



Citation: *DJ v Canada Employment Insurance Commission*, 2021 SST 953

Social Security Tribunal of Canada General Division – Employment Insurance Section

Decision

Appellant: D. J.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (431616) dated August 24, 2021
(issued by Service Canada)

Tribunal member: Suzanne Graves

Type of hearing: Teleconference

Hearing date: October 4, 2021

Hearing participant: Appellant

Decision date: October 13, 2021

File number: GE-21-1726

Decision

[1] The appeal is allowed. The Tribunal agrees with the Claimant.

[2] This means that the Claimant can receive 31 weeks of extended parental benefits.

Overview

[3] The Claimant's baby was born on December 19, 2019. The Claimant and his spouse decided to divide the maximum number of extended parental benefits allowed under the *Employment Insurance Act* (EI Act). Since they are sharing parental benefits, the EI Act allows them to take up to eight additional weeks of extended benefits.

[4] After getting advice from Service Canada, the two parents opted to claim 69 weeks of shared parental benefits, taken sequentially. The Claimant planned to take 31 weeks of those parental benefits. On February 1, 2021, the Commission wrote to the Claimant, confirming that he was approved to receive 31 weeks of parental benefits, starting on January 3, 2021.

[5] The Commission argues that the Claimant cannot receive all 31 weeks of parental benefits he expected. It says that parental benefits must be paid within the "parental benefit window" set out in section 23 of the EI Act. The Commission argues that the extended parental benefit window ends 78 weeks after the birth of his baby. It says that the Claimant's parental window ends on June 19, 2021.

[6] The Claimant is appealing the Commission's decision to the Social Security Tribunal.

Issue

[7] Can the Claimant receive 31 weeks of extended parental benefits, including eight weeks of shared benefits, taken immediately after his spouse's claim for maternity and parental benefits?

Analysis

[8] Parental benefits are payable to a claimant to care for their newborn child.¹ The EI Act says that parental benefits are payable for the period that begins with the week in which the child is born or placed with the parent, and ends after 52 weeks.²

[9] The 52-week period after a baby is born or placed is referred to as the “parental benefit window.” This window can be extended in some circumstances. It can be extended for 26 weeks for a claimant to receive extended parental benefits. The period can also be extended when a claimant’s baby is hospitalized.

[10] The law also says that when a claimant claims more than one type of special benefit, the parental benefit window is extended to allow them to claim the maximum number of special benefits allowed under the EI Act.³

[11] The maximum number of weeks of parental benefits in a benefit period for an individual claimant is 35 weeks of regular parental benefits or 61 weeks of extended parental benefits, as elected by the claimant.⁴

Additional weeks of shared parental benefits

[12] In 2018, the government passed the *Budget Implementation Act, 2018, No. 2*, which allowed additional weeks of parental benefits when those benefits are shared between two parents.⁵ I will refer to this amending legislation as Bill C-86.

[13] New sections added by Bill C-86 say that when benefits are shared between two parents, they can receive an additional eight weeks of extended parental benefits.⁶ Each claimant is limited to an individual maximum of 35 weeks of standard parental benefits or 61 weeks of extended parental benefits.

¹ See section 23 of the *Employment Insurance Act* (EI Act).

² See section 23(2) of the EI Act.

³ See section 23(3.2) of the EI Act.

⁴ See section 12(3) of the EI Act.

⁵ Sections 23(4), (4.1) and (4.11) were added to the EI Act by section 304 of the *Budget Implementation Act, 2018, No. 2*, S.C. 2018, c. 27.

⁶ See sections 23(4), (4.1) and (4.11) of the EI Act.

Is the wording of section 23 of the EI Act clear?

[14] The Commission says that the legislation is clear and unambiguous. It argues that parental benefits are only payable during the parental window, which generally begins with the week in which the child of a claimant is born or placed with the claimant, and ends 52 weeks after that week.

[15] When extended benefits are chosen, the Commission says that the 52-week parental window is extended by up to 26 weeks, to allow for payment of extended parental benefits up to a maximum of 61 weeks of benefits. The Commission says that the EI Act clearly states that extended parental benefits, including additional shared benefits, can only be claimed up to 78 weeks after the birth or placement of a child.

[16] The Claimant argues that the legislation is unclear, and this is why he called the Commission for advice. He relied on information the Commission gave him, including its written confirmation that he would receive 31 weeks of parental benefits, starting on January 3, 2021.⁷ He queries how a claimant can be expected to understand the rules, if even Commission agents cannot interpret this provision.

[17] The Claimant says he arranged his parental leave based on the information provided to him by the Commission. As a result, he was unexpectedly left with no income for the remaining weeks of shared extended benefits he expected to receive.

[18] The Commission says that it is unfortunate that agents gave the Claimant incorrect advice, but that it cannot deviate from the text of the EI Act, no matter what a claimant's personal circumstances are.⁸

[19] I agree with the Commission's argument that the EI Act must be applied as it is written. But I respectfully disagree with the Commission's argument that the legislation is clear and unambiguous. I think that the wording of section 23 of the EI Act is unclear

⁷ The Commission's letter to the Claimant dated February 1, 2021, is at GD3-18.

⁸ The Commission's argument on this issue is at GD4-3. It relies on the decision of the Federal Court of Appeal in *Canada (AG) v Knee*, 2011 FCA 301.

on whether the parental benefit window applies to prevent a claimant from receiving the additional shared weeks of parental benefits allowed under section 23(4) of the Act.⁹

[20] I find that the legislation is unclear for the following three reasons.

Conflict between the parental benefit window and the added benefits

[21] First, if a 78-week parental benefit window must be met, it is mathematically impossible for two parents to take all 69 weeks of extended shared benefits sequentially, after a childbearing parent completes 15 weeks of maternity benefits. This is because 15 weeks of maternity benefits, followed by 69 weeks of shared extended parental benefits include a total of 84 weeks of benefits. This does not include any weeks allowed for a waiting period.

[22] There is nothing in the EI Act that states that the extra weeks of shared parental benefits must overlap with the other parent's benefits so that the parents can be sure to receive them. So, I think there is a conflict between the parental window in section 23(2) of the EI Act and the additional shared benefits allowed under a combination of sections 12(4) and 23(4) of the Act.

[23] Also, the Commission references section 23(3.21) of the EI Act, but does not mention section 23(3.2) of the Act.¹⁰ The childbearing parent appears to be eligible under that section for an extension of the extended parental window beyond 26 weeks if they are claiming both maternity and parental benefits.

[24] If the childbearing parent is eligible for a benefit period extension, then only the non-childbearing parent would be required to take all of their extended parental benefits within a 78-week parental benefit window.

⁹ I acknowledge that in most previous decisions, the Tribunal has decided that the parental window applies to claims made for additional shared parental benefits. However, I am not required to follow previous Tribunal decisions and I have decided not to follow them because I think that the legislation is unclear. There is, as yet, no guidance from the courts or from the Tribunal's Appeal Division on this issue.

¹⁰ The Commission's representations at GD4-4 to GD4-5 include sections 10(13.01), 12(3)(b), 23(1.1), (2), and (3.21) and section 112 of the EI Act. Its representations do not include section 23(3.2) or any sections which reference the additional shared parental benefits permitted by Bill C-86.

[25] I find it unlikely that the government would have introduced additional shared benefits only to limit a non-childbearing parent from receiving them, when they are taken sequentially. Allowing additional weeks of benefits, but requiring that the weeks overlap, does not necessarily enable a childbearing parent to return to work earlier.

The parental benefit window refers to benefits under section 12(3)(b)

[26] Second, there is no reference to the additional weeks of benefits in sections 23(2) to (3.4) of the EI Act (the parental benefit window provisions). Section 23(2)(b) says that benefits are payable for each week of unemployment in the period “that ends 52 weeks after the week in which the child or children of the claimant are born or [...] placed with the claimant for the purpose of adoption.”

[27] The Commission then relies on section 23(3.21) of the EI Act, which says that the 52-week period is extended by 26 weeks where “[...] the applicable maximum number of weeks is established in subparagraph 12(3)(b)(ii) [...]” But the **additional** weeks of **shared** benefits are not permitted by section 12(3)(b) of the EI Act. Rather, they are permitted by a combination of sections 12(4)(b)(ii) and 23(4) of the EI Act.

[28] Also, the wording in section 23(4) of the EI Act is similar to the wording used in section 23(2). Section 23(4) (which allows the additional weeks) expressly refers to the number of shared weeks of extended parental benefits as the “*weeks of benefits payable under this section [...] up to a maximum of 69*”¹¹ This wording suggests that the additional weeks are allowed, independent of the parental benefit window.

¹¹ Section 23(4) of the EI Act says: “If two major attachment claimants each make a claim for benefits under this section — or if one major attachment 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 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.”

[29] So, I think that the EI Act is, at best, silent on whether the extra shared benefits are subject to the parental benefit window.

Bill C-86 parental benefit provisions contain important clarifications

[30] Third, when the additional shared benefits were added to the EI Act, Bill C-86 included important clarifications, apparently to ensure that there was no misunderstanding about a claimant's entitlement to benefits.

[31] Section 23(4) of the EI Act says that where two major attachment claimants each make a claim for extended parental benefits, the weeks of benefits payable may be divided between them, up to a maximum of 69 weeks. Section 23(4.1) adds "For greater certainty," that the total number of weeks that can be paid is limited to 40 weeks of standard parental benefits, or 69 weeks of extended parental benefits.

[32] Section 23(4.11) of the EI Act clarifies that the maximum number of weeks that may be paid to an individual claimant is 35 or 61 weeks, even if the number of weeks of benefits are divided in accordance with sections 23(4) and (4.1).

[33] While Parliament was careful to emphasize any limits on the additional benefits, there is no reference in Bill C-86 to clarify that there is a "parental window" limit and that when the additional benefits are claimed, shared parental benefits must overlap.

[34] If Parliament had intended to limit the additional shared parental benefits allowed under section 23(4) to a 52 or 78-week parental window, I think it would have done so. This would have been an important clarification. But the government included no clarification that the shared benefits, if taken, must overlap with the other parent.

[35] I also note that in related provisions, Bill C-86 amended the *Canada Labour Code* to increase the aggregate amount of leave for two employees in respect of the same child or children to 86 weeks.¹²

¹² Bill C-86 added the following section to the *Canada Labour Code*: s 206.2 The aggregate amount of leave that may be taken by more than one employee under sections 206 and 206.1 in respect of the

Ambiguity should be resolved in favour of the Claimant

[36] The Supreme Court of Canada has held that the Act is designed to make benefits available quickly to those unemployed persons who qualify under it and so it should be liberally interpreted to achieve that end.¹³

[37] The Supreme Court of Canada has also held that, in the context of benefits-conferring legislation, an Act ought to be interpreted in a broad and generous manner, and that “any doubt arising from difficulties of language should be resolved in favour of the claimant.”¹⁴

[38] There is an apparent conflict between the parental benefit window set out in sections 23(2) to (3.4) of the EI Act, and the provisions that allow additional shared weeks of parental benefits set out in section 23(4) of the Act. Since the legislative provisions are unclear, the ambiguity caused by this conflict should be resolved in favour of the Claimant.

So, can the Claimant receive 31 weeks of extended parental benefits?

[39] Yes, the Claimant can receive 31 weeks of extended parental benefits, starting on January 3, 2021.

[40] The EI Act allows shared parental benefits, including the additional weeks of parental benefits to be claimed sequentially when the benefits are shared between two parents.

[41] I have considered the wording of the EI Act and the legislative intent of the Act. I do not agree with the Commission’s argument that the parental benefit window applies

same birth shall not exceed 86 weeks, but the aggregate amount of leave that may be taken by one employee under those sections in respect of the same birth shall not exceed 78 weeks.

¹³ *Abrahams v Attorney General of Canada* [1983] 1 S.C.R. 2 at page 1.

¹⁴ *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27. See also *Hills v Canada (Attorney General)*, 1988 CanLII 67 (SCC), [1988] 1 S.C.R. 513, at p. 537.

to prevent claimants from receiving the additional weeks of benefits allowed under section 23(4) of the EI Act, when those benefits are shared by two parents and taken one after the other.

Conclusion

[42] The appeal is allowed.

[43] This means that the Claimant can receive 31 weeks of extended parental benefits, starting from January 3, 2021.

Suzanne Graves
Member, General Division – Employment Insurance Section