Federal Court Cour fédérale

Date: 20220413

Docket: T-1254-21

Citation: 2022 FC 527

Ottawa, Ontario, April 13, 2022

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

KATHERINE DE LEON

Respondent

JUDGMENT AND REASONS

[1] The Attorney General asks the Court to review and set aside a July 13, 2021, decision [the Leave Decision], of a member of the Appeal Division of the Social Security Tribunal refusing leave to appeal a decision of the General Division [the General Division Decision] on the basis that there were no reasonable grounds of success.

[2] The General Division Decision related to an appeal by the Respondent, Katherine De Leon, of a decision by Canada Employment Insurance Commission [the Commission] that she could not change her election for extended parental leave benefits. The General Decision decided that her election was invalid and that she was therefore entitled to elect standard parental benefits.

Background

[3] Paragraphs 12(3)(a) and (b) of the *Employment Insurance Act*, SC 1996, c 23 [the *EI Act*] provide for the payment of maternity benefits and parental benefit, respectively. Maternity benefits last for a maximum 15 weeks, with parental benefits following thereafter. Applicants for parental benefits can make an election between two options: standard benefits and extended benefits. Standard benefits are paid for up to 35 weeks at the same benefit rate as maternity benefits, while extended benefits are paid for up to 61 weeks but at a lower benefit rate. The election between standard and extended benefits is irrevocable once benefits are paid, pursuant to subsection 23(1.2) of the *EI Act*.

[4] The Respondent applied for maternity and parental benefits two days after giving birth. On her application form, the Respondent selected the extended option for her parental benefits and requested a maximum of 48 weeks of parental benefits. However, she also indicated on her application that her return-to-work date would be 48 weeks after she left work. When accounting for the 15 weeks of maternity benefits, this would lead to only 33 weeks of parental benefits being paid.

[5] Upon receiving her first parental benefit payment, the Respondent was surprised to find that her benefit rate had decreased. She requested that the Commission change her to standard parental benefits. The Commission refused. The Respondent appealed the Commission's decision to the Social Security Tribunal [the Tribunal].

[6] On May 10, 2021, the General Division of the Tribunal found for the Respondent. The General Division found that to "elect" is to make a deliberate choice between options. The General Division held that where a claimant has been misled or misinformed about their options, they are not able to make a deliberate choice and their election is invalid.

[7] The question on the benefits application form asked "How many weeks do you wish to claim?" The Respondent told the General Division that she understood this to mean the total number of weeks of both parental and maternity benefits. The General Division noted that English was not the Respondent's first language and she had completed the application two days after giving birth, while "physically fatigued, in an emotional state, and on pain medication." The General Division further noted the inconsistent answers on the Respondent's application with respect to the length of the benefits. The return-to-work date that she entered was inconsistent with 48 weeks of parental benefits.

[8] Based on the above considerations, the General Division found the Respondent's election to be invalid, making her entitled to elect standard parental benefits. The Commission sought leave to appeal the General Division Decision to the Appeal Division.

[9] On July 13, 2021, the Appeal Division refused leave to appeal. The Appeal Division found that the Commission's appeal had no reasonable chance of success.

[10] On leave to appeal, the Commission raised three arguments: (1) the General Division failed to analyze the evidence in a meaningful way, (2) the General Division failed to impose relevant legal obligations on the Respondent, and (3) the General Division failed to apply subsection 23(1.2) of the *EI Act*.

Failure to Analyze the Evidence

[11] The Commission claimed that the General Division failed to meaningfully analyze the evidence, as it had not considered the entirety of the application form. The Commission noted that the question at issue, "How many weeks do you wish to claim?", is found under the heading "Parental Information." Furthermore, under the heading "Maternal Information", the application form also asks whether applicants "want to receive parental benefits immediately after receiving maternity benefits?" These parts of the form, in the view of the Commission, highlight the difference between maternal and parental benefits and clearly show that the Respondent had been asked about the length of parental benefits only.

[12] The Appeal Division found that this argument had no reasonable chance of success. The Appeal Division found that the General Division is presumed to have considered all of the evidence and thus had considered the contents of the application form. The Appeal Division found that the parts of the form relied on by the Commission "are not nearly so illuminating or

important that the General Division needed to mention them" and noted that the Commission itself had not specifically relied on these sections in its submission to the General Division. The Appeal Division further found that these sections "clearly do not signal that, when answering the "How many weeks do you wish to claim?" question, an applicant needs to deduct 15 weeks of maternity benefits from their answer."

[13] The Appeal Division also reviewed the evidence of the file and did not find any evidence that the General Division might have ignored or misinterpreted.

Failure to Impose Legal Obligations on the Claimant

[14] The Commission argued that applicants are required to seek information about the benefits for which they are applying and to ask the Commission questions where they don't understand, citing this Court's decision in *Karval v Canada (Attorney General)*, 2021 FC 395 [*Karval*]. The Appeal Division found *Karval* decision to be distinguishable. The Appeal Division noted that in *Karval*, all the answers on the claimant's form pointed to the extended option and she waited six months before requesting to switch, suggesting it was a change in circumstances that motivated the request, which is clearly prohibited by the *EI Act*. The Appeal Division found that in the present case, the Respondent's form was inconsistent and, unlike in *Karval*, the General Division found that the form misled the Respondent, preventing her from making a valid choice.

Failure to Apply Subsection 23(1.2) of the EI Act

[15] The Commission argued that the General Division failed to apply subsection 23(1.2) of the *EI Act*. The Appeal Division noted that the General Division did acknowledge subsection 23(1.2) but then followed three previous decisions of the Social Security Tribunal that found there are cases in which a claimant's election is invalid: *ML v Canada Employment Insurance Commission*, 2020 SST 255; *Canada Employment Insurance Commission v TB*, 2019 SST 823; and *MH v Canada Employment Insurance Commission*, 2019 SST 1385. The Appeal Division further noted that the information on the application form was conflicting, so the General Division was required to look at the evidence and determine which option had been chosen.

[16] The Respondent is not participating on this Judicial Review Application and the Applicant has agreed not to seek costs against the Respondent.

Issues

[17] The Applicant submits that the Leave Decision is unreasonable and raises the following issues:

1. Is the Leave Decision unreasonable because the Appeal Division failed to apply subsection 23(1.2) of the *EI Act*?

2. Is the Leave Decision unreasonable because the Appeal Division disregarded the Applicant's arguments about the application form?

3. Is the Leave Decision unreasonable because the Appeal Division misinterpreted *Karval*?

Analysis

[18] To be granted leave to appeal a decision of the General Division, an appellant is only required to demonstrate an "arguable case" (see *Ingram v Canada (Attorney General)*, 2017 FC 259 at para 16). This is a low bar. The question before this Court is whether it was unreasonable to conclude that the Applicant had no arguable case.

[19] Subsection 58 (1) of the *Department of Employment and Social Development Act, SC* 2005, c 34 [the *ESD Act*] provides that the only grounds of appeal are that:

(a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;	a) la division générale n'a pas observé un principe de justice naturelle ou a autrement excédé ou refusé d'exercer sa compétence;
(b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or	b) elle a rendu une décision entachée d'une erreur de droit, que l'erreur ressorte ou non à la lecture du dossier;
(c) the General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without	c) elle a fondé sa décision sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments portés à sa connaissance.

> regard for the material before it.

[20] I have some sympathy for the Applicant's position regarding the first two issues; however, I am of the view that both are largely encompassed by the submission that the Appeal Division misinterpreted and failed to apply *Karval* to the facts before it. I am satisfied that this ground of review must succeed for the following reasons.

Karval Decision

[21] When Ms. Karval filed her claim, she chose the option of receiving extended parental benefits but, later, she sought to receive benefits under the standard option of 35 weeks. The Commission refused to amend the claim because s 23(1.2) of the *EI Act* states that such an election is irrevocable once payments have commenced. Ms. Karval appealed the Commission's decision to the General Division, which denied her appeal. The Appeal Division refused her leave to appeal that adverse decision.

[22] The judgment in *Karval* is dated May 5, 2021, only 5 days before the General Division Decision here. In *Karval*, Justice Barnes made it clear that while there may be legal remedies where a claimant is misled, being mislead occurs when a claimant relies "on official and incorrect information" (*Karval* at para 14). Furthermore, there is no legal remedy where a claimant "merely lacks the knowledge necessary to answer unambiguous questions."

[23] The Appeal Division found that *Karval* did not apply here because it was distinguishable on its facts. The Appeal Division at paragraphs 30-36 of the Leave Decision explains why, in its view, *Karval* has no application:

> [30] Specifically, the Commission argues that the General Division overlooked the Claimant's evidence that she was confused when completing her application form and didn't really understand the difference between the standard and extended options. According to *Karval*, applicants need to seek information about the benefits they're applying for and ask the Commission questions if there are things they don't understand.
>
> [31] However, the *Karval* decision clearly doesn't apply in this case.
>
> [32] Ms. Karval might have been confused during the application process, but all the answers on her application form pointed to the extended option. Plus, even after the amount of her EI benefits went down, she waited six months before contacting the Commission and asking to switch options. So, a change in circumstances was likely motivating Ms. Karval's request to change options. However, the law clearly prohibits this.
>
> [33] In *Karval*, the Court was careful to distinguish between people who lack the knowledge to answer clear questions and those who are misled by relying on incorrect information that the Commission provides.
>
> [34] Here, the General Division found that the Commission's application form misled the Claimant: the lack of clear and complete information prevented the Claimant from making a valid choice.
>
> [35] Plus, in this case, the Claimant's application form did not reveal a clear choice between the standard and extended options. This allowed the General Division to consider the evidence and determine which option the Claimant had, in fact, chosen.
>
> [36] These important factual differences mean that the *Karval* decision does not apply in this case.
>
> [Footnotes omitted and emphasis added]

[24] The relevant potion of the Respondent's online application as she filled it out is the following:

Maternity Information

Answers to fields and questions with an asterisk (*) are mandatory.

* The expected date of birth is or was: (DD/MM/YYYY)

17-10-2020

* Have you given birth?

◉Yes

○No

* The actual date of birth: (DD/MM/YYYY)

17-10-2020

* Do you want to receive parental benefits immediately after receiving maternity benefits?

◉Yes, I want to receive parental benefits immediately after my maternity benefits.

○No, I only want to receive up to 15 weeks of maternity benefits.

If your newborn child is hospitalized during the period in which you are eligible to receive maternity or parental benefits, contact us by calling 1-800-206-7218 to ensure that you receive all of the benefits to which you are entitled.

Parental Information

Answers to fields and questions with an asterisk (*) are mandatory.

Parental benefits are payable only to the biological, adoptive, or legally recognized parents while they are caring for their newborn or newly adopted child.

In order to be considered a legal parent for the purposes of receiving EI parental benefits, when not the birth or adoptive parent, an individual has to be recognized as such by their province or territory on the birth registration and have taken leave from work to care for the child or children.

Standard option:

- The benefit rate is 55% of your weekly insurable earnings up to a maximum amount.
- Up to 35 weeks of benefits payable to one parent.
- If parental benefits are shared, up to a combined total of 40 weeks payable if the child was born or placed for the purpose of adoption.

Extended option:

- The benefit rate is 33% of your weekly insurable earnings up to a maximum amount.
- Up to 61 weeks of benefits payable to one parent.
- If parental benefits are shared, up to a combined total of 69 weeks payable if the child was born or placed for the purpose of adoption.

If parental benefits are being shared, the parental benefit option selected by the parent who first makes a claim is binding on the other parent(s).

You must choose the same option as the other parent(s) to avoid delays or incorrect payments of benefits.

Once parental benefits have been paid for the same child, the choice between standard and extended parental benefits is irrevocable.

* Select the type of parental benefits you are applying for:

○ Standard option

◉ Extended option

Parental Information

Answers to fields and questions with an asterisk (*) are mandatory.

> * How many weeks do you wish to claim?
>
> 48

[25] In finding that Ms. De Leon was misled by the application form, the General Division stated the following: "The absence of clear information on the application prevented the Claimant from making a valid election for parental benefits" and "The Claimant completed the application based on the instructions provided."

[26] I agree that the facts of *Karval* are not the same as those here. Because of this, *Karval* may be said to be distinguishable. However, there is a strong argument that *Karval* applies despite the factual differences. As the Applicant points out, there are many similarities, including the fact that the application forms in the two cases are essentially identical.

[27] *Karval* is clear that there remains legal recourse where a claimant is misled and the General Division made a finding that the Respondent here was misled based on the "absence of clear information on the application." However, the finding that the Respondent was misled was not consistent with *Karval*, which indicates one is only misled "by relying on official and incorrect information" (*Karval* at para 14).

[28] Moreover, Justice Barnes at paragraph 11 of *Karval* found that the application form is not in itself misleading:

> There are also problems with Ms. Karval's assertion that the application for benefits is bereft of necessary information and is otherwise confusing, all of which led her astray. One problem is that the questions Ms. Karval now says were confusing are not

> objectively so and the explanations provided to claimants are not particularly lacking in information. This program itself is not overly complicated to understand. Maternity benefits are payable for 15 weeks followed by parental benefits which can be claimed by either or both parents. Parental benefits can be claimed in one of two ways. A claim to standard benefits allows for payments at the rate of 55% of weekly insurable earnings payable over 35 weeks. A claim to extended benefits allows for reduced payments (33%) payable over an extended term of up to 61 weeks. Once the election is made and payments commence, it cannot be changed.

[29] Having examined the application form, I concur with the view of Justice Barnes that it is not confusing, nor lacking in information.

[30] The instructions provided with that form specify the following at Step 1:

> **Choose benefits**
>
> **Maternity benefits**
>
> You can start receiving maternity benefits as early as 12 weeks before your due date or the date you give birth. You can't receive these benefits more than 17 weeks after your due date or the date you gave birth, whichever is later. A maximum of 15 weeks of benefits is available.
>
> When you apply for maternity benefits, you can also apply for parental benefits. This will save you time later.
>
> **Parental benefits**
>
> You can start receiving parental benefits the week your child is born or placed with you for the purpose of adoption.
>
> When applying for parental benefits, you need to choose between 2 options:
>
> 1. Standard parental (up to 35 weeks, up to $573 a week)
>
> 2. Extended parental (up to 61 weeks, up to $344 a week)
>
> If you applied for parental benefits at the same time as maternity benefits, you don't need to apply again.

> Once you start receiving parental benefits, **you can't change options**.
>
> [Emphasis in original]

[31] Notwithstanding the minor factual differences between this case and *Karval*, the following observation of Justice Barnes at paragraph 14, would arguably apply equally to this Respondent:

> 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, where a claimant like Ms. Karval is not misled but merely lacks the knowledge necessary to accurately answer unambiguous questions, no legal remedies are available. Fundamentally it is the responsibility of a claimant to carefully read and attempt to understand their entitlement options and, if still in doubt, to ask the necessary questions. Ms. Karval deliberately selected the extended benefit option and, had she read the application, she would have understood that the parental payments would be reduced. She would also have appreciated that once parental benefits were paid her election was irrevocable. These things are clearly stated on the application and were at the heart of the General Division's dismissal of her appeal and the Tribunal's decision to deny leave to further appeal.
>
> [Emphasis added]

Conclusion

[32] For these reasons, I find that it was unreasonable for the Appeal Division to find that there was no arguable case that failing to consider *Karval* was an error and it was unreasonable to say that the Commission had no arguable case or reasonable chance of success on an appeal.

[33] This application will be allowed, the Leave Decision set aside, and the matter referred back to the Appeal Division, all without costs.

JUDGMENT IN T-1254-21

THIS COURT'S JUDGMENT is that this application is granted, the decision of the Appeal Division is set aside, the application for leave to appeal is remitted back to a different member of the Appeal Division for determination in accordance with these Reasons, and no costs are ordered.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Tiffany Glover	FOR THE APPLICANT
-Nil-	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada Department of Justice ESDC Legal Services Gatineau, Québec	FOR THE APPLICANT
-Nil-	SELF-REPRESENTED RESPONDENT