



Citation: *IT v Canada Employment Insurance Commission*, 2021 SST 867

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

Decision

Appellant: I. T.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (437161) dated October 26, 2021
(issued by Service Canada)

Tribunal member: Teresa M. Day

Type of hearing: Videoconference

Hearing date: December 13, 2021

Hearing participant: Appellant

Decision date: December 22, 2021

File number: GE-21-2289

Decision

[1] The appeal is allowed in part. The Claimant (who is the Appellant) cannot be paid standard parental benefits beyond the 52 weeks allowed at law.

[2] But he can be paid extended parental benefits because he did not make a valid election when he chose standard parental benefits. The application form did not give him all of the information necessary to make an informed choice.

Overview

[3] The Claimant arranged to take a parental leave of absence from his employment from September 1, 2021 to December 24, 2021. On September 3, 2021, he applied for employment insurance (EI) parental benefits. He indicated that his child was born on X and asked for 17 weeks¹ of standard parental benefits.

[4] But the Claimant applied for these benefits less than a week before his child's first birthday. There is a 52-week "parental window", starting from the date the child is born, in which a claimant can collect standard parental benefits². Because the Claimant applied so close to the expiry of the parental window for standard benefits in relation to this child³, he only received 2 weeks of benefits on his claim⁴.

[5] Payment for the first week of standard parental benefits was issued to him on September 10, 2021.

[6] The Commission did not notify the Claimant that he would not be receiving the 17 weeks of standard parental benefits he asked for. On October 4, 2021, when the Claimant became aware there was a problem, he asked to switch to extended parental

¹ This is the approximate length of his parental leave from his employment with X.

² Subsection 23(2) of the *Employment Insurance Act* (EI Act) provides that standard parental benefits are payable during a period that begins in the week in which the child is born and ends **52 weeks** after that.

³ His claim was established as of August 29, 2021 pursuant to subsection 10(1) of the EI Act. His child was born on X. This means that the parental window for standard parental benefits to care for this child expired on September 11, 2021.

⁴ He was paid 2 weeks of standard parental benefits from August 29, 2021 to September 11, 2021.

benefits instead, to correspond with his parental leave from work⁵. The Commission declined his request.

[7] The Commission says that the Claimant's choice of standard parental benefits became irrevocable on September 10, 2021, when the first payment was issued to him⁶.

[8] The Claimant says he didn't know about the window of time for standard parental benefits when he applied for EI benefits. There was no information about this on the application form or in his online account. He now understands that he should have chosen the extended option because his parental leave extended beyond his child's first birthday, which is the cut-off for the standard option. He made a mistake, and asks for extended parental benefits so he can receive EI benefits during his parental leave.

[9] I find that the Claimant's election of standard parental benefits was not valid. This means he can change his election to extended parental benefits. These are the reasons for my decision.

Preliminary Matter

[10] The Commission identified two issues under appeal⁷:

- a) whether the Claimant can be paid any further standard parental benefits after the parental window on his claim has closed; and
- b) whether the Claimant can switch his election from standard to extended parental benefits.

[11] The Claimant does not contest the Commission's decision on the first issue. He testified that he now understands what the *Employment Insurance Act* (EI Act) says

⁵ Subsection 23(3.21) of the EI Act provides that the parental window for extended parental benefits begins with the week of the birth of the child and ends **78 weeks** later.

⁶ Subsection 23(1.2) of the EI Act says that the election between standard or extended parental benefits is irrevocable once parental benefits are paid in respect of a particular child.

⁷ See GD4-1.

about standard parental benefits, and accepts that they must be claimed within 52 weeks of the date of the birth of the child.

[12] I agree with the Commission on the first issue. The Claimant cannot be paid standard parental benefits beyond the 52 weeks allowed by law. The parental window on his claim closed on September 11, 2021. He received standard parental benefits for the period August 29, 2021 to September 11, 2021. This means that no further standard parental benefits are payable to him.

[13] I confirm the Commission's decision that no further standard parental benefits are payable to the Claimant, and dismiss his appeal on this issue.

[14] But I am allowing the Claimant's appeal on the second issue. I will now set out my reasons for doing so.

Issue

[15] Can the Claimant receive extended parental benefits?

Analysis

[16] Parents have two options for parental benefits: standard or extended parental benefits⁸.

[17] Standard parental benefits are payable for up to 35 weeks⁹ at a benefit rate of 55% of the claimant's weekly insurable earnings¹⁰.

[18] Extended parental benefits are payable for up to 61 weeks¹¹, but at a reduced benefit rate of 33% of the claimant's weekly insurable earnings¹².

⁸ Section 23(1.1) of the *Employment Insurance Act*

⁹ Section 12(3)(b)(i) of the *Employment Insurance Act*

¹⁰ Up to a maximum amount, as per section 14(1) of the *Employment Insurance Act*

¹¹ Section 12(3)(b)(ii) of the *Employment Insurance Act*

¹² Up to a maximum amount, as per section 14(1) of the *Employment Insurance Act*

[19] Claimants who request parental benefits ***must*** make a choice about the maximum number of weeks for which benefits may be paid¹³. This choice is known as the claimant's "election", and it is irrevocable once the claimant has been paid parental benefits on their claim¹⁴.

[20] When the Appellant submitted his initial application for EI benefits, he had to choose between standard and extended parental benefits. He chose standard parental benefits. In the field asking how many weeks of parental benefits he wanted, the Claimant asked for 17 weeks, which corresponded with the roughly 4 months of parental leave he had arranged with his employer.

[21] The Claimant was paid his first week of standard parental benefits on September 10, 2021. On October 4, 2021, he asked to change his election to the extended option.

Issue 1: What kind of parental benefits did the Claimant choose?

[22] The Claimant chose standard parental benefits.

[23] On his application, the Claimant selected the standard option (GD3-9). He asked for 17 weeks of benefits (GD3-10). He gave his last day of work as August 31, 2021 and his return to work date as December 25, 2021 (GD3-6). This is roughly 17 weeks after his last day of work.

[24] At the hearing, the Claimant agreed that he chose standard parental benefits. He testified that:

- He chose "standard" because he only wanted 17 weeks of EI benefits and this number "fell within the up-to-35-weeks standard option", so why would he go with the extended option that was at a lower rate but for even longer? It seemed obvious that the standard option was the best choice for him.
- He could only afford to take 4 months off work. This is the same amount of time he took off with his first child. However, in that case, he took his leave as soon

¹³ Section 23(1.1) of the *Employment Insurance Act*

¹⁴ Section 23(1.2) of the *Employment Insurance Act*

as the child was born and collected standard parental benefits without any problem.

- Nothing in the application or his online account warned him that this time would be any different.

[25] I find that the Claimant's choice was clear: he elected standard parental benefits.

Issue 2: Was his election of standard parental benefits valid?

[26] The Claimant's election of standard parental benefits was not valid. This is because the application form did not give him all of the information he needed to make a valid choice between standard or extended parental benefits.

[27] The Claimant testified at the hearing that:

- He always meant to take 17 weeks of parental leave from work.
- He wanted to collect EI parental benefits during his parental leave.
- A human resources (HR) representative at work told him that, as long as he started his parental leave before his child turned 1 year old, he could take parental leave from his job. The HR representative never told him that his parental leave had to be completed within the first year of the child's life.
- He applied for EI parental benefits on September 3, 2021, and his child turned 1 year old on September 8, 2021.
- There was nothing in the application for EI benefits that warned him about a 1-year rule for collecting standard parental benefits.
- He didn't know that his choice of standard parental benefits made it impossible for him to collect the 17 weeks of EI benefits he was applying for.
- If he had known he was effectively out of time to collect standard parental benefits when he was applying, he would have chosen the extended option.

- But there was nothing in the application form that explained you only had 52 weeks to collect standard parental benefits, but 78 weeks to collect extended parental benefits.
- And the Commission never provided him with a decision letter or any other notice that he was only going to get 2 weeks of benefits even though he'd asked for 17 weeks.
- He applied for EI on September 3, 2021.
- On September 6, 2021, he went in to his online account and saw the message that he was approved. But there was nothing saying how many weeks he was approved for.
- He didn't go online again after that because, on his application, he chose to be exempt from completing reports while receiving parental benefits.
- He was paid the first week of benefits on September 10, 2021, but nothing further after that.
- By October 2, 2021, he thought he might have "done something wrong", so he logged into his online account again. It said he'd been paid for 1 week, but nothing about the status of further payments. So he decided to submit a report to see if he could get the payments started again.
- He checked back on October 3, 2021, he saw a message in his online account that said his report was "rejected" and "action required".
- On October 4, 2021, he saw a message that his claim was paid in full, so he called Service Canada.
- That was the first time he heard anything about the "1 year rule" for standard parental benefits. When the agent explained that this meant he would not receive any more payments, he asked to change to the extended option.

- But he did end up getting 1 more week of standard parental benefits, bringing the total to 2 weeks.
- It was a mistake to ask for 17 weeks of benefits using the standard option. However, he didn't understand that at the time, and there was no information on the application that would have alerted him to his mistake.
- And the Commission didn't advise him of the consequences of his election.
- He had no idea that he'd even made a mistake until it was too late.

[28] The Commission says the Claimant was advised of the difference between standard and extended parental benefits, and that once parental benefits have been paid the choice is irrevocable.

[29] I agree that the application form does indeed point out the differences in benefit rate and benefit period for the standard and extended parental benefit options. And it includes the irrevocability warning. But this is not **all** of the information a claimant needs to make an informed decision about their election.

[30] I have reviewed the application form, and I agree with the Claimant. I don't see any information about a limited window of time to receive standard parental benefits¹⁵. Yet this was critically important information at the time of his application and, therefore, an essential requirement for making an informed decision. I therefore find that the application form didn't give the Claimant all of the information he needed to make a valid choice between standard or extended parental benefits.

[31] The Commission also says there was no obligation to question the claimant's selection of parental benefits or examine his intentions. I disagree. The Claimant said he would have chosen extended parental benefits if he had known about the 52-week parental window for the standard option. I accept his testimony on this point without hesitation. It is far more likely that he wanted 17 weeks of EI benefits, even at a

¹⁵ Nor did I see anything about the parental window for extended parental benefits.

reduced rate, than 2 weeks of standard parental benefits. In my view, this amounts to an inconsistency in the application that should have caused the Commission to enquire about his intentions

[32] The Appeal Division of the Tribunal has said that if a claimant's election as between standard and extended parental benefits was based on misleading information, then they can make their election again¹⁶. The Appeal Division has also refused leave to appeal a decision of the Tribunal where the election of standard parental benefits was held to be invalid because the application misled the claimant into making a selection that was contrary to his needs and wishes¹⁷. In the latter case, the Appeal Division distinguished a Federal Court decision¹⁸, which requires applicants to seek information about the benefits they are applying for and ask the Commission questions if there are things they don't understand. The Appeal Division highlighted the need to determine whether the claimant merely lacks the knowledge to answer clear questions (in which case they cannot change their election) ,or if the claimant was actually misled by relying on incorrect information that the Commission provides (in which case they can change their election).

[33] I find that the Claimant's situation falls within these Appeal Division cases. The Commission's failure to include critical information about the parental window for receipt of standard parental benefits misled the Claimant into selecting the standard option. This omission caused the Claimant to make his choice without knowing that his claim would end after only 2 weeks of EI benefits – long before his 17-week parental leave was over.

[34] I therefore find that the Claimant's election of standard parental benefits was invalid from the outset because the application form misled him by not giving him enough information to make a proper decision.

¹⁶ *Canada Employment Insurance Commission v. MO*, 2021 SST 435.

¹⁷ *Canada Employment Insurance Commission v. SA*, 2021 SST 406.

¹⁸ *Karval v. Canada (Attorney General)*, 2021 FC 396

[35] I am further supported in this conclusion by the fact that the Commission failed to issue a decision letter or otherwise notify the Claimant that he would only be receiving 2 weeks of benefits on his application for 17 weeks.

[36] In his testimony, the Claimant referred to the message in his online account on September 6, 2021, which he viewed and was satisfied that his application filed on September 3, 2021 had been approved. Immediately after the hearing, he filed a screen shot of the message, which was headed "Decision Made Claim Finalized" and said:

"We have finalized your claim for Employment Insurance benefits. You can view information about your claim on the Latest claim section." (GD5-1)

He also filed a screen shot of the screen that comes up when he clicks on the "Latest claim" link now (also at GD5-1). This link gives information about the start date of the claim (August 29, 2021), the fact that his waiting period was waived, the type of benefit (standard parental benefits), and his total insurable earnings, benefit rate and federal tax to be deducted. It also shows that 2 weeks of parental benefits were paid, 17 weeks were requested, and says "Total Weeks Paid" was 2. It also gives the end date of the claim as August 27, 2022.

[37] There is no information in the "Latest claim" section of the Claimant's online account that would have alerted him to the fact that he would only get 2 weeks of the 17 weeks of benefits he had asked for, or why. Nor does the information in this section suffice for purposes of the Commission's obligation to communicate the entitlement decision to the Claimant. This requires a clear statement of outcome and an explanation of the legal basis for the decision. I therefore find the Claimant was never provided with a decision about the number of weeks of standard parental benefits he was entitled to for the application he filed on September 3, 2021.

[38] The law allows a claimant to change their election prior to the first payment of parental benefits. But the Claimant wasn't given this chance. By failing to advise him of the decision about the weeks of entitlement on his claim prior to the issuance of the first

payment, the Commission took this opportunity away from the Claimant. They cannot now rely on the fact of the first payment to prevent him from changing his election.

[39] The Appeal Division of this Tribunal has said that a Claimant can make a new election if their first election was not valid. The Claimant testified repeatedly that he would choose the extended option if he could make a new choice based on the information he has now.

[40] Having found that the Claimant's first election was not valid, I further find that he can make a new election. He has elected extended parental benefits.

Conclusion

[41] The 52-week parental window for standard parental benefits in relation to the child born on X expired on September 11, 2021. The Claimant cannot be paid standard parental benefits beyond that date.

[42] But his election of standard parental benefits is invalid. This means the Claimant can make a new election. He has elected extended parental benefits. This means he can be paid extended parental benefits for the child born on X.

[43] This means the appeal is allowed in part.

Teresa M. Day
Member, General Division – Employment Insurance Section