



Citation: *Canada Employment Insurance Commission v JE*, 2022 SST 201

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: Canada Employment Insurance Commission
Representative: Jordan Fine

Respondent: J. E.

Decision under appeal: General Division decision dated
August 31, 2021 (GE-21-1246)

Tribunal member: Shirley Netten

Type of hearing: Teleconference

Hearing date: January 10, 2022

Hearing participants: Appellant's representative
Respondent
Respondent's spouse

Decision date: March 23, 2022

File number: AD-21-313

Decision

[1] I am dismissing the appeal by the Canada Employment Insurance Commission (Commission). The General Division decision remains in place.

Overview

[2] This appeal is about eligibility for the employment insurance (EI) emergency response benefit (ERB). Could someone who earned more than \$1,000 in a four-week period get the EI ERB? Yes — for any two-week period during which they had no income for at least seven days in a row.

[3] J. E. (the Claimant) works as a journeyman. He was laid off when the COVID-19 pandemic began in March 2020. He received \$5,500 in EI ERB, from March 22 to May 9, 2020. He returned \$3,500 on his own initiative.

[4] Service Canada¹ later decided that the Claimant wasn't eligible for the EI ERB, because he had earned over \$1,000 in four weeks.

[5] The Claimant's appeal to the General Division was allowed in part. The Claimant wasn't entitled to EI regular benefits, because the EI ERB had temporarily replaced regular benefits.² But he was entitled to the EI ERB for four weeks. This was because he had no income for at least seven consecutive days in the two-week periods from March 22 to April 4, 2020, and April 5 to 18, 2020. So, the Claimant could keep \$2,000 in EI ERB.

[6] Now the Commission appeals to the Appeal Division. The Commission argues that the General Division made errors of law in its interpretation of the EI ERB provisions, specifically section 153.9(4) of the *Employment Insurance Act* (Act).

¹ Service Canada acts on behalf of the Canada Employment Insurance Commission.

² This is explained in paragraphs 16 and 17 of the General Division decision. See also sections 153.8(5) and 153.1310 of the *Employment Insurance Act* (Act).

[7] I haven't found any errors of law, and I agree with the General Division's interpretation. I am dismissing the Commission's appeal.

Issue

[8] The only issue in this appeal is whether the General Division made errors of law in its interpretation of the EI ERB eligibility provisions.

[9] The Claimant mentioned other concerns at the hearing of this appeal, but he hasn't appealed the General Division decision.

Analysis

[10] One of the grounds of appeal to the Appeal Division is that the General Division made an error of law in making its decision.³ Based on this unqualified language, I agree with the Commission that I don't owe the General Division any deference on questions of law. This means that I will need to decide whether the General Division's interpretation of the law is right or wrong. Because of this, I will turn directly to the interpretation of section 153.9 of the Act.

[11] The General Division said that claimants are eligible for the EI ERB if they have no income for seven consecutive days in a two-week period **or** if they earn less than \$1,000 in a four-week period. The Claimant agrees with this interpretation. The Commission says that claimants are eligible if they earn less than \$1,000 in four weeks but not eligible if they earn more than \$1,000 in four weeks.

The General Division's interpretation is right

[12] To decide what a section of the law means, I have to look at the words, their context, and the purpose of the law. The Supreme Court of Canada put it this way:

[T]he words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the

³ This is found in section 58(1)(b) of the *Department of Employment and Social Development Act*.

scheme of the Act, the object of the Act, and the intention of Parliament.⁴

[13] So, I will consider:

- the meaning of the words themselves;
- their context, including how they fit with surrounding and related provisions;
and
- the purpose of the EI ERB and the Act.

The words are clear

[14] Section 153.9 deals with eligibility and ineligibility — what you need to get the EI ERB and what stops you from getting it. Section 153.9(1) includes the **income loss requirement** for a claimant to be eligible:

153.9 (1) A claimant is eligible for the employment insurance emergency response benefit

(a) if they

(i) reside in Canada,

(ii) are at least 15 years of age,

(iii) have insurable earnings of at least \$5,000 in 2019 or in the 52 weeks preceding the day on which they make the claim under section 153.8,

(iv) whether employed or self-employed, cease working for **at least seven consecutive days within the two-week period** in respect of which they claimed the benefit, and

(v) have **no income from employment or self-employment in respect of the consecutive days on which they cease working**;

(b) if they are a claimant referred to in paragraph 153.5(2)(b) and they have **no income from employment or self-employment for at least seven**

⁴ This quote is from the Supreme Court of Canada decision in *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC) at paragraph 21, citing Driedger in *Construction of Statutes*. The Supreme Court of Canada recently confirmed this approach to statutory interpretation in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65.

consecutive days within the two-week period in respect of which they claimed the benefit; **or**

(c) if they are a claimant referred to in paragraph 153.5(2)(c) or (d) and they

(i) reside in Canada,

(ii) are at least 15 years of age,

(iii) have insurable earnings of at least \$5,000 in 2019 or within the 52 weeks preceding the day on which they make the claim under section 153.8, and

(iv) have **no income from employment or self-employment for at least seven consecutive days within the two-week period** in respect of which they claimed the benefit.

[emphasis added]

[15] Section 153.9(1)(a) applies to claimants who stopped working because of COVID-19 and don't fit into the other categories.⁵

[16] Section 153.9(1)(b) applies to claimants who were entitled to EI regular or sickness benefits (like the Claimant in this appeal).⁶

[17] Section 153.9(1)(c) applies to claimants who couldn't go back to work because of COVID-19 and had previously received EI regular or fishing benefits.⁷

[18] In each situation, a claimant is eligible for the EI ERB if they have **no income for at least seven days in a row during the two-week benefit period**.

[19] Section 153.9(4) sets out an exception to the income loss requirement in section 153.9(1):⁸

153.9(4) If a claimant receives income, whether from employment or self-employment, the total of which does not exceed \$1,000 over a period of four weeks that succeed each other in chronological order but not necessarily consecutively and in

⁵ See section 153.5(2) of the Act, especially section 153.5(2)(a).

⁶ See section 153.5(2)(b) of the Act.

⁷ See section 153.5(2)(c) and (d) of the Act.

⁸ The Commission's representative calls this the "Income Provision" in his submissions. I can't describe it that way. It sets out an **exception** to an income provision.

respect of which the employment insurance emergency response benefit is paid, the claimant is **deemed to meet the requirements** of subparagraphs (1)(a)(iv) and (v), of paragraph (1)(b) or of subparagraph (1)(c)(iv), as the case may be.

[emphasis added]

[20] Section 153.9(4) is a conditional (if/then) sentence. **If** the condition applies (income of less than \$1,000 over four weeks), **then** the law says that you meet the income loss requirement in section 153.9(1). If the condition isn't met, the paragraph (and the consequence) simply doesn't apply.

[21] The Commission argues that there is ambiguity, or that there is a gap, because section 153.9(4) doesn't say what happens to a claimant who earns more than \$1,000 over four weeks.

[22] I see no ambiguity or gap. There is an income loss requirement for claimants, in section 153.9(1). There is an exception to that requirement for certain claimants, in section 153.9(4). If you don't meet the exception of earning less than \$1,000 over four weeks, you are still eligible so long as you meet the income loss requirement in section 153.9(1).

[23] Under a plain reading of sections 153.9(1) and (4):

- a claimant meets the income loss requirement for the EI ERB if they have no income for at least seven days in a row during the two-week benefit period
- as an **alternative** path to eligibility, a claimant will be **deemed** to have met that income loss requirement if they earn less than \$1,000 over four weeks

[24] Section 153.9(4) doesn't say that a claimant will be deemed **not** to meet the income loss requirement if their income over four weeks is above \$1,000. It doesn't say that a claimant is **ineligible** if their income over four weeks is above \$1,000.

[25] The French version of section 153.9 is equally precise. I agree with the Commission that it doesn't lead to a different interpretation.

[26] The text is the most important consideration when, as here, the words are clear. Still, I have to look at context and purpose, in case there is some hidden ambiguity.⁹

The context supports the plain meaning of section 153.9

[27] The Commission says that section 153.9(4) has a dual purpose: offering an alternative path to EI ERB eligibility for those earning nominal (little) income, while also setting a cap on the amount of income that can be earned in a four-week period. In other words, the Commission wants me to interpret section 153.9(4) to mean two things:

- A claimant will be deemed to have met the income loss requirement if their income over four weeks is less than \$1,000; **and**
- A claimant will be **ineligible** for the EI ERB if their income over four weeks is **more** than \$1,000.

– The Commission’s interpretation doesn’t fit with section 153.9 as a whole

[28] In the context of section 153.9 as a whole, the Commission’s interpretation makes no sense. If section 153.9(4) means that you are eligible if you earn under \$1,000 and ineligible if you earn over \$1,000, it would fully cover off the income criteria for the EI ERB. This would make the income loss requirement in section 153.9(1) meaningless. What difference would it make if you worked more or less than seven days in the two-week period if your earnings alone determined your eligibility? I can’t accept an interpretation that makes parts of section 153.9(1) superfluous.¹⁰

[29] The Commission says that the income loss requirement in section 153.9(1) is there just to ensure claimants’ employment status. I don’t agree. The requirement related to employment status is found in the definition of an EI ERB claimant: only

⁹ The Supreme Court of Canada says this in decisions such as *ATCO Gas & Pipelines Ltd. v Alberta (Energy & Utilities Board)*, 2006 SCC 4 (paragraph 48); and *Montréal (City) v 2952-1366 Québec Inc.*, 2005 SCC 62 (paragraph 10).

¹⁰ It is an established principle of statutory interpretation to presume that Parliament doesn’t include meaningless words and phrases. See, for example, *Bristol-Myers Squibb Co. v Canada (Attorney General)*, 2005 SCC 26 at paragraph 178; and *R. v Proulx*, 2000 SCC 5 at paragraph 28.

someone who had stopped working, had an interruption of earnings, or couldn't start working was allowed to claim the EI ERB.¹¹

[30] Moreover, section 153.9 has a separate provision for **ineligibility**.

Section 153.9(2) says that a claimant can't get the EI ERB in a variety of situations. If the Minister of Employment and Social Development (Minister)¹² wanted to make those who earned over \$1,000 in four weeks ineligible for the EI ERB, section 153.9(2) was the obvious place to say so.

[31] Instead, section 153.9(4) was added only as an **exception**, deeming the income loss requirement to be met if earnings were under \$1,000 over four weeks. Earning less than \$1,000 wasn't added as an eligibility **requirement**. The construction of section 153.9(4) as a deeming provision ("the claimant is deemed to meet the requirements") confirms that the usual income loss requirement applies in all other cases.

– **The question of retroactive assessment doesn't help the Commission**

[32] The Commission argues that the General Division's interpretation doesn't allow for reassessment of eligibility, and it's unclear how section 153.9(4) would work in practice.

[33] I disagree. It's true that section 153.9(4) contemplates a determination of eligibility after the EI ERB has been paid. The plain meaning of section 153.9 allows for this.

[34] If a claimant met the income loss requirement in section 153.9(1) — no income for at least seven days in a row during the two-week benefit period — nothing else was needed. If a claimant got EI ERB and didn't meet the income loss requirement, Service Canada would have to assess their income over four (or more) weeks retrospectively. This is how Service Canada would see if the claimant met the exception in section 153.9(4) of earning less than \$1,000 over four weeks.

¹¹ There is more detail in section 153.5(2) of the Act. See also section 153.8(1) of the Act.

¹² The EI ERB provisions were introduced by the Minister of Employment and Social Development (Minister), not by Parliament.

– **The evolution of the EI ERB supports the plain meaning of section 153.9**

[35] Part VIII.4 of the Act, containing the EI ERB provisions, was enacted through a series of interim orders.¹³ From the outset, the EI ERB was a flat rate benefit of \$500 per week, claimed in two-week periods, available between March 15 and October 3, 2020.¹⁴ It replaced EI sickness and regular benefits during this period.¹⁵ Unlike with those benefits, employment earnings would not be deducted from the EI ERB.¹⁶ So, Part VIII.4 had to specify how much income a claimant had to lose, to get the EI ERB.

[36] The Minister could easily have said that the requirement was to have no income within each two-week benefit period. Instead, section 153.9(1) set a different limit: a claimant had to have no income for at least seven days in a row during the two-week benefit period.

[37] Originally, claimants who were otherwise entitled to EI regular or sickness benefits didn't have this, or any, restriction on their income.¹⁷ The income loss requirement was quickly added. This was to ensure that the two categories of claimants — those who stopped working because of COVID-19 and those who qualified for EI — “meet the same income restrictions.”¹⁸

[38] At the same time, the exception to those income restrictions was introduced in section 153.9(4). This was added so that “claimants can receive nominal income from employment or self-employment, while still being eligible to receive the benefit.”¹⁹

¹³ Section 153.3(1) of the Act gave the Minister a temporary power (until September 30, 2020) to make these orders.

¹⁴ See sections 153.10, 153.8, and 153.6 of the Act; and *Interim Order Amending the Employment Insurance Act (Employment Insurance Emergency Response Benefit)*: SOR/2020-61.

¹⁵ See sections 153.8(5) and 153.1310 of the Act.

¹⁶ See section 153.6 of the Act. A portion of earnings is usually deducted from weekly EI benefits: section 19 of the Act.

¹⁷ See *Interim Order Amending the Employment Insurance Act (Employment Insurance Emergency Response Benefit)*: SOR/2020-61 (April 1, 2020, but retroactive to March 15, 2020).

¹⁸ See *Interim Order No. 2 Amending the Employment Insurance Act (Employment Insurance Emergency Response Benefit)*: SOR/2020-88 (April 16, 2020, but retroactive to March 15, 2020). The Commission's representative seemed to think this objective applied to section 153.9(4). It is clear from the full note and amendments that this comment applied to the addition of the same income loss requirement for EI claimants as was already in place for other claimants.

¹⁹ See the explanatory note in *Interim Order No. 2 Amending the Employment Insurance Act (Employment Insurance Emergency Response Benefit)*: SOR/2020-88.

[39] Then, two new categories of claimants (those who couldn't return to work because of COVID-19 and had exhausted either EI regular or fishing benefits) were added. The same income loss requirement (no income for at least seven days in a row during the two-week period) was established for these claimants.²⁰

[40] The Commission seems to want me to conclude that introducing an exception for nominal income means that only those with no income were previously eligible for the EI ERB. I can't reach that conclusion: the version of the law before and after adding the exception didn't say that a claimant had to have no income to be eligible. It said, explicitly, that a claimant had to have no income for seven days in a row in a two-week benefit period.

[41] The content and sequencing of the interim orders point in the same direction: the Minister established a benefit scheme with the same income loss requirement for all claimants in section 153.9(1), along with an exception to that requirement in section 153.9(4). The exception allowed claimants to continue working a small number of hours for nominal earnings,²¹ without needing to have no income for seven days in a row in each two-week period.

– **The Commission's new evidence isn't helpful**

[42] The Commission referenced a report by the Auditor General of Canada about the emergency response benefits.²² That report wasn't in front of the General Division. The Commission wants to me to consider the Auditor General's description of the design of the EI ERB.

²⁰ See *Interim Order No. 3 Amending the Employment Insurance Act (Employment Insurance Emergency Response Benefit)*: SOR/2020-89 (April 16, 2020, but retroactive to March 15, 2020); and *Interim Order No. 4 Amending the Employment Insurance Act (Employment Insurance Emergency Response Benefit)*: SOR/2020-95 (April 24, 2020, but retroactive to March 15, 2020).

²¹ Even at minimum wage, a claimant had to work far fewer than full-time hours to stay under the \$1,000 limit. In Ontario, for example, they had to work 70 hours or less over four weeks.

²² The report, available online, is titled "Canada Emergency Response Benefit." It addresses that specific benefit (known as the CERB) as well as the EI ERB. The report is dated March 2021.

[43] The Appeal Division doesn't normally accept new evidence. This is because our task is to decide whether the General Division made errors in its procedures or decision. This means we have to look at the information that the General Division had.

[44] On an exceptional basis, the Appeal Division has accepted new evidence that provides general background information.²³ This must be information that helps the Appeal Division understand the issue under appeal, without going to the merits of the appeal.²⁴

[45] I reviewed the Auditor General's report on the basis that the Commission relies on it for general background information only. But I don't find the report to be helpful in understanding the issue under appeal, because it appears to rely on a false premise.

[46] The Auditor General said that the initial design "did not allow for any income to be earned while receiving the benefit."²⁵ The report doesn't reference a source or section of the law to support this statement. Section 153.9(1) didn't initially (or at any time) say that a claimant must have no income at all to get the EI ERB, nor was this written elsewhere in Part VIII.4 of the Act.

– **The CERB scheme doesn't support the Commission's argument**

[47] The Commission also suggested that the law governing the Canada Emergency Response Benefit (CERB) could help me understand Parliament's intention for the EI ERB.

[48] This weakens rather than strengthens the Commission's case. The income loss requirement for the CERB was having no income for at least 14 days in a row in the four-week benefit period.²⁶ By regulation, income of \$1,000 or less during that period was **excluded** from consideration.²⁷ Since income over \$1,000 was **not** excluded, it had

²³ Another exception has been made for evidence about procedural fairness that can't be found in the record. See, for example, *SZ v Minister of Employment and Social Development*, 2020 SST 853.

²⁴ See, for example, *CT v Minister of Employment and Social Development and CA*, 2021 SST 204. This follows an approach taken by the federal courts: See, for example, *Sharma v Canada (Attorney General)*, 2018 FCA 48.

²⁵ The Commission quotes the Auditor General's report at AD2-15.

²⁶ This is found in section 6(1) of the *Canada Emergency Response Benefit Act*.

²⁷ See section 1 of the *Income Support Payment (Excluded Nominal Income) Regulations*, SOR/2020-90.

to be counted as “income” — but the applicant would still be eligible if they had no income for 14 days in a row in the four-week period. This was essentially the same scheme as the EI ERB: in both cases, you got benefits if you had no income for at least half the benefit period, but you didn’t need to meet this requirement if you earned less than \$1,000 over four weeks.

The plain meaning of section 153.9 is consistent with its purpose

[49] The Commission’s argument is largely focused on concerns that the General Division’s interpretation creates absurd results, inconsistent with the purpose of the Act and the EI ERB. I don’t share those concerns.

[50] I agree with the Commission that the purpose of the Act is to compensate people, temporarily, for a loss of income resulting from unemployment.²⁸

[51] Within this overarching purpose, the EI ERB was introduced to mitigate the economic effects of the COVID-19 pandemic.²⁹ Consistent with the Commission’s arguments, the purpose of the EI ERB was:

- to support those who lost income during the initial months of the COVID-19 pandemic, and
- to do so through a simple, fixed-rate benefit that Service Canada could pay to a large number of claimants quickly.

[52] Speed and efficiency called for a blunt instrument: there would be no assessment of insurable hours, no consideration of the regional unemployment rate, no determination of maximum weeks payable, no calculation of a benefit rate, and no deduction for actual earnings.³⁰ Eligibility requirements were few.

²⁸ See *Canada (Attorney General) v Greey*, 2009 FCA 296.

²⁹ See section 153.3(1) of the Act.

³⁰ Section 153.6 of the Act eliminates the application of most of the usual benefits provisions to the EI ERB.

[53] The plain meaning of section 153.9 is consistent with the purpose of quickly compensating people for a loss of employment income — it just sets the bar for income loss lower than the Commission would like. According to the Commission, a claimant who earns less than \$1,000 in four weeks gets the EI ERB, and a claimant who earns more than \$1,000 in four weeks does not. In contrast, applying the plain meaning, a claimant without income for seven days in a row in two weeks gets the EI ERB, as does a claimant who earns less than \$1,000 in four weeks.

[54] The Commission is asking me to read into the law something that isn't written there: that a claimant can't get the EI ERB if they earn over \$1,000 in a four-week period. The Commission says that I can do this because otherwise the result — that "claimants can earn a seemingly unlimited income and remain eligible" — is absurd.³¹

– **The plain meaning doesn't lead to absurd results**

[55] An absurd result may arise from a logical contradiction or internal incoherence, or from a violation of established legal norms or standards of justice and reasonableness.³²

[56] While it is surprising to see a claimant get the EI ERB for a working week, this result isn't absurd when considered in light of the two-week claim period and the imprecise nature of this short-term emergency benefit.

[57] Recall that a claimant who hasn't been deemed to meet the income loss requirement (by earning less than \$1,000 over four weeks) has to meet the **actual** income loss requirement: they must have had no income for at least seven days in a row during the two-week benefit period. This is a different kind of income cap — a cap on days worked, rather than on money earned.

[58] No matter the dollar value of employment earnings, a claimant who can work only one week out of two has experienced a loss of income during that two-week period.

³¹ The Commission says this at AD2-10.

³² The Commission referenced the Federal Court decision that says this: *Canada (Attorney General) v Canadian Merchant Service Guild*, 2009 FC 344 at paragraph 22.

Even the Commission’s mythical million-dollar-a-week claimant who met the income loss requirement would have lost between \$1 million and \$2 million in the two-week period, and gained only \$1,000 in EI ERB.

[59] I appreciate that the Commission is concerned about paying the EI ERB to people “who may not require temporary economic and social security.”³³ But neither the EI ERB nor the usual EI scheme is need-based: those who could manage without getting benefits aren’t excluded.³⁴ Rather, the focus is on a loss of employment income.

[60] Instead of the million-dollar-a-week claimant, let’s consider a regular person — someone earning the average industrial wage of \$1,042 per week in 2020 — who met the requirement of no income for at least seven days in a row in two weeks. They would have lost between \$1,042 and \$2,084 over two weeks, and gained \$1,000 in EI ERB. That may be generous if the person lost only \$1,042, but it doesn’t strike me as absurd.

[61] I recognize that it was mathematically possible for a low-income or part-time worker who was laid off but then worked every second week (thereby meeting the income loss requirement) to get more in EI ERB than they lost. This is not, in and of itself, absurd. The Minister accepted the possibility of overcompensation when she chose a benefit of \$500 per week, regardless of average weekly earnings and hours.³⁵ This was the price to pay for having a simple, flat-rate benefit for all claimants. The risk of overcompensation was mitigated by the reality of COVID-19 lockdowns and the short-term nature of the EI ERB.³⁶

³³ The Commission says this at AD2-12.

³⁴ Even under the Commission’s interpretation, the million-dollar-a week claimant would have gotten EI ERB after a full layoff in March 2020, despite having already earned \$10 million that year.

³⁵ This possibility arises under either interpretation of the EI ERB eligibility provisions. For example, someone earning \$400 per week before their layoff got \$500 per week in EI ERB. As another example, a part-time worker earning less than \$1,000 every four weeks before their layoff could have resumed working at the same nominal income and gotten EI ERB as well.

³⁶ Initially, claimants could receive only 16 weeks of benefits. This was later increased to a maximum of 24 weeks and then 28 weeks. See section 153.11 of the Act; *Interim Order Amending the Employment Insurance Act (Employment Insurance Emergency Response Benefit)*: SOR/2020-61; *Interim Order No. 5 Amending the Employment Insurance Act (Employment Insurance Emergency Response Benefit)*: SOR/2020-141; *Interim Order No. 9 Amending the Employment Insurance Act (Employment Insurance Emergency Response Benefit)*: SOR/2020-188.

– **The Commission’s interpretation is problematic**

[62] It is the Commission’s interpretation that seems to contradict the purpose of compensating people for a loss of income during the pandemic.

[63] If I were to read in a provision that claimants were ineligible if they earned over \$1,000 in four weeks, claimants could suffer a significant loss of income but get no benefits at all. The Claimant makes this point, and the facts of this appeal illustrate the problem. The Claimant had no income for three out of four weeks, but earned over \$1,000 in the one week that he was called back to work. He lost around \$6,000 in employment income.³⁷ Yet, under the Commission’s interpretation, he wouldn’t get any EI ERB for those four weeks. How would that meet the objective of compensating those who lost employment income during the pandemic?

[64] Moreover, as the Claimant emphasized, if not for the EI ERB he would have received EI regular benefits after his layoff. For the same four weeks, he would have gotten \$1,791 in EI regular benefits,³⁸ yet the Commission argues that he shouldn’t get the EI ERB. It’s hard to imagine that the Minister intended the EI ERB to drastically reduce or eliminate compensation for income loss during the initial months of the pandemic, in comparison to the EI benefits that it replaced.³⁹

[65] And there is another problem with the Commission’s interpretation. Under section 153.9(4), a claimant is deemed to meet the income loss requirement if they earn less than \$1000 in four weeks, but it doesn’t have to be four weeks in a row.⁴⁰ Consider a claimant who earned \$200 in weeks one, two, four and five, and \$500 in week three. The Minister clearly intended for them to be eligible for the EI ERB for weeks one, two, four and five, because they earned only \$800 over four non-consecutive weeks. Yet,

³⁷ The Claimant’s most recent earnings were just over \$2,000 per week; they were a little lower before that. See the Records of Employment at GD3-17 and GD3-18.

³⁸ This is based on three weeks at the 2020 maximum benefit rate of \$573 per week. In the fourth week, the Claimant’s employment earnings would have reduced his EI to nil.

³⁹ Some claimants would get slightly lower benefits, because the \$500 flat rate was less than the maximum EI benefit rate of \$573.

⁴⁰ On this point, section 153.9(4) says “over a period of four weeks that succeed each other in chronological order but not necessarily consecutively”.

under the Commission's interpretation, that claimant would be ineligible because they earned more than \$1,000 in a four-week period.

– **The plain meaning is consistent with the purpose of the EI ERB**

[66] The examples above show why the usual EI scheme is complex: it makes sense to base the benefit rate on recent earnings, and to reduce benefits when a claimant has some employment income.⁴¹

[67] The EI ERB was a compromise, to get money into claimants' hands quickly. The scheme doesn't compensate people perfectly or precisely, but it does compensate for lost employment income. Under its plain meaning, the EI ERB provides benefits to those with no income for seven consecutive days in a two-week period, as well as those who earned less than \$1,000 over four weeks. This is consistent with the purpose of compensating people for lost employment income using a simple and efficient mechanism.

– **There's no reason to be "lenient" toward the Commission**

[68] The Commission also says that the legislative intent should be considered more leniently because the EI ERB was designed quickly to address an unprecedented global emergency. I see no reason to favour the Commission's interpretation on this basis. I have found no ambiguity in section 153.9. But, if I had any doubt about the meaning of the provisions, I would resolve that doubt in favour of the Claimant, not the Commission.⁴²

Text, context and purpose confirm the General Division's interpretation

[69] Collectively, the text, context and purpose support the plain meaning of section 153.9: you're eligible for the EI ERB if you had no income for seven days in a row during the two-week benefit period; alternatively, you're eligible for the EI ERB if you earned

⁴¹ Usually, EI benefits are paid at 55% of weekly insurable earnings, up to a maximum: section 14 of the Act. Approximately half of weekly earnings are deducted from benefits payable: section 19 of the Act.

⁴² The Supreme Court of Canada says that this is the right approach to interpreting benefits-conferring laws, in *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC) at paragraph 36.

less than \$1,000 over four weeks. You aren't ineligible for the EI ERB just because your income over four weeks was above \$1,000.

[70] The General Division correctly interpreted section 153.9 according to its plain meaning. This was not an error of law.

The General Division didn't make an error of law in the way it approached its task

[71] In addition to disagreeing with the General Division's conclusion, the Commission says that the General Division made an error of law because of the way it approached its statutory interpretation. Specifically, the General Division didn't grapple with the legislative context and purpose.

[72] The interpretation of a statutory provision must be consistent with its text, context, and purpose. A "formalistic statutory interpretation exercise" isn't required in every case. The text will be more important when the words are unambiguous, but the decision maker must still show "that it was alive to these essential elements." A failure to consider a key element that may have led to a different result will be considered unreasonable, for the purposes of judicial review.⁴³

[73] When a court reviews a decision that interprets a statute, the court decides whether the decision is reasonable (not whether it is correct), and asks if it is transparent, intelligible, and justified. The focus is on the decision and its justification, not on its conclusion.⁴⁴ An appeal to the Appeal Division isn't judicial review. Since the Appeal Division decides whether the General Division's interpretation is correct, without deference, there is little point in separately deciding on its justification.

[74] Even assuming that the General Division must follow the modern approach to statutory interpretation, and that not following this approach amounts to an error of law, I don't find an error in this case.

⁴³ The quotations and concepts in this paragraph are in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paragraphs 119 to 122.

⁴⁴ See *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paragraph 15.

[75] The General Division was aware of the EI ERB's purpose as a temporary flat-rate benefit responding to the impact of the COVID-19 pandemic in place of the usual EI benefits.⁴⁵ The General Division considered section 153.9(4) in the context of related provisions.⁴⁶ I am satisfied that the General Division was aware of these essential elements.

[76] Significantly, the Commission didn't make any arguments to the General Division that the context or purpose of the provisions supported its interpretation. At that time, the Commission appears to have focused only on the text.⁴⁷ And, a more in-depth analysis by the General Division wouldn't have led to a different result: the text is unambiguous and consistent with the surrounding context and purpose.

[77] In any case, if the General Division did make an error of law by not addressing context and purpose more fully, it would not change the result of this appeal. Since I've already decided that the General Division's interpretation of section 153.9 is the correct interpretation, any error of justification would be fixed by applying that same interpretation.

Conclusion

[78] There is an income loss requirement for EI ERB claimants in section 153.9(1), and an exception to that requirement in section 153.9(4). The plain meaning of these provisions is that:

- a claimant meets the income loss requirement for the EI ERB if they have no income for at least seven days in a row during the two-week benefit period
- as an alternative, a claimant will be deemed to have met the income loss requirement if they earn less than \$1,000 over four weeks

⁴⁵ See paragraphs 12 to 17 of the General Division decision.

⁴⁶ See paragraphs 31 to 35 of the General Division decision.

⁴⁷ The representative at that time simply paraphrased section 153.9(4) without providing further argument on its meaning. See GD4-5.

[79] This plain meaning is consistent with the context and purpose of the Act and the EI ERB. Despite the wishes of the Commission, I can't add an entirely new provision to section 153.9. That section doesn't say, or mean, that a claimant is ineligible for the EI ERB just because they earned more than \$1,000 in a four-week period.

[80] The General Division didn't make any errors of law in its interpretation of the EI ERB eligibility provisions. The appeal is dismissed.

Shirley Netten
Member, Appeal Division