



Citation: *SF v Canada Employment Insurance Commission*, 2024 SST 1573

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

## **Decision**

**Appellant:** S. F.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission  
reconsideration decision 641266 dated February 1, 2024  
(issued by Service Canada)

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**Tribunal member:** Laura Hartslief

**Type of hearing:** Videoconference

**Hearing date:** December 10, 2024

**Hearing participants:** Appellant

**Decision date:** December 13, 2024

**File number:** GE-24-2893

## **Decision**

[1] The appeal is dismissed. The Tribunal disagrees with the Appellant.

[2] The Appellant received 40 weeks of Employment Insurance (EI) parental benefits when he was only entitled to receive 32 weeks of parental benefits.

[3] The Appellant says that, even though he made a mistake on his application for parental benefits, the Commission should bear some of the responsibility for failing to notice his mistake.

[4] For the following reasons, I find that the Appellant received 8 additional weeks of benefits above the maximum allowable number of weeks. This means the Appellant received benefits he was not entitled to receive and he must repay those benefits.

## **The Appellant's Appeal was Returned from the Appeal Division**

[5] The Appellant first appealed the Commission's decision regarding his extended parental benefits to the Tribunal's General Division in May 2024. He told the Tribunal about his experience with the Commission and his intentions for his parental leave.

[6] The General Division decided the Appellant had failed to establish that he was entitled to receive the 40 weeks of parental benefits he applied for. The General Division found that the Appellant was required to repay the 8 weeks of parental benefits he received by mistake. The Appellant appealed this decision to the Tribunal's Appeal Division.

[7] The Appeal Division decided the General Division had failed to properly consider whether the Commission exercised its discretion judicially when it reconsidered the Appellant's parental benefits. By failing to conduct this analysis, the General Division had made an important error of law.

[8] The Appeal Division ordered the appeal to be returned to the General Division for a new hearing. This decision is a result of that hearing.

## Overview

[9] When you fill out your EI parental benefits application, you need to choose between two options: the “standard option” and the “extended option.”<sup>1</sup> 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. Once you start receiving parental benefits, you can not change options.<sup>2</sup>

[10] In addition, subsection 23(1.3) of the Act says that, when parental benefits are shared, the choice made by the first parent regarding the same child is binding on the other parent<sup>3</sup>. Also, subsection 23(4) of the Act says that, when parents share standard parental benefits, they cannot receive more than a combined maximum of **40** weeks of benefits; when parents share extended parental benefits, they cannot receive more than a combined maximum of **69** weeks of benefits<sup>4</sup>.

[11] The Appellant’s child was born on October 26, 2021<sup>5</sup>. There is no dispute that the Appellant’s wife applied for benefits first and she received **37** weeks of extended parental benefits. In July 2022, the Appellant applied for **40** weeks of extended parental benefits<sup>6</sup> and he started receiving those benefits on July 3, 2022.<sup>7</sup>

[12] The Appellant says that he understands that he received 8 more weeks of benefits than he was entitled to receive. However, the Appellant says that he should not be held responsible for his mistake. The Appellant says the Commission gave him incorrect advice when he applied for benefits and the Commission failed to act judicially when it eventually reconsidered his claim for parental benefits. For these reasons, the

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<sup>1</sup> Section 23(1.1) of the *Employment Insurance Act* (EI Act) calls this choice an “election.”

<sup>2</sup> Section 23(1.2) of the EI Act says that the election is irrevocable (that is, final) once you receive benefits.

<sup>3</sup> Subsection 23(1.3) of the EI Act.

<sup>4</sup> Subsection 23(4) of the EI Act.

<sup>5</sup> See GD3-8

<sup>6</sup> See GD3-9

<sup>7</sup> See GD3-22-26

Appellant says he should not be responsible for re-paying the benefits he received by mistake.

[13] The Commission says that the Appellant was only entitled to receive **32** weeks of parental benefits. The Commission noticed the mistake on the Appellant's application on December 9, 2023<sup>8</sup>. The Commission says it acted judicially when it reconsidered the Appellant's claim for parental benefits and the Appellant's mistaken choice resulted in an overpayment of \$3,064.00<sup>9</sup> and he responsible for paying back those benefits.

## Issues

[14] Did the Commission exercise its discretion judicially when it reconsidered the Appellant's claim for parental benefits?

[15] Is the Appellant allowed to receive the 40 weeks of extended parental benefits he applied for?

[16] Is the Appellant responsible for the overpayment, even though the Commission failed to notice the mistake prior to paying out the benefits?

## Analysis

a) *Did the Commission exercise its discretion judicially when it reconsidered the Appellant's claim for parental benefits?*

[17] Section 52 of the Act says that the Commission "may reconsider a claim for benefits" even after benefits have been paid to a person<sup>10</sup>. This means that, even after the Commission pays out benefits, it is legally permitted to re-open that claim and consider whether those benefits should have been paid. The Commission has the authority to do this for **any** claim regarding benefits that have been paid or should have

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<sup>8</sup> See GD3-27

<sup>9</sup> See GD3-30

<sup>10</sup> See section 52(1) of the EI Act.

been paid<sup>11</sup>. However, just because the Commission is allowed to reconsider a claim for benefits does not mean that it should reconsider a claim.

[18] If the Commission decides to reconsider a claim, it must do so within the proper timelines and it must do so judicially (or fairly). This means that the Commission cannot act in bad faith or for an improper purpose, discriminate, consider irrelevant factors or fail to consider relevant factors<sup>12</sup>. The law doesn't tell the Commission what factors to consider. The Federal Court says the Commission should consider factors that favour finality (claimants should be able to rely on Commission decisions) and accuracy (mistakes and misrepresentations should be corrected). This includes the factors in its reconsideration policy.<sup>13</sup> The Commission should not consider the claimant's personal factors – such as ability to pay or stress<sup>14</sup>.

[19] Specifically, the Commission may reconsider a claim within 36 months after benefits have been paid<sup>15</sup> or within 72 months if the Commission believes that a false or misleading statement was made in connection with a claim<sup>16</sup>.

[20] When the Commission acts judicially, the Tribunal can not interfere with its decision to reconsider a claim. When the Commission does not act judicially, the Tribunal can decide whether to reconsider a claim.

[21] In the matter before me, there is no dispute that the Commission exercised its discretion to reconsider the Appellant's claim within the proper timeframe. The Commission's reconsideration decision was made on December 9, 2023.<sup>17</sup> The parental benefits the Commission looked at were for the period from February 12, 2023, to April 8, 2023, which is within 36 months of the decision to reconsider.

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<sup>11</sup> *Canada Employment Insurance Commission v BB*, 2024 SST 89 (AD-23-821)

<sup>12</sup> *Purcell* A-694-94(FCA)

<sup>13</sup> Chapter 17.3.3 of the *Digest of Benefit Entitlement Principles*

<sup>14</sup> *Molchan* 2024 FCA 46; *Al-Harbawi* FCA 148

<sup>15</sup> See section 52(1) of the EI Act

<sup>16</sup> See section 52(5) of the EI Act

<sup>17</sup> See GD3-28

[22] The real issue before me is whether the Commission acted judicially (or fairly) when it decided to reconsider the Appellant's claim for parental benefits. As noted above, in order to act judicially, the Commission:

- cannot act in bad faith or for an improper purpose or motive;
- cannot consider an irrelevant factor;
- cannot ignore a relevant factor; and
- cannot act in a discriminatory manner<sup>18</sup>.

[23] Because the EI doesn't specifically say what factors are relevant to the Commission's exercise of discretion, the Commission developed an internal policy document which outlines different scenarios when the Commission should reconsider a claim. This policy is designed to ensure that there is consistency within the Commission's decisions and its decisions are not arbitrary<sup>19</sup>. The Federal Court in *Molchan* notes that while the Commission has a reconsideration policy, it isn't law<sup>20</sup>. But the Federal Court says that these are relevant factors to weigh when deciding if a claim should be reviewed. The Commission's internal policy document says that a claim will only be reconsidered when:

- benefits have been underpaid;
- benefits were paid contrary to the structure of the EI Act;
- benefits were paid as a result of a false or misleading statement; or
- the claimant ought to have known there was no entitlement to the benefits received<sup>21</sup>.

[24] For the following reasons, I am not satisfied that the Commission failed to act judicially when it reconsidered the Appellant's claim for benefits.

[25] I say this even though I believe the Appellant when he says he received incorrect information from the Commission when he applied for parental benefits. At the hearing, the Appellant provided detailed testimony about the previous mistakes he made on his

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<sup>18</sup> See *Suresh v Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 17101 (FCA), [2000] 2 FC 592; *Canada (Attorney General) v Purcell*, 1995 CanLII 3558 (FCA), [1996] 1 FC 644; *Canada (Attorney General) v Uppal*, 2008 FCA 388; *MS v Canada Employment Insurance Commission*, 2022 SST 933 (AD-22-91)

<sup>19</sup> *T-Giorgis v Canada (Attorney General)*, 2024 FCA 47 at para. 59

<sup>20</sup> *Molchan* para 20

<sup>21</sup> See Chapter 17.3.3 of the *Digest of Benefit Entitlement Principles*

El application when his first child was born in 2019. The Appellant explained that, in order to avoid similar mistakes, he contacted Commission staff who then gave him advice about his application and stepped him through the process. The Appellant says both he and his wife participated in this phone call and they followed the instructions the Commission staff gave them.

[26] The Appellant gave testimony on this point in a detailed and consistent manner and I have no reason to disbelieve him. I believe the Appellant when he says contacted the Commission prior to completing his application because he was intentionally trying to avoid the mistakes he had made in the past. I believe the Appellant when he says that the Commission staff gave him advice about his application and he followed that advice precisely.

[27] The difficulty here is that the prevailing caselaw addresses the specific situation when the Commission has given incorrect information to an individual. The case of *Molchan v AGC*, 2024 FCA 46 says misinformation from the Commission cannot be relied upon to avoid the Commission's authority to reconsider a claim or to relieve the Appellant of an overpayment. This case means that, even though the Commission likely gave incorrect information to the Appellant, he cannot rely on that argument to establish that the Commission failed to act judicially (or fairly) when it reconsidered his claim. This portion of the Appellant's argument must be dismissed.

[28] I have also considered the Appellant's testimony about the Commission's lack of transparency when it reconsidered his claim. The Appellant expressed some frustration at the hearing because the Commission did not inform him why his particular claim was being reconsidered or what factors led the Commission to re-open his claim. The Appellant says the whole process felt "random", "improper" and "frustrating".

[29] While I completely understand the Appellant's position and I deeply sympathize with his situation, there is insufficient evidence before me to establish that the Commission failed to act judicially when it reconsidered the Appellant's claim for parental benefits. The fact is that the Appellant received 8 weeks of parental benefits that he was not entitled to receive. There is no judgement or discretion used when

determining the total number of weeks payable for parental benefits. The EI Act sets out the basic components of a person's entitlement to benefits. This means he was paid benefits that were "contrary to the structure of the EI Act<sup>22</sup>" and the Commission's policy allows the Commission to reconsider the Appellant's claim for those benefits. Also, the Appellant's EI application specifically reminds him that, "if parents share the [extended] parental benefits, they can receive up to a combined total of **69** weeks<sup>23</sup>." This suggests to me that the Appellant "ought to have known there was no entitlement to the benefits<sup>24</sup>" he received and the Commission's policy allows the Commission to reconsider the Appellant's claim for those benefits.

[30] For all of these reasons, I am satisfied that the Commission did not act in bad faith or for an improper purpose, discriminate, consider irrelevant factors, or fail to consider relevant factors. It followed its internal policy document, it was justified in reconsidering the Appellant's claim for benefits and it exercised its discretion judicially in this regard.

*b) Is the Appellant allowed to receive the 40 weeks of extended parental benefits he applied for?*

[31] When you apply for EI parental benefits, you need to choose between the standard option and the extended option.<sup>25</sup> When parental benefits are shared, both parents are required to make the same choice - either standard or extended. Subsection 23(1.3) of the EI Act says that the first parent who completes the EI application binds the other parent to the same option<sup>26</sup>. The Act also says that, when parents share extended parental benefits, they cannot receive more than a combined maximum of **69** weeks of benefits<sup>27</sup>.

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<sup>22</sup> See *Chapter 17.3.3 of the Digest of Benefit Entitlement Principles*

<sup>23</sup> See GD3-8

<sup>24</sup> See *Chapter 17.3.3 of the Digest of Benefit Entitlement Principles*

<sup>25</sup> 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.

<sup>26</sup> Subsection 23(1.3) of the EI Act.

<sup>27</sup> Subsection 23(4) of the EI Act.



[32] This means that the answer to the question before me is no - the Appellant is not entitled to receive the **40** weeks of extended parental benefits he applied for. There is no dispute that the Appellant's wife applied for benefits before him and she received **37** weeks of extended parental benefits. This means the Appellant was only entitled to receive **32** weeks of benefits to reach the combined maximum total of **69** weeks.

[33] The Appellant says he applied for **40** weeks of extended parental benefits because he wanted to take as much time off as he could to be with his family. The Appellant says that when his application was accepted and he was paid **40** weeks of benefits, he assumed that he was entitled to these benefits.

[34] At the hearing, I showed the Appellant the portion of his application which indicates that parents who share extended parental benefits are not permitted to receive more than a combined maximum of **69** weeks. The Appellant says he does not remember reading this portion of the application. However, he now understands that he chose to receive too many weeks of parental benefits.

[35] The Appellant's primary concern is that the Commission failed to notice his mistake when he submitted his application for benefits. The Appellant says that he spoke with his wife and the Commission prior to submitting his application but at no time did the Commission notice the Appellant's mistake or bring it to his attention. The Appellant says he cannot understand why the Commission was not able to notice his mistake sooner in the application process. The Appellant says if he was notified about his mistake, he could have easily returned to work and avoided being paid benefits he was not entitled to receive. The Appellant says that the Commission failed to notice his mistake and, for this reason, he does not feel he should be held responsible for receiving too many weeks of benefits.

[36] However, as outlined above, regardless of whether the Commission provided incorrect information or failed to notice the Appellant's mistake, the fact remains that the Appellant chose to apply for several weeks of parental benefits that he was not entitled to receive. The EI Act is clear that, when parents share extended parental benefits, they are not entitled to receive more than a combined maximum of **69** weeks. As the

Appellant's wife received **37** weeks of parental benefits and the Appellant received **40** weeks of parental benefits, the Appellant received **8** weeks of benefits he was not entitled to receive.

*c) Is the Appellant responsible for the overpayment?*

[37] Once the Commission recalculated the Appellant's parental benefits from **40** weeks to **32** weeks of extended parental benefits, the result was an overpayment of \$3,064.00<sup>28</sup>. The Appellant says that he should not be responsible for paying back the entire amount because the Commission failed to notice the mistake on his application.

[38] At the hearing, the Appellant described the financial impact this overpayment has created. The Appellant gave details about his family's circumstances and his financial situation and he described the detriment to his family that would result if he had to pay back \$3,064.00 to the Commission. The Appellant gave his testimony on these points in a detailed and consistent manner and I have no reason to disbelieve him.

[39] While I recognize the financial impact and I sympathize with the Appellant regarding his circumstances, he received benefits he was not entitled to receive and he is responsible for the resulting over payment. The law says that a person who receives EI benefits to which they are not entitled must return the amount wrongly paid<sup>29</sup>.

[40] Also, the fact that the Commission initially accepted the Appellant's claim for 40 weeks of parental benefits does not erase the Appellant's liability for the overpayment. The Federal Court of Appeal has addressed the issue of the Commission's clerical errors and has said that they are not fatal to a Commission's decision<sup>30</sup>. This means that the Appellant is still responsible for the overpayment, regardless of any error the Commission may have made in its initial decision when it paid him 40 weeks of parental benefits.

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<sup>28</sup> See GD3-30

<sup>29</sup> EI Act Sections 43-46.1 and 65

<sup>30</sup> See *Desrosiers v. Canada* (AG) A-128-89

[41] I would also note that the Commission's delay in noticing the Appellant's error, while most unfortunate, does not erase the Appellant's responsibility for the overpayment. Subsection 52(1) of the EI Act allows the Commission to revisit a claim up to 36 months after the benefits have been paid<sup>31</sup>. Also, subsection 52(5) allows the Commission to revisit a claim up to 72 months, within certain circumstances<sup>32</sup>. While I understand how frustrating and extremely inconvenient it is to have the Commission overpay benefits and then not notice for a period of time, the fact remains that the law allows the Commission to do this and this delay does not erase the Appellant's responsibility for the overpayment.

[42] Finally, it is important to note that the Tribunal does not have the jurisdiction to write-off an overpayment. This means that the law does not allow me to write-off the overpayment or make any decision which affects the Appellant's responsibility to repay the benefits he received by mistake.

[43] However, while I do not have jurisdiction to write-off an overpayment, **the Appellant may have options** in this regard. The Commission has the discretion to write-off overpayments in specific circumstances.<sup>33</sup> The Appellant may decide to request a write-off of his overpayment due to financial hardship. To do this, he may contact his Service Canada office to request a write-off of his overpayment and specifically ask for a "write-off of his overpayment because of financial hardship". The Appellant can also contact the Canada Revenue Agency (CRA) to negotiate a repayment option. The CRA would then assess the Appellant's financial situation and make a recommendation to the Commission's Chief Financial Officer Branch.

[44] In any case, and for all the reasons already stated, I find that the Appellant received **8** weeks of standard parental benefits that he was not entitled to receive. This created an overpayment and the Appellant is responsible for repaying those benefits.

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<sup>31</sup> See EI Act subsection 52(1)

<sup>32</sup> See EI Act subsection 52(5)

<sup>33</sup> See EI Regulations section 56(1)

## **Conclusion**

[45] The Commission acted judicially when it reconsidered the Appellant's claim for parental benefits.

[46] The Appellant is not entitled to receive 40 weeks of extended parental benefits.

[47] The Appellant is responsible for the overpayment that resulted from his choice.

[48] This means that the appeal is dismissed.

Laura Hartsliof

Member, General Division – Employment Insurance Section