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

Citation: *Canada Employment Insurance Commission v TH*, 2020 SST 800

Tribunal File Number: AD-20-662

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

T. H.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Shirley Netten

DATE OF DECISION: September 22, 2020

Canada

DECISION AND REASONS

Decision

[1] The appeal is allowed. T. H. (Claimant) elected standard parental benefits. He could not change that election after December 17, 2019.

Overview

[2] The Claimant applied for standard parental benefits two weeks after his daughter was born. He requested five weeks of benefits, and received these for the period November 17 to December 21, 2019. His wife had also applied for standard parental benefits, which would follow her maternity benefits. In January 2020, the Claimant asked to switch from standard to extended parental benefits. Service Canada[1] refused this request on the basis that the Claimant could not change his election of standard parental benefits after these benefits had been paid.

[3] On appeal, the Social Security Tribunal's General Division allowed the Claimant's appeal. The General Division found that the Claimant did not understand that his five weeks of benefits were part of the shared parental benefits that would make his choice of standard benefits irrevocable. The General Division laid the blame on the application form, describing it as unclear and causing confusion. The General Division concluded that the Claimant had not made any election between standard and extended benefits in his initial application. This would allow the Claimant to make his choice anew.

[4] I am allowing the Commission's appeal. The General Division made an error of fact. I have made a new decision, finding that the Claimant elected standard parental benefits. He could not change this election after he started to receive parental benefits.

Issues

[5] The issues in this appeal are:

1. Did the General Division base its decision about the Claimant's election on an error of fact?

[1] On behalf of the Canada Employment Insurance Commission (Commission)

2. If so, how should that error be fixed?

1. Did the General Division base its decision on an error of fact?

[6] One of the grounds of appeal to the Appeal Division is that the General Division based its decision on an erroneous finding of fact "made in a perverse or capricious manner or without regard for the material before it."[2]

The General Division's finding of fact was made without regard to the evidence

[7] The General Division had a copy of the Claimant's application form.[3] On that form, the Claimant:

- Selected "Parental benefits" in response to the question "What type of benefits are you applying for?";
- Provided his employment information; and
- Confirmed that he was a parent claiming benefits in respect of a child born on November 10, 2019.

[8] The next section of the form, titled Parental Information, included the following details about parental benefits:

> 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.

[2] *Department of Employment and Social Development Act* (DESDA), s 58(1)(c)
[3] GD3-3 to GD3-20

> 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.
>
> 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 on the claim, the choice between standard and extended parental benefits is irrevocable.

[9] The Claimant then:

- Selected "Standard option" in response to the question "Select the type of parental benefits you are applying for"; and
- Selected "5" in response to the question "How many weeks do you wish to claim?"

[10] The General Division decided that 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."[4] The General Division stated that "the error here lay with the application form, because it is not clear."[5]

[11] The following were the General Division's first two examples of problems with the application form:

> 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.[6]

[4] At paragraph 1
[5] At paragraph 33
[6] At paragraph 20

> 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 is (sic) 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.[7]

[12] The application form clearly states that, under the standard option, 35 weeks are payable to one parent and a combined total of 40 weeks are payable if shared. It is obvious that this gives a couple an extra five weeks of standard parental benefits; I see no lack of clarity here. Significantly, the fact that the form did not separately mention another five weeks of benefits contradicts, rather than supports, a finding that the form caused the Claimant to believe that he was claiming a different type of 5-week benefit.

[13] The following was the General Division's remaining example of how the form confused the Claimant:

> 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.[8]

[14] The application form does state that the election is irrevocable once parental benefits have been paid. I see nothing inaccurate, misleading or confusing about this statement. It would be redundant to repeat that the election can be changed during the maternity period only if no parental benefits have been paid. And, any uncertainty about whether maternity benefits were included in parental benefits would have led to an assumption that irrevocability began earlier, not later. In any case, this statement is about when an election can be changed. It is not about how an election is made, or the difference between the standard and extended options. This statement would not cause a claimant to mistakenly select the wrong type of parental benefit.

[15] At the hearing, the Claimant and his wife stated that the application form wasn't clear, but they were unable to point to anything specific on the form that led to their confusion. Rather, it appears that they relied upon media information about the additional weeks newly available in

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[7] At paragraph 26
[8] At paragraph 27

2019; this somehow led them to believe that the five weeks claimed by the Claimant were neither standard nor extended parental benefits, and that they could change their election at any time during the maternity benefits period.

[16] The evidence before the General Division contradicts a finding that the application form was unclear and caused confusion about the Claimant's parental benefits election. The application form required this Claimant to make only three selections, for which his responses were "Parental benefits", "Standard option", and "5" weeks. The Claimant did not select any other type of employment insurance benefit, nor did the form mention a third option for parental benefits. Although the Claimant says that he did not intend to begin standard parental benefits by claiming the five weeks, this was the unavoidable result based upon his application form. The General Division's finding that the form caused the Claimant to believe that he was not making an election or that he was claiming a type of benefit other than standard parental benefits ignores the contents of the application form and the Claimant's responses.

[17] Furthermore, the application form clearly laid out the differences between standard and extended benefits that were applicable to the Claimant's choice. While the Claimant and his wife may have been confused about the effect of their election, this was not the fault of the application form. The General Division based its decision on an erroneous finding of fact about the application form and its impact on the Claimant's election; that finding was unsupported by the evidence.

2. How should the error be fixed?

[18] Because the General Division made an error of fact, I can give the decision that the General Division should have given.[9] In doing so, I can decide any question of law or fact to dispose of this appeal.[10]

[19] The underlying facts of this appeal are not in dispute, and no further evidence is needed to resolve this appeal. I will decide the issue that was appealed to the General Division: Did the Claimant elect standard parental benefits, and can that election be changed?

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[9] DESDA, s 59(1).
[10] DESDA, ss 64(1), 64(2)(a).

The parental benefits election

[20] Parental benefits are available for a shorter period at the regular benefit rate, and for a longer period at a lower benefit rate.[11] As set out in the *Employment Insurance Act* (Act), claimants must make a choice, or an "election", when claiming parental benefits:

> **23(1.1)** In a claim for benefits made under this section, a claimant shall elect the maximum number of weeks referred to in either subparagraph 12(3)(b)(i) or (ii) for which benefits may be paid.

[21] The maximum number of weeks in section 12(3)(b)(i) and (ii) are 35 weeks and 61 weeks. Section 12(4) increases these maximums to 40 weeks and 69 weeks, respectively, when the weeks are shared by two parents. As we have seen, the Commission's application form describes the two options as the "Standard option" and "Extended option", and requires claimants to choose one of these two options.

[22] Under the Act, the election cannot be changed once parental benefits are paid, and both parents must make the same election:

> **23(1.2)** The election is irrevocable once benefits are paid under this section or under section 152.05 in respect of the same child or children.
>
> **(1.3)** If two major attachment claimants each make a claim for benefits under this section […] in respect of the same child or children, the election made […] by the first claimant […] is binding on both claimants [...] .

Tribunal Decisions

[23] A series of Tribunal decisions have held that the selection of standard or extended parental benefits, expressed in an option button on the application form, does not necessarily reflect a claimant's election under section 23(1.1). With supportive evidence, a number of decisions have found that a claimant made a different election from the one selected on the form, or that a claimant did not make a valid election, from the outset.[12]

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[11] *Employment Insurance Act* (Act), ss 12, 14

[12] In other cases, the evidence has not been persuasive. See, for example, *C.D. v Canada Employment Insurance Commission*, 2020 SST 759.

[24] To date, this approach has been taken in three fact situations:[13]

- When someone other than the claimant completes the application form and records the election incorrectly;[14]
- When a mother selects extended benefits despite planning only a year's maternity and parental leave, because this appears to be the only option that allows her to choose enough weeks. In this situation, the mother has included her maternity benefits in the number of weeks selected;[15] and
- When a parent selects standard benefits despite being ineligible for the benefits as claimed (because of the child's approaching first birthday), and the parent was misled about the benefit windows for standard and extended benefits.[16]

[25] What all of these decisions have in common is this: there is evidence, usually contemporaneous, to support a finding that at the time of the application the claimant did not or could not have meant to elect the option that they selected on the form. In the latter two scenarios, the parent has typically given irreconcilable responses to relevant questions on the application form (such as the return to work date or the age of the child, contradicting the option selected).

[26] The Commission's representative argues that such decisions are inconsistent with the legislation. I disagree.

[27] First, the fact that a claim for parental benefits must be made using the Commission's form, following the Commission's instructions,[17] does not prevent the Commission or the Tribunal from determining what election was actually made on that form, or if it was valid.

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[13] I have not included any decisions that are presently under appeal.
[14] *M.C. v Canada Employment Insurance Commission*, 2019 SST 666; *Canada Employment Insurance Commission* v *J.H.*, 2020 SST 483
[15] *Canada Employment Insurance Commission v T.B.*, 2019 SST 823; *M.H. v Canada Employment Insurance Commission*, 2019 SST 1385; *V.V. v Canada Employment Insurance Commission*, 2020 SST 274
[16] *M.L. v Canada Employment Insurance Commission*, 2020 SST 255; *R.C. v Canada Employment Insurance Commission*, 2020 SST 390
[17] Act, s 50(2)

[28] Secondly, these decisions have not overridden the clear prohibition on changing an election after parental benefits have been paid. The effective date of the Tribunal's findings has been the date of the application, not a date after parental benefits were paid.

[29] Thirdly, the Commission and the Tribunal do have the authority to determine what election was made and if it was valid. Every time the Commission pays parental benefits in accordance with the selection on the application form, it implicitly decides what the claimant actually elected under section 23(1.1). The Commission can vary these decisions on reconsideration, as can the Tribunal on appeal.[18] To the extent that the Tribunal's approach may "frustrate the principle of certainty,"[19] such uncertainty is inherent in any recourse process in which initial decisions may be changed retroactively on appeal.

[30] I have not gone into further detail on these points because I agree with the Commission's representative's alternative argument: the facts of this appeal are different from those in the Tribunal decisions described above, and they lead to a different result.

This Claimant elected standard parental benefits

[31] The Claimant selected the standard option on his application form. Despite this, I must consider whether the Claimant did not mean to, or could not have meant to, elect the standard option at that time.

[32] The contemporaneous evidence in this appeal supports a finding that the Claimant meant to make an election, and meant to elect standard parental benefits, when he applied in November 2019:

- The Claimant selected parental benefits and the standard option, in response to mandatory questions on the application form;
- He did not misclick;
- The other details on his application form were compatible with an election of standard parental benefits;

[18] Act, ss 112, 113, DESDA, ss 54, 59
[19] Commission's submissions, at AD7-13

- There was no communication with Service Canada to the contrary during the application process;
- Service Canada had not misled or misinformed the Claimant about the differences between standard and extended benefits that applied in his circumstances;
- The Claimant was eligible for the five weeks of standard parental benefits that he claimed; and
- His wife had made the same selection on her application form.

[33] Moreover, the couple confirmed at their General Division hearing, and in writing, that they had decided only later that extended parental benefits would be a better option for their family. The Claimant's wife first contacted Service Canada to make this change on or around January 28, 2020.[20] On January 31, 2020, in support of his request to switch to the extended option, the Claimant wrote the following:[21]

> Prior to having our daughter […] my wife and I decided to go with the 12-month standard parental leave, based on a calculation of lost income with my wife taking the full leave. […]
>
> We were informed by a friend about the additional five-week leave, and it seemed like a brilliant decision, considering my wife's condition. We decided to collect the five-week additional parental leave for myself right at the beginning of the maternity leave – albeit without fully understanding the consequences. […] [T]he implications of taking those five weeks with respect to EI (i.e. losing the ability to change our minds about the length of parental leave) were not top of mind, otherwise we would have investigated further. […]
>
> Now that we've had a couple months to adjust and get to know our baby, we are realizing that the extended leave is what is best for our family.

[34] The evidence in this appeal all points in the same direction: the Claimant selected and validly elected standard parental benefits in November 2019.

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[20] GD3-25
[21] GD3-27

[35] I recognize that the Claimant and his wife did not realize that taking five weeks of parental benefits would mean that they could not change their election during the maternity benefits period. Their misunderstanding about when the election would become irrevocable was not the fault of the application form and, in any case, it is neutral as between standard and extended benefits. This misunderstanding does not alter or invalidate the Claimant's election. On the evidence, I can only conclude that the Claimant meant to elect the standard option in November 2019, and changed his mind at a later date.

The election could not be changed after December 17, 2019

[36] Having confirmed that the Claimant did elect standard parental benefits when he applied, I must also confirm that this election could not be changed as requested in January 2020.

[37] Section 23(1.2) of the Act is clear. The Claimant's election of standard parental benefits could not be changed once parental benefits had been paid. Parental benefits were first paid on December 17, 2019.[22] There is no suggestion that the Claimant tried to change the election in the few weeks between the application date and the payment date. When the couple asked to switch to extended benefits in January 2020, it was unfortunately too late.

[38] The Commission is not obliged to provide a reminder to claimants of an upcoming irrevocability date. Nevertheless, the Commission is encouraged to ensure that claimants' accounts promptly set out their parental benefit election, the weeks for which maternity and parental benefits will be paid, the benefit rate(s), and when the election will be irrevocable.

[39] The Claimant and his wife point out that the irrevocability provision means that there is not enough flexibility for families like theirs, when circumstances or priorities change. Parliament presumably sought to balance flexibility and certainty by allowing parents to change their election, but only for a limited time. When additional weeks were recently introduced for shared benefits, Parliament may not have considered that this would lead to an overlap of maternity and parental benefits in more cases, potentially reducing the change period to nil. Only Parliament can amend the Act to provide additional flexibility for parents. Neither the Commission nor the Tribunal has the discretion to ignore or override the irrevocability provision.

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[22] GD3-24

[40] As was discussed at the hearing of this appeal, the standard and extended options typically provide claimants with a similar total amount of benefits, over different lengths of time. Electing the standard option for parental benefits does not prevent a parent from taking parental leave over an extended period. The Act only governs parental benefits, whereas provincial legislation (in this case, Ontario's *Employment Standards Act*) governs parental leave entitlements.

CONCLUSION

[41] The Commission's appeal is allowed. The Claimant elected standard parental benefits. He could not change that election after December 17, 2019.

Shirley Netten
Member, Appeal Division

HEARD ON:	August 21, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	H. P., Representative for the Appellant T. H., Respondent Kimberly Johnston, Representative for the Respondent (Jointly with the Respondent)