Citation: *KK v Canada Employment Insurance Commission*, 2023 SST 1850

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

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

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (556544) dated December 5, 2022 (issued by Service Canada)

Tribunal member:	Laura Hartslief
Type of hearing:	Teleconference
Hearing date:	June 1, 2023
Hearing participants:	Appellant
Decision date:	July 3, 2023
File number:	GE-22-4079

Decision

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

[2] The Appellant's Employment Insurance (EI) parental benefits application does not clearly show whether she elected to receive extended parental benefits. The Appellant is therefore entitled to amend her application to clarify her election and confirm that she elected to receive standard parental benefits.

Overview

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

[4] 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 the same. It is just stretched over a different number of weeks.

[5] Once you start receiving parental benefits, you can not change options.[2]

[6] The Appellant's baby was born on June 19, 2022. In her application, the Appellant checked the box to select extended parental benefits. However, she also selected "48 weeks" and indicated that her return-to-work date would be May 15, 2023[3]. The Appellant started receiving parental benefits at the lower rate the week of October 14, 2022.

[7] The Appellant says that, other than the checked box, her application clearly indicates that she elected to receive standard parental benefits. Both the number of weeks she chose and her predicted return-to-work date confirm her intentions to receive standard parental benefits and return to work almost one year after her baby's birth. The

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[1] Section 23(1.1) of the *Employment Insurance Act* (EI Act) calls this choice an "election."
[2] Section 23(1.2) of the EI Act says that the election is irrevocable (that is, final) once you receive benefits.
[3] See GD03-19

Appellant says that she accidentally checked the extended benefits box, but this does not accurately reflect her election.

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

Issue

[9] Which type of parental benefits did the Appellant elect when she made her choice on the application?

Analysis

[10] When you apply for EI parental benefits, you need to choose between the standard option and the extended option.[4] The law says that you can not change options once the Commission starts paying parental benefits.[5]

[11] The prevailing Federal Court Caselaw in this regard is *Canada (Attorney General) v. Hull* 2022 FCA 82. In this decision, the Court gives a detailed analysis explaining why an individual is not permitted to change their election regarding standard or extended parental benefits once they have started to receive parental benefits payments. However, for the following reasons, I find that the situation before me can be distinguished from *Hull* both on its facts and based on the Court's own analysis.

The Facts Are Different Than Hull

[12] There are two key facts in the situation before me that are different than the facts contained in the *Hull* decision. First, the Appellant before me did not delay nine months (as the Appellant did in *Hull*) before contacting the Commission to clarify her election. As will be shown below, this fact supports my finding that the Appellant did not actually

[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.

choose the extended parental benefits option, but instead chose the standard benefit option.

[13] The second distinguishing fact is that the Appellant in *Hull* described herself as being "confused" by the information on the application form.[6] In contrast, the Appellant before me says she is very familiar with the application form because part of her employment involves assisting newcomers to Canada as they navigate the EI application process. The Appellant is a Settlement Officer at an Arab Charitable Organization and a key part of her job is to assist newcomers and new Canadian citizens with EI applications, immigration related forms and other federally regulated processes. This means that the Appellant was not confused when she completed her application. She understood the questions, understood the information she had to provide and understood the differences between maternity and parental benefits as well as standard and extended parental benefits.

[14] The reality here is that the Appellant accidentally selected the extended benefits option. However, she indicates in her application that she intends to take 48 weeks off and also indicates that her return-to-work date is approximately 48 weeks after her baby's birth. This is not a situation where the Appellant changed her mind, or received incorrect information from the Commission, or received incorrect information from her employer, or was confused by the application process. Instead, the Appellant understood the process, understood the form, provided accurate information, but then accidentally checked the wrong box. It is for these reasons that the case before me is distinguished from the facts in *Hull*.

The Court's Analysis

[15] In the *Hull* decision, the Court divides its analysis into three topics in order to give definitive guidance regarding when/if an individual is permitted to change their election for parental benefits[7]. The Court's analysis is divided into a discussion of the text of the

[6] *Hull*, para 6
[7] *Hull*, paras 43 to 65

Act, the context and purpose of the application process, and the purpose of this particular area of the legislation. I will address each of these topics in the following.

a) The Text of the Act

[16] In *Hull*, the Court engages in a statutory interpretation analysis, beginning with a discussion of the plain meaning of the term "elect" in the legislation. The Court says:

"The interpretation of the term "elect" is what is at issue. It is not defined in the EI Act. According to the Oxford English Dictionary (Online: https://www.oed.com", the ordinary meaning of the verb "elect" is "to pick our, choose…to make a **deliberate choice**…". The ordinary meaning of the mound "election" is the act of choosing; the exercise of a **deliberate choice** or preference." [Emphasis added]

[17] While I agree with the Court's analysis here, I would also say that it is this very analysis which leave me to find that the Appellant before me did not "elect" to receive extended parental benefits. This is specifically because she did not make a "deliberate choice". There are several clues that support this assertion. First, the contents of the Appellant's application form suggest that she did not make a deliberate choice to select extended parental benefits. The Appellant's return to work date is clearly identified on the application form as May 15, 2023, which is approximately 48 weeks from the date of her baby's birth; this suggests that she did not deliberately choose to take an extended period of time off or receive extended parental benefits. Similarly, the Appellant selected "48 weeks" in her application form. This period of time coincides directly with her expected return-to-work date which supports my finding that she did not deliberately choose to receive extended parental benefits. Therefore, based on the contents of the Appellant's application form, it cannot be said that she deliberately chose, or elected, to receive extended parental benefits. Instead, she deliberately chose to receive standard parental benefits, but accidentally checked off the wrong box on the application form.

[18] In this same portion of its statutory interpretation analysis, the Court in *Hull* goes on to say:

"Here, the ordinary meaning of the text of subsection 23(1.1) supports the position that what the respondent elected was what the responded chose in her application form, ie. the extended parental benefits for the precise number of 52 weeks. By choosing this option, she informed the Commission of her choice of extended parental benefits, **without anything to indicate that this was not her deliberate choice**." [Emphasis added]

[19] This is another aspect of *Hull* that can be distinguished from the matter before me. While it is true that the Appellant in *Hull* gave no other indicia or clues to suggest that she was selecting anything other than extended parental benefits, that is not the case in the matter before me. The Appellant before me clearly indicated in her application that her return-to-work date was May 15, 2023, and the number of weeks she selected (48) corresponds with that date. Unlike in *Hull*, these are indications that the Appellant did not deliberately choose extended parental benefits. Instead, she attempted to choose standard parental benefits, but accidentally checked the wrong box on one part of the application form. Not only can this set of facts be distinguished from *Hull*, but the analysis in *Hull* suggests that if there IS any indication that a Claimant's election is not deliberate, the Commission has an obligation to investigate that with the Claimant and ensure that their election is a deliberate choice. The Commission's role in this regard will be discussed further below.

b) The Context and Purpose of the Application Process

[20] In *Hull*, the Court moves next to an analysis of the context of the EI system generally and the parental benefits application process specifically. In its decision, the Court says:

"The process of applying for parental benefits is also important to consider for context…subsection 48(2) further specifies that the Claimant must supply the information in the form and manner directed by the Commission. Once again, the respondent must provide her employment circumstances and other circumstances pertaining to her interruption in earnings in accordance with the form provided by the Commission There is nothing confusing in this process. The language is

mandatory. **The onus is on the respondent and she is required to provide the information because only she knows of her circumstances**. The Commission will review the application only once the relevant information is provided and the form is completed, again, including the election of the specific parental benefit and the number of weeks."[8] [Emphasis added.]

[21] The Court is correct here; an examination of the application process is crucial to understand the context in which the Commission makes its decision. In fact, the Court makes an important observation that only the Appellant has full knowledge of her circumstances and only the Appellant can provide the information the Commission requires in order to make its decision. However, the Court's comments imply that, because a Claimant possesses all of the required information, the Commission must effectively review the complete application form to evaluate the Claimant's intentions and determine their election.

[22] In the matter before me, this means that the Commission was required to review all of the information in the application form including the Appellant's return-to-work date, the number of weeks requested and the box regarding standard vs extended parental benefits. It would create a procedural absurdity if the Appellant were required to provide all of these details regarding her circumstances, but the Commission was only required to consider one small piece of that information on one checked box to the exclusion of all the other information the Appellant provided. If this were the case, the application form would essentially be comprised of numerous irrelevant questions and a Claimant would be required to provide several irrelevant details, all because the focus of the Commission's review would be narrowed to one small portion of the application. Based on the application process and the context of the Commission's decision-making, this absurdity can not be what the legislature intended when it drafted subsection 48(2). Instead, it is incumbent upon the Commission to review the entire application to completely ascertain the Appellant's circumstances and determine whether the election fits with the rest of the information provided.

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[8] *Hull*, para 52-54

[23] Furthermore, subsection 48(2) requires a Claimant to provide "such other information as the Commission may require". This suggests that the Commission can and should ask questions during the initial decision-making process. If, for example, a checked box on the application conflicts with other information a Claimant provides, it is incumbent upon the Commission to ask for more information and not simply rely on the checked box as confirmation of the Claimant's election. This implied portion of the process is crucial and failing to adhere to this portion of the process in the matter before me resulted in negative consequences for the Appellant.

[24] Finally, when a Claimant is applying for other EI benefits, it is widely understood that the Commission routinely contacts those Claimants to request additional information and gather additional facts before making their initial entitlement decision. To suggest that a similar information-gathering portion of the decision-making process is not required regarding Claimants for parental benefits is creates a legal absurdity at best, and at worst this practice could be considered discriminatory based on a person's family status and/or gender. In the matter before me, the Appellant's election clearly conflicts with her return-to-work date and the number of weeks she selected. For the reasons already stated, and based on the reasoning outlined in *Hull*, this should have prompted the Commission to ask additional questions before determining that the Appellant elected to receive extended parental benefits. For all of these reasons, I find that the Appellant did not elect to receive extended parental benefits but chose instead to receive standard parental benefits and she should be permitted to amend her application to reflect this election.

c) Purpose of The Legislation

[25] The final portion of the Court's analysis in *Hull* is a discussion of the purpose of subsections 23(1.1) and (1.2) of the EI Act. These sections prohibit a Claimant from changing their election once they begin to receive parental benefits. The Court says:

"The purpose of irrevocability allows **certainty** for Service Canada, **certainty** for the other spouse who may have also applied for benefits, **certainty** for the Claimant's employer and I would add **certainty** for the spouse's employer. **All**

of these parties may be affected by the Claimant's election once benefit payments have started….these other parties are equally deserving of **certainty** and efficiency in their financial planning.[9]" [Emphasis added]

[26] While I agree with the Court, I would add to these comments by saying that this principle of certainty for all parties is completely lost when a Claimant is held to a mistake on their application form. This is true in the matter before me, prior to her taking maternity leave from work, the Appellant's employer was fully aware that she was returning to work within one year of giving birth and they made staffing decisions based on the Appellant's intentions.

[27] At the hearing, the Appellant provided ample proof of this by submitting emails between herself and her employer dated May 30, 2022[10]. These emails are between the Appellant as well as her Human Resources Manager, the Executive Director and a Settlement Manager. They state as follows:

Appellant: Yes that is correct, my maternity leave will start on the 13th of June. I believe you will send me the Record of Employment so I can apply for EI maternity, correct? As for my return date, I am planning to return in the beginning of May 2023.

Manager: So tentatively we will record your return as May 1, 2023.

[28] The Appellant also submitted a letter from her employer dated November 3, 2022, which states: "…this is to confirm that she will be returning back to work, from her maternity leave, on May 15, 2023[11]."

[29] These messages between the Appellant and her Employer confirm that all of the parties involved planned for the Appellant to return to work during the beginning of May 2023. This corresponds directly with the return-to-work date the Appellant included in her application form.

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[9] *Hull*, paras 57 and 59
[10] See GD05-2 and 3
[11] See GD02-page 9

[30] The Court in *Hull* is correct that the purpose of irrevocability is to ensure certainty for all the parties involved. However, in this instance, that certainty was thwarted because the Commission failed to properly investigate and confirm the Appellant's election. Even though the Appellant checked the box indicating extended parental benefits, the other information she included in the application form as well as the discussions she had with her employer establish that this box does not reflect her deliberate choice and was instead an accident.

[31] The Court in *Hull* recognizes that a Claimant's spouse also requires certainty in the benefit process. However, in the matter before me, a complete lack of certainty was created for the Appellant's spouse because the Appellant's true election was not recognized. At the hearing, the Appellant gave detailed testimony about how she and her spouse had originally planned for her to take approximately one year of leave following their baby's birth. The Appellant explained their rationale in this regard and also the financial challenges her spouse faced when her true election was not recognized by the Commission. The Appellant's spouse was forced to work additional time, they had difficulty paying their mortgage and a great deal of stress was created due to the level of uncertainty that resulted because the Appellant's election was not properly recognized. While I agree with the Court regarding the importance of certainty throughout this benefit process, I would also note that, when the Commission fails to properly identify a Claimant's election during the application process, this creates the very uncertainty that the Court is trying to avoid.

[32] Finally at the hearing, the Appellant provided additional documentary evidence to establish that, prior to leaving work, she fully intended to take 48 weeks of leave and receive standard parental benefits. The Appellant submitted text messages as well as an invoice from her daycare provider that are dated August 30 and 31, 2022[12]. These messages between the Appellant and the daycare provider establish that she registered her baby for a daycare spot that was set to begin on May 1, 2023, once her baby reached almost one year old. The Appellant confirmed this with the daycare staff and

[12] See GD06 pages 2 to 6

paid a registration fee of $325.00 to guarantee the spot. At the hearing, the Appellant explained that she intended to return to work on May 15, 2023, as indicated in her application, but she wanted her baby to begin daycare on May 1, 2023, to allow for any transitional difficulties that may arise. The Appellant provided detailed and consistent testimony on this point and I have no reason to disbelieve her.

[33] These daycare documents are important for two reasons. First, they support the Appellant's position that she did not deliberately choose the extended parental benefits option but it was always her plan to return to work within one year of her baby's birth. Second, these documents reinforce the Court's view in *Hull* that the principle of certainty is crucial to the application process as it not only involves the Appellant, her spouse and her employer, but extends even further to the Appellant's baby, their daycare provider or any other childcare staff who may be involved. In the matter before me, all of these interested parties relied on the certainty of the Appellant's plans to return to work after one year and enroll her baby in daycare at that time. The fact that the Commission chose to rely on one isolated piece of information on the Appellant's application form completely undermined that certainty for all of the parties involved. It is for this reason that I find that the Appellant did not make a deliberate choice to receive extended parental benefits. Instead, she provided multiple pieces of information in her application form which indicate she intended to take approximately one year of leave and then accidentally checked the box which indicated otherwise. The Appellant should not be held to this election as it did not represent her deliberate choice and was not a valid election for benefits. Instead, the Commission should have reviewed all of the information the Appellant provided and then asked questions to clarify the Appellant's choice regarding her benefits. As the Commission failed in this regard, the Appellant should now be permitted to amend her application to reflect her true election for standard parental benefits.

d) Additional Information

[34] For the sake of completeness, I have also turned my mind to the issue of why the Appellant delayed contacting the Commission for a few weeks after she began receiving

extended parental benefits. As mentioned above, this issue is important and was considered in *Hull* because the Claimant in that case waited almost 9 months before contacting the Commission to change her election. The Court in *Hull* suggested that this 9-month delay confirmed that the Claimant was confused by the application and she was therefore prevented from changing her election simply because she was confused[13].

[35] In the matter before me, the Appellant began receiving extended parental benefits on October 14, 2022, and she contacted the Commission on November 1, 2022. The Appellant says this short delay does not indicate that she was confused by the application process or by the benefit payments, but it was instead the result of a medical condition her baby developed as well as her own medical situation which required additional care. The Appellant says that, during the first weeks of receiving extended parental benefits, her baby contracted covid and jaundice and required her constant attention. This meant that she did not have an opportunity to contact the Commission until November 1, 2022[14]. When the Appellant did contact the Commission, it was because she realized she had accidentally checked the wrong box regarding the standard vs extended benefit election and she requested an amendment to her application. At the hearing, the Appellant provided detailed and consistent testimony regarding the short delay in contacting the Commission and I have no reason to disbelieve her regarding her reasons for the short delay.

[36] This is yet another example of how the matter before me can be distinguished from the facts in *Hull*. The Appellant did not delay months before contacting the Commission. Instead, the Appellant was forced to wait a few weeks to care for her sick child before she contacted the Commission to discuss her benefits. This supports the Appellant's position that she was not confused by the application or the process but instead checked an incorrect box by accident.

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[13] *Hull*, para 31
[14] GD03-page25

[37] Based on the evidence before me and my analysis of the prevailing caselaw, I find that the Appellant did not deliberately elect to receive extended parental benefits and she should be permitted to amend her application to accurately reflect her true election for standard parental benefits.

Conclusion

[38] Based on the evidence before me, I am not satisfied that the Appellant deliberately elected to receive extended parental benefits. Instead, the Appellant chose standard parental benefits.

[39] This means that the appeal is allowed.

Laura Hartslief
Member, General Division – Employment Insurance Section