



Citation: *CK v Canada Employment Insurance Commission*, 2023 SST 825

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

Decision

Appellant: C. K.
Representative: T. K.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (582976) dated May 3, 2023
(issued by Service Canada)

Tribunal member: Suzanne Graves

Type of hearing: Videoconference
Hearing date: July 6, 2023
Hearing participants: Appellant
Appellant's representative

Decision date: July 11, 2023
File number: GE-23-1540

Decision

[1] The appeal is dismissed. The Appellant's Employment Insurance (EI) parental benefits application shows he selected the standard benefits option, and he has already started to receive benefits.

[2] The law doesn't allow me to change the Appellant's election from standard to extended parental benefits, or to extend the parental benefits window beyond 52 weeks from the date his baby was born.

[3] The Appellant says he was diagnosed with a serious illness between August 12, 2022, and December 5, 2022. He may be entitled to sickness benefits for all or part of that period. I make no decision on this issue as it is not before the Tribunal.

Overview

[4] When you apply for EI parental benefits, a claimant must choose between two options: the "standard option" and the "extended option."¹ The standard option pays benefits at the normal rate for up to 35 weeks. The extended option pays about the same amount of benefits at a lower rate for up to 61 weeks. Once you start receiving parental benefits, you can't change options.

[5] The Appellant chose standard parental benefits on his benefits application.² He says he reviewed the Service Canada website and followed instructions on the application form, including giving his child's birthdate. The Commission simply accepted his claim. He says that he had no reason to believe that choosing standard benefits would stop him from receiving all 35 weeks of parental benefits. He argues that the application form and Service Canada website information are unclear, and he would have chosen the extended benefits option if he had known he could only get eight weeks of benefits.

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

² The Appellant's initial parental benefits claim dated July 22, 2022, is at GD3-3 to 17.

[6] The Canada Employment Insurance Commission (Commission) says that the two parental benefits options and the 52-week parental window limit are explained on the application form. It says the Appellant chose standard benefits, and it is now too late to change it because he has already started receiving benefits.

Issues

[7] Which type of parental benefits did the Appellant select when he made his choice on the application?

[8] If the Appellant elected to receive standard parental benefits, can he receive benefits more than 52 weeks after the birth of his child?

Analysis

[9] When you apply for EI parental benefits, you need to choose between the standard option and the extended option.³ The law says that you can't change options once the Commission starts paying parental benefits.⁴

[10] To decide which type of parental benefits the Appellant wanted when he made his choice on the application, I need to consider the evidence about that choice. In other words, the option the Appellant chose on his application matters, but it isn't the only thing to consider. For example, the number of weeks of benefits he wanted to receive or how long he planned to be off work might be things to consider too.

[11] The *Employment Insurance Act* (EI Act) says that parental benefits are usually payable for each week of unemployment in the period that begins with the week in which the child is born or placed with the parent for the purpose of adoption and ends after 52 weeks.⁵

[12] The 52-week period after a baby is born or placed is known as the "parental benefit window." This window can be extended in certain circumstances. For example, it

³ 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.

⁴ Section 23(1.2) says that the choice is irrevocable (that is, final) once you receive benefits.

⁵ See section 23(2) of the EI Act.

can be extended for 26 weeks to allow a claimant to receive extended parental benefits. The period can also be extended when a claimant's baby is hospitalized.

What the Appellant meant to choose on the application

[13] The option that the Appellant meant to choose on the application when he actually filled it out is important. At that moment, did he mean to choose the standard or extended option?

The parties' arguments

[14] The Commission says that what the Appellant chose on the application tells us which option he wanted. It argues that the application form explains that the election is final, and that the parental window for standard parental benefits ends 52 weeks after the birth or adoption of a baby. It argues that it is too late to now change from standard to extended parental benefits.

[15] The Appellant acknowledges he checked the standard parental benefits box when he claimed benefits. But he says it was not clear that he could only be paid standard benefits within 52 weeks of his baby's birth. The Commission accepted his claim without informing him of this limit in enough time for him to change his election.

[16] After reviewing information on the Service Canada website, the Appellant says that he reasonably understood that he could *start* his claim within 52 weeks of his baby's birth. He argues that neither the application form, nor the website information properly explain the 52-week limitation.

[17] The Appellant asks me to follow a decision of this Tribunal's Appeal Division (AD), *ML v Canada Employment Insurance Commission*.⁶ In that case, the claimant applied for standard parental benefits when his child was 11 months old. As a result, he only received three weeks of benefits. In that case, the Tribunal found that the length of the 52-week parental benefits window was not explained in the application form.

⁶ *ML v Canada Employment Insurance Commission*, 2020 SST 255.

[18] The AD decided that the claimant had been misinformed by the Commission and that ML's election for standard parental benefits was invalid from the outset.

[19] The Appellant argues that the Tribunal should make a similar decision in this case and find that the election he made was invalid because it was based on incomplete and misleading information from the Commission.

Which option did the Appellant mean to choose when he applied?

[20] I find that the Appellant chose the standard parental benefits option when he applied. He testified that he had intended to claim 35 weeks of standard benefits.

[21] The Commission began paying standard parental benefits to the Appellant from June 14, 2022. The parties agree that he received a total of eight weeks of benefits.

[22] The law on this issue is unfortunately very strict. I find that the Appellant hasn't proved that he meant to choose the extended parental benefits option when he applied.

[23] I acknowledge the *ML* decision of this Tribunal. However, since *ML*, both the Federal Court and Federal Court of Appeal have confirmed that, once payment has started, a claimant's election (the choice on the application form) cannot be changed. These court decisions are binding on the Tribunal.⁷

[24] The Federal Court of Appeal, in *Canada (Attorney General) v Hull*, considered a situation where an appellant chose extended parental benefits but thought they had elected standard benefits on their application. The claimant argued they were confused by the information on the form. The Court stated:

“...pursuant to subsection 23(1.2) of the EI Act, ... once a claimant has chosen on the application form the parental benefit and the number of weeks she wishes to claim, and once payments of those benefits have started, it is impossible for the claimant, the Commission, the General Division or the Appeal Division to revoke, alter or change the election.”⁸

⁷ *Canada (Attorney General) v. Hull*, 2022 FCA 82; *Karval v Canada (Attorney General)*, 2021 FC 395; *Canada (Attorney General) v De Leon*, 2022 FC 527; and *Canada (Attorney General) v Variola*, 2022 FC 1402.

⁸ *Canada (Attorney General) v. Hull*, 2022 FCA 82, at paragraph 64.

[25] In the facts of this case, the Appellant’s application form contains the following specific wording about the parental window:⁹

Type of parental benefits

Standard benefit: You’ve chosen to receive benefits at a rate of 55% of your weekly insurable earnings (up to a maximum amount) each week for 35 weeks.

The payable period for standard parental benefits begins the week in which the child is born or placed with you for the purpose of adoption and ends 52 weeks later.

...

Reminder: You can’t change your selection (standard or extended) once you’ve started receiving parental benefits.¹⁰

[26] In *Canada (Attorney General) v Variola*,¹¹ the Federal Court considered a situation very similar to the facts in this appeal. In *Variola*, the claimant elected to receive standard parental benefits, but only received three weeks of benefits until the end of the parental benefits window.

[27] The Federal Court found the information about the parental benefits window on the Service Canada website to be “neither unclear nor misleading,” although it did not doubt the claimant’s sincere efforts to clarify his position before applying for benefits, or that he was confused about information on the website.¹²

[28] I acknowledge that the Appellant received no notice from the Commission to warn him that only eight weeks of standard benefits could be paid on his claim, even though he gave his child’s birthdate on the application form. If the system had immediately alerted the Appellant to this error, the law would have allowed him to change his election to extended parental benefits.

⁹ This explanation about the 52-week parental window does not appear to have been included in the *ML* fact situation:

¹⁰ This portion of the Appellant’s application form is at GD3-7.

¹¹ *Canada (Attorney General) v Variola*, 2022 FC 1402.

¹² *Canada (Attorney General) v Variola*, 2022 FC 1402, at paragraph 30. The Tribunal had initially decided that the claimant’s election was invalid. The Federal Court decided that the Tribunal’s decision was unreasonable and sent the matter back to be decided by the Tribunal’s Appeal Division (AD). In *Canada Employment Insurance Commission v FV*, 2023 SST 104, the AD upheld the Commission’s appeal and decided that the claimant’s election for standard parental benefits could not be changed to extended benefits.

[29] But there is unfortunately no remedy for claimants who make a mistake and base their election on a misunderstanding about their rights. A claimant's election is what they choose on their application form.¹³ This is the case, even if the Commission made errors.¹⁴

Can the Appellant claim standard parental benefits more than 52 weeks after his child's birth?

[30] I find that the Commission correctly determined that the Appellant can claim only eight weeks of standard parental benefits because the time for receiving standard parental benefits under the EI Act generally closes 52 weeks after the child's birth.

[31] The Appellant's baby was born on August X, 2021, so the parental window ended 52 weeks later. There is no evidence that would allow the parental window to be extended in this case.

[32] I have a great deal of sympathy for the Appellant's situation. I accept that he wasn't aware that the rules wouldn't allow him to claim standard parental benefits outside of the 52-week parental window.

[33] But I have no choice but to follow the rules set out in the EI Act and cannot make exceptions for special cases, even in the interest of compassion.¹⁵

The Appellant may be entitled to other special benefits for all or part of the period from August 12, 2022, to December 5, 2022

[34] The Appellant testified that he was diagnosed with a very serious medical condition which required surgery during the weeks between August 12, 2022, and December 5, 2022, when he returned to work.

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

¹⁴ *Robinson v. Canada (Attorney General)*, 2013 FCA 255.

¹⁵ In *Canada (Attorney General) v. Lévesque*, 2001 FCA 304, the Federal Court of Appeal held that the legislation has to be followed, regardless of the personal circumstances of the appellant (see also *Pannu v. Canada (Attorney General)*, 2004 FCA 90).

[35] The Appellant may wish to contact the Commission to enquire whether he is entitled to sickness benefits for all or part of that period.

[36] I make no decision on the issue of whether the Appellant could claim sickness benefits as that issue is not before the Tribunal.

Conclusion

[37] The Appellant chose standard parental benefits. He cannot change his election to extended parental benefits because he has already begun to receive benefits. He also cannot receive standard parental benefits more than 52 weeks after the birth of his baby.

[38] The law requires me to dismiss the appeal.

Suzanne Graves
Member, General Division – Employment Insurance Section