



Citation: *FB v Canada Employment Insurance Commission*, 2022 SST 238

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

# Decision

**Appellant:** F. B.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (440323) dated December 23, 2021 (issued by Service Canada)

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**Tribunal member:** Amanda Pezzutto

**Type of hearing:** Teleconference

**Hearing date:** February 23, 2022

**Hearing participant:** Appellant

**Decision date:** March 2, 2022

**File number:** GE-22-175

## Decision

[1] F. B. is the Claimant. The Canada Employment Insurance Commission (Commission) is asking her to repay Employment Insurance (EI) Emergency Response Benefits. The Claimant is appealing this decision to the Social Security Tribunal (Tribunal).

[2] I am dismissing the Claimant's appeal. She hasn't proven her eligibility for EI Emergency Response Benefits (EI ERB). This is because her earnings were over the threshold that would allow her to receive benefits.

## Overview

[3] The Claimant had two jobs: a part-time job and a full-time job. She lost her full-time job in March 2020 and applied for EI benefits. The Commission started paying EI ERB. The Claimant was still working at her part-time job and so she asked the Commission for advice. Commission agents told her to keep doing her biweekly claimant reports and to keep reporting her income. So, this is what the Claimant did. She reported earnings from her part-time job every week. She collected EI ERB until early October 2020.

[4] Several months later, the Commission reviewed the Claimant's file. The Commission decided that her earnings were over the threshold that would let her collect EI ERB. So, the Commission asked her to repay all of the EI ERB she received between March 22 and October 3, 2020.

[5] The Commission argues that the Claimant consistently earned more than \$1000 in each four-week period while she was collecting EI ERB. The Commission says this means that she earned more than the allowed threshold to collect EI ERB. So, the Commission says she has to repay EI ERB.

[6] The Claimant disagrees with the Commission's decisions. The Claimant says that Commission agents told her that she was entitled to benefits and told her to keep reporting her earnings. She says that the Commission should have noticed the issue

with her income sooner instead of paying benefits first and then asking her to repay benefits later.

## Issues

[7] The Claimant is appealing the Commission's decision about her EI ERB. She says she shouldn't have to repay benefits. She has made a number of arguments explaining why she disagrees with the Commission's decisions. I have broken down her appeal into several questions, and I will go through each one in my decision.

- Did the Commission follow the law when it paid EI ERB instead of EI regular benefits?
- Does the Commission have the authority to retroactively review the Claimant's entitlement?
- What were the Claimant's earnings while she was collecting EI ERB?
- Did the Claimant earn more than the allowable threshold?
- Does misleading or incorrect advice from the Commission entitle the Claimant to benefits?
- Do I have the authority to write-off the Claimant's overpayment?

## Analysis

### **Issue 1: Did the Commission follow the law when it paid EI ERB instead of EI regular benefits?**

[8] The law says the Commission had to pay EI ERB instead of EI regular benefits. This is because the Claimant applied for benefits after the law about EI ERB came into effect.

[9] There are some basic facts that aren't in dispute. The Claimant's last day of work with her full-time job was March 20, 2020. She applied for EI benefits on the same day. Based on this information, the Commission started the Claimant's benefit period on

March 22, 2020. In other words, March 22, 2020 was the effective date of the Claimant's benefits.

[10] The Government of Canada brought in several temporary measures in response to the Covid-19 pandemic. One of the measures was the creation of the EI ERB program.

[11] In simple terms, the government created a temporary program to simplify the payment of benefits. The Commission automatically moved anyone who made a new application for EI benefits into the EI ERB program. The law didn't give you the choice to select either EI regular benefits or EI ERB. If you made an application for EI regular benefits on or March 15, 2020, the Commission automatically enrolled you in the EI ERB program.<sup>1</sup>

[12] There is no evidence showing me that the Claimant was already collecting EI regular benefits before March 2020. She didn't apply to renew a pre-existing EI claim. Instead, on March 22, 2020, she applied to start a new EI benefit period.

[13] This means that the Commission had to use the law about EI ERB because this was the law in effect at the time she applied for benefits. Neither the Commission nor the Claimant had any choice about how to pay benefits. The law didn't give the Claimant the choice to pick EI regular benefits over EI ERB.

[14] This means that the Commission had to start an EI ERB benefit period. The Claimant didn't have the option to selection EI regular benefits.

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<sup>1</sup> This is a plain language explanation of the EI ERB provisions set out in part VIII.4 of the *Employment Insurance Act*. In particular, subsection 153.5(2) of the *Employment Insurance Act* says a claimant is anyone who otherwise could have started a benefit period to claim EI regular benefits on or after March 15, 2020.

## **Issue 2: Does the Commission have the authority to retroactively review the Claimant's entitlement?**

[15] The law gives the Commission very broad powers to revisit any of its decisions about EI benefits.<sup>2</sup> But the Commission has to follow the law about time limits when it reviews its decisions. Usually, the Commission has a maximum of three years to revisit its decisions.<sup>3</sup> If the Commission paid you EI benefits you weren't really entitled to receive, the Commission can ask you to repay those EI benefits.<sup>4</sup>

[16] The law specifically says that the Commission can use its review powers to retroactively review EI ERB.<sup>5</sup>

[17] In this case, the Commission looked at the EI ERB it paid to the Claimant starting March 22, 2020. According to the Commission's evidence, the Commission started its review on March 8, 2021. During this conversation, the Commission told the Claimant that it was reviewing her earnings and her entitlement to EI ERB. The Commission decided that the Claimant wasn't entitled to EI ERB because of her earnings. The Commission sent the Claimant a notice of debt about the overpayment on October 8, 2021.

[18] So the evidence shows me that the Commission completed each part of the retroactive review within the time limits allowed by the law. The Commission reconsidered the Claimant's claims for benefits, made a decision, calculated the

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<sup>2</sup> See *Briere v Canada Employment and Immigration Commission*, A-637-86 on the broad power given by section 52 of the *Employment Insurance Act*:

This provision authorizes it to amend a posteriori within a period of three or six years, as the case may be, a whole series of claims for benefit and to make a fresh decision on its own initiative as to entitlement to benefit, and in appropriate cases to withdraw its earlier approval and require claimants to repay what had been validly paid pursuant to such approval.

<sup>3</sup> Subsection 52(1) of the *Employment Insurance Act*. The law says the Commission has 36 months. See also *Canada (Attorney General) v Laforest*, A-607-87. In this decision, the Federal Court of Appeal held that the Commission has 36 months to reconsider a claim for benefits, make a decision, calculate the overpayment, if any, and notify the claimant of the overpayment.

<sup>4</sup> Subsection 52(3) of the *Employment Insurance Act*.

<sup>5</sup> Paragraph 153.6(1)(a) and subsection 153.1303(1) of the *Employment Insurance Act* say section 52 of the *Employment Insurance Act* applies to EI ERB.

overpayment, and notified her of the decision and overpayment all within 36 months of the date it originally paid the benefits.

[19] So, I find that the Commission used its power to retroactively review the Claimant's entitlement to EI ERB in a way that respects the law. The law gives the Commission the authority to make a retroactive review, and the Commission followed the guidelines and time limits described in the law when it did its retroactive review.

[20] I understand that the Claimant honestly and accurately reported her earnings each week on her biweekly reports. Even though the Commission had information about the Claimant's earnings, the Commission waited several months to make a decision about her entitlement to EI ERB. This has led to a large overpayment for the Claimant. I am sympathetic to her circumstances, and I understand that the Commission's delay has caused her frustration. But I find that the law gives the Commission the authority to make a retroactive decision about the Claimant's entitlement to EI ERB.

### **Issue 3: What were the Claimant's earnings while she was collecting EI ERB?**

[21] The Claimant completed biweekly claimant reports while she was collecting EI ERB. Each week, she reported income:

<b>Week beginning</b>	<b>Earnings reported</b>
March 22, 2020	\$453
March 29, 2020	\$370
April 5, 2020	\$603
April 12, 2020	\$378
April 19, 2020	\$410
April 26, 2020	\$444
May 3, 2020	\$440
May 10, 2020	\$498

May 17, 2020	\$686
May 24, 2020	\$780
May 31, 2020	\$614
June 7, 2020	\$2452
June 14, 2020	\$465
June 21, 2020	\$461
June 28, 2020	\$448
July 5, 2020	\$444
July 12, 2020	\$433
July 19, 2020	\$260
July 26, 2020	\$173
August 2, 2020	\$347
August 9, 2020	\$433
August 16, 2020	\$433
August 23, 2020	\$433
August 30, 2020	\$433
September 6, 2020	\$428
September 13, 2020	\$433
September 20, 2020	\$433
September 27, 2020	\$410

[22] The Claimant says she doesn't have any evidence to contradict the earnings she reported on her biweekly claimant reports. At the hearing, the Claimant said she calculated her earnings based on the hours she worked and her hourly wage. She said she was sure the earnings were correct.

[23] The Commission relies on the earnings that the Claimant reported on her biweekly claimant report. The Commission hasn't given me different information about the Claimant's earnings.

[24] So I accept that the earnings the Claimant reported on her biweekly claimant reports are correct.

#### **Issue 4: Did the Claimant earn more than the allowable threshold?**

[25] I find that the Claimant earned more than the allowable threshold. In other words, her earnings were too high to allow her to claim EI ERB.

[26] The law explains how earnings affect your entitlement to EI ERB. You can have some income from work at the same time you collect EI ERB, but you can't earn over a certain threshold. The law says that you can't earn more than \$1000 in any four-week period. The four weeks don't have to be consecutive.<sup>6</sup> This means that the Commission can exclude weeks from the count if it is a full work week. If you earn more than \$1000 in a four week period, then you aren't eligible for EI ERB.

[27] The Commission gave me the following information explaining how it looked at the Claimant's earnings:

<b>Week beginning</b>	<b>Period</b>	<b>Earnings</b>	<b>Total earnings in the period</b>
March 22, 2020	Period 1	\$453	
March 29, 2020	1	\$370	
April 5, 2020	1	Full work week – this week excluded	
April 12, 2020	1	\$378	
April 19, 2020	1	\$410	\$1611

<sup>6</sup> Subsection 153.9(4) of the *Employment Insurance Act*.



April 26, 2020	Period 2	\$444	
May 3, 2020	2	\$440	
May 10, 2020	2	\$498	
May 17, 2020	2	Full work week – this week excluded	
May 24, 2020	2	Full work week – this week excluded	
May 31, 2020	2	Full work week – this week excluded	
June 7, 2020	2	\$2452	\$3834
June 14, 2020	Period 3	\$465	
June 21, 2020	3	\$461	
June 28, 2020	3	Full work week – this week excluded	
July 5, 2020	3	\$444	
July 12, 2020	3	\$433	\$1803
July 19, 2020	Period 4	\$260	
July 26, 2020	4	\$173	
August 2, 2020	4	\$347	
August 9, 2020	4	\$433	\$1213
August 16, 2020	Period 5	\$433	
August 23, 2020	5	\$433	
August 30, 2020	5	\$433	

September 6, 2020	5	\$428	\$1727
September 13, 2020	Period 6	\$433	
September 20, 2020	6	\$433	
September 27, 2020	6	\$410	\$1276

[28] In short, this chart means that the Claimant earned more than \$1000 in every four-week period between March 22 and October 3, 2020.

[29] The Claimant hasn't given me any information to show that the Commission made its calculations incorrectly. So, I agree with the Commission. I find that the Claimant's earnings were over the threshold. She hasn't proven that she was entitled to EI ERB between March 22 and October 3, 2020.

**Issue 5: Does misleading or incorrect advice from the Commission entitle the Claimant to benefits?**

[30] The Claimant says she contacted the Commission several times while she collected EI ERB. She says that Commission agents told her to report her earnings and to keep claiming EI ERB. She says she wouldn't have continued collecting EI ERB if she knew she wasn't entitled.

[31] I understand that the Claimant is frustrated by the advice she received from Commission agents. She says that Commission agents misled her.

[32] Even if I agree that Commission agents misled her, this doesn't mean that she can collect benefits. The Claimant can only collect benefits if the law allows for it. Individual Commission agents can't promise to pay benefits in a way that goes against

the law.<sup>7</sup> Also, the law doesn't give me the power to award the Claimant any compensation even if Commission agents made mistakes.

[33] This means that the Claimant can't collect EI ERB because of Commission errors. She can only collect EI ERB if the law allows for it.

### **Issue 6: Do I have the authority to write-off the Claimant's overpayment?**

[34] The Commission makes its own decisions about writing off overpayments. I can't order the Commission to write off the Claimant's overpayment.<sup>8</sup> I can't waive her obligation to repay benefits.<sup>9</sup>

[35] If the Claimant wants the Commission to write off the overpayment, her first step is to ask the Commission to write off the debt. If the Commission refuses her request, she can ask the Federal Court to review the Commission's refusal.

### **Conclusion**

[36] I am dismissing the Claimant's appeal. She hasn't proven her eligibility for EI ERB because of her earnings.

Amanda Pezzutto

Member, General Division – Employment Insurance Section

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<sup>7</sup> In *Canada (Attorney General) v. Shaw*, 2002 FCA 325, the Federal Court of Appeal explains that misinformation from the Commission does not give a claimant relief from the provisions of the *Employment Insurance Act*. Similarly, in *Granger v. Canada Employment Insurance Commission*, A-684-85, the Federal Court of Appeal explains that Commission agents do not have the power to amend the law. An individual Commission agent cannot promise to pay benefits in a way that is contrary to the law.

<sup>8</sup> The Federal Court of Appeal says this in its decision *Canada (Attorney General) v. Woods*, 2002 FCA 91.

<sup>9</sup> The Federal Court of Appeal says this in its decision *Canada (Attorney General) v. Buors*, 2002 FCA 372.