



Citation: *MD v Canada Employment Insurance Commission*, 2022 SST 1527

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

Decision

Appellant: M. D.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (484069) dated May 18, 2022 (issued by Service Canada)

Tribunal member: Raelene R. Thomas

Type of hearing: Videoconference

Hearing date: August 25, 2022

Hearing participant: Appellant

Decision date: September 7, 2022

File number: GE-22-1748

Decision

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

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

[3] The Claimant made a valid election for standard parental benefits when she took steps to change her election to receive standard benefits before she received parental benefits.

Overview

[4] This appeal is about whether the Claimant can receive the standard parental benefits she asked to receive.

[5] The law calculates maternity EI benefits separate from EI parental benefits. Usually when you fill out your application for EI maternity benefits you also choose to receive EI parental benefits after the 15 weeks of maternity benefits are paid out.¹ To receive EI parental benefits, you need to choose between two options: the "standard option" or the "extended option."²

[6] The standard option pays benefits at the normal bi-weekly rate for up to 35 weeks. The extended option pays the benefits at a lower bi-weekly rate for up to 61 weeks.

[7] Once you start receiving parental benefits, you can't change options.³

¹ See section 23 of the *Employment Insurance Act* (EI Act). Claimants who have given birth are entitled to 15 weeks of maternity EI benefits.

² Section 23(1.1) of the EI Act calls this choice an "election."

³ Section 23(1.2) of the EI Act says that the election is irrevocable (that is, final) once you receive benefits.

[8] In her application for EI maternity and parental benefits, the Claimant chose extended parental benefits. She started receiving benefits at the lower rate the week of April 26, 2022.

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

[10] The Claimant disagrees and says that a few days after she completed her application she contacted Service Canada. She spoke to two Service Canada officers. In the first conversation she asked that her election be changed from extended to standard. She was advised that her application had been changed. In the second conversation, the officer confirmed the change in election had been made.

Matter I have to consider first

The appeal was not summarily dismissed

[11] The Claimant's appeal was initially assigned to another Tribunal Member. That member sent a notice to the Claimant indicating the Tribunal's intent to summarily dismiss her appeal. The Claimant replied to the notice arguing that her appeal should not be summarily dismissed. The Tribunal Member agreed the appeal should not be summarily dismissed and the appeal was reassigned to me to hear. The hearing was went ahead as scheduled.

Issue

[12] Did the Claimant elect to receive standard parental benefits?

Analysis

[13] When you apply for EI parental benefits, you need to choose between the standard option and the extended option.⁴ In other words, you “elect” which benefit you want to receive.

[14] The law says that you can’t change options once the Commission starts paying parental benefits.⁵

[15] The Claimant testified she completed the application on-line at home two weeks after she had given birth. Her child had been in the neonatal intensive care unit for a week after birth and it took her a week to settle in once home.

[16] The Claimant said after she completed her application she spoke to her sister. Her sister was adamant that the Claimant check with Service Canada to make sure she chose the right parental option. The Claimant became concerned she might not have chosen the right option so she called Service Canada. The Claimant testified she is bilingual and because the wait time to speak to an officer in French was shorter she chose that option.

[17] The Claimant testified she had several points she wanted to clarify about her application. Her first concern was about the standard and extended options because it was in weeks and not months and she was confused about that. She wanted to know which one meant what. She questioned when she would start to collect benefits. In addition to her questions about the option the Claimant also wanted to know if the Record of Employment (ROE) was received. She also wanted to know about the spouse’s leave, filling out the cards, her T4, direct deposit and the amount she would receive.

⁴ Section 23(1.1) of the EI Act says that, when you make a claim for benefits under that section, you have to choose to receive benefits over a maximum of 35 or 61 weeks.

⁵ Section 23(1.2) says that the choice is irrevocable (that is, final) once you receive benefits.

[18] The first Service Canada officer the Claimant spoke to was “G.”⁶ The Claimant told G she was concerned that she was not sure if she made the right choice on her application. The Claimant told G her maternity leave was from December 15, 2021 to December 15, 2022 and she wanted to receive \$1,052 every two weeks. The Claimant asked G if G could review the application to make sure she chose the right option. The Claimant testified that G reviewed her application and said it was for 1 year at \$1,052.

[19] The Claimant said that in her conversation with G, the officer did not tell her about the two different EI benefit types, maternity and parental, she would receive.

[20] After speaking to G, the Claimant was still nervous about her choice. So she called Service Canada later the same day to confirm. She again opted to converse in French as that was the shorter wait time. The Claimant spoke to a Service Canada officer named “D.” She asked D to review the application to make sure it was the right choice. D reviewed the application and assured the Claimant she had made the right choice.

[21] The Claimant testified that it was on April 26, 2022 her benefits were reduced. There was a mistake. She called Service Canada and spoke to an officer named “S.” It was in this conversation she first learned about the two types of EI benefits. She requested reconsideration right away.

[22] The Claimant testified she was experiencing financial difficulty with the reduced amount of benefits she was receiving. She has to rely on others for financial support.

[23] The Commission provided a record of a conversation the Claimant held with “G” on December 30, 2021. G’s notes of the conversation relate to the Supplemental Unemployment Benefit (SUB) money the Claimant would receive from her employer while receiving maternity EI benefits.

⁶ In her appeal to the Tribunal the Claimant’s spelling of the Service Canada agent’s name began with a “J” the Commission records show the agent’s name begins with a “G.” I am satisfied the agent named by the Claimant is the same agent in the record provided by the Commission.

[24] The Claimant testified she does not remember having a conversation with G about receiving the SUB. She could not say why G would not have recorded the conversation about making sure the correct parental option was chosen. She said that she asked the questions because her sister told her to make sure it was for the right amount. The Claimant testified that G did say changes were made to fit her one year maternity leave.

[25] The Commission included generic screen shots of a My Service Canada Account (MSCA) where a claimant has selected an extended parental benefit option. The Claimant testified that she was able to get into the MSCA once but found it difficult to get into it because of the codes required. She found it more efficient to talk to an agent.

The parties' arguments

[26] The Claimant submitted she took faith in calling a Service Canada officer that her application would be done correctly. She said she may not be the clearest communicator but she is not the worst. She said she went the extra mile to be sure, she asked for help, she spoke to Service Canada officers. The Claimant said she is not looking to get anything extra. She has nothing negative to say about the officers but it is discouraging when you speak to two people that the application was still incorrect. The Claimant wants to receive 12 months of EI at \$1,052 bi-weekly.

[27] The Claimant's reply to the Tribunal's intention to summarily dismiss her appeal was prepared by her sister. The Claimant agreed with everything that was written in the reply. She noted that she corrected her election prior to benefits being paid.

[28] In her reply the Claimant submitted she relied on the representation of Commission officers, to her detriment. The false representations of Commission officers should not be used as a basis for denying her appeal. The Claimant submitted that in *Canada (Attorney General) v. Hull*, 2022 FCA 22, the Federal Court interpreted the very definition of "elect" pursuant to subsection 23(1.) of the EI Act. The Court explained that an "election" is what is opted for on the Application form. The Claimant submitted that her December 30, 2021 conversation forms part of her application and

assurances that her application had been internally corrected by the SST (*sic*) should be considered in the scope of her appeal. The Claimant noted that in *Hull*, that claimant took steps to change her election only after she received benefits, whereas the Claimant took measures to rectify her application / election prior to receiving benefits.

[29] The Commission submitted that in the present case the Claimant was informed on the application form of the difference between standard and extended parental benefits. In addition, it noted, the application states that up to 15 weeks of maternity would be paid at a rate of 55% followed by a 52 weeks of parental paid at a reduced rate of 33% if extended parental was chosen. The Commission says the Claimant elected to receive extended parental benefits. She was informed that the decision could not be changed once parental benefits were paid.⁷ The first payment of parental benefits was issued on April 22, 2022. The Commission submitted the Claimant's election became irrevocable as of April 22, 2022, pursuant to subsection 23(1.2) of the EI Act.

[30] The Commission submitted that on the Claimant's My Service Canada Account, she would have been informed of her upcoming extended benefit rate prior to the payment and therefore have contacted the Commission and requested a change to parental benefit type. It also submitted that the employer indicated the date of return was unknown and therefore 52 weeks of extended parental was potentially payable.

[31] The Commission submitted that it only had one record of the Claimant contacting Service Canada on December 30, 2021. The Commission submitted that the information on file does not support that the Claimant requested a modification of the type of parental benefits prior to the payment of extended parental benefits.

Analysis

[32] I find the Claimant elected to receive standard parental benefits. My reasons for this follow.

⁷ This information appears on the application form as "**Reminder:** You can't change your selection (standard or extended) once you've started receiving parental benefits."

[33] The Claimant's appeal to the Tribunal included information about her conversations with the Service Canada officers G and D. She wrote that both officers confirmed she would receive \$1,052 bi-weekly for a duration of 12 months.

[34] The Commission provided the Tribunal with a reconsideration file. The purpose of the reconsideration file is to give the Tribunal and Claimant information the Commission considers relevant when it reached its reconsideration decision. These files are provided to the Tribunal after an appeal is filed.

[35] Included in the reconsideration file is the original application for EI benefits, the ROE, a transcript/attestation certificate of full text screens showing the payments made to the Claimant, an attestation certificate (dated June 1, 2022), showing the rate and duration of benefits, and an explanation of the MSCA account information once maternity and extended parental benefit claim is established and maternity benefits have begun to be paid. The reconsideration file continues with a record of the Claimant's conversation with S on April 26, 2022, her request for reconsideration, a record of a conversation with the reconsideration officer on May 18, 2022 and the reconsideration decision.

– **The Claimant's testimony**

[36] The Claimant testified she became concerned after she completed her application for EI benefits she may have made a mistake. She spoke to her sister who was adamant the Claimant contact Service Canada to make sure she made the right choice. She told the first officer that she wanted to receive \$1,052 bi-weekly for 12 months. She was assured by the first officer that her application was revised. Still concerned about her choice, the Claimant contacted a second officer who assured her that her application would allow her to receive \$1,052 bi-weekly for 12 months. For the Claimant to receive benefits in this amount and for this duration her application would have to state she elected the standard parental option.

[37] The Commission's initial submissions to the Tribunal, provided at the same time as the reconsideration file, do not challenge the Claimant's statements she received

assurances from two Service Canada officers on December 30, 2021 that her revised application would result in her receiving \$1,052 bi-weekly for 12 months.

[38] After the Claimant replied to the Tribunal's intention to summarily dismiss her appeal the Commission provided a record of the conversation the Claimant had with the Service Canada officer named "G." The record relates to the SUB plan. There is no information in the record concerning the Claimant's election. The Commission submitted the information on file does not support that the Claimant requested a modification of the type of parental benefits prior to the payment of extended parental benefits. It says the information on file indicates the Claimant was advised on December 30, 2021 that her SUB code was input. The Commission did not provide any records related to the Claimant's conversation with Service Canada officer D.

[39] An incomplete call log or the lack of a call log does not mean the Claimant's conversations did not occur.

[40] I find that a lack of evidence is not evidence to the contrary. While the Commission may not have had a complete copy of the conversation with G or any record of the conversation with D, it did not provide any evidence or submissions that it records all conversations or that the lack of a record would imply a conversation did not occur.

[41] I accept the Claimant's evidence that she spoke to two Service Canada officers about the benefits she wanted to receive. Her application for EI benefits, made on December 27, 2021 shows she planned to return to work on December 15, 2022. She was clear with the officers she wanted to receive \$1,052 bi-weekly for 12 months. The 12 months matched the time frame she stated to the officers she would be off work and the information in her application for EI benefits. Her election of the extended option payable for 52 weeks did not. This is because a choice of 52 weeks extended parental benefits would result in the Claimant receiving benefits for 67 weeks, which is in excess of the 12 months (52 weeks) of benefits she wanted to receive.⁸

⁸ The Claimant was entitled to 15 weeks of maternity benefits. $15 + 52 = 67$.

[42] I find the Claimant's testimony of her conversations with the Service Canada officers to be more compelling and I give it more weight because of its consistency in the telling and with the information in her application for EI benefits. She appeared before me and gave direct evidence, which I find more reliable than a Commission agent's recounting of what she believed the Claimant said. I also note that the Commission has provided notes from a conversation with one officer but not the second officer the Claimant testified she spoke to who assured her the application would give her 12 months of benefits at \$1,052 bi-weekly.

– **Karval**

[43] In the Federal Court decision of *Karval*, the Federal Court found it is the responsibility of claimants to carefully read and try to understand their entitlement options.⁹ If they are unclear, they should ask the Commission.

[44] The Tribunal's Appeal Division considered how *Karval* should apply where a claimant completed two applications for EI benefits with conflicting elections for parental benefits and later confirmed her election in a telephone conversation with a Service Canada agent.¹⁰ The Appeal Division found the claimant's election to be invalid because in making her election she relied on misinformation about the amount of parental benefits she would receive. It rescinded the Commission's decision to pay the claimant extended parental benefits and allowed the claimant to choose between standard and extended benefits.¹¹

[45] In this case, the Claimant had concerns about her application. She found the application form confusing because it spoke about weeks and not months. She thought she made a mistake and contacted Service Canada to make sure, in other words to clarify, that her application would allow her to receive \$1,052 bi-weekly for 12 months.

⁹ *Karval v. Canada (Attorney General)*, 2021 FC 395

¹⁰ *Canada Employment Insurance Commission vs L.U.*, 2021 SST 619

¹¹ The Federal Court in *Karval* did not rule out the availability of legal recourse for a claimant. The Court said it would be available "Where a claimant is actually misled by relying on official and incorrect information."

She was assured by the first agent that her application was revised to allow for that and also by the second agent her application would allow for that.

[46] I find the Claimant was misdirected by the Commission and relied on the Service Canada agents' assurances to her detriment.¹² The Claimant believed she made a mistake on her application. She was assured that mistake had been corrected to allow her to receive \$1,052 bi-weekly for 12 months. She found out that was not the case on April 26, 2022 when the lower amount of benefits, calculated under the extended option, was deposited to her account. This means the assurances the Claimant received from the two agents that her application had been changed, in other words her election was changed, were misleading.

– **Hull**

[47] The Federal Court of Appeal has told us what it means to make an election.¹³ The Court stated:

The question of law for the purpose of subsection 23(1.1) of the EI Act is: does the word “elect” mean what a claimant indicates as their choice of parental benefit on the application form or does it mean what the claimant “intended” to choose?¹⁴

[48] The Court found that a claimant's election is what they choose on their application form, and not what they may have intended.¹⁵

[49] A claimant is permitted to change their election after the application form is submitted but before parental benefits have been paid.¹⁶

¹² The Claimant is experiencing financial difficulty as a result of the failure of the agents to effect the change to her election.

¹³ *Canada (Attorney General) v. Hull*, 2022 FCA 82

¹⁴ *Canada (Attorney General) v. Hull*, 2022 FCA 82

¹⁵ *Canada (Attorney General) v. Hull*, 2022 FCA 82

¹⁶ See section 23(1.2) of the EI Act

[50] The law does not say how a claimant must advise the Commission of their desire to change their election.

[51] The Commission submitted the Claimant could have accessed the MSCA page to see her benefits and contacted the Commission to request a change to parental benefit type.

[52] The Claimant submitted her December 30, 2021 conversations with two agents requesting and receiving assurances that her application for benefits had been corrected should be considered in the scope of her appeal.

[53] The evidence is clear the Claimant chose the extended option when she completed her application for maternity and parental benefits on December 27, 2021. She applied for benefits and indicated she would be returning to work on December 15, 2022. In her application, the Claimant ticked the extended parental benefit option and requested 52 weeks of parental benefits.

[54] I have accepted the Claimant's evidence she spoke to two Service Canada agents on December 30, 2021 to clarify and confirm that her application for EI benefits would result in her receiving \$1,052 bi-weekly for 12 months.

[55] I find the Claimant's conversations with the two Service Canada officers, on December 30, 2021, communicated her desire to change her election from extended parental to standard parental. Accordingly, I find the Claimant elected to receive standard parental benefits prior to receiving parental benefits.

– **Other matters**

[56] I do not agree with the Commission's submission the Claimant could have accessed the MSCA for information about her claim with the inference being that had she done so she could have taken steps to change her election prior to being paid parental benefits. The Claimant's testimony is that she contacted two Service Canada officers on December 30, 2021. On that date she changed her election and received assurances from the officers that she would receive \$1,052 biweekly for 12 months.

The evidence in the appeal file shows that her first EI payment of \$595 was processed on December 31, 2021. Thereafter she received \$1,190 (gross) bi-weekly. She would have no need to confirm via MSCA, the assurances she received from two officers that her benefits would be paid at that rate for 12 months.

[57] I also do not agree with the Commission's submission that the information about date of return on the ROE can be considered as more reliable in determining the Claimant's election. This because the date of return on the EI application, completed by the Claimant, who would be in the best position to know her plans, was December 15, 2022 which is in direct contradiction with her choice of 52 weeks of extended parental on the same application.

So, which option did the Claimant elect to receive?

[58] I find the Claimant has proven that she elected to receive standard parental benefits when she asked that her application for benefits be revised to allow her to receive \$1,052 biweekly for 12 months and did so prior to receiving parental benefits.

Conclusion

[59] The Claimant elected to receive standard parental benefits.

[60] This means the appeal is allowed.

Raelene R. Thomas
Member, General Division – Employment Insurance Section