



Citation: *Canada Employment Insurance Commission v SP*, 2025 SST 460

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: Canada Employment Insurance Commission
Representative: Adam Forsyth

Respondent: S. P.

Decision under appeal: General Division decision dated January 2, 2025
(GE-24-4074)

Tribunal member: Elizabeth Usprich

Type of hearing: Videoconference

Hearing date: March 20, 2025

Hearing participants: Appellant's representative
Respondent

Decision date: April 30, 2025

File number: AD-25-51

Decision

[1] The appeal is allowed.

[2] The General Division made an error of law. There are evidentiary gaps which require this to be returned to the General Division.

Overview

[3] S. P. is the Claimant. She applied for Employment Insurance (EI) benefits. She applied for maternity benefits to be followed by 35 weeks of standard parental benefits.

[4] The Claimant was paid these benefits. The Claimant's spouse (at the time the EI benefits were paid) also received 35 weeks of EI standard parental benefits.

Unfortunately, 40 weeks is the maximum standard parental benefits that can be shared by two parents. The Canada Employment Insurance Commission (Commission) decided this meant one of the parents was overpaid 30 weeks of EI benefits.

[5] The Commission decided it confirmed with the Claimant that she would lower her parental benefits from 35 to 5 weeks. The Claimant says she didn't understand and asked the Commission to reconsider. The Commission didn't change its mind.

[6] The Claimant applied to the Social Security Tribunal (Tribunal) General Division. The General Division held the hearing in-writing. The General Division found when the Claimant elected the number of standard benefits weeks, that this **number** couldn't be altered. The General Division allowed the appeal and decided the Claimant didn't have to repay any benefits.

[7] The Commission has appealed the General Division decision. I am allowing the appeal. The General Division made an error of law.

Issues

[8] The issues in this appeal are:

- a) Did the General Division misinterpret settled case law by deciding no claimant may change the number of parental benefits weeks they wish to take?
- b) If so, how should the error be fixed?

Analysis

[9] I can intervene (step in) only if the General Division made an error. The Commission says the General Division made an error of law when it made its decision.¹

Claimants may vary their number of benefit weeks as long as it remains within the type of benefits they chose

[10] A claimant's **election** of standard versus extended parental benefits is irrevocable. It isn't disputed that the Claimant received 35 weeks of standard parental benefits payments.² The General Division decided the Claimant established a benefit period that allowed her to receive benefits. The Claimant elected that she wanted to claim 35 weeks of standard parental benefits.³ There hasn't been a suggestion that the Claimant wanted to change the type of benefit to extended parental benefits.

[11] The General Division acknowledges that both parents of a child can split a maximum of 40 weeks of standard parental benefits.⁴ The General Division determined that it had to decide whether the Claimant could keep the 35 weeks of benefits.⁵ This is because the other parent of the child also received 35 weeks of standard parental benefits.

¹ See section 58(1)(b) of the Department of *Employment and Social Development Act* (DESD Act).

² See the General Division decision at paragraph 23 and GD3-28 to 31.

³ See GD3-9 the Claimant's Application for EI benefits.

⁴ See the General Division decision at paragraph 19 where it references section 23 of the *Employment Insurance Act* (EI Act).

⁵ See the General Division decision at paragraph 24.

[12] The General Division said case law states that parties can't amend the number of parental benefits weeks requested. So, it reasoned that since the Claimant originally asked for 35 weeks of standard parental benefits that this could never be amended.⁶

[13] The General Division relied on Federal Court of Appeal (FCA) decisions that say once parental benefits have been paid, the parental benefit election can't be changed.⁷ But the General Division has misinterpreted the law.

[14] When someone applies for parental benefits, they need to make an "election". Specifically, they have to decide if they want standard or extended parental benefits. All the cases the General Division relied on are about whether the **type** of election (standard or extended) can be changed once benefits are paid.⁸ Once parental benefits have been paid, it's settled law that the election type can't be changed. The EI Act also expressly notes that this selection is irrevocable.⁹

[15] But that isn't what happened here. No one is talking about the **type** of election that was made. It isn't disputed that the Claimant chose standard parental benefits. The Claimant has never asked for extended benefits.¹⁰ The General Division has extrapolated that the irrevocable election includes the number of weeks a parent decides to take. Unfortunately, that has no basis in the law.

[16] There are many reasons why claimants would choose to vary the number of weeks they take within their specified election type. The law doesn't prohibit that. The law only says the specified election type (standard or extended) can't change.

⁶ See the General Division decision at paragraph 26.

⁷ See the General Division decision at paragraph 27, the General Division relied on: *Canada (Attorney General) v Hull*, 2022 FCA 82; *Canada (Attorney General) v Jeffers*, 2023 FCA 52; *Canada (Attorney General) v Pettinger*, 2023 FCA 51; and *Canada (Attorney General) v Johnson*, 2023 FCA 49.

⁸ See *Canada (Attorney General) v Hull*, 2022 FCA 82 at paragraphs 21, 29, 49 and 62 to 64; *Canada (Attorney General) v Jeffers*, 2023 FCA 52 at paragraph 11; *Canada (Attorney General) v Pettinger*, 2023 FCA 51 at paragraph 11; and *Canada (Attorney General) v Johnson*, 2023 FCA 49 at paragraph 14. These cases say, "The answer to the question of law for the purpose of subsection 23(1.1) of the EI 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." The choice on the application form is between standard or extended parental benefits.

⁹ See section 23(1.2) of the EI Act.

¹⁰ See GD3-9 the Claimant's election to the type of parental benefits, in this case standard.

Remedy

[17] I have found an error. There are two main ways I can remedy (fix) it. I can make the decision the General Division should have made. I can also send the case back to the General Division.¹¹

[18] In this case, the parties agreed if I found an error, I should send the case back to the General Division. The parties agreed there were gaps in the evidence. I agree.

[19] There is no dispute the Claimant qualified for parental benefits because she received 35 weeks of benefits. The problem is the Commission says it also paid the other parent 35 weeks of parental benefits. There is only hearsay evidence that this occurred.¹² If true, because there is a statutory limit of 40 shared weeks, there would be 30 weeks paid in excess between the parents.

[20] I can't consider new evidence, but it was clear at the Appeal Division hearing that the Claimant may have additional evidence to give. She's not had an opportunity to provide all relevant evidence. The Commission also said it may have other evidence to bring about what the other parent received.

[21] The General Division held the hearing in writing. The Claimant had asked for the hearing to be held in the fastest way possible.¹³ But the Claimant also didn't have an opportunity to explain what she understood about the Commission's call to her. This call appears as the sole basis of the Commission saying it had verified the Claimant wanted to have the whole debt and the entire overpayment.¹⁴

[22] The Claimant wrote on her EI application that she wanted to claim 35 weeks of parental benefits. The Commission provided no information about what the other parent

¹¹ Section 59(1) of the DESD Act allows me to fix the General Division's errors in this way.

¹² See GD3-27 of the Commission's Reconsideration File. This is the Commission's version of what occurred in conversation with the Claimant. The Commission hasn't filed any other evidence of what the other parent received.

¹³ See GD2-3, the Claimant's Notice of Appeal to the General Division.

¹⁴ Instead of the possibility of both parents sharing the parental benefit weeks and the overpayment debt.

claimed. The other parent lost his job, so it's also unknown if he applied for parental benefits versus regular benefits.

[23] The EI Act specifies how parental benefit weeks are to be divided if there isn't an agreement between the parents. It isn't known if there was an agreement between the parents about how the 40 weeks of parental benefits would be shared. Absent an agreement between the parents, the EI Act makes it clear how the weeks are supposed to be divided. The default, if there is no agreement, is that the number of unpaid benefit weeks should be paid in alternating turns until the weeks are exhausted.¹⁵

[24] It isn't known when the other parent applied, or what type of EI benefits were requested. It isn't clear why the excess weeks weren't split between the parents. It isn't clear why the entire debt was only assessed against the Claimant.

[25] These unknowns suggest that there is a gap in the evidence. Sending the case back to the General Division would remedy this.

Conclusion

[26] The appeal is allowed.

[27] The General Division made an error of law. There are evidentiary gaps which require this to be returned to the General Division.

Elizabeth Usprich
Member, Appeal Division

¹⁵ See section 23(4) of the EI Act and section 41.6 of the EI Regulations.