



[TRANSLATION]

Citation: *RG v Canada Employment Insurance Commission*, 2022 SST 1207

## Social Security Tribunal of Canada Appeal Division

# Decision

**Appellant:** R. G.

**Respondent:** Canada Employment Insurance Commission  
**Representative:** Jessica Grant (counsel)

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**Decision under appeal:** General Division decision dated  
March 21, 2022 (GE-22-577)

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**Tribunal member:** Jude Samson

**Type of hearing:** Teleconference

**Hearing date:** September 16, 2022

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

**Decision date:** November 24, 2022

**File number:** AD-22-235

## Decision

[1] R. G. is the Claimant in this case. I am allowing his appeal.

## Overview

[2] In March 2020, the Claimant stopped working because of the pandemic. He then applied for Employment Insurance (EI) benefits. The Canada Employment Insurance Commission (Commission) established a benefit period for the EI Emergency Response Benefit (EI ERB) effective March 15, 2020. Then, the Commission paid him this benefit.

[3] The Commission later decided that the Claimant wasn't eligible for the EI ERB payments he received from March 15, 2020, to May 9, 2020. The Commission says that the Claimant is ineligible for this benefit because he earned more than \$1,000 during two periods of four consecutive weeks.

[4] The Claimant appealed the Commission's decision to the Social Security Tribunal's General Division, but it dismissed his appeal.

[5] The Claimant is now appealing the General Division decision to the Appeal Division.

[6] I find that the General Division misinterpreted the provisions of the relevant law and that the Claimant is eligible for the EI ERB from April 19 to May 16, 2020. For this reason, I am allowing his appeal.

## Issues

[7] I have to consider these issues:

- a) Can I consider new evidence?
- b) Did the General Division make an error of law by misinterpreting the EI ERB eligibility provisions in the law?
- c) If so, what is the best way to fix the General Division's error?

## Analysis

### **As a general rule, the Appeal Division doesn't consider new evidence**

[8] The Appeal Division's limited role normally prevents me from considering new evidence.<sup>1</sup> New evidence is evidence that the General Division didn't have in front of it when it made its decision.

[9] The law says that I must focus on whether the General Division made a relevant error.<sup>2</sup> And that assessment is usually based on the evidence that the General Division had in front of it. I can't take a fresh look at the case and come to my own conclusions based on more recent and stronger evidence.<sup>3</sup>

[10] There are exceptions to the general rule against considering new evidence.<sup>4</sup> For example, I can consider new evidence that provides general background information only.

#### **– I have considered new evidence**

[11] I have considered the following new evidence:

- George Rae's affidavit<sup>5</sup>
- the House of Commons Debates (Hansard)<sup>6</sup>
- the Auditor General of Canada's report on the Canada Emergency Response Benefit<sup>7</sup>

[12] I accept the Commission's argument that this evidence provides general background information that might assist me in understanding some of the changes that

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<sup>1</sup> The Appeal Division's role is mostly defined by sections 58 and 59 of the *Department of Employment and Social Development Act* (DESD Act).

<sup>2</sup> The relevant errors, formally known as "grounds of appeal," are listed under section 58(1) of the DESD Act.

<sup>3</sup> See *Gittens v Canada (Attorney General)*, 2019 FCA 256 at paragraph 13.

<sup>4</sup> See *Sibbald v Canada (Attorney General)*, 2022 FCA 157 at paragraphs 35 to 40.

<sup>5</sup> See AD4 in the appeal record.

<sup>6</sup> See footnotes 46 and 50 in the Commission's submissions (AD3).

<sup>7</sup> See footnotes 44, 45, 47, and 48 in the Commission's submissions (AD3).

were made to the law because of the COVID-19 pandemic. In addition, this evidence isn't about the Claimant's particular situation, and he doesn't object to my considering it.

[13] I recognize that George Rae's affidavit might shed some light on Parliament's intent when drafting the relevant provisions. But I place less weight on his affidavit because it isn't written in a neutral way. To fall within the "general background" exception, an affidavit must not be presented in a partisan way or provide evidence relevant to the merits of the matter.<sup>8</sup>

[14] I find that the Auditor General of Canada's report is also worthy of less weight. Although this report may provide a useful summary of the history of pandemic response benefits, it adds little to the case. The Auditor General isn't an expert in statutory interpretation and has no direct knowledge of Parliament's intentions.

– **I haven't considered an announcement by the Prime Minister**

[15] I haven't considered an announcement that the Commission cited in support of its arguments, namely the Prime Minister's announcement on April 15, 2020.<sup>9</sup> The Commission didn't provide the Tribunal with a copy of the announcement, and it didn't provide a hyperlink to the announcement either. The Claimant and the Tribunal should not have to search the Internet for something the Commission refers to in its submissions.

[16] Going forward, I would ask the Commission to provide the Tribunal with a copy of any new evidence it relies on. Although the Tribunal lets parties use hyperlinks when referring to case law, the situation is different when it comes to evidence. Information on the Internet can change, and hyperlinks can stop working.

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<sup>8</sup> See *Delios v Canada (Attorney General)*, 2015 FCA 117 at paragraphs 45 and 46.

<sup>9</sup> See footnote 50 in the Commission's submissions (AD3).

## **The General Division misinterpreted the EI ERB eligibility provisions in the law**

[17] The main question is whether earning more than \$1,000 over a period of four weeks during which the EI ERB is paid makes a person ineligible for this benefit.

[18] The General Division answered this question in the affirmative.

[19] I can intervene in this case if I disagree with the General Division's interpretation.<sup>10</sup> For this reason, I will turn directly to the interpretation of the relevant provisions.

### **– EI ERB eligibility and ineligibility**

[20] To be eligible for the EI ERB, a person has to meet the eligibility criteria set out in section 153.9(1) of the *Employment Insurance Act* (EI Act). Although this section deals with several scenarios, it includes a common exception related to loss of income.

[21] In simple terms, a person 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.

[22] Section 153.9(4) sets out an exception to this requirement. It reads:

#### **Exception — employment, self-employment and income**

**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 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.

[23] Moreover, the EI Act has separate provisions for a person's ineligibility for the EI ERB, namely sections 153.9(2) and 153.9(2.1).

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<sup>10</sup> Based on section 58(1)(b) of the DESD Act, I don't owe the General Division any deference on questions of law.

[24] So, under the income loss requirement in section 153.9(1), an EI ERB claimant must have no income for at least seven consecutive days within a two-week period.

[25] The Commission acknowledges that the law doesn't specify any limit to the income that this person might receive during the balance of days within that two-week period.<sup>11</sup>

[26] As a result, the Commission argues that sections 153.9(1) and 153.9(4) have to be read together and that Parliament intended for them to work in complement to describe the eligibility criteria for claimants who worked while receiving the EI ERB.

[27] Parliament added section 153.9(4) to the EI Act after sections 153.9(1) to 153.9(3) were enacted.<sup>12</sup> The Commission says that section 153.9(4) was designed with a dual purpose:

- offering flexibility in EI ERB eligibility for those earning nominal income
- setting a cap on income beyond which a person would no longer be eligible for the EI ERB

[28] The relevant question is whether the second purpose can be read into section 153.9(4) of the EI Act.

– **The Appeal Division has already interpreted the relevant provisions**

[29] Two days after the General Division decision in this case, the Appeal Division made a decision interpreting the relevant provisions in *Canada Employment Insurance Commission v JE*.<sup>13</sup>

[30] The General Division answered “yes” to the relevant question, while the Appeal Division came to the opposite conclusion. But the General Division provided no reasons

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<sup>11</sup> See paragraph 14 of George Rae's affidavit.

<sup>12</sup> See *Interim Order Amending the Employment Insurance Act (Employment Insurance Emergency Response Benefit)*: SOR/2020-61; and *Interim Order No. 2 Amending the Employment Insurance Act (Employment Insurance Emergency Response Benefit)*: SOR/2020-88.

<sup>13</sup> See *Canada Employment Insurance Commission v JE*, 2022 SST 201.

for its interpretation. The Appeal Division, on the other hand, thoroughly assessed the words, context, and purpose of the relevant provisions, and the EI Act as a whole.

[31] I try to follow previous Appeal Division decisions. But I can depart from a previous decision when there are good reasons for doing so.<sup>14</sup>

[32] In the following paragraphs, I consider the Commission's arguments that I have to depart from *JE*.

– ***JE* is persuasive, and I agree with the reasons for the decision**

[33] The Commission says that I have to depart from *JE* because the Appeal Division didn't:

- sufficiently weigh the evidence about Parliament's intent
- discuss the entire wording of section 153.9(4)
- recognize the dual purpose of section 153.9(4)

[34] I reject the Commission's arguments. On the contrary, *JE* is persuasive, and I adopt its interpretation of the relevant provisions in this decision.

[35] To begin with, I find that the words of section 153.9(4) are clear and precise. It has only one purpose. It considers that some people are eligible for the EI ERB even if they don't meet the stricter criteria in section 153.9(1).

[36] There is no way to read section 153.9(4) of the EI Act as having a second purpose of making a person ineligible for the EI ERB if their income over four weeks is above \$1,000.

[37] When the words of a provision are clear, their ordinary meaning is given considerable weight in the interpretive exercise.<sup>15</sup>

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<sup>14</sup> See *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paragraphs 129 to 132.

<sup>15</sup> See *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paragraph 120.

[38] The Commission's arguments rely heavily on Parliament's intent, something the Appeal Division didn't have full knowledge of when it decided *JE*.

[39] But the Commission hasn't convinced me that Parliament intended to set, through section 153.9(4), a cap beyond which a person would no longer be eligible for the EI ERB.

[40] For example, the statements from the Prime Minister and Ministers Qualtrough and Hussen that the Commission relies on often contain ambiguities. Because of this, they lend little support to George Rae's statements about Parliament's intent.

[41] I especially note that these statements were made during a conversation on the best way to expand or relax the eligibility criteria for the EI ERB. Parliament wanted to get this benefit into the hands of as many people as possible.<sup>16</sup> Specifically, Parliament committed to creating a threshold under which low-income earners could continue to earn income and access the EI ERB.

[42] In addition, the discussions in the House of Commons show that Parliament had other goals, namely to design a benefit that would be quick and easy to access and that would keep recipients connected to the workforce.<sup>17</sup>

[43] But the Commission's interpretation is inconsistent with these goals. For example, it could lead to many overpayments, since a person could claim benefits every two weeks, but it would not be possible to confirm their eligibility for those benefits until the end of the four weeks. Moreover, the Commission's interpretation would make it possible for someone to manipulate their eligibility for the EI ERB based on the weeks for which they want to be paid.

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<sup>16</sup> See, for example, Minister Qualtrough's remarks in the House of Commons, 43rd Parliament, 1st Session, Edited Hansard No. 33, April 11, 2020, from 1355 to 1405. Even the document I wasn't able to consult is entitled "Prime Minister announces expanded access to Canada Emergency Response Benefit and support for essential workers."

<sup>17</sup> See, for example, the Prime Minister's remarks in the House of Commons, 43rd Parliament, 1st Session, Edited Hansard No. 34, April 20, 2020, from 1630 to and [sic] 1800.



[44] Overall, the statements that the Commission relies on show Parliament's intent to make the EI ERB available to more people. They don't suggest to me that Parliament also intended to subject potential recipients to a new, meaningful limit.

[45] I find that the Commission's argument is based on an error of logic. Even if Parliament were to create an exception that a person who earns less than a certain amount would become eligible for the EI ERB, this doesn't mean that a person would no longer be eligible for the benefit if they were to earn more than that amount.

[46] I also reject the Commission's argument that the Appeal Division's interpretation in *JE* didn't sufficiently take into account the words "over a period of four weeks that succeed each other in chronological order but not necessarily consecutively and in respect of which the employment insurance emergency response benefit is paid."

[47] These words shed little light on how sections 153.9(1) and 153.9(4) interact. Additionally, the Appeal Division didn't need to apply them to the specific case it was deciding.

[48] So, I find that the General Division made an error of law when it found that earning more than \$1,000 over a period of four weeks during which the EI ERB is paid necessarily makes a person ineligible for this benefit.

[49] If there is a gap in the EI Act because it doesn't say what happens when a person earns more than \$1,000 over four weeks, it is up to Parliament to address it. I am not convinced that this gap is inconsistent with Parliament's intentions. Also, I can't read into section 153.9(4) a second purpose that isn't supported by the ordinary meaning of the words Parliament chose to use.

### **I will give the decision the General Division should have given**

[50] At the hearing before me, the parties agreed that I should give the decision the General Division should have given.<sup>18</sup>

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<sup>18</sup> Sections 59(1) and 64(1) of the DESD Act give me the power to fix the General Division's errors in this way. Also, see *Nelson v Canada (Attorney General)*, 2019 FCA 222 at paragraphs 16 to 18.

[51] I agree. The facts of the case aren't in dispute. In addition, the Claimant wasn't prevented from presenting his case before the General Division in any way.

[52] This means that I can decide whether the Claimant was eligible for the EI ERB and for what periods.

– **The Claimant is eligible for the EI ERB from April 19, 2020**

[53] In his notice of appeal, the Claimant mentions that he had no income after April 23, 2020, and that he must be eligible for the EI ERB after that date at the latest.

[54] I begin my analysis by looking at the following claims for benefits that are under appeal:<sup>19</sup>

- On May 1, 2020, the Claimant made a claim for the period from April 19 to May 2, 2020.<sup>20</sup>
- On May 15, 2020, he made a claim for the period from May 3 to 16, 2020.<sup>21</sup>

[55] The Claimant received income during only one of those four weeks, specifically \$430 during the week of April 19 to 25, 2020.

[56] This means that the Claimant met the income loss requirement during both periods. In other words, he had no income for at least seven consecutive days in both two-week periods for which he claimed benefits.

[57] The Claimant was able to establish his eligibility for benefits under section 153.9(1) of the EI Act. Section 153.9(4) doesn't apply to his situation. He doesn't need to rely on this exception to be eligible for the EI ERB, and this provision can't take away his eligibility for this benefit either.

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<sup>19</sup> Although the Claimant made previous claims, he no longer argues that he is eligible for benefits for those periods.

<sup>20</sup> The claim starts at GD3-35 in the appeal record.

<sup>21</sup> The claim starts at GD3-40 in the appeal record.

## **Conclusion**

[58] I am allowing the Claimant's appeal. The General Division made an error of law by misinterpreting the EI ERB eligibility provisions in the law.

[59] This error allows me to give the decision the General Division should have given. I find that the Claimant is eligible for the EI ERB for both periods mentioned earlier, that is, from April 19 to May 16, 2020.

Jude Samson  
Member, Appeal Division