section 183 and 188.

[14] The General Division decided that both of these criteria had been met in the Claimant's case. It found that the Claimant's intentions have changed over time and that she now intends to maintain custody of the child on a permanent basis.[8]

[15] The General Division also found that a letter provided by the Claimant supported that a Home Study had been completed. This letter states that CAS is in the process of completing an assessment of the Claimant as a care provider.[9]

[16] The General Division concluded that the Claimant had satisfied the two legal criteria for adoption and that she intends to make her custody of the child permanent. It found that this is equivalent to being placed for the purposes of adoption.[10]

[17] The General Division set out additional reasons why it determined that the child was placed with the Claimant "for the purposes of adoption":

- The child's parents do not and have never had any decision-making authority.
- The Claimant is the primary caregiver and decision-maker, and she does not consult the parents.
- The Claimant does not receive any financial assistance from the biological parents and was forced to stop working to care for the child.
- The Claimant has permanent custody of her daughter's older child, who is 14 years old. She is this child's primary caregiver, and she considers her care for him to be permanent. CAS will not release custody of this child to the birth parents.[11]

[18] The General Division reviewed the relevant case law from the Tribunal. It considered *PD v Canada Employment Insurance Commission*, 2022 SST 748, in which the General Division found that there was insufficient evidence to support that there had been a

[8] General Division decision at para 18.
[9] General Division decision at para 20.
[10] General Division decision at para 22.
[11] General Division decision at paras 24 to 26.

placement for the purposes of adoption. It distinguished this case from the Claimant's because the court in that matter was still giving the biological parents time to address the CAS concerns. The claimant in that case did not have the option to adopt the children.[12]

[19] The General Division also distinguished the Claimant's situation from that in *T.W. v. Canada Employment Insurance Commission*, 2018 SST 1171. In TW, the General Division found that permanent custody is not the same as adoption. This case was distinguished on the basis that the claimant in that matter was purposely not pursuing adoption because she intended the biological mother to remain involved in the child's life. The General Division also found that it was not bound by this decision.[13]

[20] The General Division found that the Claimant's situation was similar to that of the claimant in *SC v Canada Employment Insurance Commission*, 2022 SSTAD 748. In that case, the Commission agreed with the claimant that the General Division had erred and that her appeal should be allowed. The claimant was caring for her grandson and there was a temporary custody order in place. That claimant was found to have "every intention" to adopt her grandson but was waiting for the court process to conclude.[14]

[21] The General Division concluded that the child was placed with the Claimant in a permanent custody situation and that this is the equivalent of being placed for the purposes of adoption. It found that the date of placement was September 1, 2023 because this was when the Home Study was completed, and the Claimant had expressed her intention to care for the child permanently.[15]

The General Division made an error of law

[22] The Commission argues that the General Division made an error of law by finding that permanent custody is equivalent to placement for the purposes of adoption, as set out in the EI Act. It says that the case law from the Federal Court of Appeal and the Tribunal has clearly set out that an intention to adopt is a requirement of section 23 of the EI Act.

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[12] General Division decision at paras 32 and 33.
[13] General Division decision at paras 36 and 37.
[14] General Division decision at para 34.
[15] General Division decision at para 43.

[23] The Commission says that the Federal Court of Appeal in *Hunter* made it clear that an intention to adopt is required, though it recognizes that a specific type of custody arrangement is not necessary. The Commission points to the consistency on this point found in decisions of the Tribunal. Though not binding, the General Division has consistently found that there can be no parental benefits without the intention to adopt.

[24] The Commission also questions the General Division reasoning for departing from the principles outlined in the other decisions of the General Division. It says that those decisions are not binding but the General Division should not have departed from the reasoning without good reason.

[25] The Commission also argues that the General Division based its decision on an important factual error when it found that the Claimant had permanent custody of her grandchild.

[26] The Claimant says that the General Division did not make any errors. She says that she should be entitled to parental benefits. She argues that she initially did not intend to adopt her grandson, but it became clear to her quite quickly that she would need to. She does not see any difference between adoption and permanent care.

[27] I find that the General Division made an error of law when it concluded that permanent custody is the equivalent of adoption for the purposes of section 23 of the EI Act. The General Division did not explain its reasons for this interpretation.

[28] The General Division distinguished other Tribunal's decisions on the basis of different factual circumstances. However, these decisions have consistently noted that there is a difference between permanent custody and adoption. The General Division did not explain why it disagreed with this determination.

[29] In *PD*, the Tribunal reviewed the majority decision in *Hunter*, and discussed the legal differences between custody and adoption. It concluded:

> I find that having custody of the children does not equate to a placement for the purpose of adoption under the laws governing adoption in Ontario. The [sic] receive parental benefits, the *Employment Insurance Act* clearly requires an intent to pursue

> the legal process of adoption. The law does not refer simply to "adoption," which could potentially include an arrangement similar to adoption. Rather, it qualifies the word "adoption" with the requirement that the placement must be for the purpose of adoption under the laws of the province in which the claimant resides. The *Hunter* case says that no specific documents are required to meet this test. However, there must be sufficient evidence to make a factual finding that the purpose of the placement was for adoption under the laws of Ontario.[16]

[30] Similarly, in *TW*, the Tribunal found:

> The Tribunal is not satisfied, on the evidence presented, that the Appellant has proven that her grandson was placed with her for the purpose of adoption under the laws governing adoption in Ontario. While the Tribunal has absolutely no doubt that the Appellant' s intention is to seek and obtain sole custody of her grandson and to remain his caregiver until he is an adult, that alone, without an intent to legally adopt him, is not sufficient to meet the requirements of subsection 23(1) of the Act.[17]

[31] The General Division found that *PD* could be distinguished because, in that case, the claimant did not yet have the option to adopt the children and CAS was still working with the biological parents. It found that this was sufficiently different from the Claimant's situation in which it was clear that the biological parents could not parent the child and that the child was with the Claimant permanently.

[32] The General Division did not refer to the comment that there must be an intention to pursue adoption, and that custody is not equivalent to adoption. It is not clear to me that the factual differences between that case and the Claimant's are relevant to the General Division's determination that an intention to adopt is required.

[33] Similarly, the General Division found that the *TW* decision could be distinguished because the claimant was intentionally not pursuing adoption and wanted the biological mother to remain in the child's life. It found that this was different from an intention to provide permanent care. Here, again, the General Division did not explain why it was

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[16] See *PD* at para 19.
[17] See *TW* at para 15.

disagreeing with the finding that permanent custody is not the same as placing a child for the purposes of adoption.

[34] I find that the General Division erred in law when it found that an intention to provide permanent care is equivalent to a placement for the purposes of adoption. Permanent custody and adoption are distinct legal concepts, and the legislation clearly requires that the placement be for the purpose of adoption. As discussed below, there may be circumstances when permanent custody is what is finally obtained, but the intention must be to adopt.

[35] In CUB 38323, a statutory interpretation of section 20(1) of what was then the *Unemployment Insurance Act* was undertaken by the Umpire. The wording of that section also included the requirement that the child or children be placed with a claimant "for the purposes of adoption pursuant to the laws governing adoption in the province in which that claimant resides."

[36] CUBs are decisions of the Umpire, a Federal Court Judge, which was the second level of appeal under the previous administrative appeal system for Employment Insurance matters. I am not required to follow CUBs but may be persuaded by the reasoning. I find the interpretation in CUB 38323 persuasive.

[37] In CUB 38323, the claimant and his wife initially fostered the children involved. Shortly after the placement, they initiated the adoption process. Because of the unique circumstances of the children in that case, a custody order was deemed to be appropriate, rather than an adoption order. The Court granted the claimant a permanent custody order. The Umpire considered the following question: "Does a situation that is effectively, but not technically, an adoption situation qualify one for parental benefits…?"

[38] The Umpire reviewed the principles of statutory interpretation and then interpreted section 20(1). He found that the words "children placed" refers to actual physical custody. He then turned to the phrase "for the purpose of adoption."

[39] The Umpire found that the word "purpose" is forward-looking and refers to something that one wishes to be seen carried through. In the context of the section, the

ultimate goal, or the thing one wishes to see carried through, is an adoption. The Umpire emphasized the forward-looking nature of the word and the fact that the section does not require an actual adoption, only an intention to adopt.

[40] The Umpire concluded:

> The plain and ordinary sense of the words indicates that an actual adoption need not take place in order for one to qualify for benefits under the provision. However, the intent of the placement of the child, definitely, must be for adoption. The distinction is a fine one, but one which must be respected.

[41] The claimant's situation of permanent care was found to come with all the rights and responsibilities of an adoptive parent. The Umpire decided that the Court could not grant an adoption order in the circumstances, and instead issued a permanent custody order. It was found to essentially be an adoptive situation. The Umpire stated:

> A liberal construction of section 20 is that it speaks not only to those claimants who have already commenced adoption proceedings and have physical custody of the child, but also those claimants who have legal and actual custody of the children and intend to adopt those children – and – can prove that intent – whether or not the adoption actually takes place.
>
> It is the manifest intent to adopt that is paramount in subsection 20(1).

[42] I am persuaded by this interpretation of the phrase "for the purpose of adoption" and see no reason to depart from it. The case law that has followed has confirmed that the intention to adopt is necessary. The General Division erred in law in finding that a placement for the purpose of permanent custody is equivalent to a placement for the purpose of adoption.

Remedy

[43] To fix the General Division's error, I can give the decision that the General Division should have given, or I can refer this matter back to the General Division for reconsideration.[18]

[44] The Commission says that I should make the decision that the General Division should have made, that the Claimant is not entitled to parental benefits.[19] As discussed below, the subjective intention of the Claimant is a paramount consideration in this case.

[45] The Claimant maintains that she does not see the difference between permanent custody and adoption and there is evidence in the file of her using both terms in the context of her intention. In her Notice of Appeal to the General Division, she refers to adoption[20] and in her oral submissions at the hearing in this matter she referred to her intention to adopt. She seems to use the terms interchangeably. I find that the Claimant did not have an opportunity to explain her intention in light of this important distinction between custody and adoption.

[46] It does not appear that the Claimant has ever been asked why she would seek permanent care, but not adoption, or why that was the circumstance with the older child. Given the significance of the subjective intention of the Claimant, I am not satisfied that the record is complete.

[47] The General Division found that there was an important distinction between the Claimant's situation and others where claimants expressly chose not to adopt but seek custody instead. However, the Claimant was not asked why she was seeking permanent care, or what she understood to be the difference between this and adoption.

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[18] Section 59(1) of the DESD Act explains the remedies available to the Appeal Division.
[19] AD6-5
[20] GD2-9.

[48] In light of the apparent conflation that the Claimant makes between adoption and permanent care, I am returning the matter to the General Division so that she may have an opportunity to fully explain her intention and address inconsistencies with respect to prior statements of her intention.

[49] This is unlike the cases where claimants made it clear that they were intentionally not choosing adoption and seeking permanent care instead. In this case, the Claimant argues that she sees no difference and they are the same thing for her. However, as discussed above, there is a difference between permanent custody and adoption. The Claimant should have an opportunity to explain her intention with an awareness of that important distinction.

Conclusion

[50] The appeal is allowed. The General Division made an error of law. I am returning the matter to the General Division for reconsideration.

Melanie Petrunia
Member, Appeal Division