



Citation: *CM v Canada Employment Insurance Commission*, 2021 SST 756

Social Security Tribunal of Canada General Division – Employment Insurance Section

Decision

Appellant: C. M.
Representative: Megan Niccolls
Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (422262) dated May 6, 2021
(issued by Service Canada)

Tribunal member: Katherine Wallocha
Type of hearing: Videoconference
Hearing date: June 17, 2021
Hearing participants: Appellant
Appellant's representative
Decision date: June 18, 2021
File number: GE-21-900

DECISION

[1] The appeal is allowed. The Claimant (C. M.) elected to receive standard parental employment insurance (EI) benefits.

OVERVIEW

[2] The Claimant applied for maternity and parental EI benefits. On her application, she selected the option for extended parental benefits wishing to claim 39 weeks. When the Claimant's parental benefits started, she noticed that the rate of weekly benefits was reduced.

[3] The Claimant contacted the Canada Employment Insurance Commission (Commission) and requested an amendment to the parental benefits option initially selected. The Commission refused to change the type of parental benefits selected because the Claimant had already received a parental benefit payment.

[4] The Claimant appealed the Commission's decision. She explained that her intention was always to return to work after 12 months, as noted on the record of employment (ROE). Her return-to-work date is slightly more than 12 months after her leave began, so she selected the extended parental leave option on the application form. Her sleep deprived brain didn't realize that her response to this question would dictate the amount of her weekly benefit payment. Her error is having such a huge impact on her family's finances, so she hopes this can be corrected.

WHAT I MUST DECIDE

[5] Did the Claimant elect to receive extended parental EI benefits?

REASONS FOR MY DECISION

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

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

[7] When you choose a type of benefit, the law calls this an “election”. Once you have received a parental benefit payment, you can’t change your election².

Did the Claimant elect to receive extended parental EI benefits?

[8] No, I find, on the balance of probabilities³, that the Claimant elected standard parental benefits.

[9] The Commission said the following:

- 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 39 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 January 8, 2021;
- she requested her claim to be changed to standard parental benefits on April 15, 2021;
- the Claimant’s election became irrevocable as of January 8, 2021;
- the law is clear and unambiguous that once the choice of election is made and benefits paid, that choice can’t be recalled.

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

[10] However, a recent decision by the Appeal Division (AD) of the Social Security Tribunal 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.

[11] 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 applications⁴.

[12] Another decision by the AD confirms that I must consider all of the relevant evidence regarding what kind of parental benefits the Claimant likely elected to receive⁵.

[13] I am not required to follow the AD's guidance, but in this case, I find it applies.

[14] The Claimant applied for EI benefits on September 28, 2020. In her application she indicated the following:

- Her last day of work was September 4, 2020. Her return to work date is unknown;
- Her expected due date was September 6, 2020. The actual date of birth was September 11, 2020;
- She wished to claim 39 weeks of extended benefits.

[15] The Claimant said the following in her reconsideration request and notice of appeal:

- she misunderstood the application and made an error applying for extended parental leave instead of standard leave;
- her intention was always to take 12 months' leave, as noted on her ROE;

⁴ See the AD decision *V.E. v. Canada Employment Insurance Commission*, AD-20-3.

⁵ See the AD decision *Canada Employment Insurance Commission v. T.B.*, 2019 SST 823.

- she gave her employer a return-to-work date a few weeks after her actual due date. Her daughter arrived late and she wanted to return to work after her first birthday;
- because of this, she selected the extended parental leave. She guessed her sleep deprived brain didn't realize that her response to this question would dictate the amount of weekly benefits;
- she noticed earlier that her payments were lower; however, she thought it was because she hadn't submitted her 2019 tax return and assumed it was related to that;
- once her taxes were submitted, she reached out to the Commission, but it took several calls before she realized she made an error on the application form.

[16] The ROE indicates that the Claimant's last day of work was September 4, 2020, and her return-to-work date is September 20, 2021.

[17] I asked the Claimant when she made the agreement with her employer about her return-to-work date. The Claimant said she had an agreement with her employer before she left on maternity leave. She told her employer she would be off work for a year. She wanted to come back to work after her child's first birthday, but she didn't know the exact date because she worried her child would arrive late.

[18] I asked the Claimant why she chose the extended option. She said she answered the questions out of sequence. She got so focused on counting the number of weeks she was going to be off work that when she answered that question she chose the extended option because the number of weeks she was going to be off work came to 39.

[19] The Claimant told me that she was just trying to be accurate. She wanted to make sure she accurately reported how much time she would be off work, not realizing this would affect her benefit payments. It was not her intention to request extended parental benefits. She had accrued vacation time and she intended to use the vacation time for the weeks she would not be paid EI benefits.

[20] I find the Claimant is more likely than not to have elected the standard parental benefits option. I make this finding based on the information in the Claimant's application as a whole and her testimony at the hearing.

[21] I placed a lot of weight on the ROE which showed the Claimant had an agreement with her employer to return to work a little more than a year after her leave began. I accept her explanation that she was focused on figuring out how many weeks she would be off work, not realizing that what she was telling the Commission was how many weeks she wanted to collect benefits.

[22] 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

[23] The Claimant elected to receive standard parental benefits. This means the appeal is allowed.

K. Wallocha

Member, General Division - Employment Insurance Section