



Citation: *NS v Canada Employment Insurance Commission*, 2022 SST 741

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

## Decision

**Appellant:** N. S.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (411162) dated July 19, 2021 (issued by Service Canada)

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**Tribunal member:** Suzanne Graves

**Type of hearing:** Videoconference

**Hearing date:** February 24, 2022

**Hearing participant:** Appellant

**Decision date:** April 02, 2022

**File number:** GE-22-242

## Decision

[1] The appeal is allowed in part.

[2] The Claimant received two more weeks of Employment Insurance – Emergency Response Benefits (EI-ERB) than she was entitled to. This means that she has to repay \$1,000 of the EI-ERB advance payment that she received.

## Overview

[3] The Claimant applied for Employment Insurance (EI) benefits on March 27, 2020. The Canada Employment Insurance Commission (Commission) paid her EI-ERB from March 22, 2020, to September 12, 2020. On April 6, 2020, she got an advance EI-ERB payment of \$2,000. An amount equal to the advance payment was deducted from her later EI-ERB payments.

[4] In July 2020, the Claimant's employer told the Commission that she was participating in work-sharing. The employer also stated that the Claimant took a leave of absence from May 3, 2020, to May 30, 2020. In November 2020, the Commission reviewed her benefits and decided she could only get EI-ERB until May 2, 2020. So, it says the Claimant must now repay the advance payment of \$2,000, the equivalent of four weeks of EI-ERB.

[5] The Claimant argues that she did not take a leave of absence from May 3, 2020, to May 30, 2020. She says her employer offered for her to voluntarily return to the office in early May 2020. But she had health concerns about taking a long commute on transit during a pandemic emergency lockdown. She says that she should not have to repay the advance EI-ERB payment she received.

[6] The Claimant says she was available to work from home in May and June 2020, just as she was for March and April 2020 during the pandemic, and her employer agreed she should stay home. She was recalled on July 5, 2020, and began work-sharing. The Claimant says she was at home due to the COVID-19 pandemic, from May 3, 2020, to July 4, 2020, and is entitled to receive EI-ERB payments for that period.

## Issue

[7] Did the Claimant receive four more weeks of EI-ERB payments than she was entitled to?

## Analysis

[8] In March 2020, the government changed the *Employment Insurance Act* (EI Act) to allow the Minister to make interim orders to mitigate the economic effects of the COVID-19 pandemic.<sup>1</sup> The Minister made several orders to amend the EI Act, one of which added a new temporary benefit, called the EI-ERB.<sup>2</sup> This temporary law was effective on March 15, 2020.

[9] Claimants who applied for regular benefits between March 15, 2020, and September 26, 2020, were considered to have applied under the EI-ERB.

[10] The Claimant applied for benefits on March 27, 2020, and received EI-ERB payments until September 12, 2020.<sup>3</sup> On April 6, 2020, she received an advance payment of \$2,000, which was recovered from her benefits for the weeks of June 14, 2020, June 21, 2020, August 2, 2020, and August 9, 2020.<sup>4</sup> The Commission informed the Claimant that these payments were being withheld in order to repay the \$2,000 advance payment.

[11] On July 10, 2020, the Claimant's employer told the Commission she was participating in work-sharing.<sup>5</sup> Benefits under a work-sharing agreement were separate and distinct from the EI-ERB program.

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<sup>1</sup> The *COVID-19 Emergency Response Act* added section 153.3 to the *Employment Insurance Act* (EI Act), which allows the Minister of Employment and Social Development to make temporary orders amending the Act. Subsection 153.3(8) of the EI Act says that interim orders prevail to the extent of any conflict with the Act or any regulation made under it.

<sup>2</sup> Sections 153.5 to 153.13 of the EI Act, added by: *Interim Order: Amending the Employment Insurance Act (Employment Insurance Emergency Response Benefit)* (SOR/2020-61).

<sup>3</sup> The Claimant's application for benefits on March 27, 2020, is at GD3-4 to 32.

<sup>4</sup> The Claimant's EI-ERB payment schedule is set out at GD3-74.

<sup>5</sup> The Commission's record of its discussion with the Claimant's employer on July 10, 2020, is at GD3-63.

[12] The Commission continued to pay EI-ERB to the Claimant, even after she began work-sharing on July 5, 2020. It says there was a master queue to make changes in the system, due to pandemic delays.<sup>6</sup>

[13] Later, the Commission made retroactive changes to the Claimant's benefits and calculated an overpayment. The Claimant's work-sharing benefit was a lower weekly benefit rate, but the Commission says the overpayment of benefits as a result of the switch from EI-ERB to work-sharing has already been forgiven.

[14] In order to determine whether the Claimant received too many weeks of EI-ERB payments, I must first determine whether the Claimant was entitled to EI-ERB from May 3, 2020, to July 4, 2020.

### **My jurisdiction**

[15] The Commission argues that the Claimant's entitlement to regular and work-sharing benefits is not subject to review by the Tribunal.

[16] I agree that I don't have the authority to consider the Claimant's entitlement to work-sharing benefits. But the Commission says that the Claimant's claim was converted to a regular claim from May 3, 2020, to July 4, 2020.

[17] According to the temporary legislation in force in May 2020, regular benefit claims were considered to be claims for EI-ERB.<sup>7</sup>

[18] So, I find that I have the jurisdiction to consider how many weeks of EI-ERB benefits the Claimant should receive.

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<sup>6</sup> At GD4-2, the Commission says that there were no processing procedures in place at the start of the pandemic to convert the new EI-ERB/CERB program to work-sharing. As a result, in order to prevent any interruption in benefit payment, the Commission allowed the Claimant to continue to receive ERB/CERB at \$500 a week while waiting for procedures to convert ERB/CERB to work-sharing.

<sup>7</sup> See section 153.8 of the EI Act.

## What does the Commission say?

[19] The Commission says that the Claimant received a total of ten weeks of EI-ERB payments, from the start of her claim on March 22, 2020, including the \$2,000 advance payment.<sup>8</sup>

[20] In June 2020, the employer told the Commission that the Claimant had been on a leave of absence from May 3, 2020, to May 30, 2020, because she “could not secure a commute” to work.<sup>9</sup>

[21] The Commission decided that the Claimant should receive regular benefits starting on May 3, 2020, followed by work-sharing benefits. It says she was only entitled to a total of six weeks of EI-ERB, from March 22, 2020, to May 2, 2020. So, she must repay an amount equal to four weeks of EI-ERB payments.

[22] The Commission says it adjusted the Claimant’s benefits using a two-step process. First, it established a regular claim effective May 3, 2020, because it argues the Claimant was taking a leave of absence until the week of June 28, 2020. In its first notice of decision, it decided that the Claimant should have been receiving work-sharing benefits starting on May 3, 2020.

[23] Second, the Commission adjusted the newly created regular and work-sharing claim to reflect the work-sharing benefit rate of \$356. It says that the Claimant was allowed to keep the \$500 weekly benefit rate that was already paid to her as EI-ERB, and it waived the overpayment that was created.<sup>10</sup>

[24] The Commission informed the Claimant that she was no longer entitled to receive EI-ERB from May 3, 2020, to May 30, 2020, as she had taken a four-week leave of absence. It says there is no evidence that she has repaid some or all of the \$2,000 advance payment.

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<sup>8</sup> See GD4-6.

<sup>9</sup> A record of the Commission’s discussion with the Claimant’s employer is at GD3-61.

<sup>10</sup> GD4-3

## **What does the Claimant say?**

[25] The Claimant says that she did not receive four more weeks of EI-ERB payments than she should have. She argues that she was not on a leave of absence from May 3, 2020, to May 30, 2020, and was entitled to receive EI-ERB payments until July 4, 2020, when she enrolled in the work-sharing program.

[26] The Claimant testified that she exchanged emails with her employer in early May 2020. The employer offered for her to return to the office, if she felt comfortable. But she had a long commute which would have required taking transit during the early days of the pandemic health emergency. The Claimant was particularly concerned, as she has some underlying health issues. She told her employer she was available to work from home, as she had been during the rest of the pandemic lockdown. So, her employer agreed that she should continue to stay home.

[27] The Claimant says she was not enrolled in work-sharing starting May 3, 2020. In fact, her employer did not call her back to the office until July 5, 2020. She filed a first claim for work-sharing benefits on June 29, 2020,<sup>11</sup> and a revised claim on July 5, 2020,<sup>12</sup> when she received a new work-sharing code.

## **Was the Claimant entitled to receive EI-ERB payments from May 3, 2020, to July 4, 2020?**

[28] I accept the Claimant's evidence that she did not begin participating in the employer's work-sharing plan until July 5, 2020. I make this finding because this date is consistent with the Claimant's application for work-sharing benefits, and the Commission's payment schedules.<sup>13</sup>

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<sup>11</sup> GD3-33 to 44.

<sup>12</sup> GD3-45 to 56.

<sup>13</sup> The Commission recalculated payment schedules shows that the Claimant's participation in work-sharing began on July 5, 2020 (GD3-72 to 73 and GD3-75).

[29] The Claimant filed copies of emails from her employer exchanged in early May 2020.<sup>14</sup> Although her manager offered for her to return to the office, it was reasonable in May 2020 for the Claimant to express health concerns about returning to work via a lengthy transit commute.

[30] From May 31, 2020, to July 4, 2020, the Claimant also remained available to work from home, and the employer did not call her back to the office during that period.

[31] I accept the Claimant's evidence that she was available for work from home, and did not request a leave of absence starting on May 3, 2020. I find that she was unemployed due to the COVID-19 pandemic from March 22, 2020, to July 4, 2020.

[32] As a result, the Claimant was entitled to receive EI-ERB payments from March 22, 2020, to July 4, 2020.

**So, did the Claimant receive four more weeks of EI-ERB payments than she was entitled to?**

[33] I do not agree with the Commission's argument that the Claimant was entitled to only six weeks of EI-ERB payments. I have already found that the Claimant was entitled to EI-ERB payments until July 4, 2020.

[34] According to the Commission's payment schedules, the Claimant repaid two weeks of her advance payment during the weeks of June 14, 2020, and June 21, 2020.

[35] There is no evidence that the Claimant repaid the second half of the EI-ERB payment in the amount of \$1,000 before her claim was converted to work-sharing benefits starting July 5, 2020.

[36] So, the Claimant received two more weeks of EI-ERB payments than she was entitled to.

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<sup>14</sup> Copies of the email exchange between the Claimant and her employer are at GD7-3 to 6.

[37] The Claimant argues she was misinformed by the Commission, and that lengthy delays led to significant confusion about how her claim was processed. She says it was cruel and unjust to continue paying her benefits, and then ask for funds to be repaid many months later.

[38] The Claimant says the matter was further complicated when the Commission randomly injected more funds that it said was an underpayment of work-sharing benefits. She asks that any remaining overpayment be written off in the circumstances.

[39] I make no finding on any payments related to work-sharing benefits, as that issue is not before me.

[40] The Commission says that the overpayment due to the change in the Claimant's benefit rate has already been forgiven. I have sympathy for the Claimant's situation, particularly given the pandemic related delays. But have no authority to cancel overpayments.

[41] Only the Commission can write off an amount that is payable under section 43 of the EI Act.<sup>15</sup>

## **Conclusion**

[42] The appeal is allowed in part.

[43] The Claimant received two more weeks of EI-ERB than she was entitled to. This means that the Claimant is required to repay the equivalent of two weeks of EI-ERB payments that she received, in the amount of \$1,000.

Suzanne Graves

Member, General Division – Employment Insurance Section

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<sup>15</sup> See section 56 of the *Employment Insurance Regulations*.