



Citation: *KB v Canada Employment Insurance Commission*, 2022 SST 603

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

Decision

Appellant: K. B.
Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (454179) dated February 3, 2022
(issued by Service Canada)

Tribunal member: Angela Ryan Bourgeois
Type of hearing: Videoconference
Hearing date: May 24, 2022
Hearing participant: Appellant
Decision date: May 29, 2022
File number: GE-22-815

Decision

[1] The appeal is dismissed. The Appellant (Claimant) elected to receive extended parental benefits. She cannot change her election because payments have started.

Overview

[2] This appeal is about whether the Claimant elected standard or extended parental benefits, and if she elected extended parental benefits, whether that election can be changed now.

[3] The Claimant applied for maternity and parental benefits. On her application form, she indicated that she wanted 35 weeks of parental benefits and selected extended parental benefits.

[4] The *Employment Insurance Act* (EI Act) says that claimants who want to receive parental benefits have to elect the maximum number of weeks of parental benefits to be received, 35 weeks or 61 weeks.

[5] A claimant who elects a maximum of 35 weeks is said to have elected “standard” parental benefits. The benefit rate is 55% of the claimant’s weekly insurable earnings up to a maximum amount.

[6] A claimant who elects a maximum of 61 weeks is said to have elected “extended” parental benefits. The benefit rate is 33% of the claimant’s weekly insurable earnings up to a maximum amount.

[7] Once you start receiving parental benefits, you can’t change your election.¹

[8] The Canada Employment Insurance Commission (Commission) paid the Claimant at the lower extended parental benefit rate.

¹ Section 23(1.2) of the EI Act says that the election is irrevocable (that is, final) once you receive benefits.

[9] When the Claimant started to receive parental benefits at the lower rate, she called the Commission. The Commission told her that her election of extended parental benefits couldn't be changed.

[10] The Claimant is appealing that decision to the Tribunal.

Issue

[11] Which parental benefit option did the Claimant elect?

[12] If she selected the extended option, can she change it now?

Analysis

What the law says about the election

[13] Section 23(1.1) of the EI Act says that when a claimant wants parental benefits they "shall elect the maximum number of weeks referred to in either subparagraph 12(3)(b)(i) or (ii) for which benefits may be paid."

[14] Section 12(3)(b) of the EI Act sets out the maximum number of weeks for which benefits may be paid in a benefit period, 35 or 61.

[15] When someone elects a maximum of 35 weeks, it is called "standard" parental benefits. When someone elects a maximum of 61 weeks, it is called "extended" parental benefits, as it is an extension of the maximum weeks previously allowed.

[16] The EI Act doesn't use the words "standard" or "extended" when referring to the election. But those terms are used in the application form to explain the choice between a maximum of 35 or 61 weeks of benefits.

What the application form says

[17] The application form explains the election in terms of the "standard option" and the "extended option."²

² See the application form on page GD3-7.

[18] The application form is clear that one option has to be picked, and that once the election has been made, and parental benefits paid, the election can't be changed.³

[19] Immediately after the explanation about the two options for parental benefits, the claimant is asked two questions: which option they are applying for and how many weeks they wish to claim.

[20] This is what the Claimant's application form shows:

* Select the type of parental benefits you are applying for:

Standard option

Extended option

Parental Information

Answers to fields and questions with an asterisk (*) are mandatory.

* How many weeks do you wish to claim?

35 ▾

What the Claimant says

[21] The Claimant says she selected 35 weeks, which means she wanted standard parental benefits. To select 35 weeks on the form, she had to purposefully scroll down from 61 to 35. She says this shows her intention to select a maximum of 35 weeks, or the standard parental option.

[22] The Claimant says that the Commission called her to clarify her earnings. She says it should also have asked her about this contradiction in her application form. She wonders why anyone would ever decide to take the lower amount (extended rate) for the same number of weeks that they could get the higher amount (standard rate).

[23] The Claimant says that she wasn't provided with the opportunity to review her selection. She wasn't emailed or otherwise provided with a copy of her completed application form.

³ See the application form on page GD3-7 and GD3-8.

What the Commission says

[24] The Commission says that the Claimant elected extended parental benefits.

[25] It says that the Claimant was given all the information she needed on the application form. And after she applied, she could have found details about her claim on her My Service Canada Account. The Commission says she was “negligent towards her claim.”⁴

[26] The Commission says that the Claimant’s situation may evoke sympathy, but the law is clear and unambiguous that once the election is made and benefits paid, the choice cannot be recalled.

My findings

– The election

[27] I find that the Claimant elected to receive extended parental benefits.

[28] The election is what the Claimant selected on her application form, not what she intended to select.

[29] The application form explains extended parental benefits like this:

Extended option:

- The benefit rate is 33% of your weekly insurable earnings up to a maximum amount.
- One parent can receive up to 61 weeks of benefits.
- If parents share the parental benefits, they can receive up to a combined total of 69 weeks

[30] The Claimant selected extended parental benefits. By selecting the extended option on the application form, she made an election to receive parental benefits for up to 61 weeks under section 12(3)(b)(ii) of the EI Act.

⁴ See page GD4-3 of the Commission’s written submissions.

[31] As soon as the Commission paid her parental benefits, the election became irrevocable. She cannot change her election now.

[32] I know the Claimant only ever intended to take 35 weeks of parental benefits. But the Federal Court of Appeal says that I can't interpret "election" as what the Claimant intended to choose.⁵

[33] The election is a choice between two options – a maximum of 35 weeks, standard, and a maximum of 61 weeks, extended. The choice on the application form for the election is the choice between those two options. The selection of the number of weeks is not an "election" between the two options.

– **Other considerations**

[34] I considered all of the Claimant's arguments.

[35] I know that she only intended to take 35 weeks' leave, but the election is about what she selected on the application form, not what she meant to select.

[36] I know the Commission could have asked her to explain her selection. It admittedly isn't clear why someone would elect the extended option for 35 weeks because they could have the same number of weeks at a higher benefit rate. But there was no legal obligation on the Commission to do so.

[37] I know she didn't get an email after she completed the form. I have no doubt that the discussions between the Claimant and the Service Canada officer about her access code could have been more helpful. Based on the discussions with the officer, the Claimant thought she only needed the access code if she had to file biweekly reports. Unfortunately, confusion or misinformation after the fact doesn't change her election.

[38] I thought about whether the Claimant was misled about what to select on her application form. But there is no compelling evidence that this happened. The Claimant

⁵ *Attorney General of Canada v Hull*, 2022 FCA 82

said she didn't know if she misunderstood what the Service Canada officer told her, or if she had a slip of the hand when she selected the extended option.

[39] But the law is clear that even if a claimant bases their election on a misunderstanding of the parental benefit scheme, they still can't change their election after benefits have been paid.⁶

[40] I know the Claimant's election has imposed a financial burden on her, and she may have to return to work earlier than she intended.

[41] As much as I'd like to change the Claimant's election for her, I cannot reverse engineer a decision to give a desired outcome.⁷ The Claimant elected extended parental benefits. Those benefits have been paid, so the election can't be changed.

Conclusion

[42] The Claimant elected extended parental benefits. Her election can't be changed because benefits have already been paid.

[43] The appeal is dismissed.

Angela Ryan Bourgeois
Member, General Division – Employment Insurance Section

⁶ See *Karval v Attorney General of Canada*, 2021 FC 395, and *Attorney General of Canada v Hull*, 2022 FCA 82, para 31.

⁷ *Attorney General of Canada v Hull*, 2022 FCA 82,