



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *TH v Canada Employment Insurance Commission*, 2020 SST 803

Tribunal File Number: GE-20-1053

BETWEEN:

T. H.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Candace R. Salmon

HEARD ON: May 14, 2020

DATE OF DECISION: May 14, 2020

Decision

[1] The appeal is allowed. I find the Claimant did not make an election for parental benefits because he was confused by the contents of the application form and thought he was claiming a separate five-week benefit.

Overview

[2] The Claimant applied for parental employment insurance (EI) benefits. He and his wife applied for standard parental benefits, and he was paid for five weeks of parental benefits. While his wife was receiving maternity benefits, she contacted the Canada Employment Insurance Commission (Commission) to ask to switch from standard to extended parental benefits for both herself and her husband, who is the Claimant in this case. The Commission stated the election could not be changed because the Claimant had already received parental benefits.

[3] The Claimant requested reconsideration of the Commission's decision, arguing, amongst other things, that he did not know that taking five weeks of benefits immediately after his child's birth would result in him not being able to switch from standard to extended parental benefits. The Commission upheld its decision. The Claimant appeals the decision to the Social Security Tribunal (Tribunal). I must decide what type of benefits the Claimant elected to receive, and if it is not what he now seeks, whether that election can be changed.

Preliminary Matters

[4] The hearing was held by videoconference. The Claimant attended with his wife, who was affirmed as a witness to give testimony.

Issue

[5] What type of parental benefits did the Claimant elect to receive?

Analysis

[6] Parental benefits are a special benefit provided under the *Employment Insurance Act*.¹

[7] Prior to March 17, 2019, the law stated that if parents of a child requested standard parental benefits² and wanted to share those benefits, they could divide the weeks to a maximum of 35 weeks.³ This version of the law was in effect from December 3, 2017, until March 16, 2019.⁴

[8] A new version of this section of the *Employment Insurance Act* was announced in the 2018 Canadian federal budget.⁵ It changed the law, so that for parents seeking to share standard parental benefits for a child born on or after March 17, 2019, an additional five weeks of EI benefits could be accessed. For those sharing extended parental benefits, an additional eight weeks are available. The law now specifies that the maximum number of weeks of standard parental benefits that can be paid to a parent remains 35 weeks; however, if the other parent seeks to share parental EI benefits, the maximum is 40 weeks. For extended parental benefits, the maximum number of weeks that can be paid to one parent is 61 weeks; however, if the other parent seeks to share parental EI benefits, the maximum is 69 weeks.⁶

[9] The Claimant's child was born on November 10, 2019. He applied for parental EI benefits on November 25, 2019. He selected to receive standard benefits for five weeks and stated he would be sharing his benefits with the child's other parent.

[10] The application for EI benefits explains the standard EI benefit option as being 55% of the Claimant's weekly insurable earnings up to a maximum amount. It adds that for one parent, up to 35 weeks of EI benefits are payable, but says that if parental EI benefits are shared between two parents, up to a combined total of 40 weeks of benefits are payable.

¹ *Employment Insurance Act*, section 23.

² Parental benefits are paid as either standard or extended. Each option provides a different number of weeks of EI eligibility, at a different rate of pay. The parent who files the first application for parental EI benefits binds the other parent to the type of benefit chosen.

³ *Employment Insurance Act*, subsections 23(4) and 23(4.1).

⁴ See Government of Canada Justice Laws website, *Employment Insurance Act*, which specifically notes previous versions of section 23 and the dates they were in force and effect. This is available at <http://laws.justice.gc.ca>.

⁵ *Budget Implementation Act No. 2*. (S.C. 2018, c. 27), part IV, Division 8, section 304.

⁶ *Employment Insurance Act*, subsection 23(4) and (4.1)

[11] The application also states that extended parental EI benefits are paid at 33% of the Claimant's weekly insurable earnings up to a maximum amount. It adds that for one parent, up to 61 weeks of EI benefits are payable, but says that if parental EI benefits are shared between two parents, up to a combined total of 69 weeks of benefits are payable.

[12] The form also states that if parental benefits are shared, the parental option selected by the parent who first claims benefits binds the other parent to the same selection, and that once parental benefits have been paid on the claim the choice between standard or extended parental benefits is irrevocable.⁷

[13] On the application form, the Claimant reported that his last day worked was November 8, 2019, and he planned to return to work on December 31, 2019. He testified that he chose standard parental benefits because he knew that his wife had chosen the same. On the form, he requested five weeks of EI benefits, even though he planned to be off work for more than five weeks. He testified that he thought the five weeks were a different, new benefit and he did not intend to start standard or extended parental benefits by claiming those five weeks.

[14] The Commission submits the Claimant served the one-week waiting period and was subsequently paid all five weeks of requested parental EI benefits from November 17, 2019, through December 21, 2019. The Claimant confirmed at the hearing that he received the benefits.

[15] The Claimant's wife testified that she contacted the Commission to change from standard to extended parental benefits while in her maternity benefit period. She stated that she thought she was able to change her selection so long as she did so before her maternity benefits converted to parental benefits. She stated that in this conversation, she was informed by the Commission that the election could not be changed because her husband had already received five weeks of parental benefits.

[16] The Claimant filed a request for reconsideration, submitting that he thought he and his wife had the 15-week maternity benefit window to decide whether they wanted to collect standard or extended EI benefits. He stated that his wife had an emergency caesarean section and needed him to stay home and help her. He added that a friend told him the government

⁷ These statements reflect the contents of the *Employment Insurance Act*, subsections 23(1.2) and 23(1.3).

implemented a new program allowing for five extra weeks of parental benefits, so he decided to collect those weeks while supporting his wife while she recovered from surgery. He testified that he thought the five weeks were an additional government program, and did not understand the impact on his family and the parental benefits claim until much later.

[17] After the Commission upheld its decision, the Claimant filed a Notice of Appeal and attached a letter with further explanation of his position. He stated that the Commission's decision does not respect Parliament's intention when it enacted the legislation. He stated the legislation was supposed to "give families more flexibility" and make it "easier for families to balance work and life." He submits that switching to extended parental benefits would do that for his family.

[18] The Commission submits that the law is clear regarding parental benefit elections; it submits that once standard or extended parental benefits are paid, the decision between the two types of benefits is irrevocable. The decision to switch must be made before benefits are paid. The Commission submits the Claimant was aware of this, because it is stated on the application form.

[19] There is no question that the Claimant was paid for five weeks of parental EI benefits, nor that he picked the standard benefits option on the EI application form. However, his statements in the file and at the hearing have led me to question his election.

[20] At the hearing, the Claimant reiterated that he thought he had the 15-week maternity benefit period to decide whether to receive standard or extended parental benefits. He stated that he thought the additional five weeks provided by the government were a separate, new benefit, and did not understand that they were part of the standard shared parental benefit period. I note that the application form states standard benefits can be paid for 35 or 40 weeks, depending on if they are shared, but it does not specifically explain the extra five weeks or extra 8 weeks if extended benefits are chosen.

[21] The Claimant testified that he was "thoroughly confused" by the Commission's website. He stated that he got most of his information from a newspaper article, but did not contact the Commission because he did not realize that he was making a mistake. The witness stated she and

the Claimant, “did not know what we did not know,” and said they had spoken to the Commission three times on other issues and would have asked if they knew or suspected they were making a mistake.

[22] The witness stated she and the Claimant chose to receive standard parental benefits because they thought they had 15 weeks to make the decision and were just picking a box on the form that did not bind them to a benefit option. At the time they filed the application they were also dealing with an unexpected surgery and birth complication, so she submitted they were not as thorough in researching the additional five weeks of benefits as they otherwise would have been. She also stated that she contacted the Commission to change from standard to extended benefits while in her maternity benefits period, at approximately week 12. She submitted she thought she would be able to change the type of benefits because she was still in the maternity window.

[23] The Claimant submitted that EI application forms are supposed to be filled out by “common people” but he found the documents were difficult to understand. The witness stated she understands the Commission’s role as a gatekeeper to EI benefits, but submits its decision does not reflect the priorities of real people, or show compassion and flexibility for real people. She submits that Parliament did not intend to penalize families for having to make decision under duress.

[24] The courts have not interpreted the meaning of “election” for the purpose of section 23(1.1) or 23(1.2) of the *Employment Insurance Act*. While not precedent, I am persuaded by certain decisions of this Tribunal’s Appeal Division (AD) that have held that a claimant’s choice of standard or extended benefits on the application form does not necessarily represent the claimant’s election. While Parliament explicitly made the election of a type of parental benefits irrevocable,⁸ it did not define “election,” or state that a claimant’s selection on the application form must be conclusively deemed to be his election.

[25] An AD decision considered Parliament’s reasoning behind the irrevocability of the election and found that, “the purpose of making the election irrevocable is to prevent claimants from changing their minds as their circumstances change and they reassess which type of benefit

⁸ *Employment Insurance Act*, subsection 23(1.2)

would be most advantageous. Its purpose is not to punish claimants for provable slips or objectively reasonable misunderstandings at the time that they complete their applications.”⁹

[26] The Claimant submits that he chose standard parental benefits because he knew his wife had made that selection, and stated that he thought the decision was changeable while in the 15-week maternity benefit period. He also stated that he knew five additional weeks were available, but did not understand that those weeks were the five weeks described on the application form when it stated standard parental benefits could be shared for “up to a combined total of 40 weeks.” I note the form does not specifically state that five additional weeks of standard EI benefits, or eight additional weeks of extended benefits, are available if parental benefits are shared. The numbers of 35 and 40 are listed for standard benefits, and 61 and 69 for extended benefits, but the number of additional weeks is not listed.

[27] Additionally, the form states that once parental benefits have been paid, the choice between standard and extended parental benefits is irrevocable, but it does not explain that maternity benefits are a separate 15 weeks period or that the election can be changed during that time only if no parental benefits are claimed.

[28] In this case, the Claimant completed the application for parental EI benefits 15 days after his child was born. His wife was recovering from surgery, and he testified that she needed him to help with everything because she could not lift even the baby for a number of weeks. When he completed the application form, he selected standard because it was what his wife had selected and he believed he had the maternity benefit period to change that selection. He submits that he did not understand that the additional five weeks of parental benefits he read about in newspapers was part of the parental benefits structure, and the application form did not make it clear that if he claimed those five weeks he would not be able to change his election in the future.

[29] The Claimant and his wife also stated that the Commission did not reference the correct areas of the law when making its argument, because it did not reference a section addressing the additional weeks of benefits, either five or eight, recently added to shared parental benefits.

⁹ *Evangelista v. Canada Employment Insurance Commission*, AD-20-3, paragraph 11

While I find the Claimant's submission is without legal merit,¹⁰ I note the argument because it shows that to him this case is about the additional five weeks of EI benefits allowable under shared standard parental EI benefits. The Claimant thought those five weeks were a separate program. I find he did not understand that those five weeks were part of the shared parental benefits.

[30] I recognize that the Claimant chose to receive standard EI benefits on the application form, and that he and his wife did not decide to claim extended benefits until after their child was born and they realized that it would be the better choice for their family. The Claimant made a request for reconsideration on January 31, 2020, received by the Commission on February 11, 2020, which is likely within his wife's 15-week maternity benefit period.¹¹ Even if it is not, his wife testified that she first inquired about changing from standard to extended benefits while in approximately week 12 of her maternity benefit period. I find this means the Claimant intended to elect extended parental benefits while still in his wife's maternity benefits period. The Claimant thought that he could switch from standard to extended EI benefits while in that window.

[31] I also note that the Claimant finished work on November 8, 2019, but did not plan to return to work until December 31, 2019. This is more than five weeks. The Claimant testified that he only claimed five weeks on the application form because he only intended to claim the additional five weeks benefit, not standard or extended benefits. Further, the Claimant testified that the form itself is confusing and includes irrelevant information. For example, he stated that the application included information about fishing benefits and made statements about qualifying for different benefits but then listed exemptions and exceptions. He stated that when he read through the parental benefits section, he thought it was just a summary of the benefits he could receive under the parental benefits program, the same as the summary of fishing benefits he read earlier in the application. He thought he was claiming a new five-week entitlement, not an

¹⁰ The case is about the election of standard or parental EI benefits, which is addressed by subsections 23(1) and 23(1.1) of the *Employment Insurance Act*. Irrevocability is included at subsection 23(1.2). The fact that the Commission did not highlight subsection 23(4), dealing with the division of benefits and maximum weeks of EI benefits payable to claimants sharing parental benefits, is not determinative.

¹¹ Maternity benefits can start up to 12 weeks before the expected date of delivery, based on *Employment Insurance Act* subsection 22(2). The Claimant stated that he did not believe his wife's maternity period ended until February 2020.

additional five weeks of standard benefits that would trigger irrevocability of the parental benefits election.

[32] The Claimant argued that Parliament intended to make lives easier for new parents when it enacted the extra weeks of EI benefits for shared parental benefit situations. While that may be true, it also intended to make elections irrevocable. In this case, on the balance of probabilities, I find the Claimant did not elect to receive standard benefits. He selected standard benefits on the form because his wife had picked that option and he thought he was confirming the selection on a summary page of the EI application but applying for a separate five week benefit. He did not understand that the additional five weeks of benefits were actually five weeks of standard benefits that would make the election of standard versus extended irrevocable.

[33] I find the error here lay with the application form, because it is not clear. The Claimant chose to receive only five weeks of parental EI benefits because he thought new parents were entitled to five additional weeks. He thought that he would receive those benefits, then he and his wife could decide whether to use standard or extended parental benefits closer to the end of her maternity benefit period. Given the confusion caused by the form, I find the Claimant did not make an election.

[34] While his wife's case is not before me, I note that she testified that she also did not intend for the standard benefits election to be binding and contacted the Commission before the end of her maternity benefits period to request a change to extended benefits. While I cannot direct the Commission relating to her file, I encourage it to consider the spirit of this decision and the witness's statements and amend her file accordingly.

[35] The Claimant and his wife stated that they understood that if they were successful in this appeal, both of their parental benefit periods would be recalculated. They submitted that they knew that they would certainly have been overpaid because they have been receiving standard parental benefits at 55% of their weekly insurable earnings instead of extended parental benefits at only 33% of their weekly insurable earnings.

Conclusion

[36] The appeal is allowed.

Candace R. Salmon

Member, General Division - Employment Insurance Section

HEARD ON:	May 14, 2020
METHOD OF PROCEEDING:	Videoconference
APPEARANCES:	T. H., Appellant