



Citation: *AB v Canada Employment Insurance Commission*, 2023 SST 1988

Social Security Tribunal of Canada General Division – Employment Insurance Section

Decision

Appellant: A. B.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (611284) dated September 13, 2023 (issued by Service Canada)

Tribunal member: Elyse Rosen

Type of hearing: Videoconference

Hearing date: November 15, 2023

Hearing participant: Appellant

Decision date: November 20, 2023

File number: GE-23-2871

Decision

[1] The appeal is dismissed.

[2] The Appellant isn't entitled to parental benefits outside the parental benefit window (as that term is explained, below, in my analysis).

Overview

[3] The Appellant and his wife were offered the possibility of adopting a baby girl. The child was placed in their care on May 3, 2022.

[4] Since the opportunity was unexpected and came with almost no notice, the Appellant and his wife were unprepared for the baby's arrival. Because both the Appellant and his wife had jobs with significant responsibilities, neither of them was in a position to immediately begin a parental leave.

[5] The couple tried to inform themselves about the possibility of delaying the onset of their parental leave. The adoption agency they were working with advised them that there was no issue in delaying their leave. They were told that the only requirement was that they begin their leave within 78 weeks of the date that their child came into their care. The couple verified this information by consulting a government of Ontario website and found it to be accurate.

[6] The couple decided that neither of them would take parental leave before October 2022. After discussing it with their respective employers, they determined that they would share 40 weeks of parental leave. The Appellant would take 10 weeks of leave after his wife completed 30 weeks of leave.

[7] They chose standard parental benefits, as they thought that this is what best met their needs.

[8] The Appellant's wife took her parental leave as planned, and was paid standard parental benefits from October 16, 2022, to May 06, 2023.¹ The Appellant took his leave

¹ See GD2-33.

once she returned to work. His last day of work was May 19, 2023. He applied for 10 weeks of standard parental benefits.

[9] The Canada Employment Insurance Commission (Commission) decided that the Appellant wasn't entitled to parental benefits. This is because the benefits he was claiming fell outside of the parental benefit window.

[10] The Appellant says he was unaware there was a parental benefit window. He contends that the information regarding the parental benefit window found on the Commission's website and on the application form is confusing and incomplete. He claims that because of this, he and his wife were deprived of the opportunity to make an informed choice regarding the timing of their leave and the type of benefits they chose.

[11] He also believes that the Commission should have alerted his wife that his benefits would fall outside the parental benefit window when she declared in her application that she would be sharing 40 weeks of benefits with him.

[12] He claims he would have started his leave earlier if he had understood that he had to take his leave within 52 weeks, rather than 78 weeks, of his child being placed with him. He feels that the distinction between the provincial legislation regarding entitlement to parental leave, and the federal legislation setting out the parental benefit window, should be explicitly called to the attention of claimants when they apply for parental benefits.

[13] He asks that the Tribunal extend the parental benefit window so that he can receive the benefits he applied for. Alternatively, he and his wife want to change their election from standard to extended parental benefits.

Issue

[14] Is the Appellant entitled to receive the parental benefits he applied for?

Analysis

[15] I find that the Appellant isn't entitled to parental benefits. This is because the weeks he is claiming fall outside of the parental benefit window.

What is a parental benefit window?

[16] Parental benefits are paid to eligible claimants while they care for a newborn or a child placed with them for the purpose of adoption.²

[17] There are two types of parental benefits; standard and extended. Parents who elect (in other words, choose) standard parental benefits get up to 40 weeks of parental benefits to share.³

[18] The *Employment Insurance Act* (Act) sets out the period when parental benefits can be paid. This is often called the **parental benefit window**, although that phrase doesn't appear in the Act.

[19] The parental benefit window begins with the week your child is born or placed with you for adoption, and usually ends 52 weeks later.⁴ It can be longer than 52 weeks if:

- you have chosen extended parental benefits⁵
- your child is hospitalized during the window⁶
- you are a member of the Canadian Forces and are required to defer your leave, or are directed to report for duty, during the window⁷
- you are collecting more than one type of special benefits⁸

² See section 12(3)(b) of the Act.

³ See section 12(4)(b)(i) of the Act.

⁴ See section 23(2) of the Act.

⁵ See section 23(3.21) of the Act.

⁶ See section 23(3) of the Act.

⁷ See section 23(3.01) of the Act.

⁸ See section 23(3.2)

- you are collecting certain combinations of regular and special benefits⁹

[20] The 40 weeks of shared benefits I referred to, above, can only be paid within the parental benefit window.¹⁰

When did the Appellant's parental benefit window begin?

[21] I find that the Appellant's parental benefit window began on May 1, 2022, which is the Sunday of the week that his child was physically placed with him for the purpose of adoption.¹¹

[22] The Appellant says that his child's birth mother had 21 days to change her mind about placing the child for adoption. He provided documentation confirming this.¹²

[23] He argues that although his child was in his physical custody as of May 3, 2022, she couldn't be placed with him for adoption until those 21 days expired. He contends that his parental benefit window would have only started the week that the 21-day delay expired.

[24] The law says that parental benefits are payable to a claimant who has had a child placed with them for the purpose of adoption under the laws governing adoption in the province where they reside.¹³ It says the parental benefit window begins when the child is actually placed for adoption.¹⁴

[25] The Appellant resides in Ontario. So, to determine when the parental benefit window began in the Appellant's case, I need to consider what the Ontario *Child and Family Services Act* (the CFSA) says about when a child is considered to be placed for the purpose of adoption.

⁹ See section 23(3.22) of the Act.

¹⁰ See section 23(2) of the Act.

¹¹ Weeks begin on Sundays (see section 2(1) of the Act).

¹² See GD5.

¹³ See section 23(1) of the Act.

¹⁴ See section 23(2)(a) of the Act.

[26] Although the CFSA uses the term "placed for adoption" numerous times, it doesn't define the term.

[27] The adoption process set out in the CFSA includes a number of formalities, including the expiry of a 21-day delay for the birth parents to withdraw their consent to the adoption.¹⁵ However, I'm unable to conclude that this formality impacts the date at which a child can be considered to be placed for adoption.

[28] From my reading of the CFSA, when the Children's Aid Society (or its representative) makes a plan of care for a child that includes the child's eventual adoption, the physical placement of the child with potential adoptive parents, who have been vetted for that purpose and have accepted to adopt, is for all intents and purposes "placement for the purpose of adoption".

[29] I find that the CFSA considers a child to be placed for adoption if the birth parents have signed a consent to adoption and the child has been placed with adoptive parents who have committed to the plan of care for that child.

[30] The agreement the Appellant signed with the adoption agency involved in his daughter's adoption confirms this.¹⁶ It's addressed to the "prospective adopting parents". It appears to have been preceded by an Acknowledgement of Adoption Placement. In its first sentence it states that the child was placed in the care of the Appellant and his wife pending an order of adoption. It confirms that the birth mother signed a consent to adoption.

[31] The Appellant argues that because his status as an adoptive parent remained precarious until the 21-day delay given to the birth mother to withdraw her consent expired, it was only after that 21-day delay that the placement became permanent. Because of this, he says his child was actually placed with him **for the purpose of adoption**, as is required by EI law, on May 25, 2022.

¹⁵ See sections 137(2) and 137(8) of the *Child and Family Services Act* (CFSA).

¹⁶ See GD5-3.

[32] I don't accept that the precarity of the Appellant's status as an adoptive parent can be understood as delaying the point at which his child was placed "for the purpose of adoption." This is because his status remained precarious even after the expiry of the 21-day delay.

[33] There are a number of situations set out in the CFSA which could prevent an adoption from actually taking place even after the 21-day delay expires.¹⁷ A potential adoptive parent's status only truly ceases to be precarious once an order of adoption is made.¹⁸ So, I can't accept that the end of the 21-day delay is the point at which the placement becomes "for the purposes of adoption."

[34] I believe the correct interpretation of the law is that the parental benefit window begins when the child is physically placed in the custody of a claimant who has committed to adopt them. This interpretation is in keeping with the text, context, and purpose of the subsection of the law setting out the commencement of the parental benefit window.

[35] That subsection says that the parental benefit window begins the week the child is "**actually** placed with the claimant for the purpose of adoption."¹⁹

[36] The definition of actually is *in act or in fact; really*.²⁰

[37] I understand that the words "actually placed" are meant to emphasize what has really taken place in act and in fact (physical placement) as opposed to what may occur in theory (that the purpose of the placement—adoption—is no longer precarious). So, the plain meaning of that subsection is that the payment of benefits begins in the week the child is physically placed with the claimant.

¹⁷ For instance, the Children's Aid Society could decide to remove the child and terminate the adoption process (see section 144(1)(b) CFSA).

¹⁸ The agreement he and his wife signed with the adoption agency confirms this (see GD5-3 at item 6).

¹⁹ See section 23(2)(a) of the Act.

²⁰ See the Merriam-Webster online dictionary.

[38] This interpretation would also be consistent with the context and purpose of the subsection, which is found in a section of the law entitled “parental benefits.”²¹

[39] As mentioned, above, parental benefits are meant to provide financial assistance to claimants who are unemployed because they are caring for a newborn, or a child placed with them for adoption.

[40] In the case of adoption, the requirement to care for the child begins as soon as the child is physically placed with the claimant. This would explain why Parliament would have chosen to have the window commence as soon as the child is in the claimant’s physical custody.

[41] If the window during which parental benefits can be paid were only to commence once the delay for birth parents to withdraw consent has expired, or once an order of adoption is made (which is the point at which a claimant’s status as an adoptive parent is truly no longer precarious), claimants might be deprived of financial assistance for weeks or months while off work caring for the child that was placed with them. This can’t be what Parliament intended.

[42] Furthermore, as the Appellant himself points out, making time to bond with the child is a required component of any adoption. Delaying the onset of the parental benefit window would make it financially difficult, if not impossible, for some parents to take time off work to begin bonding with their child. Again, this can’t be what Parliament intended.

[43] In my view, if Parliament had intended to delay the onset of the parental window to the week the birth parents can no longer withdraw their consent to the adoption, or to the week the order of adoption is made, they would have said so clearly. I don’t see how the terms “actually placed...for the purpose of adoption” can be read to mean that.

[44] So, I find that the only interpretation that is consistent with the plain meaning of the text of the relevant subsection, its context, and its purpose, is that the parental

²¹ See section 23(1) of the Act.

benefit window begins as soon as the child is physically placed with the claimant. This is of course subject to there also being an adoption process sanctioned by provincial law in place, as was the case here.

When did the Appellant's parental benefit window end?

[45] I find that the Appellant's parental benefit window ended on May 6, 2023. This is 52 weeks after the week his daughter was placed with him.

[46] According to his testimony, none of the conditions set out in the law that would allow for the extension of the parental benefit window apply in his case.

[47] The Appellant argues that because there are circumstances in which the parental benefit window can be extended, and that these circumstances exist to provide more flexibility, I should show flexibility and extend the window in his case.

[48] As sympathetic as the Appellant's case may be, I'm unable to do so. I must apply the law as it's written.²² I can't add something to the law that isn't there. Parliament provided for a number of exceptions where the parental benefit window can be extended. They are the only exceptions where that would be possible.

Is it otherwise possible to adjust the parental benefit window?

[49] I find that there isn't any legal basis on which I can adjust the parental benefit window.

²² See *Canada (Attorney General) v Knee*, 2011 FCA 301.

[50] The Appellant argues that despite the fact that he is claiming benefits outside of the parental benefit window, the window should be adjusted in his case because:

- he was misled by the provincial legislation with respect to entitlement to parental leave and by what he was told by the adoption agency
- the Commission didn't provide clear information on its website, or in the application form, that would have allowed him and his wife to understand that there is a parental benefit window
- the Commission failed to provide information that would allow him to distinguish between the provincial legislation setting out the right to parental leave and the parental window
- the Commission didn't advise his wife that his benefits would fall outside the parental benefit window when she made her application for benefits and declared that they would be sharing 40 weeks of benefits

[51] He contends that he and his wife were deprived of the opportunity to make an informed choice when planning their respective leaves, because the existence of the parental window wasn't adequately communicated to them. As a result, he believes he should be paid the benefits that fall outside the window, but that he would otherwise be entitled to.

[52] In the alternative, he argues that he and his wife should be able to change their election from standard to extended benefits.

[53] In addition, he asks that I consider that:

- he and his wife had virtually no time to plan for the arrival of their daughter
- they were in a state of overwhelm and in no position to read the fine print on the various sources they consulted to determine when they could take their leaves
- their decision to delay their leaves was influenced, in large part, by their professional responsibilities and their commitment to their employers and colleagues, and not their own interests
- the Commission isn't held responsible for its errors²³, which creates an unfair double standard
- he and his wife were not trying to manipulate the system by delaying their parental leaves

[54] The Appellant and his wife both testified at the hearing. They are both extremely bright, thoughtful, and highly credible.

[55] I believe them when they say that they were taken by surprise and completely overwhelmed during the weeks and months after their daughter arrived at their doorstep.

[56] I have no doubt that they relied on the adoption agency they were working with, and their respective employers human resources departments, as subject matter experts on when they could take their parental leaves. And I don't doubt that they were told the only limitation was that their parental leave had to start within 78 weeks of their daughter's placement.

[57] I am certain that they did their best, in the circumstances they were in, to verify the information they had received from others for themselves in order to ensure they were making the right decision regarding when to take their leaves.

²³ The Commission says it made an error on the date of the Appellant's disentitlement.

[58] I'm also sure that after doing so, they honestly believed that the Appellant's wife could delay her 30-week leave until October 2022, and that the Appellant could take 10 weeks of leave once his wife went back to work.

[59] I believe them when they say that in delaying their leaves, they were putting others' needs ahead of their own.

[60] The Commission points out that contrary to what the Appellant asserts, the application for benefits and Ontario government website do refer to the parental benefit window. And the website mentions that there are differences between when an employee is entitled to take leave under provincial law and when they can receive parental benefits. The website also encourages claimants to contact the Commission for more information.

[61] However, I can understand perfectly why the Appellant and his wife missed that information, and didn't understand that no benefits are payable more than 52 weeks after the week that a child is born or placed for purposes of adoption. And I can understand why, even after verifying the Ontario government's website and the Commission's website, and after completing their applications for benefits, they continued to think that what they had been told about starting their leaves within 78 weeks was correct and that they didn't need to enquire further.

[62] Yet, all of that said, the Appellant can only receive employment insurance benefits if he can prove that he is entitled to them. And as I've explained, above, he's not entitled to any benefits that fall outside of the parental benefit window.

[63] As unfair as it may seem, especially since the law governing parental benefits is quite confusing, claimants are expected to know the law.²⁴ No recourse is available to them if they acted without complete information.

[64] With respect to the Commission's failure to alert the Appellant's wife that his benefits would fall outside the window, the Commission is not obliged to take the

²⁴ See *Karval v Canada (Attorney General)*, 2021 FC 395.

initiative of providing claimants with information.²⁵ The onus is on claimants to reach out to the Commission to ensure that they understand their rights and make appropriate choices.

[65] Moreover, the Commission can't be expected to understand what a couple's intentions are from the information contained on the application of one of the claimants.

[66] In all events, case law provides that the Commission can't be held responsible for providing claimants with inaccurate information, much less so for not proactively providing them with information they didn't seek themselves.²⁶

Can the Tribunal consider the Appellant's request to change his election?

[67] The Appellant says that now that he understands the parental benefit window, he would like to change his election from standard to extended benefits. He would like to do this so that the window can be extended, thereby allowing him to receive benefits.

[68] The Commission says that I can't decide this issue, because it isn't the object of its reconsideration decision. I don't agree.

[69] The reconsideration decision appealed from deals with the Appellant's entitlement to parental benefits within the parental benefit window.

[70] In my view, the type of benefits elected is connected to the issue of the Appellant's entitlement to benefits and to the duration of the window. Moreover, the Appellant raised the possibility of changing his election to extended benefits in his reconsideration request.²⁷

[71] So, I consider it to be within my authority to look at whether the Appellant can change his election from standard to extended benefits.

²⁵ See *Karval v Canada (Attorney General)*, 2021 FC 395.

²⁶ See *Canada (Attorney General) v. Shaw*, 2002 FCA 325 and *Mauchel v Canada (Attorney General)*, 2012 FCA 202.

²⁷ See GD3-28.

Can the Appellant change his election to extended benefits?

[72] I find that the Appellant can't change his election from standard to extended benefits.

[73] The law says that once you elect (in other words, make a choice between) standard and extended parental benefits that choice becomes irrevocable (in other words it can't be changed).²⁸

[74] Previously, there was some controversy over what it meant to elect a type of benefit. Some decisions of the Tribunal suggested that if you didn't have the necessary information to make an informed choice, your election might be invalid and could therefore be changed. The Appellant submitted two of these decisions in support of his appeal.²⁹

[75] However, as I explained to the Appellant at the hearing, the Federal Court of Appeal has rendered a number of decisions which resolve that controversy. They make it clear that, regardless of the circumstances, once a claimant makes a choice on their application form and receives a benefit payment, they can no longer change their election.³⁰

[76] Moreover, both parents must elect the same type of parental benefits. The election of the first parent to elect is binding on the other parent.³¹

[77] The Appellant made his request on his own behalf and on that of his wife.

[78] However, even if the law didn't make the election irrevocable, I am only seized with the Appellant's appeal. I have no authority to do something that concerns another claimant who isn't a party to the appeal.

²⁸ See section 23(1.2) of the Act.

²⁹ The Appellant referred to *RC v Canada Employment Insurance Commission*, GE-23-513, and *VV v Canada Employment Insurance Commission*, AD-23-3.

³⁰ See *Canada (Attorney General) v Hull*, 2022 FCA 82, *Canada (Attorney General) v Pettinger*, 2023 FCA 51, *Canada (Attorney General) v Johnson*, 2023 FCA 49, and *Canada (Attorney General) v Jeffers*, 2023 FCA 52

³¹ See section 23(1.3).

[79] In all events, from a practical standpoint, if both the Appellant and his wife were to change their election to extended parental benefits, it's unclear to me that they would be better off financially. This is because extended parental benefits are paid at a lower rate.³² I suspect that the total amount they would receive would be less, not more, than what the Appellant's wife has already received.

The Commission may want to consider how it can improve the information on its website and application form

[80] Having a child, or adopting one, is a busy, emotionally overwhelming, exhausting period in any new parent's life.

[81] The entitlement to parental benefits is a complicated part of the law. Furthermore, there are inconsistencies between the period a claimant is entitled to receive benefits and their rights to parental leave under labour standards legislation.

[82] Those whom claimants rely on for advice surrounding these matters, such as their employer's human resources personnel or adoption agencies, often don't have complete and accurate information about claimants' rights and obligations with respect to parental benefits and provide bad advice.

[83] I have seen a number of cases where the Commission's own agents have provided mistaken information to claimants about their entitlement to parental benefits.

[84] So, it isn't surprising that when busy, overwhelmed, and exhausted parents attempt to understand their entitlement to parental benefits, mistakes are made.

[85] As I mentioned, above, the Appellant and his wife are clearly intelligent, highly educated people. They hold jobs with significant responsibilities. They took the planning of their leave very seriously. And yet, they didn't understand the information made available to them and didn't catch some of the nuances it contains.

³² 33% as opposed to 55% of a claimant's weekly insurable earning, subject to a maximum amount.

[86] The Appellant and his wife are far from alone. The Tribunal receives a large number of appeals from claimants who say that they didn't understand that there was a parental benefit window, didn't fully comprehend the distinction between standard and extended parental benefits, and didn't realize that once they made their election it became irrevocable.

[87] Over time, the Commission has made improvements to the information on its website and to its application for benefits. But there clearly continues to be room for improvement.

[88] The Appellant has made some suggestions as to how the Commission can make the information available to claimants clearer and reduce mistakes. They include:

- explain the parental benefit window in its own separate section on the website
- create a separate heading for the parental benefit window on the application form
- have the dates of the parental benefit window self-populate on the application form based on the claimant's other selections (date of child's birth or placement, first day of leave, number of weeks, return date)
- indicate on the application form and on the website that the parental benefit window differs from the period in which a claimant is entitled to take leave under labour standards legislation
- add a check box asking the claimant to confirm that they understand the parental benefit window and requiring them to call the Commission if they don't

[89] The Commission may want to give consideration to these suggestions, which would likely benefit future claimants.

Conclusion

[90] The Appellant isn't entitled to parental benefits. This is because the weeks he is claiming fall outside of the parental benefit window.

[91] So, the appeal is dismissed.

Elyse Rosen

Member, General Division – Employment Insurance Section