Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

[TRANSLATION]

Citation: *E. B. v Canada Employment Insurance Commission*, 2019 SST 795

Tribunal File Number: GE-18-1986

BETWEEN:

E. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Catherine Frenette

HEARD ON: February 20, 2019

DATE OF DECISION: March 12, 2019

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant had a child who was born in August 2017. At that time, the child's mother made a claim for parental benefits. In October 2017, the Appellant informed the child's mother that he wanted parental benefits as of February 2018. The Appellant made a claim for parental benefits on February 19, 2018. The Canada Employment Insurance Commission (Commission) declared that the Appellant was disentitled from receiving parental benefits because he was not caring for his child.

[3] The Tribunal must therefore determine whether the Appellant is entitled to parental benefits.

ISSUE

[4] Was the Appellant entitled to parental benefits for the period beginning on February 19, 2018?

ANALYSIS

[5] A claimant is eligible for parental benefits to care for their child regardless of their availability (section 23(1) of the *Employment Insurance Act* (Act)).

[6] To be entitled to this type of benefit, a claimant must have had not only sufficient hours of insurable employment in their qualifying period, but also an interruption of earnings (section 7(2) of the Act).

[7] For parental benefits, an interruption of earnings occurs in respect of an insured person at the beginning of a week in which a reduction in earnings of 40% of the insured person's normal weekly earnings occurs because the insured person ceases to work in that employment by reason of the need to care for their newborn child (section 14(2) of the *Employment Insurance Regulations* (Regulations)).

[8] The maximum number of weeks of parental benefits that are payable applies to the two parents (sections 12(3), 12(4), and 23(4) of the Act).

Was the Appellant entitled to parental benefits for the period beginning on February 19, 2018?

[9] The Appellant and the mother separated before their child was born. The Appellant testified that, initially, it had been agreed that the child's mother would take the full 35 weeks of parental benefits, while he would look after the child on his days off.

[10] After the child was born, the Appellant looked after the child directly at the mother's residence until she asked the Appellant not to come to her house anymore. Consequently, the Appellant and the child's mother agreed that the Appellant would take the child to his house on his days off for three hours between two nursing periods.

[11] In October 2017, the child's mother sent the Appellant an affidavit because she was demanding full custody of the child in court. The Appellant told the mother in an email that he would start his parental leave on February 18, 2018. The mother did not respond to the Appellant about this request.

[12] On January 25, 2018, the New Brunswick family court issued an order stating the following:

a) The two parents have joint legal custody of the child.

b) The mother has primary custody as well as decision-making authority for the child.

c) The child's primary care and primary residence are with the mother.

d) The Appellant has gradually more access to the child as follows:

- Between January 25, 2018, and February 28, 2018, the Appellant had access to the child for three hours a day from 9 a.m. to 12 p.m. on three of his days off from work.

- Between March 1, 2018, and April 30, 2018, the Appellant had access to the child

for six hours a day from 11 a.m. to 5 p.m. on three of his days off from work.

- Between May 1, 2018, and June 30, 2018, the Appellant had access to the child for eight hours a day from 10 a.m. to 6 p.m. on three of his days off from work.

- Between July 1, 2018, and August 13, 2018, the Appellant had access to the child for three of his days off from work with one overnight stay. For the first day, the Appellant had access from 9 a.m. to 6 p.m. For the second day, the Appellant had access from 9 a.m. until 6 p.m. on the third day.

e) The Appellant would pick the child up and return him to his mother's house after his access periods.

[13] The mother would look after the child between the Appellant's access periods.

[14] The Appellant began parental leave from work on February 17, 2018. The Appellant wanted the weeks to be allocated equally between the two parents with 18 weeks for him and 17 weeks for the mother.

[15] The Appellant submitted into evidence a copy of a [translation] "screenshot" from a Commission officer that shows the parental benefit rate that he would be assigned. The Appellant explained that the officer had told him that another officer would contact him to verify the parental benefits. However, the child's mother informed the Commission that she did not intend to return to work and that she refused to share the weeks of parental benefits.

[16] As a result, the Commission refused to grant the Appellant parental benefits.

[17] The Appellant's argument can be broken down into two issues: the definition of [translation] "caring for a child" and the evidence that he met the criteria for that definition.

[18] The Appellant pointed out to the Tribunal that section 23(1) of the Act mentions that a claimant who "**veut**" ["wants" in English] to care for their child can receive parental benefits. In the Appellant's view, Parliament did not write "**peut**" ["can" in English], but instead "**veut**" ["wants" in English], which has a very different meaning.

[19] The Appellant referred to the Commission's Digest of Benefit Entitlement Principles to define [translation] "caring for a child." First, the intent of the Act is to allow the parent to bond with and care for the child. Furthermore, the requirement of caring for the child is met when the parent is providing for the needs of the child. In the Appellant's view, the needs of the child are cradling, feeding, diaper changing, and so on.

[20] The Appellant also argued that the Digest of Benefit Entitlement Principles specifies that parental benefits provide a means of financial support that allows one or both parents to be away from work to care for the child.

[21] Furthermore, the Digest of Benefit Entitlement Principles states that a reasoned approach should be taken and each case should be decided on its own merit having regard for the intent to allow a parent to care for the child. In the Appellant's view, the term "caring for a child" should not be interpreted too strictly.

[22] For this purpose, the Digest of Benefit Entitlement Principles states that a parent may continue to receive parental benefits while they maintain their regular activities, without the child necessarily being with them.

[23] According to the Appellant, the Act does not state that the parent must care for the child at all times. This means that a parent may leave the home and continue to receive benefits, regardless of whether the child is with the parent during their activities.

[24] Furthermore, the Appellant is of the view that, since availability is not at issue for parental benefits, a parent may be away in the evening to take a course or for an employment activity while they receive benefits. A claimant may even be on vacation outside the country and remain entitled to benefits.

[25] Given that definition, the Appellant is of the view that he stopped working to care for his son.

[26] The Appellant explained that, when he had his child, he would feed him, change his diaper, cradle him, and put him to sleep. Consequently, he looked after the child; he was entitled

to parental benefits. The Appellant mentioned that he wanted to care for his child but that the order did not allow him to do so.

[27] According to the Appellant, the fact that the court granted [translation] "primary care and primary residence" to the mother does not mean that he was not looking after the child and that the mother had full authority over the child.

[28] Furthermore, the Appellant argued that the Act does not stipulate that the child must spend the night at the parent's house.

[29] Finally, the Appellant said that, according to the Digest of Benefit Entitlement Principles, he could have worked part-time and looked after his son a few hours a day and be eligible for benefits. However, the Appellant argued that he chose to be away from his work to stay at home and look after his child. Furthermore, if the child's mother had returned to work after the 17 weeks of parental benefits, he would have looked after the child while she worked.

[30] According to the Commission, the mother is the child's primary carer because he stays with her full-time and she is responsible for making decisions about the child's welfare. Furthermore, the Commission is of the view that, for entitlement to benefits, the child must live primarily with one of the parents.

[31] The Tribunal is of the view that the Appellant has failed to show, on a balance of probabilities, that he was entitled to parental benefits.

[32] The Appellant did not have an interruption of earnings because he did not stop working to care for his child (sections 7(2) of the Act and 14(2) of the Regulations). The Federal Court of Appeal has summarized the scope of these sections as follows: "Consequently, the purpose of the parental benefits is to compensate parents for the interruption of earnings which occurs when they cease to work or reduce their work to care for a child or children" (*Martin v Canada (Attorney General)*, 2013 FCA 15).

[33] First, the Appellant was not caring for the child within the meaning of the Act.

[34] Contrary to the Appellant's claim, the term "veut" ["wants" in English] that is used in

section 23(1) of the Act cannot be limited to the mere will or desire to care for one's child; instead, the capacity to care for one's child must also exist. Section 23(1) of the Act must be considered in relation to sections 12(3) and 12(4) of the Act and section 14(2) of the Regulations where Parliament refers to the phrases "because the claimant is caring for [a] new-born [child]" and "by reason of [...] the need to care for a child or children."

[35] The Federal Court of Appeal clearly states that parental benefits exist "to care for a child or children" (*Martin, supra*; see also *Reference re Employment Insurance Act*, [2005] 2 SCR 669).

[36] Therefore, according to the Act and case law, parental benefits are payable to a claimant who is caring for their child in concrete ways and not to a person who wants to or would like to care for their child.

[37] Given that definition, the Tribunal is of the view that the Appellant was not able to care for his child because of the court order.

[38] The Appellant did have joint legal custody of the child, but only the mother was vested with primary care, residence, and decision-making authority. According to the court order, the Appellant had only a right of access to the child. It is true that the Appellant looked after his child, but only through his right of access specified by the court. In this way, the Appellant was providing for the needs of the child only temporarily, during the few hours a week he had access to the child. Consequently, the Appellant was not able to [translation] "care for his child."

[39] It is true that the Act allows parents to go about their regular activities and that they do not have to stay at home all the time to be with the child, but this is dependent on a claimant being initially entitled to parental benefits because they stopped working to care for their child (*Martin*, *supra*). This is not the case here because the Appellant has only a right of access to his child and was not entitled to benefits.

[40] Second, the Appellant did not stop working to care for his child. In fact, the court order states that the Appellant had a right of access to the child during his days off work, as had been agreed with the child's mother before the child was born. The Appellant did not stop working to

care for his child, since he was meant to look after him on his days off. As for the other days, the Appellant was not able to care for the child because of the order. As a result, the fact that the Appellant stopped working could not have been to care for his child because he was not legally able to do so.

[41] The Appellant argued that, if the child's mother had returned to work in February 2018, the Appellant would have looked after the child while she worked. However, the court order did not allow the Appellant to look after the child beyond the limits of the access rights. According to the way the order is written, the Appellant could not have looked after his child while the mother worked.

[42] Since the Appellant did not stop working to care for his child and since he did not have an interruption of earnings, the Tribunal is of the view that the Appellant was not entitled to receive parental benefits.

CONCLUSION

[43] The appeal is dismissed.

Catherine Frenette
Member, General Division – Employment Insurance Section

HEARD ON:	February 20, 2019
METHOD OF PROCEEDING:	Videoconference
APPEARANCES:	E. B., Appellant