



Citation: *Canada Employment Insurance Commission v JJ*, 2022 SST 262

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: Canada Employment Insurance Commission
Representative: Jared Porter

Respondent: J. J.

Decision under appeal: General Division decision dated November 18, 2021
(GE-21-1975)

Tribunal member: Melanie Petrunia

Type of hearing: Teleconference

Hearing date: February 16, 2022

Hearing participants: Appellant's representative
Respondent

Decision date: April 15, 2022

File number: AD-21-427

Decision

[1] The appeal is allowed. The Claimant is not entitled to receive parental benefits outside the parental benefit window.

Overview

[2] This appeal is about when claimants sharing parental benefits can receive those benefits. Can any of the weeks of shared parental benefits be received outside the parental benefit window set out in the *Employment Insurance Act* (EI Act)?

[3] In August 2021, the Respondent, J. J. (Claimant), applied to receive 12 weeks of extended parental benefits. He stated in his application that his child was born on April 3, 2020. The Claimant and his spouse had decided to share the maximum number of weeks of extended parental benefits allowed under the Employment Insurance (EI) Act, which is 69 weeks.

[4] The Appellant (Commission) told the Claimant that he could not receive all 12 weeks of benefits because the parental benefit window ends 78 weeks after the date of birth of the Claimant's child. The parental window was extended by two weeks for a period that his child was hospitalized so the Claimant had an 80-week parental benefit window.

[5] The Commission decided that the Claimant could be paid 7 weeks of benefits within the parental benefit window. The Claimant requested a reconsideration and the Commission maintained its decision.

[6] The Claimant successfully appealed to the General Division of the Tribunal. The General Division decided that the Claimant and his spouse were entitled to receive a total of 69 weeks of shared extended parental benefits allowed under section 23(4) of the EI Act.

[7] The General Division decided that the additional weeks of benefits were allowed regardless of the parental benefit window. The Claimant could receive benefits more than 80 weeks after the birth of his child.

[8] The General Division determined that there is a conflict between the parental benefit window set out in the EI Act and the section that allows additional weeks of shared parental benefits. It found that the legislation (laws from Parliament) is unclear and that the ambiguity should be resolved in favour of the Claimant.

[9] The Commission is appealing the General Division decision to the Tribunal's Appeal Division. It argues that the General Division made an error of law.

[10] I agree. The General Division misinterpreted the law when it decided that the parental benefit window does not apply to the additional weeks of shared parental benefits.

[11] I will give the decision that the General Division should have given: The Claimant is not entitled to receive parental benefits outside the parental benefit window.

Issues

[12] The issues in this appeal are as follows:

- a) Did the General Division make an error of law in its interpretation of the shared parental benefit provisions of the EI Act?
- b) If so, how should the error be fixed?
- c) Is the Claimant entitled to receive parental benefits outside the parental benefit window?

Analysis

[13] I can intervene in this case only if the General Division made a relevant error, which is known as a “ground of appeal.”¹ One of the grounds of appeal is that the General Division made an error of law in making its decision. The interpretation of legislation is a question of law.²

Background

– Pregnancy benefits and parental benefits

[14] The EI Act provides pregnancy benefits to eligible claimants who prove their pregnancies.³ Parental benefits are paid to eligible claimants while they care for newborn or adopted children.⁴ Parental benefits are a separate benefit from pregnancy benefits. These benefits are among the special benefits available under the EI Act.

[15] Claimants can receive up to 15 weeks of pregnancy benefits.⁵ Pregnancy benefits are payable during the period that begins 12 weeks before the week that the claimant expects to or does give birth and ends 17 weeks later.⁶

[16] When applying for pregnancy benefits, claimants can also request parental benefits, which will follow the 15 weeks of pregnancy benefits they receive. Claimants have to choose between two types of parental benefits:

- Standard parental benefits: The benefit rate is 55% of a claimant’s weekly insurable earnings up to a maximum amount. Up to 35 weeks of benefits are payable to one parent.

¹ Section 58(1) of the *Department of Employment and Social Development Act* (DESD Act) sets out the grounds of appeal.

² See *Canada (Attorney General) v Trochimchuk*, 2011 FCA 268 at paragraph 7.

³ See section 22 of the *Employment Insurance Act* (EI Act).

⁴ See section 23 of the EI Act.

⁵ See section 12(3)(a) of the EI Act.

⁶ See section 22(2) of the EI Act.

- Extended parental benefits: The benefit rate is 33% of a claimant's weekly insurable earnings up to a maximum amount. Up to 61 weeks of benefits are payable to one parent.

[17] The EI Act also says that, when two claimants apply for parental benefits for the same child, they can share additional weeks of benefits.⁷ I will refer to these as “shared parental benefits.” When two claimants elect (choose) to share parental benefits, the maximum number of weeks that can be divided between them is 40 for standard benefits and 69 for extended benefits.

[18] Neither parent can receive more than 35 weeks of standard or 61 weeks of extended parental benefits when they are shared.⁸ This means that two parents receiving shared parental benefits could get an additional 5 weeks of standard or 8 weeks of extended parental benefits.

– **The parental benefit window**

[19] The section of the EI Act that provides for parental benefits sets out the period when parental benefits can be paid.⁹ This is often called the “parental benefit window,” although that phrase does not appear in the EI Act. I will refer to the period as the “parental benefit window” in these reasons.

[20] The starting point in the EI Act is that the parental benefit window ends 52 weeks after the week of the child's birth, or the date of placement in cases of adoption.¹⁰ The window can be extended in certain circumstances.¹¹ When claimants elect to receive extended parental benefits, the window is extended by 26 weeks, for a total of 78 weeks.

⁷ See section 23(4) of the EI Act.

⁸ See section 23(4.11) of the EI Act.

⁹ See section 23(2) of the EI Act.

¹⁰ See section 23(2) of the EI Act.

¹¹ See sections 23(3) to 23(3.4) of the EI Act.

The General Division decision

[21] The General Division allowed the Claimant's appeal, finding that he was entitled to 12 weeks of shared extended parental benefits, including those weeks that fall outside the parental benefit window.

[22] The General Division reviewed amendments to the EI Act in 2018, which brought in the additional weeks of shared parental benefits (the relevant amendments).¹² The amendments allowed for parents who elected to share parental benefits to receive an additional 5 weeks of standard and 8 weeks of extended parental benefits. The General Division found that the legislation is unclear as to whether the parental benefit window applies to the additional weeks of shared parental benefits.¹³

[23] The General Division gave three reasons for finding that the legislation is unclear:

- There is a conflict between the parental benefit window and the provision that allows for the additional weeks of shared parental benefits.
- The parental benefit window provisions of the EI Act do not refer to the additional weeks of shared parental benefits.
- The relevant amendments adding the additional weeks of benefits included important clarifications but did not refer to the parental benefit window.

[24] After finding that the legislation is unclear, the General Division considered the object and purpose of the EI Act. It also considered the legislative intent behind the relevant amendments adding the additional weeks of shared parental benefits.¹⁴ Additionally, it looked at comments made during legislative debate. It relied on these

¹² Sections 23(4), 23(4.1), and 23(4.11) were added to the EI Act by the *Budget Implementation Act*, 2018, No. 2 (S.C. 2018, c. 27), sections 303 to 306.

¹³ See paragraph 14 of the General Division decision.

¹⁴ See paragraph 42 of the General Division decision.

comments and found that Parliament's intent was to extend the parental benefit period by 5 weeks for standard benefits and 8 weeks for extended benefits.¹⁵

[25] Having found that there is ambiguity in the legislation, the General Division decided that the ambiguity should be resolved in favour of the Claimant.¹⁶ It found that the Claimant could receive all of the 12 weeks of extended parental benefits that he requested.

[26] The General Division decided that the parental benefit window does not apply to the additional weeks of shared parental benefits (5 weeks for standard benefits or 8 weeks for extended benefits) when taken sequentially by two parents.¹⁷

– **The Commission's appeal to the Appeal Division**

[27] The Commission argues that the General Division made an error of law in its interpretation of the parental benefit window provisions. It says that the words of the EI Act are precise and unequivocal (unambiguous): They clearly state that claimants cannot receive parental benefits outside the parental benefit window.

[28] The Commission argues that the General Division did not follow the proper approach to interpreting the provisions of the EI Act. It says that the wording of the legislation is clear and should have played a dominant role in the General Division's interpretation. The Commission argues that, instead of focusing on the clear wording of section 23 of the EI Act, the General Division incorrectly found a conflict in the legislation.

[29] The Commission also says that the General Division relied on a misconception about pregnancy benefits when it found that two parents could not take the additional weeks of shared parental benefits sequentially if the parental benefit window applied. It relied on irrelevant information given by Service Canada agents and made incorrect assumptions about the legislative intent behind the relevant amendments to the EI Act.

¹⁵ See paragraph 46 of the General Division decision.

¹⁶ See paragraph 51 of the General Division decision.

¹⁷ See paragraph 52 of the General Division decision.

[30] The Claimant argues that the General Division's decision that the EI Act is ambiguous or, at best, silent about whether the shared benefits are subject to the parental benefit window is accurate.

[31] The Claimant says that the General Division did not make an error of law. He argues that the General Division clearly laid out the conflicts and ambiguity in the legislation. The Claimant's position is that the General Division was right to resolve the ambiguity in his favour and I should dismiss the appeal.

The General Division made an error of law in its interpretation of sections 23(2) and 23(4) of the EI Act

[32] The General Division based its interpretation of the legislation on a perceived conflict between section 23(4) of the EI Act, which allows for additional weeks of shared parental benefits and the parental benefit window at section 23(2). I find that the General Division erred in law by failing to consider the text of section 23(2) in its exercise of statutory interpretation.

[33] When interpreting legislation, the courts have said that the Tribunal must consider the text, context, and purpose of the legislation.¹⁸ The General Division's decision focused on the purpose of the legislation and the perceived conflict between the sections. However, the General Division failed to properly consider the actual wording of sections 23(2) and 23(4). This is an error of law.

[34] In its decision, the General Division rejected the Commission's argument that the wording of the section is clear. However, the General Division did not include the text of section 23(2) in its decision or interpret the words used in that section.

[35] The General Division said that many Tribunal decisions note circumstances in which Commission agents have told claimants that they are entitled to claim shared

¹⁸ See *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (*Vavilov*) at paragraph 121 where the Court held that "the administrative decision maker's task is to interpret the contested provision in a manner consistent with the text, context and purpose, applying its particular insight into the statutory scheme at issue."

parental benefits beyond the parental benefit window.¹⁹ It relied on this as an indication that the wording is unclear.

[36] As mentioned above, the General Division gave three reasons for finding that the legislation is unclear. First, the General Division found that there is a conflict between the parental benefit window and the additional weeks of benefits. It based this finding on the conclusion that it is mathematically impossible, within a 78-week parental benefit window, for two parents to take 69 weeks of extended parental benefits sequentially after the childbearing parent receives 15 weeks of pregnancy benefits.²⁰

[37] The General Division noted that there is nothing in the EI Act that says that the extra weeks of shared parental benefits have to overlap with the other parent's benefits so that the parents can be sure to receive them. For this reason, it found that there is a conflict between the sections.²¹

[38] The General Division made an error of law in concluding that the sections are in conflict because there is no requirement that the benefits be taken concurrently. There are situations in which two parents could take the additional weeks of benefits sequentially within the standard 52-week or 78-week parental benefit window:

- The additional weeks of benefits apply to claimants who adopt and would not have to accommodate any weeks of pregnancy benefits. Those parents can take the additional weeks of benefits sequentially.
- The General Division made an error in misconstruing how pregnancy benefits work. These benefits may be taken up to 12 weeks before the claimant is expected to give birth. In cases where pregnancy benefits are taken before birth, two parents may be able to take some or all of the additional weeks of shared parental benefits sequentially.

¹⁹ See paragraph 24 of the General Division decision, citing *CF v Canada Employment Insurance Commission*, 2020 SST 784; *MJ v Canada Employment Insurance Commission*, 2020 SST 1178; and *DH v Canada Employment Insurance Commission*, 2020 SST 1197.

²⁰ See paragraph 27 of the General Division decision.

²¹ See paragraph 28 of the General Division decision.

[39] I acknowledge that many claimants will be in the same situation as the Claimant, with the childbearing parent having taken pregnancy benefits starting at or around the time of birth. The Claimant argues that the General Division did not make a mathematical error, as the Commission states, when it found that two parents cannot take the additional weeks sequentially if the childbearing parents take pregnancy benefits starting when the child is born. For these parents, the parental benefit window would prevent two claimants from taking the additional weeks sequentially.

[40] However, the General Division was wrong to conclude that Parliament would have included a provision requiring the additional weeks to overlap if it intended the parental benefit window to apply. The General Division ignored those circumstances in which claimants are able to take the weeks sequentially.

[41] The General Division also noted that the extension to the parental benefit window in section 23(3.2) would seemingly allow the childbearing parent to have their parental benefit window extended so that the additional weeks could be received. This is because that section allows for an extension to the parental benefit window when a claimant is receiving more than one special benefit.²²

[42] The General Division found that it is unlikely the government would have allowed additional weeks of shared benefits only to limit the non-childbearing parent from receiving them, when taken sequentially.²³

[43] Section 23(3.2) allows for an extension to the parental benefit window when a claimant receives more than one type of special benefit, in this case pregnancy and parental benefits. However, this section would not be helpful to two parents sharing the weeks of additional parental benefits.

[44] The childbearing parent will presumably take 15 weeks of pregnancy benefits followed by the chosen number of weeks of extended parental benefits. Each individual claimant can only take a maximum of 61 weeks of extended parental benefits. A

²² See paragraph 29 of the General Division decision.

²³ See paragraph 30 of the General Division decision.

childbearing parent would reach the maximum number of weeks allowed for an individual claimant when the 78-week window ends.

[45] Second, the General Division found that there is no reference to the additional weeks of shared parental benefits in the sections about the parental benefit window (sections 23(2) to 23(3.4) of the EI Act).²⁴ For this reason, it found that the EI Act is silent on whether the parental benefit window applies to the extra weeks of shared benefits.²⁵

[46] However, none of those subsections specifically refer to a certain number of weeks of benefits. By including “[s]ubject to section 12,” section 23(2) references the applicable maximums.

[47] Section 12 of the EI Act sets out the maximum number of weeks of benefits that can be paid to a claimant. Section 12(1) reads:

12 (1) If a benefit period has been established for a claimant, benefits may be paid to the claimant for each week of unemployment that falls in the benefit period, subject to the maximums established by this section.

[48] Section 12(4) refers to the additional weeks of shared parental benefits. It reads:

(4) The maximum number of weeks for which benefits may be paid

(a) for a single pregnancy is 15; and

(b) for the care of one or more new-born or adopted children as a result of a single pregnancy or placement is,

(i) if the maximum number of weeks that has been elected under subsection 23(1.1) is established under subparagraph (3)(b)(i), 35 **or, if the weeks for which benefits may be paid are divided in accordance with section 23, 40,** or

(ii) if the maximum number of weeks that has been elected under subsection 23(1.1) is established under subparagraph (3)(b)(ii), 61 **or, if the weeks for which**

²⁴ See paragraph 32 of the General Division decision.

²⁵ See paragraph 35 of the General Division decision.

benefits may be paid are divided in accordance with section 23, 69.²⁶

[emphasis added]

[49] The General Division failed to consider the full text of the section, particularly the words “[s]ubject to section 12” in section 23(2).

[50] Finally, the General Division noted that the amendments that introduced the additional weeks of shared parental benefits included clarifications. Specifically, it noted that section 23(4.1) says that, “[f]or greater certainty,” the total number of weeks of parental benefits that can be paid for the same child or children is 40 for standard benefits or 69 for extended benefits.²⁷ Section 23(4.11) makes it clear that each individual claimant can get no more than 35 or 61 weeks when benefits are shared.²⁸

[51] The General Division found that these clarifications did not set out a parental benefit window limit or say that the benefits have to overlap. It found that Parliament would have included a provision saying that the parental benefit window applies, or that benefits have to overlap, if that was the intention.²⁹ The fact that it did not include this clarification shows that the legislation is unclear.

[52] As discussed above, the General Division ignored those situations in which claimants can take the weeks sequentially when it decided that Parliament would have included a provision requiring the benefits to overlap.

[53] The General Division’s interpretation of section 23(4) is that the parental benefit window does not apply to the additional 5 weeks of standard or 8 weeks of extended benefits when shared parental benefits are taken sequentially, but presumably does apply to the 35 or 61 weeks that an individual claimant may receive.

²⁶ This section was also amended by the *Budget Implementation Act, 2018, No. 2* to include reference to the additional weeks of shared parental benefits.

²⁷ See paragraph 37 of the General Division decision.

²⁸ See paragraph 38 of the General Division decision.

²⁹ See paragraph 40 of the General Division decision.

[54] If the parental benefit window did not apply to those additional weeks, there is nothing in the wording of the section 23 to suggest the weeks would have to be taken immediately after the other claimant's benefits end. This would mean that a claimant could take the additional 5 or 8 weeks of parental benefits at any time.

[55] The General Division found that only the additional 5 or 8 weeks of shared parental benefits are not covered by the parental benefit window. There is no explicit reference in sections 23(4), 23(4.1), or 23(4.11) to 5 or 8 additional weeks of benefits. Two claimants may choose to divide the 40 or 69 weeks however they decide.

[56] I find that the wording of the section 23 cannot support the General Division's interpretation that the parental benefit window applies to 35 or 61 weeks of shared parental benefits, but not the additional weeks.

[57] The General Division made an error of law in its interpretation of section 23 when it found that the wording is unclear and that the parental benefit window provisions conflict with the section that allows additional weeks of shared parental benefits.

[58] The General Division failed to consider the actual wording of sections 23(2) and 23(4). It focused on the purpose of the legislation when finding that the sections are unclear rather than looking at the text of the legislation.

I will fix the General Division's error by giving the decision it should have given

[59] The General Division based its decision on a misinterpretation of the legislation, which is an error of law. This means that I can substitute my own decision or I can refer the matter back to the General Division for reconsideration.³⁰ I can decide any question of law or fact that is needed to resolve the Claimant's appeal.³¹

[60] In this case, I find that it is appropriate for me to substitute my own decision. The parties agree that I should make the decision that the General Division should have

³⁰ Section 59(1) of the DESD Act sets out my powers to fix an error.

³¹ See section 64(1) of the DESD Act.

made. The record is complete and the parties had a full opportunity to make their case at the General Division.³²

The Claimant cannot receive benefits outside the parental benefit window

[61] I found that the General Division erred in its interpretation of sections 23(4) and 23(2) of the EI Act. I now have to interpret the legislation. To do so, I have to consider the words of the legislation in their entire context in their grammatical and ordinary sense harmoniously with the scheme and object of the EI Act, and the intention of Parliament.³³

[62] The Commission argues that the wording of section 23(2) is precise and unequivocal. It says that the General Division's interpretation should have ended with a finding that the language of the section is clear and that no further analysis is required.

[63] The Claimant argues that the wording used in section 23(2) does not refer to the additional weeks of shared benefits. He says that the additional weeks are allowed by a combination of sections 12(4)(b)(ii) and 23(4). He says that the application for benefits only says that two parents can receive up to a combined total of 69 weeks of extended benefits. It does not refer to a parental benefit window, or say that these weeks must be taken within a 78-week period after the child's birth.

[64] The Claimant argues that the General Division's decision that the EI Act is ambiguous or, at best, silent about whether the shared benefits are subject to the parental benefit window is accurate. If the EI Act is silent, this explains why the application for benefits is also silent and why the Service Canada agents did not tell him or his spouse about the parental benefit window. He says that the parental benefit window does not apply.

³² *Canada Employment Insurance Commission v Lu*, 2021 SST 619 at paras 34-36; *X v Canada Employment Insurance Commission*, 2019 SST 351 at para 18.

³³ See *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC) at para 21 and *Canada Trustco Mortgage Co. v Canada*, 2005 SCC 54 (*Canada Trustco*).

[65] The Claimant also says that there are many other appeals concerning this issue because the EI Act is confusing. The General Division made a careful and thorough analysis of the law and did not err.

[66] I agree with the Commission that the wording of section 23(2) is clear. However, I disagree that this ends the statutory interpretation exercise. I have to consider the total context of the sections to be interpreted.³⁴

[67] The Commission relies on the Supreme Court of Canada decision in *Canada Trustco*. In that case, the Court said that the precise and unequivocal words will play a dominant role in the interpretive process.³⁵ When the words used are clear, their ordinary meaning does play a more significant role in the interpretation.³⁶

[68] However, the Court also said that we have to “look beyond the mere text of the provisions and undertake a contextual and purposive approach to interpretation in order to find meaning that harmonizes the wording, object, spirit and purpose of the provisions.”³⁷

[69] The language in the EI Act cannot be interpreted independent of its context and purpose. In *Canada Trustco*, the Court also said that context and purpose can reveal ambiguity in the legislation where the language appears to be plain and clear.³⁸

[70] I will examine the wording of sections 23(2) and 23(4), the context of these sections in the EI Act, the purpose of the legislation, and the intention of Parliament.

– **The wording of the legislation is clear**

[71] The Commission argues that the wording of the legislation is precise and unequivocal, so the words should play a dominant role in interpreting the provisions.

³⁴ See *Atco Gas & Pipelines Ltd. V Alberta (Energy & Utilities Board)*, 2006 SCC 4, at para 48.

³⁵ See *Canada Trustco* at para 10.

³⁶ See *Vavilov* at para 120.

³⁷ See *Canada Trustco* at para 47.

³⁸ See *Canada Trustco* at para 47.

Because the wording of the sections is important, I will include the full text of the relevant sections.

[72] The parental benefit window is set out in section 23(2) of the EI Act:

(2) Weeks for which benefits may be paid - Subject to section 12, benefits under this section are payable for each week of unemployment in the period

(a) that begins with the week in which the child or children of the claimant are born or the child or children are actually placed with the claimant for the purpose of adoption; and

(b) that ends 52 weeks after the week in which the child or children of the claimant are born or the child or children are actually placed with the claimant for the purpose of adoption.

[73] The EI Act then outlines certain circumstances in which the parental benefit window can be extended:

- when the child is hospitalized
- when a claimant is deployed
- when a claimant receives multiple special benefits
- where a claimant elects to receive extended parental benefits
- when there are certain combinations of regular and special benefits³⁹

[74] In 2018, the EI Act was amended to add the section that allows two claimants to share up to 40 weeks of standard parental benefits or 69 weeks of extended parental benefits.⁴⁰ This section allows for an extra 5 weeks of standard or 8 weeks of extended benefits to be paid when shared. Section 23(4) reads:

Division of weeks of benefits

(4) If two claimants each make a claim for benefits under this section — or if one claimant makes a claim for benefits under this section and an individual makes a claim for benefits under section 152.05 — in respect of the same child or children, the weeks of benefits payable under this section, under section 152.05

³⁹ See sections 23(3) to 23(3.4) of the EI Act.

⁴⁰ See the *Budget Implementation Act, 2018*, No. 2 (S.C. 2018, c. 27), sections 303 to 306.

or under both those sections, may be divided between them up to a maximum of 40, if the maximum number of weeks that has been elected under subsection (1.1) or 152.05(1.1) is established under subparagraph 12(3)(b)(i) or 152.14(1)(b)(i), or up to a maximum of 69, if that number of weeks is established under subparagraph 12(3)(b)(ii) or 152.14(1)(b)(ii). If they cannot agree, the weeks of benefits are to be divided in accordance with the prescribed rules.

[75] The amendments also say that an individual claimant cannot receive more than 35 or 61 weeks of benefits. Section 23(4.11) reads:

(4.11) Even if the weeks of benefits payable are divided in accordance with subsections (4) and (4.1), the maximum number of weeks for which benefits may be paid to a claimant is 35 or 61 weeks, in accordance with the election made under subsection (1.1) or 152.05(1.1).

[76] The opening words to section 23(2) are: “[s]ubject to section 12, **benefits under this section** are payable for each week of unemployment in the period ...” [emphasis added]. The additional weeks of shared benefits are set out in section 23(4), which makes them benefits under section 23.

[77] The plain wording of section 23 is that the benefits payable under section 23 are limited to the parental benefit window set out in section 23(2). There is nothing in the legislation to suggest the additional weeks of shared parental benefits are not benefits under section 23.

[78] I have also considered the words “[s]ubject to section 12” in section 23(2). The relevant parts of section 12 are set out in paragraphs 46 and 47, above. As stated, I find that the additional weeks are referred to in section 12(4).

[79] I find that the wording of section 23 is clear. The section addresses all parental benefits. It includes the additional weeks of shared parental benefits at section 23(4).

[80] Section 23(2) sets out when the benefits under section 23 can be paid. A plain reading of the section is that the parental benefit window applies to all benefits provided for by section 23, including the additional weeks of shared parental benefits. This is

further supported by the use of the phrase “[s]ubject to section 12” as the additional weeks are referred to in section 12(4).

[81] I understand the Claimant’s argument that the legislation is not clear because he was never advised of the parental benefit window, and there is no reference to it on the application for benefits. I find that this is more likely because of confusion in the application of the law, resulting in misinformation. It does not mean that the language used in the EI Act is unclear.

[82] As indicated, the analysis does not end with the plain meaning of the text. Having found that the words are clear, they will play a dominant role in the interpretation.⁴¹ However, I also have to look at the context to determine whether this interpretation is consistent with the purpose of the legislation and the intention of Parliament.

– **Context and purpose of the parental benefit provisions**

[83] Benefits under the EI Act are payable within a benefit period. Section 10 of the EI Act concerns the commencement, length, and termination of the benefit period. This period begins when a claimant has an interruption of earnings. A claimant has to have established a benefit period to receive benefits.

[84] The parental benefit window defines when parental benefits may be paid. The parental benefit window extensions allowed by the EI Act have corresponding extensions to the benefit period in section 10.⁴² This means that a claimant who is entitled to an extension to their parental benefit window will also see an extension to their benefit period, so that they can receive benefits.

[85] If the parental benefit window did not apply to the additional weeks of benefits, as found by the General Division, presumably a claimant would be relying on their benefit period under section 10 to ensure eligibility.

⁴¹ See *Celgene Corp v Canada (Attorney General)*, 2011 SCC 1 at para 21.

⁴² See sections 10(10) to 10(15) of the EI Act.

[86] However, the payment of parental benefits is dependent on the parental benefit window and not the benefit period. The Federal Court of Appeal has stated:

Although there can be no doubt that the benefit period established pursuant to sections 9 and 10 of the *Act* is specific to a claimant, the period in which parental benefits may be paid under subsection 23(2) is not. That period is tied to the birth of a child or children (see: subsection 23(2)). Therefore, even though two claimants can make a claim for parental benefits for the care of one or more children and each claimant must separately establish his or her own benefit period, the parental benefits that will be paid can only be paid during the period set out in subsection 23(2), regardless of when a claimant's benefit period commences and ends.⁴³

[87] The purpose of parental benefits is to compensate eligible parents who have an interruption of earnings when they care for a newborn or adopted child or children. These provisions are not driven by the needs of the parents. The purpose of the legislation is to provide these parents with income replacement for a limited time.⁴⁴

[88] I have reviewed the commentary during parliamentary debate as discussed by the General Division.⁴⁵ It is clear that the intention in amending the EI Act to allow for additional weeks of shared parental benefits was to encourage parents to share parenting and work responsibilities more equitably and to give parents greater flexibility.

[89] I acknowledge that a comment was made during legislative debate that the amendments would allow new mothers more flexibility to return to work sooner if they wish.⁴⁶ This objective could be frustrated by limiting the weeks of shared parental benefits to the parental benefit window. However, the objective of encouraging parents to share parenting obligations is consistent with the parental window applying.

⁴³ See *Martin v Canada (Attorney General)*, 2013 FCA 15 (*Martin*) at para 75.

⁴⁴ See *Martin* at para 66 where the Court states: "Consequently, 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."

⁴⁵ See General Division decision at paras 44 and 45.

⁴⁶ Joel Lightbound, Parliamentary Secretary to the Minister of Finance, said this in the House of Commons Debates, *Edited Hansard*, 148(347), 42nd Parliament, 1st session, November 1, 2018.

[90] As discussed above, there may be circumstances where parents can take the weeks sequentially, while others will have to overlap to receive all 40 or 69 weeks. Whether the weeks of benefits are taken sequentially or concurrently, two parents have more weeks available to share in parenting obligations. Two parents have additional weeks of parental benefits available to share, which were not available prior to the relevant amendments.

[91] The Claimant argues that the intention of sharing equitably in parenting responsibilities is frustrated if parents have to overlap their weeks of benefits, or a childbearing parent has to take some weeks of pregnancy benefits before birth. I recognize that it may have been preferable for Parliament to have included an extension to the parental benefit window to allow all parents to take the additional weeks sequentially.

[92] However, the actual words in the legislation cannot be ignored to interpret a provision in a way that better fits with the purpose of the legislation.⁴⁷ The plain language of the text is consistent with the purpose of encouraging parents to share parenting obligations.

[93] I have considered the amendment to the *Canada Labour Code*, which was referenced by the General Division and raised by the Claimant at the hearing before the Appeal Division. This amendment was brought in at the same time as the additional weeks of shared parental benefits under the EI Act. The amendment increased the aggregate amount of leave for two employees in respect of the same child or children to 86 weeks.⁴⁸

[94] However, I note that the *Canada Labour Code* also contains a limitation on when parental leave may be taken.⁴⁹ This period was not amended when the aggregate number of weeks was increased and limits parental leave to the 78-week period beginning when a child is born, or placed for adoption. This means that two employees

⁴⁷ See *Canada (Information Commissioner) v Canada (Minister of National Defence)*, 2011 SCC 25 at para 40.

⁴⁸ See section 206.2 of the *Canada Labour Code*, R.S.C., 1985, c. L-2.

⁴⁹ See section 206.1(2) of the *Canada Labour Code*, R.S.C., 1985, c. L-2.

may take 86 weeks of leave combined for the same child, but will also be limited to a 78-week leave period.

[95] The amendment to the *Canada Labour Code* does not suggest that Parliament intended for an extension to the parental benefit window.

[96] I find that the wording of section 23 is clear. While it is true that a benefits-conferring law should be given a broad and liberal interpretation, this interpretive approach cannot be used to read out an express limitation in the legislation.⁵⁰ Reading section 23(4) as allowing 5 or 8 additional weeks of parental benefits outside the parental benefit window would effectively read out the express limitation in section 23(2).

[97] Furthermore, the courts have said that, for there to be ambiguity in a text, the ambiguity has to be real. This means that the text has to be capable of reasonably supporting more than one meaning.⁵¹

[98] I do not find that the text can reasonably support the meaning that the parental benefit window does not apply to the additional weeks of shared parental benefits. The context and purpose do not reveal ambiguity in this clear language. The plain meaning of the section is consistent with the purpose of the legislation and the intention of Parliament.

[99] When the parental benefit window applies to the additional weeks of shared parental benefits, many parents in the same situation as the Claimant will be unable to take those weeks sequentially. The Claimant argues that it is not line with Parliament's intention to require some parents to take these weeks concurrently, or to require a childbearing parent to take some weeks of pregnancy benefits before the child's birth in order to take the weeks sequentially.

⁵⁰ See *Villani v Canada (Attorney General)*, 2001 FCA 248.

⁵¹ See *Bell ExpressVu Limited Partnership v Rex*, [2002] 2 SCR 559 at para 29.

[100] I have considered whether limiting the additional weeks of shared parental benefits to the parental benefit window amounts to an absurdity or, potentially, an error in legislative drafting.

[101] A result may be absurd if it “leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment”⁵²

[102] I find that, while it might be more consistent with the stated objectives of the legislation to have increased the parental benefit window for parents who share additional weeks of benefits, this does not amount to an absurdity.

[103] The additional weeks of shared parental benefits are available to claimants, some of whom will be able to take the weeks sequentially, while others will have to take them concurrently. This amounts to a potential inconsistency in the application of the law depending on the claimant’s circumstances. However, this inconsistency does not rise to the level of an absurdity.

[104] As discussed above, if the parental benefit window does not apply to the additional weeks of shared parental benefits, claimants would be able to take 5 or 8 weeks of parental benefits at any time. I find that this would be an illogical outcome that is incompatible with the other sections of the EI Act.

[105] I have considered whether the fact that the parental benefit window was not amended to include an extension to allow the additional weeks of shared parental benefits to be taken concurrently could be seen as an error in legislative drafting. Generally, a drafting error can be corrected when three criteria are met:

- the error leads to a manifest absurdity
- the absurdity is caused by a traceable error
- an obvious correction is available⁵³

⁵² See *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 at para 27.

⁵³ See *Canada (Attorney General) v Vorobyov*, 2014 FCA 102 at para 29 (*Vorobyov*).

[106] As I have discussed, I do not find that the potential error leads to a manifest absurdity.

[107] There is also a difference between a drafting error and a legislative gap. A legislative gap happens when a law is under-inclusive and results in a narrower application than it should. In this case, the legislation does not allow certain claimants to take the additional weeks of shared parental benefits consecutively. Under-inclusiveness is cured by legislation not by reading in an exception that is not in the EI Act. This is considered an amendment that has to be left to the legislature.⁵⁴

[108] Parliament did not amend the parental benefit window, or provide an exception to the window for the additional weeks. If this decision was not intentional, I find that the lack of an extension to the parental benefit window would be a legislative gap rather than a drafting error.

[109] Given that Parliament had extended the parental benefit window before, such as when it introduced extended parental benefits, consideration has to be given to the likelihood that Parliament did not intend to modify the parental benefit window, just as it did not amend the leave period in the *Canada Labour Code*.

[110] The language of section 23(2) is clear that the window will apply to benefits under that section. This suggests that the legislative drafters would have been aware that section 23(2) would apply to the weeks of benefits under section 23(4).

[111] I note that the Claimant made every effort to ensure that he was complying with the law when applying for shared parental benefits. In this case, the Claimant and his spouse contacted the Commission for information and advice numerous times. He was never told about the parental benefit window. He relied on this information when making plans for his leave.⁵⁵ There was little more that the Claimant could have done.

⁵⁴ See *Vorobyov* at para 30.

⁵⁵ See GD2-5.

[112] I understand the Claimant's frustration. I am sympathetic to his circumstances and those of the many other claimants in the same situation. However, I have to interpret and apply the law, and I cannot re-write legislation.⁵⁶

[113] I find that the legislation is clear. The additional weeks of shared parental benefits are benefits under section 23. This means that the parental benefit window applies and that benefits cannot be paid outside this period.

Conclusion

[114] The appeal is allowed. The General Division made an error of law in its interpretation of sections 23(2) and 23(4) the EI Act. The Claimant is not entitled to receive parental benefits beyond the parental benefit window.

Melanie Petrunia
Member, Appeal Division

⁵⁶ See *Canada (Attorney General) v Knee*, 2011 FCA 301 at para 9.