



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *M. L. v Canada Employment Insurance Commission*, 2020 SST 255

Tribunal File Number: AD-19-681

BETWEEN:

M. L.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Shirley Netten

DATE OF DECISION: March 25, 2020

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] M. L. (the Claimant) applied for parental benefits when his child was 11 months old. He claimed 35 weeks of standard parental benefits but received only 3 weeks. His benefits ended after his child turned one year old, as the *Employment Insurance Act* (Act) requires. The Claimant then asked for extended parental benefits instead. The Canada Employment Insurance Commission denied this request.

[3] The Claimant's appeal to the General Division of the Social Security Tribunal was dismissed. The Claimant now appeals to the Tribunal's Appeal Division. I have concluded that the General Division made an error of fact about the information provided on the application form. I am substituting my decision for that of the General Division: The application process misled the Claimant, and his initial election of standard parental benefits was invalid.

ISSUES

[4] The issues in this appeal are:

- a) Did the General Division make an important error of fact about the information provided on the Claimant's application form?
- b) If so, did Service Canada's application process mislead the Claimant?
- c) If so, did the Claimant make a valid election?

ANALYSIS

Options for Parental Benefits

[5] Since December 2017, claimants must choose, or "elect," one of two options for parental

benefits.¹ The two options are commonly called standard and extended parental benefits.

[6] Standard parental benefits are paid for up to 35 weeks, at the regular benefit rate.² They are payable during a period that ends 52 weeks after the child is born or placed for adoption.³ This period is called the parental benefit window.

[7] Extended parental benefits are paid for up to 61 weeks, at a lower rate.⁴ For extended parental benefits, the parental benefit window ends 78 weeks after the child is born or placed for adoption.⁵

[8] The choice, or “election,” between standard and extended parental benefits cannot be changed once parental benefits are paid.⁶

The General Division made an important error of fact

[9] One of the grounds of appeal to the Appeal Division is that the General Division based its decision on an erroneous finding of fact that was made contrary to, or without regard for, the evidence.⁷

[10] The General Division found that the Claimant had elected to be paid standard parental benefits and that this election was irrevocable once benefits were paid. At paragraph 17, the decision states:

[T]he information provided on the initial EI claim form explains the difference between the extended and [standard] parental benefit options. The onus is on the Claimant to read the information provided and make a decision about the benefits he is seeking.

¹ Act, s 23(1.1).

² Act, ss 12(3)(b)(i) and 14. Recent amendments (providing additional weeks when benefits are shared) are not relevant to this appeal.

³ Act, s 23(2). There are limited exceptions, which do not apply here.

⁴ Act, ss 12(3)(b)(ii) and 14. Recent amendments (providing additional weeks when benefits are shared) are not relevant to this appeal.

⁵ Act, s 23(3.21).

⁶ Act, s 23(1.2).

⁷ *Department of Employment and Social Development Act* (DESDA), s 58(1)(c).

[11] The application form described the two types of benefits this way:⁸

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 on or after March 17, 2019.

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 on or after March 17, 2019.

[12] In the context of this appeal, it was an error of fact and contrary to the evidence for the General Division to say that the information on the application form explained the difference between extended and standard parental benefits. The application form outlined most of the differences between extended and standard parental benefits. But a critical difference — the length of the parental benefit window — was not on the application form. Moreover, the General Division did not recognize that this **is** a difference between the two types of benefits. The decision mentions the 52-week parental benefit window only as a secondary issue, distinct from the choice between the two options, without acknowledging that there is a longer parental benefit window for extended benefits.

[13] Not every error of fact allows the Appeal Division to intervene. The General Division must have “based its decision on an erroneous finding of fact...”⁹ The Commission’s representative argues that, even if the General Division misstated the facts about the information on the application form, it did not base its decision on this error. I disagree.

⁸ At GD3-7.

⁹ DESDA, s 58(1)(c).

[14] I recognize that the General Division previously stated the Claimant's responsibility more broadly: "[T]he onus was on the Claimant to ensure that he understood the differences between standard and extended parental benefits when he made his initial claim."¹⁰ Nevertheless, the subsequent reference to the application form suggests that the General Division also relied upon its belief that the form explained the differences between standard and extended parental benefits. To have "based its decision" on the error, it is enough that the General Division's error about the information on the application form had an impact on the decision.¹¹

Remedy

[15] I have concluded that the General Division based its decision on an error of fact contrary to the evidence. One of the options available to me is to substitute my decision for that of the General Division.¹² This is appropriate in cases such as this one, where the evidence before the General Division is sufficient to decide the appeal. The parties agree on this point, and they have both provided detailed arguments on the merits of the appeal.

[16] The General Division's error about the information on the application form leads me to consider whether the application process misled the Claimant and, if so, whether the Claimant made a valid election.

Service Canada's application process misled the Claimant

[17] The online application process for parental benefits required the Claimant to choose between standard and extended benefits. There was a piece of information missing from the application form that, for this Claimant, was crucial. The Claimant wanted 35 weeks of parental benefits. If he had known that he could get only 3 weeks of standard parental benefits,¹³ compared to 29 weeks of extended parental benefits,¹⁴ he would have chosen the extended option. But the Claimant didn't know about the 52- and 78-week parental benefit windows. The

¹⁰ General Division decision at para 16.

¹¹ See *JB v Minister of Employment and Social Development*, 2019 SST 1000, and *Marlowe v Canada (Attorney General)*, 2009 FCA 102.

¹² DESDA, s 59(1).

¹³ Ending at the 52-week point.

¹⁴ Ending at the 78-week point.

Commission says that this was entirely the Claimant's responsibility. In contrast, the Claimant says that Service Canada's form should have guided him to the best option.

[18] In my view, the answer lies between. Claimants are responsible for carefully choosing between standard and extended parental benefits based on their own circumstances. Yet, when Service Canada informs claimants about the two options during the application process, it should not confuse, mislead, or misinform them about their options or their responses.¹⁵ That is what happened here.

[19] The Claimant applied for parental benefits on May 3, 2019. He followed the instructions on the form, as required.¹⁶ The Claimant gave his child's birthdate, June 1, 2018. After the explanation of the standard and extended options,¹⁷ the instructions said to choose the same option as the other parent, and warned that the choice would be irrevocable once parental benefits were paid. The Claimant then gave the following responses:¹⁸

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

Standard option

Extended option [...]

How many weeks do you wish to claim?

[20] The earlier description of standard parental benefits stated "up to" 35 weeks of benefits but then asked the Claimant to choose the number of weeks to claim. Nothing on the application form alerted the Claimant to the possibility that he could not receive 35 weeks of benefits because his child was already 11 months old. Nothing on the application form suggested that the detailed description of the differences between the two options was incomplete. Nothing on the

¹⁵ The Federal Court of Appeal recently reached a similar conclusion about this Tribunal, in a different context, in *Moreau v Canada (Attorney General)*, 2019 FCA 237: Even though the Tribunal is not obliged to provide advice or guidance, Tribunal staff cannot provide incomplete or misleading information to appellants.

¹⁶ Act, s 50(3).

¹⁷ Cited in paragraph 10 above.

¹⁸ At GD3-8.

application form directed the Claimant to look for additional information on the website or elsewhere, before making the election.

[21] On receiving a claim, the Commission (or Service Canada on its behalf) is obliged to decide whether a claimant is qualified to receive benefits and to notify them of the decision.¹⁹ Similarly, the application form said that Service Canada is responsible for “let[ting] you know about decisions we’ve made about your claim...”²⁰ On receiving the Claimant’s application, Service Canada did not call or write to the Claimant to tell him that they were denying his claim for 35 weeks of benefits. Service Canada simply started paying him parental benefits after his one-week waiting period, and stopped paying him three weeks later.

[22] The application form also said that Service Canada is responsible for “giv[ing] you accurate information about your claim.”²¹ The form said to consult your My Service Canada Account (MSCA) to obtain this information. After applying, the Claimant did check his account. It noted an “End Date of Claim” in May 2020. It did not tell him that his standard parental benefits would end in June 2019. It did not tell him about the parental benefit window or give him any other warning that he would not receive the 35 weeks of benefits he had claimed. It appears that the MSCA system reports the general benefit period²² rather than the period available for parental benefits, even when the claim is only for parental benefits.

[23] The information included in and left out of the application form misled the Claimant about the choice between standard and extended parental benefits, specifically about the different parental benefit windows. The absence of a timely decision from Service Canada on actual benefits to be paid, and the confusing use of the term “End Date of Claim” in the online system, added to the Claimant’s misunderstanding. Any reasonable claimant would have expected to receive 35 weeks of standard parental benefits in these circumstances

[24] I acknowledge the Commission’s point that the Claimant could have gotten additional information about standard and extended benefits from Service Canada’s website or phone line, on his own initiative. But the Claimant didn’t look for more information, because he relied on

¹⁹ Act, s 48(3).

²⁰ At GD3-13.

²¹ At GD3-12.

²² 52 weeks from the interruption of earnings or initial claim: Act, s 10(1) and (2).

Service Canada's application process and the information given during that process. The Claimant had no reason to think that this information was incomplete. Relying on this information is what a reasonable person would have done in the Claimant's situation.²³ The election was a mandatory part of the application process; the application form appeared to provide a full explanation of the two options; the Claimant followed the instructions on the form; the claim was not denied; and there was no contrary information in the MSCA account. The Claimant made an election that was misinformed, at the outset and beyond the point of irrevocability, because of the communication choices made by Service Canada and/or the Commission.

[25] The Commission's representative says that the MSCA details were technically accurate about the benefit period for the claim, since it might eventually have included more than just parental benefits. She also highlights the difficulty of providing information for every possible circumstance on the application form. Yet, information about the parental benefit window would be important not just for this claimant, but for any claimant seeking benefits when their child is more than 17 weeks old.²⁴ I don't know how easy or difficult it would be for Service Canada to add the parental benefit window to the list of differences between the two options on the application form, to issue prompt decisions to claimants about their parental benefits, or to revise the online system to include the parental benefit window. These are matters for the Commission to decide going forward. They do not change my conclusion that Service Canada's application process misled and misinformed the Claimant in this appeal.

The Claimant's election was invalid

[26] Misinformation from the Commission doesn't allow a decision-maker to ignore the law.²⁵ Even though the application process misled the Claimant, he can't get benefits beyond those permitted by the Act. For example, I can't direct the Commission to pay the Claimant standard

²³ Even in a context (backdating benefits) where there is an obligation to determine one's rights and obligations, that obligation extends only to doing what a reasonable person would have done in the situation: *Canada (Attorney General) v Albrecht*, [1985] 1 F.C. 710 (C.A.).

²⁴ This is when the parental benefit window starts to limit benefit entitlement.

²⁵ *Granger v Canada Employment and Immigration Commission*, 1986 CanLII 3962 (FCA); *Canada (Attorney General) v Shaw*, 2002 FCA 325.

parental benefits after his child's first birthday, because that would be contrary to the 52-week parental benefit window in the Act.

[27] Rather, I have concluded that the effect of the misleading application process is to invalidate the Claimant's May 3, 2019, election of standard parental benefits. To "elect" is to make a deliberate choice between options.²⁶ In my view, someone who has been misled or misinformed about those options has not been able to make a deliberate choice of one over the other.

[28] The Commission's representative takes the position that only explicit misinformation would invalidate an election about parental benefits. This would be the case if a Service Canada agent told the Claimant that he would receive 35 weeks of standard benefits when he could not, or if the application form had wrongly confirmed that 35 weeks of benefits would be paid. While I agree with these examples, the Claimant was equally misinformed through the combination of factors discussed above. He reasonably relied on the information provided, and he reasonably believed (from the application form, the MSCA account, and the lack of any decision to the contrary) that he would receive 35 weeks of benefits by choosing the standard option.

[29] The Commission's representative warns that a finding of invalidity in this case would make the irrevocability provision in the Act meaningless, because any claimant wanting to change their election could say they were misinformed. I don't share the Commission's concern. There is compelling evidence in this case that the Claimant misunderstood his options at the time of the initial election, as a result of Service Canada's application process: The Claimant claimed benefits that were, from the outset, inconsistent with the details he put on the application form.²⁷ He gave his child's birthdate, selected standard benefits of up to 35 weeks at a 55% benefit rate, and claimed 35 weeks of benefits — yet only 3 weeks of standard benefits were possible under

²⁶ See, for example, *Newcorp Properties Ltd. v West Vancouver (District)*, 1989 CanLII 2908 (BCSC).

²⁷ There are similarities between this appeal and two appeals recently decided by the Appeal Division. In those cases, the application forms also contained irreconcilable details, strongly suggesting a misunderstanding of the choice to be made. The decision-makers were able to determine from the facts that those claimants had actually elected a different option. See *Canada Employment Insurance Commission v TB*, 2019 SST 823; *MH v Canada Employment Insurance Commission*, 2019 SST 1385.

the law. It is clear that this was not someone who made a deliberate, informed choice and later decided that he wanted a shorter or longer parental leave.

[30] I have found that the Claimant's election was invalid from the outset. As a result, I am rescinding the decision to pay standard parental benefits to the Claimant. It is open to the Claimant to make a valid election of either standard or extended parental benefits in his claim. I understand from the Commission's representative that, if there is a finding of invalidity, the Commission will accept the Claimant's multiple requests as confirmation of his revised initial election for extended parental benefits and adjust his benefits accordingly.

CONCLUSION

[31] The appeal is allowed. The General Division made an important error of fact about the information on the application form. The Claimant's election of standard parental benefits on May 3, 2019, was not valid. Accordingly, the decision to pay the Claimant standard parental benefits is rescinded. The Claimant may now make his election for parental benefits in his May 3, 2019, claim.

Shirley Netten
Member, Appeal Division

HEARD ON:	February 11, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	M. L., Appellant Angèle Fricker, Representative for the Respondent