



Citation: *JE v Canada Employment Insurance Commission*, 2021 SST 924

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

Decision

Appellant: J. E.
Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (425976) dated July 8, 2021
(issued by Service Canada)

Tribunal member: Charlotte McQuade
Type of hearing: Teleconference
Hearing date: August 10, 2021
Hearing participants: Appellant

Decision date: August 31, 2021
File number: GE-21-1246

Decision

[1] The appeal is dismissed with modification. The Canada Employment Insurance Commission (the “Commission”) correctly established J. E.’s (the “Claimant’s”) claim as an EI Emergency Response Benefit (“EI ERB”) claim.

[2] The Claimant was overpaid EI ERB benefits. However, the overpayment amount is modified from \$5500.00 to \$3500.00.

Overview

[3] The Claimant was laid off on March 17, 2020 and applied for regular Employment Insurance (EI) benefits on March 19, 2020. There were amendments to the *Employment Insurance Act* (Act) due to the pandemic. A new benefit called the EI Emergency Response Benefit (EI ERB) was created effective March 15, 2020. Claimants who could have had a benefit period established for EI regular or EI sickness benefits between March 15, 2020 and September 26, 2020, were required by the law to have their benefit periods established as an EI ERB claim, rather than as a claim for regular or sickness EI benefits.

[4] The Commission says the Claimant could have had a benefit period for EI regular benefits established on or after March 15, 2020 so the law required that his claim be established as an EI ERB claim. The Commission says the Claimant was paid a total of \$5500.00 in EI ERB benefits. The Claimant was paid an advance EI ERB payment of \$2000.00 and then 7 weeks of EI ERB payments for the period from March 22, 2020 to May 9, 2020 of \$3500.00. The Commission reviewed the Claimant’s entitlement after he had already been paid and decided the Claimant was not entitled to any of the EI ERB benefits he was paid because his earnings exceeded the allowable amount. The Commission asked the Claimant to pay back all the EI ERB benefits he had been paid.

[5] The Claimant disagrees. He says he applied for EI regular benefits, not EI ERB benefits and the Commission never told him that he was being paid EI ERB benefits. He says all the documentation he received referred to EI regular benefits. He says he

completed claim reports for regular EI benefits and reported all his earnings. The Claimant says his bank account shows the amounts deposited were regular EI benefits. He says when he received the initial payments from the Commission, there was no information what they were for. He knew it was more money than he was entitled to so he paid back \$3500.00 in June 2020. The Claimant says it was only when he was enquiring what happened to that money, that the Commission assessed the overpayment. The Claimant says his claim should be established as a claim for EI regular benefits and his entitlement should be determined with respect to EI regular benefits. He says the reason he kept \$2000.00 of the \$5500.00 paid to him is because that is what he thought he would have been entitled to if his claim had been established as a claim for regular EI benefits.

[6] I have to decide whether the Claimant's claim should have been established as a claim for regular EI benefits or a claim for EI ERB benefits. If the claim was properly established as an EI ERB claim, I have to decide whether the Claimant was overpaid and if so, by how much.

[7] I have decided, for the reasons set out below, that the Claimant's claim was properly established as EI ERB claim. However, the Claimant was only overpaid EI ERB benefits in the amount of \$3500.00, not \$5500.00.

Matter I have to consider first

[8] The Claimant's spouse testified as a witness. As the essential facts were not in dispute, I did not exclude her from the room when the Claimant was testifying.

[9] The Claimant provided post-hearing documentation. He provided a copy of an online claimant report setting out the earnings and hours he had reported to the Commission.¹ I accepted the post-hearing documentation into evidence as the hours and earnings are relevant to the Claimant's eligibility for EI ERB benefits. The documentation was sent to the Commission for reply. The Commission provided supplementary representations advising that it erred in saying the Claimant had not

¹ GD5.

reported his earnings. However, the Commission's position remained the same regarding the establishment of the claim as an EI ERB claim and the overpayment amount.²

Issue

[10] Should the Claimant's claim have been established as a claim for EI ERB benefits or as a claim for regular EI benefits?

[11] If the Claimant's claim was properly established as an EI ERB claim, was he overpaid and if so, by how much?

Analysis

EI ERB or regular EI benefits claim

[12] In March 2020, the government amended the Act to allow temporary orders to respond to the impact of the COVID-19 pandemic.³

[13] One of those changes was the creation of a new temporary benefit, called the EI ERB.⁴ The EI ERB is payable to eligible claimants for two-week periods that fall between March 15, 2020 and October 3, 2020.

[14] The EI ERB pays eligible claimants \$500.00 per week for a maximum of 24 weeks, minus any weeks for which the claimant receives benefits under the Canada Emergency Response Benefit Act or the Canada Emergency Student Benefit Act.⁵ The rate is the same for all EI ERB claimants.

[15] The EI Act defines EI ERB "claimants" for different reasons. "Claimants" are not just those who have stopped working for reasons related to COVID-19.

² GD6.

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

⁴ This new EI benefit is provided in Part VIII.4 of the Act.

⁵ Subsection 153.10(1) of the Act and subsection 153.11 of the Act.

[16] The law says that claimants who could have established a benefit for regular EI or EI sickness benefits on or after March 15, 2020 are considered to be claimants for the purposes of the EI ERB.⁶ This is the case even if they did not apply for EI ERB benefits.

[17] The law also says that no benefit period can be established for regular EI benefits or EI sickness benefits for the period from March 15, 2020 to September 26, 2020.⁷ This means that claimants who could have started a benefit period for regular EI benefits between March 15, 2020 and September 26, 2020 cannot chose between claiming regular EI benefits or the EI ERB benefits. They can only start a benefit period for EI ERB benefits.

[18] So, I have to decide whether the Claimant could have established a benefit period for regular EI benefits on or after March 15, 2020 to September 26, 2020.

[19] There is no dispute that the Claimant's last day of work was March 17, 2020 and he made his claim for benefits on March 19, 2020.

[20] A benefit period begins on the later of the Sunday of the week in which the interruption of earnings occurs, and the Sunday of the week in which the initial claim for benefits is made.⁸

[21] The Commission says that this means the Claimant's benefit period would begin on March 15, 2020. However, the Claimant had earnings in the week of March 15, 2020 that would have been deducted, preventing any payment of benefits for that week.⁹ So, the Commission says it started the Claimant's benefit period on the following Sunday, March 22, 2020, which was the most advantageous to the Claimant's situation.

[22] The Commission argues that whether the benefit period begins on March 15, 2020 or March 22, 2020, the Claimant could have established a benefit period on or

⁶ See paragraphs 153.5(2)(b) and 153.5(3)(a) of the Act.

⁷ See paragraph 153.5(3)(a) and subsection 153.8(5) of the Act.

⁸ See subsection 10(1) of the Act.

⁹ The Commission says these deductions are required pursuant to section 19 of the Act.

after March 15, 2020 for regular benefits so his claim had to be established as a claim for EI ERB benefits according to the law.

[23] The Claimant argues that his benefit period should have begun on March 15, 2021 according to the strict reading of the law.¹⁰ He says that means his claim should have been established as an EI regular benefit claim, not an EI ERB claim.

[24] The Claimant testified he was blindsided by the changes to the legislation. He says this was the first time he had applied for EI benefits. He says his last day of work was March 17, 2020 and he applied for regular EI benefits on March 19, 2020. He says he then received a letter from Service Canada confirming his application for regular EI benefits. He also received a letter with his access code for regular EI benefits. The Claimant says that his application and all letters and paperwork he received from the Commission referred to regular EI benefits. Nothing referred to EI ERB benefits and he was not alerted to the change. He was not aware of the \$1000.00 income limit the Commission says he was subject to. The Claimant says he submitted his claim reports every two weeks, and reported all his earnings, yet was paid anyway.

[25] The Claimant testified that he initially received a \$2000.00 payment. He did not know why he was paid this money or who paid it. He thought it might be the Canada Emergency Response Benefit, which he knew he had not applied for. The Claimant said he sent back \$3500.00 to the Canada Revenue Agency in June 2020, as he knew this was too much money.

[26] The Claimant says he was called back to work and worked for four days. He earned over \$1000.00 and then his work was shut down again for three weeks. Then he began working partial weeks again. The Claimant says the Commission told him last week that their practice at that time was to ignore earnings reported and pay the full \$500.00 from March 15, 2020 to September unless a claimant declared a full workweek. The Claimant said if he had known that working four days would cost him \$2000.00, he would not have worked the four days.

¹⁰ See subsection 10(1) of the Act.

[27] The Claimant's spouse testified that the Claimant applied for regular EI benefits and the letters from the Commission referred to regular EI benefits. She says the Claimant reported his earnings on his claim reports. The payments he received were noted as EI regular benefits in their bank account and when they logged into his online Service Canada account, it also referred to regular EI payments. The Claimant's spouse said she was laid off at the same time and they had a huge influx of money into their bank account. They did not think they were entitled to this money. They knew it was too much. They sent back \$3500.00 in June 2020 to the CRA. The Claimant's spouse says the overpayment came up only when she went looking for what happened to the repayment. They had initially returned the money to the CRA as a tax installment and they later found out that money had been transferred to Service Canada. She says the Claimant followed all the rules as an EI claimant and he is caught between two different laws.

[28] The Claimant is correct that the law provides for a benefit period start date of March 15, 2020. However, even if the Claimant's benefit period had been established on that date, rather than on March 22, 2020 his claim still had to be established as a claim for EI ERB benefits. This is because any claim on or after March 15, 2020 was required to be established as a claim for EI ERB benefits and the benefits the Claimant was paid, had to be paid as EI ERB benefits. So, the fact the Commission established the benefit period on March 22, 2020 as opposed to March 15, 2020 does not change the fact an EI ERB claim had to be established. I find the Commission correctly established the Claimant's claim as an EI ERB claim.

[29] I acknowledge the Claimant's argument that he did not apply for EI ERB benefits, and was not aware his claim was being established as anything other than EI regular benefits. However, even if the Commission did not alert the Claimant to the fact his claim was created as an EI ERB claim and the benefits being paid were EI ERB benefits rather than EI regular benefits, there is no discretion. The Claimant could not choose to have his claim created as a claim for regular EI benefits. It had to be established as an EI ERB claim.

[30] I agree with the Claimant that he should have been alerted to the fact his claim was being treated as an EI ERB claim. I acknowledge his frustration in that the rules had changed, yet all outward appearances reflected they had not. However, this does not change the fact that the law requires his claim be established as a claim for EI ERB benefits.

Eligibility for EI ERB benefits

[31] Eligibility for EI ERB benefits is determined in two-week periods.

[32] To be eligible for EI ERB benefits as a claimant who could have established a benefit period for regular or sickness benefits on or after March 15, 2020, a claimant must stop working for at least seven consecutive days within a two-week period and must have no income from employment for the consecutive days on which they stop working.¹¹

[33] However, if a claimant has income from employment of less than \$1000.00 over a period of four successive chronological weeks (but not necessarily consecutive) and in respect of which the EI ERB is paid, the claimant is deemed to meet the income eligibility requirement.¹²

[34] A claimant can become ineligible for EI ERB benefits.¹³ There are specific reasons for this. A claimant is not eligible if, (a) they receive, under this Act, a benefit other than the employment insurance emergency response benefit; (b) they receive allowances, money or other benefits paid under a provincial plan (i) because of pregnancy, or (ii) because the claimant is caring for one or more of their new-born children, or one or more children placed with them for the purpose of adoption; (c) they receive an income support payment under the Canada Emergency Response Benefit Act; or (d) they receive a Canada emergency student benefit under the Canada Emergency Student Benefit Act.

¹¹ See paragraph 153.9(1)(a)(iv) and paragraph 153.9(1)(a)(v) of the Act.

¹² See subsection 153.9(4) of the Act.

¹³ See subsections 153.9(2) of the Act.

[35] A claimant is also not eligible for EI ERB benefits if a benefit period established for the claimant begins after the claimant received an EI ERB benefit or an income support payment under the Canada Emergency Response Benefit Act.¹⁴

[36] The Commission says if the Claimant has earned less than \$1000.00 over a period of four weeks that succeed each other in chronological order but not necessarily consecutively and in respect of which the EI ERB is paid, he would remain eligible for the benefits.¹⁵ The Claimant said the Claimant's earnings exceeded this threshold so he is not entitled to any of the benefits he was paid.

[37] The Commission maintains that the Claimant's wages are earnings pursuant to subsection 153.9(4) of Part VIII.4 of the Act because the payments were made to compensate the claimant for the performance of services rendered. The Commission submits that in accordance with subsection 36(4) of the *Employment Insurance Regulations* (EI), it correctly allocated the wages to the weeks payable.

[38] The Commission says the Claimant's earnings were \$1,622.00 from March 22, 2020 to April 18, 2020 and \$4,205.00 from April 19, 2020 to May 16, 2020. As the claimant's earnings exceed \$1,000.00 over these 4-week periods, EI ERB is not payable during the period of March 22, 2020 to May 16, 2020. The Commission also says the Claimant has failed to demonstrate entitlement to the \$2,000.00 initial payment of EI ERB. He returned to work full-time the week of May 10, 2020 and the ROE from his employer shows he worked consistently for the employer until January 13, 2021.

[39] I do not agree with the Commission's interpretation of subsection 153.9(4) of the Act. The Act says a claimant is eligible for EI ERB benefits if they have stopped working for at least seven consecutive days within the two-week period and have no income from employment for those consecutive days.

[40] Subsection 153.9(4) of the Act does not say a claimant only *remains* eligible if they earn less than \$1000.00 over a period of four weeks that succeed each other in

¹⁴ See subsection 153.9(2.1) of the Act.

¹⁵ See subsection 153.9(4) of the Act.

chronological order but not necessarily consecutively and in respect of which the employment insurance emergency response benefit is paid. Rather, it says a claimant is *deemed* to meet the income eligibility requirement if their income from employment over the defined four-week period and in respect of which the EI ERB benefits are paid is less than \$1000.00.

[41] In other words, a claimant who has earned less than \$1000.00 in the defined period and in respect of which EI ERB benefits are paid, can still be eligible for EI ERB benefits even if that claimant did not meet the requirement of having no income from employment for at least seven consecutive days within the two-week period the benefits were being claimed.

[42] I also do not agree that the subsection 36(4) of the EI Regulations and section 19 of the Act applies to the Claimant's situation such that his wages are to be allocated to the weeks in which the wages were earned.

[43] Subsection 153.6(3) of the Act provides that no other provision of this Act or of any regulations made under it applies in respect of a claim for the employment insurance emergency response benefit unless a contrary intention appears.

[44] Subsection 153.6(1) sets out the specific provisions of the Act that apply to the EI ERB, with adaptations. Section 19 of the Act, which sets out the required earnings deductions from benefits paid is, included in Part I of the Act. This is not identified as a provision that applies to the EI ERB. Subsection 36 of the EI Regulations, which deals with the allocation of earnings to claims, is also not identified as a provision that applies to the EI ERB.¹⁶

[45] Part VIII.4 of the Act does not incorporate subsection 36(4) of the EI Regulations or section 19 of the Act. So, I conclude that wages are not to be allocated to EI ERB claims and there is to be no deduction of earnings in the form of wages from the

¹⁶ See subsection 153.6 (1) of the Act.

\$500.00 benefit rate. As long as the income eligibility criteria are met, the full \$500.00 is to be paid, even if a claimant had wages.

Was the Claimant eligible for EI ERB benefits for the two-week periods he received them?

[46] The Claimant was only eligible for some of the two-week periods for which he was paid EI ERB benefits. I find the Claimant was overpaid \$3500.00 in EI ERB benefits. Both the Claimant and the Commission agree the Claimant has already repaid \$3500.00 to the Commission. ¹⁷ I have explained this below.

[47] The first question is whether for each of the two-week periods between March 23, 2020 and May 9, 2020 the Claimant had no work and at least seven consecutive days without income from employment. If so, then he is eligible for EI ERB benefits for that two-week period.

[48] If the Claimant did not have at least seven consecutive days without income from employment in the two-week period, then I have to decide whether he is deemed to meet the income eligibility requirements because he has income that does not exceed \$1000.00 over a period of four weeks that succeed each other in chronological order and in respect of which the EI ERB is paid.

[49] The Claimant testified he returned to work on March 30, 2020. He testified consistent with information he had provided to the Commission¹⁸, that his earnings and hours worked for the two-week periods he claimed EI ERB benefits were as follows:

<u>Week</u>	<u>Earnings</u>	<u>Hours</u>
March 22, 2020 to March 28, 2020	none	none
March 29, 2020 to April 4, 2020	\$1622.00	32

¹⁷ GD4-7.

¹⁸ GD3-42.

April 5, 2020 to April 11, 2021	none	none
April 12, 2020 to April 18, 2020	none	none
April 19, 2020 to April 25, 2020	\$1292.00	26
April 26, 2020 to May 2, 2020	\$1554.00	32
May 3, 2020 to May 9, 2020	\$1359.00	27
May 10, 2020 to May 16, 2020	Claimant returned to work full-time on May 10, 2020 until January 23, 2021	

[50] I find that the Claimant went seven consecutive days without income from employment for the week of March 22, 2020 to March 28, 2020. The Claimant did not start work until March 30, 2020 so he is eligible for benefits for the two-week period from March 22, 2020 to April 4, 2020.

[51] The Claimant had no work or earnings at all between April 5, 2020 and April 18, 2020 so he went seven days without income from employment. The Claimant is eligible for benefits for the two-week period from April 5 to April 18, 2020.

[52] The Claimant is not eligible to EI ERB benefits for the two-week period from April 19, 2020 to May 2, 2020. He earned \$1292.00 for 26 hours work from April 19, 2020 to April 25, 2020 and he earned \$1554.00 for 32 hours work from April 26, 2020 to May 2, 2020. The Claimant was working and earning income in this two-week period. He did not provide evidence that in this two-week period, there was a stretch of seven consecutive days without income from employment. So, the Claimant has not proven he is eligible for that reason.

[53] The Claimant is also not eligible to EI ERB benefits for the two-week period from May 3, 2020 to May 16, 2020. The Claimant earned \$1359.00 for 27 hours worked between May 3, 2020 and May 9, 2020. He testified he returned to work full time on May 10, 2020. The ROE from his employer shows he remained employed until January 23, 2021. The Claimant was working and earning income in this two-week period. He

did not provide evidence that in this two-week period, there was a stretch of seven consecutive days without income from employment. So, the Claimant is not eligible for EI ERB benefits from May 3, 2020 to May 16, 2020.

[54] The Claimant cannot be deemed to meet the income requirements and be therefore eligible for EI ERB benefits for the two week periods from April 19, 2020 to May 2, 2020 and May 3 to May 16, 2020 as his income exceeded \$1000.00 over a period of four weeks that succeed each other in chronological order and in respect of which the EI ERB benefit was paid.

[55] The EI ERB benefit was payable for the two-week periods that fall between March 15, 2020, to October 3, 2020. The Claimant provided no evidence that he had no income from employment for seven consecutive days in any of the two-week periods between May 10, 2020 and October 3, 2020. He testified he was working full time from May 10, 2021. Also, his income in those weeks always exceeded \$1000.00 according the ROE on file so he cannot be deemed to meet the income eligibility requirement of hearing earned less than a \$1000.00 over a period of four weeks that succeed each other in chronological order and in respect of which EI ERB was paid.

[56] The Claimant was therefore eligible for \$500.00 EI ERB benefits for the weeks of from March 22, 2020 to April 4, 2020, and April 5, 2020 to April 18, 2020. There is no evidence he was ineligible for benefits for these weeks according to the ineligible criteria in the Act.¹⁹ So, the Claimant was eligible for a total of \$2000.00 EI ERB benefits. He has not shown he was eligible for any further EI ERB benefits.

Overpayment amount

[57] The Commission says the Claimant was paid a total of \$5500.00 in EI ERB benefits. The Commission says he was paid an advance EI ERB payment of \$2000.00 and then 7 weeks of EI ERB payments from March 22, 2020 to May 9, 2020 of \$3500.00. There is no evidence that advance payment related to any specific weeks.

¹⁹ See subsections 153.9(2) and 153.9(2.1) of the Act.

The law allowed the Commission to pay the EI ERB in advance of the customary time paying for it.²⁰

[58] The Claimant was only eligible for a total of \$2000.00 in EI ERB benefits. He was paid \$5500.00 in EI ERB benefits. So, the Claimant was overpaid \$3500.00 in EI ERB benefits.

[59] The law requires that a person who received an EI ERB benefit for which they were not eligible must repay it.²¹

[60] The Claimant says he never asked the Commission for a waiver of the \$3500.00. He says he sent that money back in June 2020. The Claimant says that he reported his earnings to the Commission yet they paid him benefits.

[61] The Commission now acknowledges the Claimant reported his earnings.²² However, the Commission says where a claimant has either received benefits to which he or she is not entitled, or has not received benefits to which he or she is entitled, the Commission has the authority to reconsider that individual's claim for benefits within 36 months after the benefits have been paid or would have been payable. The Commission says the decision to pay the Claimant EI ERB benefits as of March 22, 2020 was made on April 6, 2020, and the Commission reconsidered this decision on February 13, 2021 and May 28, 2021, which is within 36 months of the April 6, 2020 date.²³

[62] I agree the Commission has acted within the 36-month period to reconsider the Claimant's claim.

[63] The overpayment of \$3500.00 was validly created. The Claimant has already repaid the \$3500.00 owing, according to both the Claimant and the Commission. So, there is no further overpayment owing.

²⁰ See subsection 153.7(1.1) of the Act.

²¹ See section 153.1301 of the Act.

²² GD6.

²³ See section 52 and section 153.6 (1) of the Act.

Conclusion

[64] The appeal is dismissed with modification. The Claimant's benefit period was properly established by the Commission as an EI ERB claim. The Claimant was overpaid EI ERB benefits but the overpayment amount is modified from \$5500.00 to \$3500.00. The Claimant has already reimbursed this amount to the Commission.

Charlotte McQuade
Member, General Division – Employment Insurance Section