



Citation: *MM v Canada Employment Insurance Commission*, 2021 SST 209
(Related neutral citations/decisions)

Social Security Tribunal of Canada General Division – Employment Insurance Section

Decision

Appellant: M. M.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (413154) dated January 19, 2021
(issued by Service Canada)

Tribunal member: Lilian Klein

Type of hearing: Teleconference
Hearing date: March 10, 2021
Hearing participants: Neither party attended the hearing.
Decision date: April 15, 2021
File number: GE-21-267

Decision

[1] I am dismissing the appeal.

[2] The Claimant did not meet the conditions to claim the Employment Insurance Emergency Response Benefit (EI-ERB) starting on March 29, 2020, because his employer was still paying him wages until June 6, 2020. He had no interruption of earnings until June 7, 2020.

[3] The Commission recouped \$1,500 of the \$2,000 the Claimant received as an advance payment of EI-ERB. That means the Claimant still owes \$500 from the overpayment.

Overview

[4] The Claimant applied for employment insurance (EI) benefits, reporting that his employer laid him off on March 24, 2020. The Canada Employment Insurance Commission (Commission) determined that he should receive EI-ERB, with a benefit period starting on March 29, 2020.

[5] The Commission made an initial EI-ERB advance payment of \$2,000. It started paying the Claimant \$500 a week starting on March 29, 2020.

[6] The Commission says the Claimant was not entitled to EI-ERB because his employer paid him retroactively from the week of his lay-off until June 6, 2020. The employer was able to pay him because of the wage subsidy it received under the Canada Employment Wage Subsidy (CEWS) program. The Commission says it could not establish a benefit period for the Claimant until June 7, 2020, because he only had an interruption of earnings he stopped getting wages.

[7] The Claimant applied to reactivate his EI-ERB claim on June 7, 2020, and payments of EI-ERB resumed. He received a notice of debt dated December 20, 2020, for \$2,000.

[8] The Commission says it recouped \$1,500 against the Claimant's EI-ERB benefits for the weeks of June 7, 2020, August 23, 2020, and August 30, 2020. It says he still owes \$500.

[9] The Claimant says he already repaid the \$2,000 because he did not get EI-ERB benefits for about a month in the summer of 2020. He says the Commission told him over the phone in

October 2020, that he no longer has any debt. He argues that any remaining debt is due to the Commission`s mistakes, which have caused him great stress and financial hardship.

[10] The Claimant wants any remaining debt to be cancelled. The Commission has already refused his request. He is now appealing the matter to the Social Security Tribunal.

Matters I must consider first

[11] On March 1, 2021, Claimant made an administrative change of date request for his hearing scheduled for March 8, 2021. He said he could attend a teleconference hearing after March 9, 2021. I rescheduled the hearing for March 10, 2021. The day before the new hearing date, he told the Tribunal he was unsure whether he wanted to attend and thought it would be better not to participate because of the legal jargon.

[12] The Claimant did not attend the hearing on March 10, 2021. A hearing can go ahead without the Claimant if he got notice of the hearing.¹ I find that he got the Notice of Hearing because he responded to the notice directly. So the hearing took place as rescheduled, but without the Claimant.

[13] On March 14, 2021, the Claimant enquired about the status of his decision, reporting that at the last minute he was unable to attend his hearing on March 10, 2021. On March 18, 2021, he asked if there would be a new hearing time.

[14] On April 14, 2021, the Claimant contacted the Tribunal to ask if he could submit his reasons for not attending the hearing. I agreed to his request and offered him more time to make a submission. On April 15, 2021, the Claimant said he was not going to make a submission. He says he will not agree with any decision that costs him money, especially now he has COVID-19.

The issues I must decide

[15] Was the Claimant entitled to EI-ERB benefits as of March 29, 2020? If not, when did his entitlement begin? Does he still have an overpayment of benefits?

¹ This rule is set out in s 12 of the *Social Security Tribunal Regulations*.

Analysis

[16] Not everyone who requests EI-ERB under the EIA is entitled to receive it. It is up to you to show that you met the basic conditions to receive benefits.² In March 2020, the government changed the EI Act to allow temporary orders to respond to the impact of the COVID-19 pandemic.³ Effective March 15, 2020, the government made an order to add a new temporary benefit called EI-ERB.⁴ If you could establish a claim for EI benefits between March 15, 2020, and the week of September 26, 2020, you were considered a claimant for EI-ERB.

[17] One of the qualifying conditions for EI-ERB is that you have an interruption of earnings due to COVID-19 of at least seven days without work or pay within the two-week period for which you claim benefits.⁵ Getting a different benefit under the EIA makes you ineligible for EI-ERB.⁶ Another condition is that you can have no employment income during your claim,⁷ although there is an exception if you receive income under \$1,000 in the four-week period set out in the law.⁸ You have to repay any EI-ERB you were not qualified to receive.⁹

[18] The federal government created a separate program called CEWS to help employers experiencing a significant drop in revenue due to the COVID-19 pandemic. The program pays eligible employers to subsidize the wages of eligible employees when there is a shortage of work. The CEWS subsidy was retroactive to as early as March 15, 2020.

What does the Commission say?

[19] The Commission says the Claimant did not meet the definition of “claimant”¹⁰ on March 29, 2020, because he had no interruption in earnings until June 7, 2020. The day before is

² These conditions are set out in S 7(2) of the EIA.

³ The *COVID-19 Emergency Response Act* added section 153.3 to the EI Act, which allows temporary orders to amend the Act.

⁴ S 153.9(1)(a) sets out the conditions to establish an EI-ERB claim, such as having insurable earnings of at least \$5,000 in 2019 or in the 52 weeks before you make your claim.

⁵ S 153.9(1)(a)(iv) of the EIA.

⁶ S 153.9(2)(a) of the EIA.

⁷ S 153.9(1)(a)(v) of the EIA.

⁸ S 153.9(4) of the EIA.

⁹ The liability to repay an overpayment of EI-ERB is set out in s 153.6(1)(a) and s 153.1301 of the EIA.

¹⁰ S 153.5(2) of the EI Act defines four categories of claimant. The category that applies to the Claimant is that he had to stop working due to COVID.

documented on his amended Record of Employment as the last day the employer paid him under the CEWS. The Commission says this means that his EI-ERB cannot start until June 7, 2020.

[20] The Commission says it paid the Claimant an advance payment of \$2,000, which equals four weeks of benefits at \$500 per week. It argues that it paid him 16 weeks of EI-ERB: two weeks from March 29, 2020, to April 11, 2020, 10 weeks from June 14, 2020, to August 22, 2020, and four weeks from September 6, 2020, to October 3, 2020. The Commission says this equals 20 weeks, but he was only entitled to 17 weeks from June 7, 2020, to October 3, 2020.

[21] The Commission submitted proof of the EI-ERB it paid the Claimant.¹¹ The evidence shows that it issued an advance payment of \$2,000 on April 6, 2020, while weekly benefits of \$500 began on March 29, 2020, ending the week of September 27, 2020. The Commission did not pay benefits the weeks beginning April 12, 2020, August 23, 2020, and August 30, 2020.

[22] The Commission says it did not pay the Claimant benefits during those three weeks so it could recoup \$1,500 (\$500 each week) from the \$2,000 he owed. The Commission says the overpayment arose because the Claimant received EI-ERB when his employer was still paying him wages.

[23] The Commission says it made advance payments of EI-ERB to claimants who appeared to qualify to alleviate the financial impact when the COVID-19 pandemic first hit. It says it advanced the \$2,000 as quickly as possible to help claimants out and then recouped any overpayments by withholding weekly payments later in the benefit period.

What does the Claimant say?

[24] The Claimant says he does not owe any money because the Commission already took away benefits he was expecting in the summer of 2020, starting with the week of June 7, 2020.

[25] The Claimant says any remaining debt is due to mistakes by the Commission, which have caused him great personal stress and financial hardship. He says a Commission agent told him over the phone in October 2020 that he had no debt.

¹¹ GD3-20 to GD3-22.

My findings

[26] The Claimant cannot get EI-ERB starting on March 29, 2020, because he had not yet met the conditions to be a claimant. The evidence does not show seven consecutive days without work or pay within the two-week period for which he first claimed EI-ERB benefits. His employer was still paying him wages retroactively under the CEWS program. He did not dispute that the employer paid him from his lay-off until June 6, 2020, so I accept this as fact.

[27] I accept the Commission's submission that the Claimant was only entitled to 17 weeks of benefits because under the law he could only receive EI-ERB after his employer stopped paying him wages. The evidence shows that the Commission did not pay the Claimant benefits for the three weeks listed above and directed this money towards reducing his debt from \$2,000 to \$500.

[28] A debt of \$500 is still outstanding. I accept the Commission's evidence of an advance payment of \$2,000 and payment of 16 weeks of benefits since this information was validated by an attestation from a reliable source. The Claimant did not submit any contradictory evidence.

[29] I acknowledge the Claimant's disappointment that he has to repay some of the EI-ERB he received but I cannot change the law.¹² EI is an insurance plan. As with other insurance plans, there are rules on how and when you can qualify for benefits.¹³ In this case, the Claimant did not meet the conditions to receive EI-ERB starting on March 29, 2020, because he was still receiving retroactive wages from his employer. He only met the qualifying conditions on June 7, 2020.

[30] It is up to the Commission to decide whether to write off the Claimant's remaining debt of \$500. I have no jurisdiction to consider the matter.¹⁴

Conclusion

[31] The Claimant does not meet the conditions to get EI-ERB starting on March 29, 2020, because his employer paid him wages until June 6, 2020. He still owes \$500 out of the benefits he was overpaid. This means that the appeal is dismissed.

¹² *Canada (Attorney General) v Knee*, 2011 FCA 301.

¹³ See *Pannu v Canada (Attorney General)*, 2004 FCA 90.

¹⁴ *Canada (Attorney General) v. Mosher*, 2002 FCA 355.