



Citation: *MN v Canada Employment Insurance Commission*, 2021 SST 315

**Social Security Tribunal of Canada  
General Division – Employment Insurance Section**

## Decision

**Appellant:** M. N.  
**Representative:** A. M.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission  
reconsideration decision (415101) dated March 24, 2021  
(issued by Service Canada)

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**Tribunal member:** Maria Marchese

**Type of hearing:** Videoconference  
**Hearing date:** May 11, 2021  
**Hearing participants:** Appellant  
Appellant's representative

**Decision date:** May 23, 2021  
**File number:** GE-21-676

## Decision

[1] The appeal is allowed on the type of parental Employment Insurance (EI) benefits the Appellant selected. This means the Appellant elected to receive extended parental EI benefits.

[2] The appeal is dismissed on the issue of the date the Appellant's claim was established, and whether the Commission correctly calculated the Appellant's EI benefit rate. This means that the Commission correctly decided that July 5, 2020 was the correct benefit commencement date.

## Overview

[3] The Appellant applied for EI benefits on July 5, 2021, requesting maternity benefits immediately followed by standard EI parental benefits. The Commission established a benefit commencement date of July 5, 2020.

[4] The Commission did not allow the Appellant's initial application for benefits because she did not have sufficient hours of employment due to the mandatory government shutdown of her workplace due to COVID. The Appellant appealed the Commission's decision to the Social Security Tribunal of Canada (SST).

[5] On November 4, 2020 the SST allowed the Appellant's appeal. The Commission began processing the Appellant's EI maternity and parental benefits on November 17, 2020, retroactive to July 5, 2020.

[6] On receiving her first EI benefits, the Appellant called the Commission questioning her weekly benefit rate, and asking to have her standard EI parental benefits converted to extended EI parental benefits.

[7] The Appellant also requested that the Commission reconsider her benefit rate as she felt she was entitled to receive the new \$500 weekly EI Emergency Response Benefit (EI ERB), which came into effect on September 27, 2020. The Appellant felt she should receive the higher EI ERB rate because her application for benefits was allowed after the date the new EI ERB came into effect.

[8] The Commission reconsidered the Appellant's request but maintained its decisions because it felt the Appellant's benefit rate was properly calculated based on 55% of her earnings because her benefit period began July 5, 2020, prior to the start date of the EI ERB benefit. The Commission also decided that the Appellant could not switch from standard to extended EI parental benefits because the election is irrevocable once payments begin.

[9] The Appellant appealed to the SST stating she should be paid the higher EI ERB rate and that she made a mistake in selecting standard EI parental benefits and requested her parental benefit type be switched to extended EI parental benefits.

## **Matters I need to consider**

[10] At the hearing, the Appellant's husband clarified that he would be both representing the Appellant and would be a witness at the hearing.

[11] A review of the file supported the spouse's statement, including written consent by the Appellant for her husband to represent her at the SST hearing. Both the Appellant and her husband were sworn in.

## **Issue 1**

[12] I have to decide if the Appellant's election of standard EI parental benefits is valid. If it is not valid, can the Appellant elect extended EI parental benefits?

## **Issue 2**

[13] I also have to decide if the Commission correctly determined the Appellant's benefit commencement period and correctly calculated the Appellant's benefit rate.

## **Analysis**

[14] Parental benefits are intended to support you while you take time off work to care for your newborn child.<sup>1</sup> You must choose (or elect) the maximum number of weeks,

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<sup>1</sup> Section 23(1) of the *Employment Insurance Act* (Act).

either 35 or 61, that you can be paid parental benefits.<sup>2</sup> Parents may share parental benefits.<sup>3</sup> Standard EI parental benefits are paid to a maximum of 35 weeks, at the regular benefit rate of 55%. Extended parental benefits are paid to a maximum 61 weeks, at a reduced benefit rate of 33%.<sup>4</sup>

[15] Your choice of the parental benefit term cannot be changed once parental benefits are paid.<sup>5</sup>

**Issue 1: Is the Appellant's election of standard EI parental benefits valid? And, if not, can the Appellant elect extended EI parental benefits?**

[16] I find that the Appellant's election of standard EI parental benefits is not valid.

[17] The Appellant applied online for both maternity and parental benefits on July 5, 2020. During the application process, the Appellant was asked to choose between standard or extended EI parental benefits and she selected standard benefits of 25 weeks.

[18] At the hearing, both the Appellant and her representative agreed that she applied on July 5, 2020 and that she selected the standard EI parental option. The Appellant also stated that she selected only 25 weeks of parental benefits because it was always her intention to split the parental EI benefits with her husband.

[19] The Appellant's spouse stated that this was the first time the Appellant had applied for EI maternity and parental benefits and, with the initial denial of her claim, there was a lot of confusion about what was happening with her claim.

[20] The Appellant's husband testified that, although the Appellant applied for EI benefits on July 5, 2020, her application was not allowed at first by the Commission,

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<sup>2</sup> The requirement for the claimant to elect the maximum number of weeks for which parental benefits may be paid is found in section 23(1.1) of the Act. The maximum number of weeks for which parental benefits may be paid is found in section 12(3)(b) of the Act, based on the choice the claimant makes under section 23.

<sup>3</sup> Subsection 23(1) of the Act.

<sup>4</sup> Subsection 23(1.1) and subparagraphs 12(3)(b)(i) and (ii) of the Act.

<sup>5</sup> Subsection 23(1.2) of the Act.

and only allowed on November 4, 2020 on appeal to the SST. Once allowed by the SST, the Appellant's benefits were processed on November 17, 2020, at which time they were processed retroactive to the start of the Appellant's claim on July 5, 2020.<sup>6</sup>

[21] On beginning to receive the EI parental benefits, about 1 week after the November 17, 2020 benefit processing date, the Appellant finally logged into her Service Canada account and realized the type of EI parental benefits were not correct. The Appellant's spouse said that prior to the issuance of the first payment on November 17, 2020 they would not have known the benefit rate or the parental benefit type the Appellant was receiving.

[22] The Appellant's spouse stated that they immediately tried contacting the Commission as soon as they realized the error, in November, but the lines were constantly busy, or they were put on indefinite hold. The first time the spouse recalls speaking with the Commission was on December 9, 2020.

[23] At the hearing, the Appellant's spouse also testified that the application is complicated to complete and once you move to the next page of the application it is difficult to go back and review what information was provided, or to make any changes.

[24] The Commission says that the law prohibits the changing of an election once parental benefits are paid.<sup>7</sup> It says that the election could not be amended, and the benefit type changed from standard to extended, after the first benefit payment was made, which happened on November 17, 2020.

[25] The Appellant's Record of Employment states that the expected recall date to return to work was "unknown".<sup>8</sup>

[26] On the Appellant's application for EI benefits, she confirmed that she would be returning to work with her employer, but that she did not know the date of her return to work.<sup>9</sup>

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<sup>6</sup> GD3-34 to GD3-35.

<sup>7</sup> Section 23(1.2) of the Act.

<sup>8</sup> GD3-24.

[27] I find that the Appellant's election for standard parental benefits is invalid. I find that, on a balance of probabilities, she intended to select extended EI parental benefits but mistakenly selected standard parental benefits.<sup>10</sup>

[28] In reviewing the Appellant's application for benefits, the Appellant provided no indication of a return work date. The testimony at the hearing was that the Appellant always intended to stay off longer and this statement is further supported by the Record of Employment that, too, does not include any return to work date.

[29] Furthermore, I found the testimony at the hearing to be credible as it was provided in a forthright manner, and consistent with the information which the Appellant provided in her original application for benefits, and the conversations the Appellant's spouse had with the Commission.

[30] I am further convinced it was the Appellant's intention to select extended EI parental benefits as she and her spouse immediately contacted the Commission when they realized the wrong type of parental benefits had been issued. Immediately on learning, in November 2020, that standard and not extended EI parental benefits were being paid, the Appellant's spouse tried contacting the Commission to advise of the error and to make the correction.

[31] I find that the Appellant would not have been aware of the EI parental benefit type prior to receiving the retroactive payments issued on November 17, 2020, as the Commission issued maternity and parental benefits all at the same time on November 17, 2020. While the Commission submits that the election became irrevocable upon the first payment of benefits on November 17, 2020, the Commission actually issued both the maternity and two weeks' worth of parental benefits on November 17, 2020.

[32] I am guided by a recent decision of the Appeals Branch of the SST.<sup>11</sup> The issue was not whether an election is irrevocable as prescribed by the legislation, but whether

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<sup>9</sup> GD3-6.

<sup>10</sup> I make this finding based on a balance of probabilities. Meaning that it is more likely than not.

<sup>11</sup> *Canada Employment Insurance Commission v T. B.* 2019 SST 823.

the Appellant made an election consistent with one option or the other regardless of which button was selected.

[33] I find that when the Appellant made her initial claim she provided information consistent with electing the extended parental option. While she clicked the standard benefit option, all of the other information she provided was consistent with electing the extended parental benefit option.

[34] I therefore decide that the Appellant's election for standard parental benefits is invalid. The Appellant truly elected the extended benefit option for parental benefits, and her claim should be treated as such.

## **Issue 2: Did the Commission correctly determine the Appellant's benefit commencement period and benefit rate?**

[35] The law says that a benefit period begins on the Sunday of the week in which the interruption of earnings occurs or the Sunday of the week in which the initial claim for benefits is made, whichever is later.<sup>12</sup>

[36] As a result of the Covid-19 pandemic, a temporary change was made in the law to allow a minimum weekly benefit rate of \$500 for maternity and parental benefit claimants whose benefit period started on or after September 27, 2020.<sup>13</sup>

[37] I find that the Commission correctly established the Appellant's benefit period beginning July 5, 2020.

[38] The Appellant's last day of work was December 26, 2019. She did not apply for EI maternity and parental benefits until July 5, 2020. The Commission established a benefit period for the Appellant effective July 5, 2020.

[39] The Commission maintained that the Appellant's benefit rate was calculated correctly because it was based on 55% of her earnings based on her benefit period start date which was prior to the effective date of the September 27, 2020 EI ERB changes.

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<sup>12</sup> Section 10(1) of the Act.

<sup>13</sup> Section 153.192 of the Act.

[40] At the hearing, the Appellant's representative confirmed that the Appellant was not disputing the earnings information used by the Commission to calculate her benefit rate.

[41] The Commission processed the Appellant's maternity benefits on November 17, 2020, retroactive to July 5, 2020. After serving a one-week waiting period, the Appellant received 15 weeks of EI maternity benefits from July 11, 2020 to October 24, 2020.

[42] According to the Appellant's representative, the Appellant should be entitled to receive the EI ERB because her claim was not allowed until after the date the higher EI ERB was introduced. Furthermore, not only was the Appellant's claim approved for benefits after September 27, 2020, but the EI benefits were not issued to the Appellant until November 17, 2020, which date too fell after the effective date of the EI ERB. The Appellant's claim was approved after the new EI ERB provisions became effective so the Appellant's benefit rate should be based on the new rules and the \$500 weekly benefit rate should apply.

[43] I find that the Commission was correct in establishing July 5, 2020 as the start of the benefit period as this date is the later of the Appellant's separation from her employer or the Sunday of the week in which the initial claim for benefits was made.

[44] I find that the Appellant's basis for requesting a \$500 weekly benefit rate is based on her expectation that her benefit rate should be based on the EI ERB rate of \$500 because of the date when her application for benefits was approved: November 2020.

[45] I find that since the Appellant's benefit period was established before the EI ERB came into effect, she does not qualify for the \$500 EI ERB rate.



## **Conclusion**

[46] On the issue of the election of parental benefits, the Appellant truly elected the extended benefit option for parental benefits, and her claim should be treated as such. This means that the appeal is allowed and the Appellant can elect extended EI parental benefits.

[47] On the issue of whether the Commission correctly determined the date the Appellant's claim was established, the appeal is dismissed. This means the Appellant does not meet the rules established for the EI ERB.

Maria Marchese  
Member, General Division – Employment Insurance Section