



Citation: *DT v Canada Employment Insurance Commission*, 2021 SST 581

Social Security Tribunal of Canada General Division – Employment Insurance Section

Decision

Appellant:

D. T.

Respondent:

Canada Employment Insurance Commission

Decision under appeal:

Canada Employment Insurance Commission
reconsideration decision (423220) dated May 7, 2021
(issued by Service Canada)

Tribunal member:

Katherine Wallocha

Type of hearing:

Teleconference

Hearing date:

September 1, 2021

Hearing participants:

Appellant

Decision date:

September 15, 2021

File number:

GE-21-1288

DECISION

[1] The appeal is allowed. The Claimant (D. T.) contacted the Canada Employment Insurance Commission (Commission) to amend her election for parental employment insurance (EI) benefits before she was paid those benefits.

[2] The Claimant elected to receive standard parental EI benefits.

OVERVIEW

[3] The Claimant applied for maternity and parental EI benefits. On her application, she selected the option for extended parental benefits wishing to claim 61 weeks. She received an email notification that a change had been made to her EI claim. When she realized her benefit payment was going to decrease, she called the Commission right away to prevent the reduction.

[4] The Commission refused to change the type of parental benefits selected because it said the Claimant had already been paid a parental benefit payment.

[5] The Claimant appealed the Commission's decision to the General Division (GD) of the Social Security Tribunal (SST). She says that she made a mistake when she selected the extended option. This is her first time applying for EI benefits, and this is her first baby. She had no idea she selected extended benefits nor did she know what extended benefits meant. The GD allowed the appeal finding the Claimant intended to elect standard parental EI benefits.

[6] The Commission appealed the decision to the Appeal Division (AD) of the SST. The AD allowed the appeal stating the GD made an error in how it found that the Claimant elected standard parental benefits.

[7] The appeal was referred back to the GD for reconsideration and to give the Claimant a fair opportunity to present evidence on all issues that need to be decided. In particular, the AD said the Claimant hadn't had a fair opportunity to present evidence on

whether she was paid the parental benefits before she tried to change or clarify her election.

[8] The Claimant presented new evidence to the AD showing she was paid the parental payment after she called the Commission. The Claimant argued before the AD that she should have been allowed to revoke her election because she called the Commission before she received her first parental benefit payment. The Commission argued that the Claimant was paid the benefit when it was issued, and not when she received it.

[9] It is the AD's view that the question of what it means to be "paid" must be settled before the Claimant's election for parental benefits can be found to be irrevocable. If the Claimant must receive the benefit for it to be paid, then any evidence she has about when she was paid is important to the appeal decision. The AD is unable to accept new evidence, so the Claimant hasn't had a fair opportunity to present this evidence.

[10] I am required to follow the instructions provided by the AD when a case is returned to the GD for a rehearing. This means I will first consider when benefits are considered paid and thereby irrevocable. If it turns out her election was revocable, as it hadn't yet been paid when she tried to change it, then I will determine what parental benefit option the Claimant likely elected.

[11] In making my decision, I have considered all the information that was in the appeal file before the initial GD member, the recording of the initial GD hearing, the new evidence provided to the AD, and the recording of the AD hearing.

WHAT I MUST DECIDE

[12] There are two issues I must decide:

1. Was the Claimant paid parental EI benefits before she requested an amendment to her parental benefit election?
2. Did the Claimant elect to receive extended parental EI benefits?

REASONS FOR MY DECISION

[13] When you apply for parental EI benefits, you must choose between two different kinds of parental benefits¹:

- Standard parental benefits. The Commission pays up to 35 weeks of parental benefits at the rate of 55% of your weekly earnings;
- Extended parental benefits. The Commission pays up to 61 weeks of parental benefits at the rate of 33% of your weekly earnings.

[14] When you choose a type of benefit, the law calls this an “election”. Once benefits are paid, you can’t change your election because the law says it is irrevocable².

[15] As instructed by the AD, I must first determine when a parental benefit payment is considered “paid” to the Claimant before I can decide if the Claimant’s election is irrevocable.

When is a parental benefit payment considered to be paid?

[16] The Claimant told the AD that she received an automated email at 22:43 on May 2, 2021, stating that new EI claim information was available³. In the morning, she checked her My Service Canada Account (MSCA) and read the messages⁴. She called the Commission right away on May 3, 2021, to request an amendment, but was denied⁵. She provided her bank statement showing she received the parental benefit payment on May 4, 2021⁶.

[17] The Commission argued in the hearing before the AD that the Claimant’s parental EI benefit payment was issued on April 30, 2021. Although the Claimant didn’t

¹ See sections 12(3)(b) and 14(1) of the *Employment Insurance Act* (EI Act).

² See subsection 23(1.2) of the EI Act.

³ See AD9-8.

⁴ See AD9-3 and AD9-4.

⁵ See GD3-22.

⁶ See AD9-2.

receive it in her bank account until a later day because of processing, it was still paid on April 30, 2021.

[18] I requested that the Commission provide submissions in order to support its interpretation of “benefits are paid” for the purpose of subsection 23(1.2) of the *Employment Insurance Act* (EI Act). The Commission provided the following information:

- Parental benefits are considered paid as of May 2, 2021, as per the attached Employment Insurance Benefit Statements;
- As of April 25, 2021, the Claimant’s claim type changed to extended parental benefits and her benefit rate was reduced;
- This is what triggered the email to the Claimant’s MSCA;
- These monies were then deposited into her bank account on May 4, 2021.

[19] The Commission provided two Employment Insurance Benefit Statements for the weeks starting April 18, 2021, and April 25, 2021. These statements show the following:

- The Claimant’s benefit rate was reduced from \$595 to \$357 in the week starting April 25, 2021;
- The direct deposit for both weeks was issued on May 2, 2021;
- The deposit was due on May 4, 2021;
- “When using Direct Deposit, the deposit to your financial account will serve as a record of your payment.”

[20] The Claimant told me that she wanted to know the Commission’s definition of “paid”, but its submission only apply to her. She feels a definition of something like when benefits are paid should apply to everyone who receives EI benefits.

[21] I agree with the Claimant. The Commission’s submissions provided further evidence in the Claimant’s case, but it didn’t provide justification for why it considers April 30, or May 2, 2021, to be the date in which benefits are considered paid. So, I will undertake an analysis.

[22] Subsection 23(1.2) of the EI Act says,

“The election is irrevocable once benefits are paid under this section or under section 152.05 in respect of the same child or children.”

[23] The wording in section 152.05 of the EI Act is the same. Neither of these sections of the law define “payment” or when “benefits are paid”.

[24] However, subsection 54(p) of the EI Act states that the Commission may make regulations prescribing the time and manner of paying benefits. Section 92 of the *Employment Insurance Regulations* (EI Regulations) provides guidance on the direct deposit of benefits.

[25] Specifically, subsection 92(4) of the EI Regulations states,

“In the absence of any evidence to the contrary, the following documents together constitute evidence of the transfer of funds to a claimant's account and the payment of benefits to the claimant:

- (a) a document certified by a person acting for the Commission to be an extract from the record authorizing a direct deposit transaction, in respect of the claimant, to be directed to the financial institution where the account of the claimant is located, and
- (b) a certified extract of the records of that financial institution indicating the crediting of the amount of the deposit to the account of the claimant.

[26] The Black's Law Dictionary says, “To pay is to deliver to a creditor the value of a debt, either in money or in goods, for his acceptance, by which the debt is discharged.”

[27] The Oxford Dictionary defines “pay” as, “To give (someone) money that is due for work done, goods received, or a debt incurred.”

[28] The word “paid” is the past tense or past participle of the verb “pay”.

[29] It is my interpretation of the above definitions that the Claimant was due EI benefits that she qualified for and that the Commission owed her, as a result. To pay the Claimant is to deliver to her what is due, so she may be considered paid. In other words, the Commission has paid the Claimant when payment is received by the Claimant.

[30] The law gives the Commission the power through the EI Regulations⁷, to prescribe the time and manner of paying benefits. It did so by stating that a certified document from the Commission authorizing a direct deposit transaction, together with certified records from the Claimant's financial institution indicating the crediting of the amount of the deposit, constitutes evidence of the payment of benefits to the Claimant.

[31] The Employment Insurance Benefit Statements provided by the Commission show the Claimant was authorized a payment of \$874.00 (the Claimant was entitled to \$952 in EI benefits less \$78 in taxes equals \$874). The direct deposit was issued on May 2, 2021, to be deposited on May 4, 2021. I consider these statements as documents from the Commission authorizing a direct deposit transaction.

[32] The Commission didn't question the validity of the Claimant's bank statements showing she received a deposit of \$874.00 on May 4, 2021. So, I accept the Claimant's bank statements as records from the Claimant's financial institution showing the amount of the deposit.

[33] I find that together, the Commission's benefit statements and the Claimant's bank statements meet the criteria to prove payment of benefits. The Claimant was paid EI benefits on May 4, 2021.

[34] The EI Regulations refer to the payment of benefits as a transaction. In order for the transaction to be complete, the Claimant has to receive the payment. This is supported by the note at the bottom of the benefit statements which says, "When using Direct Deposit, the deposit to your financial account will serve as record of your

⁷ See subsection 92(4) of the EI Regulations.

payment.” This note confirms that the Claimant is considered paid when the deposit to her account is made.

[35] The Commission says that benefits are considered paid when the payment is processed or issued. But what would happen if the Claimant didn’t receive the payment – would the Commission still consider it paid? In the Federal Court of Appeal decision *Roby v Canada (Attorney General)*, 2013 FCA 251, the Commission deposited the funds to the wrong bank account after the Claimant had warned that the account had changed. When the Commission was made aware of its mistake, it paid the Claimant again, and then tried to recover the funds deposited to the wrong account. This shows me that if the Claimant can prove that she didn’t receive the payment of EI benefits, the Commission would pay her despite having previously deposited the funds to another account. From this, I can only conclude that the transaction of paying EI benefits isn’t complete until it is received by the Claimant.

[36] Given the above reasoning, I find that the Claimant was paid parental EI benefits on May 4, 2021. However, she contacted the Commission on May 3, 2021, to change her parental benefit option election. The Claimant hadn’t been paid benefits on May 3, 2021, so her election was still revocable under subsection 23(1.2) of the EI Act.

[37] Since the Claimant’s election for parental benefits was still revocable when she called the Commission to request an amendment, she is entitled to change her election from extended to standard parental benefits. This means I am not required to decide whether the Claimant elected to receive extended parental benefits. However, this is an issue before me, so I will close this loop.

Did the Claimant elect to receive extended parental EI benefits?

[38] No, I find on the balance of probabilities⁸ that the Claimant elected standard parental benefits.

[39] The Commission said the following:

⁸ The balance of probabilities means it is more likely than not.

- The Claimant was informed on the application for EI benefits of the difference between standard parental benefits and extended parental benefits;
- She elected to receive 61 weeks of extended parental benefits;
- She was also informed that the decision was irrevocable once parental benefits were paid;
- The first payment for parental benefits was processed on April 30, 2021;
- She requested her claim to be changed to standard parental benefits on May 3, 2021;
- The Claimant's election became irrevocable as of April 30, 2021;
- The law is clear and unambiguous that once the choice of election is made and benefits paid, that choice can't be recalled.

[40] The Commission argued before the AD that the Claimant's intention isn't relevant to the question of which parental benefit she elected. The AD disagreed stating that the GD cannot apply the law that says an election is irrevocable unless it determines that the Claimant made the election in the first place. Evidence of the Claimant's intention is a relevant consideration.

[41] In a different decision by the AD⁹, it was explained that while Parliament made the election of standard or extended parental benefits irrevocable, it didn't define "election", or state that a claimant's selection on the application form must be conclusively deemed to be his or her election.

[42] In the AD's view, 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 would be most advantageous. Its purpose isn't to punish claimants "for provable slips or objectively reasonable misunderstandings" at the time that they complete their applications.

[43] Decisions made by the AD aren't binding on me. This means I am not required to follow the AD's guidance. But in this case I find it applies. The Claimant requested

⁹ See the AD decision *V.E. v. Canada Employment Insurance Commission*, AD-20-3.

maternity and parental EI benefits. The choices made on the application show if it is her intention to be off work for one year or longer. Knowing her intention when she made the election is a relevant consideration to show whether she made a mistake in choosing that option or whether she changed her mind as her circumstances changed.

[44] The AD's guidance tells me that I must consider all of the relevant evidence regarding what kind of parental benefits the Claimant likely elected to receive.

[45] The Claimant applied for EI benefits on January 13, 2021. In her application she indicated the following:

- Her last day of work was January 11, 2021;
- Her return-to-work date was unknown;
- She gave birth on January 11, 2021;
- She wished to claim 61 weeks of extended parental benefits.

Return-to-work date

[46] The Claimant told me that she doesn't know why she didn't indicate her return-to-work date. She said she knew she was returning to work on January 12, 2022. She applied for EI benefits two days after the birth of her baby, she had never applied for EI benefits before and she needed her partner to help her. She said it was a mistake.

[47] The record of employment (ROE) dated January 21, 2021, shows the Claimant's expected return-to-work date as January 12, 2022. The Claimant told me she had an agreement with her employer before she left work. She told her employer she wanted to come back to work after her child's first birthday. Her employer asked her if she would be taking extended leave. She told them that she could not afford the extended leave, and she wanted to have another child, so she didn't want to be off for an extended period.

[48] The Claimant told me that she was on sick leave from work for a month before her birth. This is confirmed in the ROE, box 19, which shows the Claimant was paid leave by her employer from December 1, 2020, to January 11, 2021. She said she

contacted her employer after she gave birth to share the news, so that is how they knew her return-to-work date.

[49] It would have been helpful if the Claimant had indicated her return-to-work date on her application. However, I find the ROE supports the Claimant's argument that it was her intention to return to work 52 weeks after the birth of her child. The ROE is dated just 10 days after the Claimant gave birth, so it is relevant to the Claimant's intent around the time she gave birth and completed her application. The ROE shows me it was her intent to elect standard parental benefits.

Parental benefits election

[50] I asked the Claimant if she read the information about parental benefits provided in the application. She told me that she reads the information in the application now and it makes sense, but at the time she wasn't in the proper state of mind.

[51] The Claimant told me she selected extended benefits by mistake. I asked her why she chose 61 weeks. She responded that she has no clue why she chose that number.

[52] I asked the Claimant to explain to me why she wasn't in the proper state of mind when she applied for EI benefits. I reminded her that she said in the hearing before the AD that she was crying and needed her partner's help to fill out the application. She said she was sad, tired and had no idea what she was doing.

[53] The Claimant told me that she went into labour on January 8, 2021. It was a long birth, delivering her baby on January 11, 2021. She was exhausted from the birth and lack of sleep. She had very little support since her mother could not travel to visit her because of the pandemic, and her partner had to work. She continued to look after her 9-year-old stepdaughter which included homeschooling. She said her emotions were high, but she needed to apply right away because she had bills to pay.

[54] The Claimant told me that she went into Service Canada in November 2020. She wanted to apply early and in person with assistance, so she would not make any

mistakes. She was told that she could not apply before she had the baby and she was directed to apply online. She told me that Service Canada explained a little to her, and she understood that extended meant a longer time. She had zero intention of taking a longer time, so she doesn't understand why she selected extended benefits. She said she tried to prevent mistakes from happening.

[55] The Claimant told me that at the beginning of her claim she wasn't getting paid, so she contacted the Commission. The man she spoke with clicked something and told her it was all good, she didn't need to complete reports. She said she looked at her MSCA at the time, and saw that her return-to-work date was listed as January 10, 2022, and her end-of-claim date was January 8, 2022¹⁰. She said she tried to correct the return-to-work date with the Service Canada Agent because she wasn't returning to work until January 12, 2022. She was explained that January 10, 2022, is the Sunday of the week in which she will be returning to work.

[56] The Claimant said the Service Canada Agent was on her profile for a while, but he didn't see the contradictions. She said there is a contradiction in her profile if her end-of-claim date is six months before her extended benefits should end. If her profile had said her end-of-claim date was June 2022, she would have been alerted to the fact she made a mistake. Instead, when she was alerted of a mistake by email notification, the Commission said it was already too late.

[57] The Claimant said she didn't have to complete reports, so she didn't return to her MSCA profile until she received the email notification that her benefit rate was changing. I told the Claimant that her MSCA profile shows that she had selected extended parental benefits for 61 weeks. The Claimant says she knows, but at the time she didn't look at that when she was on her profile until after the email notification was sent. She said she looked at the return-to-work date and end-of-claim date, and didn't think there was a problem.

¹⁰ See AD9-6.

[58] I believe the Claimant when she says she wasn't in the proper state of mind to be applying for EI benefits when she did, but felt pressured to do so because she needed to pay her bills. The evidence shows that the Claimant applied for EI benefits two days after she had undergone a long labour and delivery. She said she was exhausted and her emotions were high and cannot explain why she made the selection she did. I accept this explanation for why she selected 61 weeks of extended parental benefits.

[59] The Claimant's statements and testimony in her original appeal before the GD, in her appeal before the AD and in her appeal before me have been consistent. The Claimant has repeatedly said the following:

- she didn't know what she clicked on;
- she wasn't in the right frame of mind;
- she never intended to be off work for more than one year;
- she couldn't afford to be off work on the extended leave option;
- she is 34 years old and wants to have more kids, so she didn't want to be off work for 18 months;
- she made a mistake in selecting extended parental benefits.

[60] I have no reason to doubt the Claimant's statements and testimony, so I believe her when she says she made a mistake by selecting the extended option. She saw her MSCA profile showed her return-to-work date as one year after giving birth and didn't think anything was wrong with her EI claim.

[61] I placed a lot of weight on the Claimant's evidence that she received an email notification at 22:43 on Sunday, May 2, 2021. She contacted the Commission on May 3, 2021, at 10:18, to request an amendment to the parental benefit option initially selected. I find the Claimant's conduct of calling the Commission the next morning shows she realized she made a mistake and tried to correct it immediately. This further supports that the Claimant's intention was to elect standard parental benefits.

[62] I find the Claimant is more likely than not to have elected the standard parental benefits option. The evidence shows that the Claimant intended to elect standard

parental benefits. When she selected the extended parental option, she made a mistake, but a mistake isn't an election.

CONCLUSION

[63] The Claimant's election is revocable, so she can change her parental benefit option. In the alternative, I also find the Claimant elected to receive standard parental benefits. Either way, this means the appeal is allowed.

K. Wallocha

Member, General Division - Employment Insurance Section