



Citation: *AW v Canada Employment Insurance Commission*, 2022 SST 1469

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

Decision

Appellant: A. W.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (467548) dated April 13, 2022 (issued by Service Canada)

Tribunal member: Candace R. Salmon

Type of hearing: Teleconference

Hearing date: June 16, 2022

Hearing participant: Appellant

Decision date: July 13, 2022

File number: GE-22-1623

Decision

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

[2] The Claimant's Employment Insurance (EI) parental benefits application shows that she selected the extended benefits option.

[3] The Claimant argued that she made a mistake and actually wanted the standard benefits option. Importantly, she contacted the Commission a few days after applying for benefits and a Commission officer reviewed her application. The officer confirmed that she selected the option to give her one year of leave in total. This was incorrect information, which misled the Claimant.

Overview

[4] When you fill out your EI parental benefits application, you need to choose between two options: the "standard option" and the "extended option."¹

[5] The standard option pays benefits at the normal rate for up to 35 weeks. The extended option pays the same amount of benefits at a lower rate for up to 61 weeks. Overall the amount of money stays nearly the same, it is just stretched over a different number of weeks.

[6] Once you start receiving parental benefits, you can't change options.²

[7] On her application, the Claimant chose extended parental benefits. She first received parental benefits in the week of February 27, 2022. But, she actually wanted standard parental benefits.

[8] The Canada Employment Insurance Commission (Commission) says that the Claimant made her choice and it is too late to change it because she has already started receiving benefits.

¹ Section 23(1.1) of the *Employment Insurance Act* calls this choice an "election."

² Section 23(1.2) of the *Employment Insurance Act* says that the election is irrevocable (that is, final) once you receive benefits.

[9] The Claimant disagrees. She says that she may have chosen to receive 53 weeks of extended parental benefits, but submits that was only because she was confused by the Commission's application form. She adds that she recognized she was confused, and contacted the Commission almost immediately after applying for benefits to confirm that her election matched her intention to be off work for one year.

Issue

[10] Which type of parental benefits did the Claimant actually elect when she made her choice on the application?

Analysis

[11] The Claimant applied for maternity and parental EI benefits on October 18, 2021. On the application form, she said she stopped working on October 12, 2021, and is scheduled to return to work on October 17, 2022.³

[12] Despite intending to be off work for one year, the Claimant elected to receive 15 weeks of maternity benefits, followed by 53 weeks of extended parental benefits.

[13] On the Notice of Appeal, the Claimant submitted that at the time she applied for EI benefits, she thought she may have made a mistake. She knew she chose extended benefits, and wasn't sure if that was correct. She said that she telephoned the Commission, and an officer assured her that her application was completed correctly. At the hearing, she confirmed that this person told her she applied correctly to receive one year of EI benefits. She added that she had provided a return to work date on the application, so it was clear she only wanted to be off work for a year in total.

[14] The Commission submits that the Claimant was issued parental benefits on February 27, 2022. She requested to change her parental benefit election on March 23, 2022. Since benefits were already paid, the Commission says she is not able to change

³ See GD3-7.

her election. It adds that the Claimant was provided the details on parental benefits, including the duration and weekly benefit rates, prior to making her election.

[15] The Claimant said she made an honest mistake. The Federal Court of Appeal has found that there is no legal remedy available to claimants who based their parental election on a misunderstanding of the parental benefit program.⁴ However, this case is distinguishable because the Claimant testified that she contacted the Commission within a few days of applying for EI benefits, to confirm that the application matched her intention to claim on year of benefits. She submits that a Commission officer told her that the application was completed correctly, which misled her to believe she had picked the option to give her one year of maternity and parental leave.

[16] There is no record in the file of the Claimant contacting the Commission immediately following her application for benefits. On June 16, 2022, I asked the Commission to provide any further evidence in the file relating to correspondence or communication between the Claimant and the Commission.⁵ The Commission replied on June 17, 2022, confirming it has no other documentation on file.⁶

[17] The lack of a call log does not mean the Claimant's conversation did not occur. I note in the Commission's submission of May 27, 2022, it did not address the Claimant's argument that she was misled by a Commission officer. In the June 17, 2022, submission, the Commission states that there is no record of any other telephone or in person conversations between the Commission and the Claimant. It does not address her argument that a Commission officer told her that her application was completed correctly, to allow her one year of leave.

[18] While there is no record of the Claimant contacting the Commission immediately after filing an application for EI benefits, I find a lack of evidence is not evidence to the contrary. While the Commission may not have a record of the conversation, they did not provide any evidence or submissions saying that they record all conversations or that a

⁴ *Attorney General of Canada v. Hull*, A-198-21, at para 31.

⁵ See GD7.

⁶ See GD8.

lack of such record would imply a conversation didn't occur. This means there is no evidence that the conversation did not occur and the Commission has not disputed the Claimant's evidence that it did. Additionally, the Claimant was forthright, direct, and gave credible evidence. I accept as fact that the Claimant contacted the Commission a few days after she applied for EI benefits to verify her election, because her testimony was logical and consistent.

[19] While the Claimant says she was confused by the application form, she recognized that she might have made a mistake and contacted the Commission. She testified that a Commission officer verified her social insurance number and reviewed her application. The officer also confirmed that the Claimant completed the form correctly to receive a year of benefits.

[20] In a recent case, also relating to parental benefits, the Federal Court discussed how being misled by a Commission officer may affect an appeal:

It is undoubtedly the case that many government benefit programs will have complex features and strict eligibility requirements. More information, clearer language and better explanations can almost always be proposed in hindsight. Where a claimant is actually misled by relying on official and incorrect information, certain legal recourse may be available under the doctrine of reasonable expectations. However, where a claimant like Ms. Karval is not misled but merely lacks the knowledge necessary to accurately answer unambiguous questions, no legal remedies are available. Fundamentally it is the responsibility of a claimant to carefully read and attempt to understand their entitlement options and, if still in doubt, to ask the necessary questions.⁷

[21] The current case is distinguished from *Karval*. In *Karval*, the Claimant only tried to change her benefit election after she received parental benefits. In the present case, the Claimant contacted the Commission almost immediately after she filed her application for benefits to make sure she selected the proper option.

[22] Another recent case said:

⁷ This is *obiter* in *Karval v. The Attorney General of Canada*, 2021 FC 395 at para. 14. *Obiter* means the statements that are not precedent, or binding. They are incidental expressions of a judge's opinion, but may still be persuasive.

The operation of [the law] prevents a change in the election of parental benefits once the claimant receives her first payment of parental benefits; the election as described on the application form cannot be altered. There does however remain a window of opportunity for claimants to verify and modify their parental benefit election up until a payment of the parental benefit is received, for example, while the claimant is still receiving maternity benefits. This change may be accomplished by the claimant checking on her individual web account “My Service Canada Account” and requesting that the Commission change her election prior to the payment of the benefit.⁸

[23] In this case, the Claimant is attempted to verify her election before she received benefits. A Commission officer reviewed her application and gave her incorrect information. Based on this, the Claimant did not inquire further, until her benefit rate changed. When this happened, it was too late to change parental benefit election.

[24] In an often cited Federal Court of Appeal case from 1986, the Court said:

It is beyond question that the commission and its representatives have no power to amend the law, and that therefore the interpretations which they may give of that law do not themselves have the force of law. It is equally certain that any commitment which the commission or its representatives may give, whether in good or bad faith, to act in a way other than that prescribed by the law would be absolutely void and contrary to public order.⁹

[25] In this case, the issue is not that a Commission officer interpreted the law improperly or gave incorrect information *about the law*; they gave incorrect information about the file. The officer failed to accurately verify the Claimant’s claim and confirmed that she would receive one year of benefits in total when her application did not reflect that. In this case, the Commission officer made a mistake that affected the claim.

[26] I note that in a dissenting opinion of the case above, Hugessen J. wrote:

An individual applies to the authorities responsible for administering a law whose reach is social in order to determine what effect it will have upon him. They give him incorrect information. Based on that information, he takes an irrevocable step. Subsequently the authorities change their mind and seek to use against the individual the very action they had themselves

⁸ *Attorney General of Canada v. Hull*, 2022 FCA 82 at para. 51.

⁹ *Granger v. Canada Employment and Immigration Commission*, [1986] 3 FC 70 at para 7.

in large measure caused him to take. Will the law permit this? In my view, the answer must be no.¹⁰

[27] In my view, the dissent on this case gets to exactly the issue of the appeal before me. The Commission administers the *Employment Insurance Act*. Its officer gave the Claimant incorrect information about her claim, which caused her to believe it was established properly. When she was paid less money than expected and asked why, the Commission told her she couldn't change her election. It was only changeable prior to her being paid; however, she asked for it to be amended before she was paid and was assured that it was done. In this situation, how can the Claimant be left to suffer the effects of this mistake when she exercised the, "window of opportunity...to verify and modify [her] parental benefit election?"¹¹

[28] The Court in *Karval* referred to legitimate expectations. It said the claimant in that case may have some recourse if she was actually misled by relying on official and incorrect information. The doctrine of legitimate expectation means that a person may reasonably expect to be treated a certain way by administrative bodies. It is not a legal right, but an expectation for a certain type of relief or equitable remedy.

[29] I have no power to make decisions based in equity. This means I cannot make a decision based on what I think is "fair." I must make a decision based on the legislation and relevant case law, which includes *Karval* and *Hull*.

[30] Considering the evidence and arguments from parties, as well as the case law, it is clear that the Claimant was misdirected by the Commission. She was legally allowed to change her benefit election prior to receiving parental benefits, and she contacted the Commission to do that within the timeframe when it was possible. A Commission officer assured her that her claim was established correctly, to give her the one year of total leave that she wanted. The Claimant had no reason to continue checking her claim or seeking more information about her election because she reasonably expected that the Commission officer gave her the correct information about her file.

¹⁰ *Granger v. Canada Employment and Immigration Commission*, [1986] 3 FC 70 at para 12.

¹¹ *Attorney General of Canada v. Hull*, A-198-21, at para 51.

[31] I find the Claimant was misdirected by the Commission. She contacted the Commission “within a few days” of applying for EI benefits because she recognized that she may not have selected the correct number of weeks or type of benefits to match her intention to take one year off work. The Commission officer assured her that she would receive one year of benefits. For some reason, the change was not made on her file and she was paid extended parental benefits.

[32] I further find the Claimant elected to be paid standard parental benefits, because she told the Commission within a few days of making her initial application that she wanted to receive one year of benefits in total. At the time she made this statement, she was within the period when it was possible to modify the election.

Conclusion

[33] The appeal is allowed.

Candace R. Salmon
Member, General Division – Employment Insurance Section