Citation: *NM v Canada Employment Insurance Commission*, 2021 SST 499

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant: N. M.

Respondent: Canada Employment Insurance Commission
Representative: Jordan Fine

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (407358) dated September 24, 2020 (issued by Service Canada)

Tribunal member: Charlotte McQuade

Type of hearing: Videoconference
Hearing date: June 24, 2021
Hearing participants: Appellant
Respondent's representative

Decision date: August 10, 2021
File number: GE-20-1964

Decision

[1] The appeal is dismissed. This means that I agree with the Canada Employment Insurance Commission (the “Commission”).

[2] N. M. (the “Claimant”) is only entitled to 22 weeks of the 35 weeks of standard parental benefits he claimed due to the closure of the standard parental benefit window on January 2, 2021.

[3] The Claimant has not proven that subsection 23(2) of the *Employment Insurance Act* (Act) (the standard parental benefit window provision) violates his equality rights under section 15(1) of the Charter.[1]

Overview

[4] Since December 2017, claimants must choose, or “elect,” one of two options for parental benefits. [2] They must chose between standard and extended parental benefits. Standard parental benefits are paid to an individual claimant for up to 35 weeks at a benefit rate of 55% of weekly insurable earnings up to a maximum amount.[3] Extended parental benefits are paid to an individual claimant for up to 61 weeks of benefits at a benefit rate of 33% of weekly insurable earnings up to a maximum amount. [4]

[5] There are different windows in which each of the two types of parental benefits are payable. The parental benefit window for both types of parental benefits begins the week in which the child is born or placed for adoption.[5] The window for standard parental benefits ends 52 weeks after the week in which the child is born or placed for adoption. [6] The window for extended parental benefits is 26 weeks longer.[7] It is this difference in window periods that is the subject of this appeal.

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[1] *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being *Schedule B* to the *Canada Act 1982 (UK),* c 11.
[2] See subsection 23(1.1) of the *Employment Insurance Act* (Act)
[3] See subparagraph 12(3)(b)(i) of the Act.
[4] See subparagraph 12(3)(b)(ii) of the Act.
[5] See paragraph 23(2)(a) of the Act.
[6] See paragraph 23(2)(b) of the Act.
[7] See subsection 23(3.21) of the Act.

[6] The Claimant's spouse gave birth to their child on December 29, 2019. The Claimant's last day of work was July 25, 2020. He applied for thirty-five weeks of standard parental benefits on July 26, 2020.

[7] The Canada Employment Insurance Commission (the "Commission") decided the Claimant was only entitled to 22 of the 35 weeks he had claimed, because the standard parental benefit window closed on January 2, 2021, 52 weeks after the birth.

[8] The Claimant appeals the Commission's decision to the Tribunal. He says the Commission's website does not make clear that there is a different window period for the two different options of parental benefits. He says he was misled by the website so he could not make an informed decision. He understood that he had 78 weeks in which to collect the 35 weeks of standard parental benefits he was seeking. He says if the website had been clear, he would have made a different decision about when to take his parental leave.

[9] The Claimant also argues that provision in the law that provides for the 52-week window for standard parental benefits (subsection 23(2) of the Act) infringes his equality rights under subsection 15(1) of the Charter. He says he has not received equal benefit of the law because parents who chose extended parental benefits have a 78-week window in which to collect their parental benefits, whereas he, as a claimant of standard parental benefits only had a 52-week window. The Claimant says the shorter window period adversely impacts the care a claimant of standard parental benefits can provide for their child. He argues further that the window provision disproportionately affects lower income parents. The Claimant says that window provision should not be applied to him for those reasons.

[10] I have decided, for the reasons set out below, the Claimant is only entitled to 22 weeks of standard parental benefits because the standard parental benefit window closed on January 2, 2021. I have also decided that subsection 23(2) of the Act does not infringe the Claimant's equality rights under section 15(1) of the Charter.

Issues

[11] I have to decide the following issues in this case:

1. Does the standard parental benefit window limit the Claimant to 22 of the 35 weeks of standard parental benefits he claimed?

2. If so, has the Claimant proven that subsection 23(2) of the Act infringes his equality rights under subsection 15(1) of the Charter?

Analysis

Does the standard parental benefit window limit the Claimant to 22 weeks of the 35 weeks of standard parental benefits he claimed?

[12] Yes. The Claimant is limited to 22 of the 35 weeks of standard parental benefits he claimed because the standard parental benefit window closed on January 2, 2021.

Statutory scheme

[13] Before December 2017, only one type of parental benefits existed. Parental benefits were paid up to a maximum of 35 weeks at 55% of weekly insurable earnings. The benefits were only payable within a 52-week window following the birth or adoption placement.

[14] Since December 2017, claimants must choose, or "elect," one of two options for parental benefits. [8] They must chose between standard and extended parental benefits. Standard parental benefits are paid to an individual claimant for up to 35 weeks at a benefit rate of 55% of weekly insurable earnings up to a maximum amount. [9] If a claimant choses to share standard parental benefits with another parent, an additional 5 weeks of benefits can be claimed. [10] Extended parental benefits are paid to an individual claimant for up to 61 weeks of benefits at a benefit rate of 33% of weekly

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[8] See subsection 23(1.1) of the Act.
[9] See subparagraph 12(3)(b)(i) of the Act.
[10] See subparagraph 12(4)(b)(i) of the Act.

insurable earnings up to a maximum amount. [11] If a claimant choses to share extended parental benefits with another parent, an additional 8 weeks of benefits can be claimed. [12]

[15] Parental benefits can only be paid within a specified period. This is referred to as the parental benefit window. The parental benefit window for both types of parental benefits begins the week in which the child is born or placed for adoption. [13] The window for standard parental benefits ends 52 weeks later. [14] If a claimant elects extended parental benefits, their parental window is extended by a further 26 weeks. [15]

[16] The election as to the type of parental benefits becomes irrevocable once parental benefits have been paid in respect of the same child or children. [16]

When did the standard parental benefit window close?

[17] The standard parental benefit window closed on January 2, 2021.

[18] The following facts are not in dispute: The Claimant's daughter was born on December 29, 2019. The Claimant's last day of work was July 25, 2020. Almost 30 weeks after his daughter's birth, the Claimant applied for 35 weeks of standard parental benefits on July 26, 2020. The Claimant's benefit period began on July 26, 2020 and the Claimant's spouse did not claim parental benefits. [17]

[19] The Commission says the Claimant's standard parental benefit window started on December 29, 2019 and ended on January 2, 2021 so benefits were only payable to him for 22 weeks of the 35 weeks he claimed, before the standard parental benefit window closed.

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[11] See subparagraph 12(3)(b)(ii) of the Act.
[12] See subparagraph 12(4)(b)(ii) of the Act.
[13] See paragraph 23(2)(a) of the Act
[14] See paragraph 23(2)(b) of the Act.
[15] See subsection 23(3.21) of the Act.
[16] Subsection 23(1.2) of the Act.
[17] GD3-6.

[20] The Claimant elected standard parental benefits. There is no evidence on file or provided by the Claimant that suggest any of the reasons that allow an extension of the standard benefit window apply to him.[18]

[21] The Claimant's daughter was born on December 29, 2019. The parental benefit window starts on the Sunday of that week, which is December 29, 2019. The Claimant's parental benefit window ends 52 weeks after that week, on January 2, 2021. I find the standard parental benefit window is from December 29, 2019 to January 2, 2021. This means standard parental benefits are only payable to the Claimant in this period. [19]

[22] The Claimant's benefit period began on July 26, 2020 so he was only entitled to payment of 22 weeks of standard parental benefits from July 26, 2020 to January 2, 2021 before the parental benefit window closed. The Claimant does not dispute this finding. His dispute is with the Commission's website and the law itself.

Charter claim

Facts in support of Charter claim

[23] The Claimant testified he wanted to claim 35 weeks of parental benefits. He continued working until July 25, 2020 and applied for benefits on July 26, 2020. He was aware there were two parental benefit options. However, he was unaware of the two different window periods in which each parental benefit option was payable. He said the Commission's website does not make that clear. The Claimant says he was misled by the website so could not make an informed decision. He understood he had 78 weeks in which to collect the 35 weeks of standard parental benefits he was seeking. The

[18] The parental benefit window can be extended for weeks a newborn or adopted child is hospitalized after birth (Subsection 23(3) of the Act). It can also be extended where a member of the Canadian Forces has the start date of their parental leave deferred or they are directed to return to duty (Subsection 23(3.01) of the Act). There is also an extension for claimants who have collected more than one kind of special benefits (maternity benefits, parental benefits, benefits for illness or quarantine, compassionate care, and benefits to care for a critically ill adult or child), the maximum total number of weeks established for those reasons are greater than 50 weeks, and parental benefits were paid for fewer than the applicable maximum number of weeks (Subsection 23(3.2) of the Act).
[19] See subsection 23(2) of the Act.

Claimant says if the website had been clear, he would have made a different decision about his parental leave start date. The Claimant testified further that he had a conversation with a Service Canada agent who acknowledged the website was not clear and a lot of parents fall into the same trap.

[24] In response to questions, the Claimant said that he was unsure if he had made any general enquiries of the Commission before making his election. He believes the only agent he may have spoke to was the Commission's reconsideration agent. The Claimant said that he had looked at the website a few times before his child was born. He knew he wanted to take parental leave. The only question was for how long. He decided a few months prior to his leave, he would be taking 35 weeks of parental leave, after looking at his financial situation. A few weeks prior to taking his leave from work on July 25, 2020, he said he looked at the website again.

Can I make a ruling about the Commission's website or the validity of the Claimant's election?

[25] No. These matters are outside the authority I have in this appeal.

[26] The Claimant argues he was not able to make a free and informed decision due to the content of the website. He cites the following quote from *R v. Big M Drug Mart Ltd.*, 1985 CanLII 69 (SCC) in support of his argument: "the ability of each citizen to make free and informed decisions is the absolute prerequisite for the legitimacy, acceptability, and efficacy of our system of self-government." [20] This case was about a store opening on Sunday contrary to the *Lord's Day Act*. The issues in that case concerned freedom of religion and conscience, which are not relevant to the issues in this appeal.

[27] The website is a tool the Commission's uses to provide information to EI claimants. It is not part of the law. So I can't make any rulings about that. I can only decide if the law concerning the standard parental window has been properly applied to

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[20] GD10-4 and GD15-2, *R v. Big M Drug Mart Ltd.*, 1985 CanLII 69 (SCC) at paragraphs 122 to 123.

the Claimant's situation and whether that law violates the Claimant's rights under subsection 15(1) of the Charter.

[28] Nor can I consider a change of election. While the website and the Claimant's understanding of that website might be a relevant factor concerning whether the Claimant can change his election or whether his election was valid, the Claimant has not made any request of the Commission that his election be changed. The Commission therefore has not made any decision or reconsideration decision about that issue. I only have jurisdiction to review reconsideration decisions made by the Commission and there is no reconsideration decision on that issue before me. [21]

Has the Claimant proven that subsection 23(2) of the Act (the standard parental benefit window provision) infringes his equality rights under subsection 15(1) of the Charter?

[29] No. The Claimant has not proven that subsection 23(2) of the Act violates his equality rights under subsection 15(1) of the Charter.

What does subsection 15(1) of the Charter protect?

[30] Subsection 15(1) of the Charter provides that every individual is equal before and under the law and has the right to the equal protection and benefit of the law without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

[31] But subsection 15(1) of the Charter does not protect a right to identical treatment, which is known as formal equality.[22] Subsection 15(1) only protects members of groups that share specific characteristics (the enumerated grounds or grounds analogous to the enumerated grounds). The intent of subsection 15(1) is to promote equality and prevent

[21] See section 112 and 113 of the Act, which limits the Tribunal's jurisdiction to reviewing reconsideration decisions made by the Commission and denials of extensions of time to pursue reconsideration requests. See also the initial decision (GD3-16) and reconsideration decision (GD3-21) in this case concerning weeks of parental benefits.

[22] See *Withler v Canada (Attorney General)* 2011 SCC 12 at paragraph 31.

discrimination (meaning perpetuating disadvantage or stereotyping) of disadvantaged groups. [23] This is what is known as “substantive equality”.

[32] A section 15(1) analysis requires a contextual inquiry into whether a distinction arises on protected grounds and whether that distinction has the effect of perpetuating arbitrary disadvantage on a claimant because of his or her or their membership in an enumerated or analogous group. [24]

[33] A contextual enquiry in the context of EI legislation requires keeping in mind that the EI Act is a special type of legislation. It is social benefits legislation. There are many complexities in social benefits legislation. This means that sometimes there are differences in how people are treated. The Federal Court of Appeal has made clear that it is only when that difference in treatment is based on personal characteristics can there be breach of section 15(1) of the Charter:

> “By definition, laws granting social benefits entail a differential treatment. In determining categories of beneficiaries and eligibility requirements, they treat differently the persons who are excluded from their scope of application and, as a result, are denied benefits. I do not think that one can argue that these persons are not subject to a substantively differential treatment. The question is whether this occurs on the basis of one or more personal characteristics.” [25]

So, what does the Claimant have to prove?

[34] The initial burden lies upon the Claimant to show two things. He must show it is more likely than not that subsection 23(2) of the Act:

> 1. On its face or in its impact, creates a distinction that is based on an enumerated (race, national or ethnic origin, colour, religion, sex, age or mental or physical disability) or analogous grounds (implied grounds); and

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[23] See *Fraser v. Canada (Attorney General)*, 2020 SCC 28 at paragraph 27.
[24] See *Withler v. Canada (Attorney General)*, 2011 SCC 12.
[25] See *Canada (Attorney General) v. Lesiuk*, 2003 FCA 3.

2. imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating disadvantage[26]

[35] It is not enough to meet only one part of the test. Both parts must be proven.

[36] A law can create an explicit distinction. That means, on its face the law treats people differently by imposing a burden or denying a benefit to someone that is provided to others. A distinction can also occur indirectly, where the law looks like it treats all people the same but has an adverse impact on a particular group of people.

[37] An "analogous ground" has been defined by the Supreme Court of Canada as one based on a personal characteristic that is immutable or changeable only at an unacceptable cost to personal identity. [27] Once the Supreme Court has identified a ground as an analogous ground, it is always an analogous ground and Tribunals and Courts can rely on them. Some examples of analogous grounds are "marital status" and "sexual orientation".

[38] However, the Supreme Court of Canada has emphasized the need for caution in creating new analogous grounds and the importance of evidence and arguments before deciding to create a new analogous ground.[28]

[39] So, it is not enough for the Claimant to prove that claimants of extended parental benefits have a longer window in which to receive their benefits than claimants of standard parental benefits. The Claimant must prove that subsection 23(2) of the Act withholds a benefit from him that is provided to others or imposes a burden on him that is not imposed on others, *due to a personal characteristic corresponding to an enumerated or analogous ground* and he also must show that it does so in a manner that has the effect of reinforcing, perpetuating or exacerbating disadvantage. [29]

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[26] See *Fraser v. Canada (Attorney General)* 2020 SCC 28 at paragraph 27.
[27] See *Corbiere v. Canada (Minister of Indian and Northern Affairs),* 1999 CanLII 687 (SCC), [1999] 2 S.C.R. 203, at paragraph13. See also *Withler v. Canada (Attorney General)*, 2011 SCC 12, at paragraph 33.
[28] See *Fraser v Canada (Attorney General)*, 2020 SCC 28 at paragraphs 114 to 123.
[29] The Claimant must show this on a balance or probabilities which means more likely than not.

What does the Commission have to prove?

[40] The Commission does not have to prove anything if the Claimant does not meet the two-part test noted above. It is only if the Claimant meets the initial burden of the two part test, that the legal burden then shifts to the Commission to prove that the limit on the Charter right is “demonstrably justified in a free and democratic society” in accordance with section 1 of the Charter.

[41] Section 1 of the Charter guarantees the rights and freedoms set out in it, subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[42] If the Commission cannot show the limit is justified under section 1 of the Charter, then the section 15(1) claim will be successful.

Charter analysis

[43] The Claimant argues he has not received equal benefit of the law.

[44] He says there is an explicit distinction in the law in the treatment between claimants of standard parental benefits and claimants of extended parental benefits in terms of the length of the window in which benefits can be paid.

[45] The Claimant also says the law has an adverse impact on two groups because of this differential treatment. First, he says the unequal window period differentiates the support that a standard parental claimant can provide compared to the support an extended parental benefit claimant can provide, because one has longer to care for their children than the other. [30]

[46] Second, the Claimant says that subsection 23(2) of the Act has a disproportionate impact on lower income parents. [31] He argues that the extended

[30] GD5-3.
[31] GD5-4.

parental benefit option with the 78-week window is targeted at parents who are better off financially. He claims the majority of parents cannot afford to take parental leave and those that can, can only take standard parental benefits with the arbitrary restriction of the 52-week window in which those benefits can be paid.

[47] The Clamant submits that even if the legislation is remedial, it does not immunize it from Charter review. He says even though the extended parental benefits were added to the EI Act to allow for greater flexibility, a division was created that is discriminatory in its underlying nature. He argues a class system is created. The Claimant argues this violates the principle stated by the Supreme Court of Canada in *Andrews v. Law Society of British Columbia* [32] under section 15(1) of the Charter that all human beings are equally deserving of concern, respect and consideration. He asks are one set of children more important than others? [33]

Has the Claimant identified an enumerated or analogous ground?

[48] No. The Claimant has not identified any enumerated grounds of distinction. He also has not shown that the grounds he relies on are analogous grounds.

[49] The Claimant is relying on "parents who choose standard parental benefits" and "parents of a lower economic status" as analogous grounds.

[50] To show these grounds are analogous grounds, the Claimant must show that they either are: (1) based on a personal characteristic that is immutable or (2) that they are changeable only at an unacceptable cost to personal identity. [34]

[51] The Claimant provided no evidence about how these groups share personal characteristics that are immutable or changeable only at an unacceptable cost to

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[32] See *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at 171.
[33] GD10-5.
[34] See *Corbiere v. Canada (Minister of Indian and Northern Affairs),* 1999 CanLII 687 (SCC), [1999] 2 S.C.R. 203, at paragraph 13. See also *Withler v. Canada (Attorney General),* 2011 SCC 12 at paragraph 33.

personal identity and no argument about why these grounds should be considered analogous grounds.

[52] The Commission says the grounds the Claimant is relying on have not been accepted as analogous grounds by the Courts. The Claimant also has not shown that groups share the types of traits the Charter protects. He has not explained how the groups have immutable personal characteristics meaning things we cannot change about ourselves or things that can be changed only at great cost to our personal identity.

[53] The Commission says with respect to "parents who choose standard parental benefits" that the Charter is not meant to protect a choice between types of benefits. This is because a choice is not an immutable personal characteristic. The Commission says every parental benefit claimant receives the same opportunity to choose an option that best suits their situation; there is no distinction and even extended parental benefit claimants will lose weeks of benefits if they delay in applying.

[54] With respect to "parents of a lower economic status", the Commission says that the Supreme Court of Canada has not recognized economic status as an analogous ground. [35] The Commission points out that Canadian courts have repeatedly rejected economic status or poverty as analogous grounds under section 15 because financial status is not permanent. The Commission says in *Toussaint v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 873 the Court stated, "there is not one case where a Court has concluded that poverty—in and of itself—is an analogous ground".[36] The Commission says the reason for this is that economic status is not an immutable personal characteristic. In is not an inherent part of who a person is.

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[35] GD12-15; The Commission refers to *Boulter v Nova Scotia Power Inc.*, [2009] NSJ No 64 (NSCA) at paragraphs 33–44, leave to appeal refused [2009] SCCA No 172 (SCC), Appendix B, Tab 7.
[36] GD12-15; The Commission refers to *Toussaint v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 873, [2010] 3 F.C.R. 452 at paragraph 89, Appendix B, Tab 8.

[55] The Commission submits that even if “parents of a lower economic status” was an arguable analogous ground, this is a complex topic and there must be evidence of immutable characteristics before coming to such a conclusion. [37]

[56] I am unable to accept the Claimant’s position that parents who elect standard parental benefits or parents of a lower economic status are analogous grounds. The Claimant provided no evidence about how these groups share characteristics that are analogous to any of the enumerated grounds.

[57] Indeed, there is no evidence that parents who elect standard parental benefits share any identifiable common personal characteristics. There are many possible circumstances and reasons that inform a claimant’s election for a particular option of parental benefits. There may be one parental benefit claimant or two parents who wish to share benefits. Some parental claimants may enjoy a longer leave from their employment than others. Some parental claimants may have a top-up plan from their employer. Some may be financially secure and others may not. Some may want to claim the maximum weeks of benefits. Some may not. Simply put, it is not obvious that this group shares any identifiable common personal characteristics.

[58] “Parental status” has not yet been identified as an analogous ground by the Supreme Court of Canada, [38]although it has in some lower courts. [39] However, I find the the distinction the Claimant alleges the legislation imposes does not arise because he is a parent, but rather because he is a parent who elected standard parental benefits. In that regard, any parent can make an election for either option of parental benefits with the corresponding window period, based on their particular circumstances. The two differing window periods are in not in any way tied to personal characteristics or the fact alone that the Claimant is a parent. So parental status alone is not a ground of distinction.

[37] The Commission refers to *Toussaint v. Canada (Minister of Citizenship and Immigration),* 2009 FC 873, [2010] 3 F.C.R. 452, Appendix B, Tab 8.
[38] See *Fraser v. Canada (Attorney General)* 2020 SCC 28 at paragraph 115.
[39] See for example, *Attorney General) v. Lesiuk*, 2003 FCA 3 (CanLII).

[59] I am also unable to conclude that parents of a lower income status might be considered analogous grounds on the evidence before me. I agree with the Commission that poverty/economic status has not yet been accepted as an analogous ground by the Supreme Court of Canada. The Federal Court has also rejected poverty as analogous grounds under section 15(1) of the Charter.[40] Given the potentially changeable nature of one's economic status, there is nothing obvious about it that makes economic status that is immutable or that makes it similar to the protected grounds.

[60] However, the ground the Claimant is asserting is not limited to economic status. He suggests the combined characteristics of parenthood and economic status. So, the courts' rejection so far of economic status as an analogous ground is not a full answer to the question. I find it conceivable that poverty or lower economic status and parenthood could intersect to create an analogous ground. However, there is no evidence or argument before me in this case that would support such a conclusion. In that regard, the Claimant has provided no evidence about lower income parents as a whole and how they might share immutable personal characteristics or personal characteristics changeable only at an unacceptable cost to personal identity. As well, there is no evidence linking individuals in that group to the choice of standard parental benefits and the corresponding shorter parental benefit window.

[61] As the Supreme Court has stated, "recognition of further analogous grounds should be left for cases where there is sufficient argument and evidence, and where it is necessary to do so. It should not be done on an ad hoc basis." The Claimant has not provided sufficient evidence or argument upon which I can conclude that parents of a lower economic status is an analogous ground.

[62] So, I find the Claimant has not identified enumerated or analogous grounds. It is not necessary to continue the analysis further. Having not identified enumerated or analogous grounds, the Claimant's Charter claim must fail. However, for the sake of completeness, I will continue.

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[40] See *Toussaint v Canada (Citizenship and Immigration)*, 2009 FC 873 at paras 72–90, agreeing with *Boulter v. Nova Scotia Power Incorporation*, 2009 NSCA 17.

Has the Claimant identified a distinction on enumerated or analogous grounds?

[63] No. In addition to not identifying enumerated or analogous grounds, the Claimant has also not established a distinction on enumerated or analogous grounds.

[64] The Claimant argues he has not received equal benefit of the law because of the shorter window period allowed to claimants of standard parental benefits. He argues this shorter window period has an adverse impact on parents who claim standard parental benefits in the ability to care for their child and a disproportionate impact on economically disadvantaged parents.

Is there a distinction on the face of the legislation?

[65] No. There is not.

[66] The Claimant rests his argument on the fact the length of the window is longer for parents who choose extended parental benefits compared to those who choose standard parental benefits. In other words, the two groups of claimants are treated differently with respect to the length of the window.

[67] The Commission says the difference in the window period is not tied to any immutable personal characteristics.

[68] The Commission maintains that an election is a choice, not a distinction. The Commission points out that every parent collecting parental benefits is offered the same choice. Parents choosing the standard option enjoy a higher benefit rate. Parents choosing the extended option enjoy a longer window in which to receive benefits. Both options offer pros and cons. In both options, the longer a claimant waits to take advantage of parental benefits, the less likely they can receive the full number of weeks of benefits

[69] The Commission refers to the Federal Court of Appeal’s decision in *Martin v Canada (Attorney General)* as to the purpose of parental benefits:

"[…] 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. The scheme is clearly not driven by the needs of the parents or the number of children resulting from a pregnancy. The purpose thereof is clearly to compensate parents for the interruption of their earnings resulting from their taking time off to care for a child or children. Put another way, the Act provides to the parents temporary partial income replacement for 35 weeks."[41]

[70] The Commission explains that the reason for the reason for the introduction of the election between the standard and extended options in December 2017 was to give parents more flexibility to decide how to collect their benefits, based on their particular circumstances.[42] The Commission says each parent can choose the benefits that best suit their circumstance. The Commission says the purpose of the parental benefit scheme is a temporary benefit scheme when a person takes time off their employment to care for their child. If they continue working, they are not entitled to benefits. It is not a social welfare scheme but an insurance scheme.

[71] The Commission points out that the Claimant might have been entitled to 35 weeks of benefit payments if he applied earlier, but he continued working and applied seven months after his child's birth. If he received benefit payments for fewer weeks, that flowed from his application's timing and election, and not by any distinction based on personal characteristics. The Commission says the Claimant also has not provided evidence that his decision was related to his economic status but rather the information he obtained from the website. That what was drove his decision. Like any other parent, he was subject to the window as he waited too long. The Commission says this case has nothing to do with substantive equality rights.

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[41] GD12-16; *Martin v Canada (Attorney General)*, 2013 FCA 15 at paragraph 66, Appendix B, Tab 10.
[42] GD12-662; Canada Gazette, Part II, Vol 151, no 23, SORS/2017-226, Regulatory Impact Analysis Statement at 3090–93, Appendix C, Tab 1: "Additionally, the Budget committed $152 million over 5 years, starting in 2017–2018, and $27.5 million per year thereafter to make EI parental benefits more flexible, allowing parents to choose to receive EI parental benefits over an extended period of up to 18 months at a lower benefit rate of 33% of the weekly insurable earnings, as an alternative to the current 35 weeks of benefits at 55% of the weekly insurable earnings which will remain in place."

[72] The Supreme Court of Canada has held that differential treatment can be discriminatory even if it is based on choices made by the affected individual or group.[43] But that distinction still must arise on enumerated of analogous grounds.

[73] While it is true the Claimant, as a claimant of standard parental benefits is subject to a shorter period in which those benefits can be paid compared to claimants of extended parental benefits, in my view, the differential treatment the Claimant experienced is not based on immutable personal characteristics. I agree with the Commission that the shorter window period associated with standard parental benefits is based on a choice of a type of benefits and there is nothing in the legislation that explicitly ties that choice to any personal characteristic.

[74] All parents are treated the same, regardless of any personal characteristics. All have the same choice between the two types of benefits, with their corresponding benefit rates and their corresponding window periods, regardless of their personal characteristics or their economic situation. The Commission provided no information on why the window periods are the lengths they are. However, there is nothing about the window periods themselves that relates to personal characteristics.

[75] Further, there is no distinction in how the window periods work for both claimants of standard parental benefits and claimants of extended parental benefits. No matter what type of parental benefit option is chosen, a delay in claiming benefits may result in the closure of the window and an inability to collect all of the possible weeks of benefits. The length of the windows and their ultimate closure is not tied in any way to personal characteristics of claimants or the economic situation of the Claimant. The closure of the window is rather intrinsically tied to the timing of the interruption of earnings and application for benefits.

[76] I find the window provision provided for in subsection 23(2) of the Act did not treat the Claimant any different than any other claimant because of any personal characteristics. The Claimant lost out on weeks of benefits because he continued

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[43] See *Fraser v. Canada (Attorney General)*, 2020 SCC 28, at paragraph 86.

working and delayed his application for benefits until almost 30 weeks after the birth of his child. That same result would have occurred to any claimant delaying their application. A claimant for extended parental benefits who delays too long is also subject to the potential loss of week of benefits. If the Claimant had applied earlier, he may not have lost the weeks of benefits in question.

[77] I find the standard parental benefit window provision, considered in the context of the parental benefit scheme, does not, on its face, create a distinction on the basis of any personal characteristic that is associated with enumerated or analogous grounds.

Is there an adverse impact distinction?

[78] No. I find there is not.

[79] The Claimant argues that there is an adverse impact on parents who elect parental benefits because of the shorter window. He says this differentiates the support he can provide to his child.[44] He says that parents who choice extended parental benefits have more flexibility and time in which to care for their child. [45]

[80] The Claimant also argues that there is a disproportionate impact on parents who are economically disadvantaged as they are more likely to choose standard parental benefits with the shorter window.

[81] The Commission submits that no adverse impact arises from subsection 23(2) of the Act based on either of the Claimant's alleged grounds of distinction. Parents choosing the standard option enjoy a higher benefit rate. Parents choosing the extended option enjoy a longer window in which to receive benefits. Both options offer pros and cons. In both options, the longer a claimant waits to take advantage of parental benefits, the less likely they can receive the full number of weeks of benefits.

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[44] GD5-3.
[45] GD5-4.

[82] The Commission argues the Claimant has provided no evidence that that subsection 23(2) of that Act engages economic status in any way. He provided no evidence showing how economic disadvantage plays into the parental benefits election scheme. The Claimant provided no statistical evidence showing that lower income parents tend to choose standard parental benefits with the shorter window period or that they suffered any adverse impact as a result of the shorter window.

[83] The Commission says it is also unclear how or even if the Claimant's personal financial situation affected his decision to elect the standard option. He provided no evidence as to his own economic situation or that he was economically disadvantaged. The Commission points out the Claimant admits in his reconsideration request as well as in his testimony that he based his decision on information he found on the website. The Claimant stated he might have elected differently under subsection 23(1.1) had he been better informed—not had he been more economically secure or advantaged. His information was but for the website, he would have made a different choice. So, the Claimant has not provided any evidence linking his or any particular economic status to subsection 23(2) of the Act.

[84] The Commission submits that the parental benefit election regime treated the Appellant no differently than any other claimant. He was not denied entitlement to parental benefits. Subsection 23(2) imposed no burden on his ability to receive benefits to which other parents are not subjected. He might have been entitled to 35 weeks of benefit payments if he applied earlier, but he applied almost seven months after his child's birth. If he received benefit payments for fewer weeks, that flowed from his application's timing and election, and not by any distinction based on personal characteristics.

[85] As above, I am not satisfied that parents who choose standard parental benefits or economically disadvantaged parents are analogous grounds. However, even if they were, I find the Claimant has not shown an adverse impact on either of these groups in terms of their ability to provide care for their child or children.

[86] In order for a law to create a distinction based on prohibited grounds through its effects, it must have a disproportionate impact on members of a protected group. This cannot just be assumed. There has to be reliable evidence of the disproportionate impact.

[87] The Supreme Court of Canada has indicated that, in circumstances where there is not simply a straightforward, facial distinction on the basis of an enumerated or analogous ground, establishing a distinction will be more difficult.[46]

[88] The Supreme Court of Canada has also said that two types of evidence will be especially helpful in proving that a law has a disproportionate impact on members of a protected group. The first is evidence is about the situation of the claimant group. The second is evidence about the results of the law.[47]

[89] The Supreme Court of Canada says that evidence abut the situation of the claimant group that would be beneficial would be evidence about the physical, social, cultural or other barriers which provide the full context of the claimant group's situation. The Court says this evidence may come from the claimant, from expert witnesses, or through judicial notice. The goal of such evidence is to show that membership in the claimant group is associated with certain characteristics that have disadvantaged members of the group. [48]

[90] With respect to the second part of the test, the Supreme Court of Canada has said that courts will also benefit from evidence about the outcomes that the impugned law or policy (or a substantially similar one) has produced in practice. This evidence may include statistics. The Court points out that the goal of statistical evidence, ultimately, is to establish "a disparate pattern of exclusion or harm that is statistically significant and not simply the result of chance.[49]

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[46] *Withler v Canada (Attorney General)*, 2011 SCC 12, paragraphs 61 to 64.
[47] See *Fraser v. Canada (Attorney General)*, 2020 SCC 28 at paragraph 56.
[48] See *Fraser v. Canada (Attorney General)*, 2020 SCC 28 at paragraph 57.
[49] See *Fraser v. Canada (Attorney General)*, 2020 SCC 28 at paragraph 59.

[91] The Supreme Court of Canada pointed out further that, "Ideally, claims of adverse effects discrimination should be supported by evidence about the circumstances of the claimant group and about the results produced by the challenged law. Evidence about the claimant group's situation, on its own, may amount to merely a "web of instinct" if too far removed from the situation in the actual workplace, community or institution subject to the discrimination claim."[50]

[92] The Claimant had not provide either of these types of evidence. In particular, has not provided any statistical evidence about the circumstances of parents who choose standard parental benefits. He has not provided any statistical evidence showing parents of a lower economic status are more likely to choose standard parental benefits than extended parental benefits. He has produced no evidence about the physical, social, cultural or other barriers, which provide the full context of the groups he claims are subject to a distinction.

[93] There is also no evidence about the outcomes that subsection 23(2) of the Act has produced in practice. In other words, there is no statistical evidence about how the standard parental benefit window provision itself impacts the groups In question. There is no evidence that the standard parental benefit window provision disproportionately negatively impacts the care that any parent who chooses standard parental benefits, including those who are economically disadvantaged, can provide to their children.

[94] While there is no doubt the time a parent can spend with a child is vitally important, it cannot be assumed that the shorter window provision for standard parental benefits negatively impacts the care that can be provided by parents who choose that option, given the different benefits rates that are associated with the two types of parental benefit as well as the fact benefits can be shared between parents. The other overriding factor to remember is that the window provisions have nothing to do with the actual potential weeks of benefits available. The window provisions merely set out the period in which the parental benefits can be paid. The critical factor in the weeks of

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[50] See *Fraser v. Canada (Attorney General)*, 2020 SCC 28 at paragraph 60.

parental benefits a parent can collect is the timing in which those benefits are claimed, no matter which option is chosen.

[95] The Claimant's only evidence was about his own situation. His evidence was that he misunderstood the length of the window period for standard parental benefits, due to unclear information on Commission's website.[51] He said he might have taken a different leave, had he been aware of the window.

[96] I find the Claimant was unable to collect the 35 weeks of parental benefits he claimed, not because of a personal characteristic, but because he delayed ceasing work and claiming those benefits. In this case, had the Claimant applied for benefits earlier, he would not have lost the benefits in question. He did not lose his benefits because of the way the law works but because of his understanding of the law.

[97] There is no evidence that subsection 23(2) of the Act has an adverse impact on parents who elect standard parental benefits or economically disadvantaged parents.

Has the Claimant shown a discriminatory distinction?

[98] No. In this case, there is no need to proceed with this part of the analysis because the Claimant has not shown a distinction on enumerated or analogous grounds. However, for the sake of completeness, I will consider this issue.

[99] The question is whether, having regard to all relevant contextual factors, including the nature and purpose of the impugned legislation the distinction in question discriminates by reinforcing, perpetuating or exacerbating disadvantage on the Claimant because of his or her membership in an enumerated or analogous group.

[100] I will not delve into a detailed analysis as the Claimant has not shown membership in an enumerated or analogous group.

[101] Further, the Claimant has not provided any evidence that parents who choose standard parental benefits are subject to any type of prejudice or disadvantage or that

[51] GD10-2.

such a situation is reinforced, perpetuated or exacerbated because of the window provision itself. There is also no evidence showing the parents of lower economic status are more inclined to choose standard parental benefits with its corresponding shorter window and no evidence that if that was the case, that subsection 23(2) of the Act, the window provision reinforces, perpetuates or exacerbates disadvantage to that group.

[102] The Claimant argues that the difference in the window period discriminates by way of "administrative action (e.g. the implementation of an otherwise non-discriminatory statute in a discriminatory way by government officials." In support of this argument the Claimant cites *Little sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120.[52]

[103] This argument does not have merit. The Claimant has provided no facts or evidence showing any action by the Commission's representatives other than the straight application of the law in his case. Subsection 23(2) of the Act is not discretionary and does not allow for any discretionary administrative action. The provision limits all parents who choose standard parental benefits to a window of 52 weeks in which to collect those benefits.

[104] So, the Clamant also has not met this second part of the section 15(1) test.

So, has the Claimant met his burden to show a violation of subsection 15(1) of the Charter?

[105] No. the Claimant has not met his burden to show that subsection 23(2) of the Act violates his equality rights under subsection 15(1) of the Charter. This means I do not need to decide if any violation can be justified under section 1 of the Charter. The Claimant's Charter claim cannot succeed.

Conclusion

[52] GD10-4.

[106] It is no easy task to present a Charter argument, particularly when unrepresented, and the Claimant has made a tremendous effort. However, the requirements of the law must be met and Claimant has not shown that subsection 23(2) of the Act violates his rights under subsection 15(1) of the Charter.

[107] As a result, subsection 23(2) of the Act applies to the Claimant and the Claimant's standard parental benefit window closes on January 2, 2021. The Claimant is only entitled to payment of 22 weeks of parental benefits.

[108] The appeal is dismissed.

Charlotte McQuade

Member, General Division – Employment Insurance Section