



Citation: *PP v Canada Employment Insurance Commission*, 2022 SST 1615

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

Decision

Appellant: P. P.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (470133) dated June 27, 2022 (issued by Service Canada)

Tribunal member: Gary Conrad

Type of hearing: Teleconference

Hearing date: October 13, 2022

Hearing participant: Appellant

Decision date: October 26, 2022

File number: GE-22-2467

Decision

[1] The appeal is dismissed with modification. The Claimant cannot have regular Employment Insurance (EI) benefits instead of the EI Emergency Response Benefit (ERB) and she must repay all the ERB she received that she was not eligible for, but she is eligible for one more week of ERB than she was originally paid for.

Overview

[2] Due to the COVID-19 pandemic, the Government amended the *Employment Insurance Act* to create a new benefit, the ERB. The ERB is effective March 15, 2020.

[3] Generally, claimants who could have had a benefit period established for regular EI benefits between March 15, 2020, and September 26, 2020, got ERB instead.

[4] The Claimant applied for benefits on March 22, 2020. The Claimant was paid 12 weeks of ERB benefits. She was also advanced \$2,000 worth of ERB payments.

[5] The Commission says that normally, in the course of paying out ERB, they would withhold four weeks of ERB down the line, which is equal to \$2,000, in order to balance out the advance. However, in the Claimant's case she went back to work before they could do that, so they say she has a \$2,000 overpayment, as she needs to repay the advance because it represents weeks of benefits to which she is not entitled.

[6] The Claimant argues that she did not want the ERB as she qualified for EI. The Claimant says that the \$2,000 was given to her and there is no proof that when it was announced by the government anyone said it would have to be paid back.

[7] The Claimant says that when she looks at the Canada Revenue Agency (CRA) website, it says she does not have to repay the \$2,000 advance.

Matter I have to consider first

[8] At the hearing I asked the Claimant to clarify when she starting working again and her earnings. She said that she did not have that information directly in front of her. I gave her time after the hearing to send in this information to me, which she did.

[9] I considered this information¹ as it is directly relevant to the issue of whether the Claimant is eligible for the \$2,000 ERB advance payment.

Issues

[10] Can the Claimant be paid regular EI benefits instead of ERB?

[11] Does the Claimant have to repay the \$2,000 overpayment?

Analysis

[12] Before I begin my analysis of the core issues under appeal, I want to provide a little clarity on exactly what benefits I am looking at.

[13] In the information provided by the Commission, two different acronyms are used throughout, ERB and CERB. The Claimant also speaks about the CERB in her documentation.

[14] CERB refers to the Canada Emergency Response Benefit, this is the general name for the benefit created by the Government of Canada in response to the COVID-19 pandemic and its effect on the economy.

[15] There were two ways to apply for the CERB. You could apply through the Canada Revenue Agency (CRA), or you could apply through Employment Insurance.

[16] If a person applied through the CRA, then the name of the benefit they received was CERB.

[17] The benefit that was provided if a person applied through Employment Insurance is called ERB, the Emergency Response Benefit.²

[18] As the Claimant applied through Employment Insurance, the benefit she received is called the ERB. This means that information the Claimant found on the CERB

¹ See GD07 and Appellant Correspondence – Post Hearing (2)

² See the title of Part VIII.4 of the *Employment Insurance Act* <https://laws-lois.justice.gc.ca/eng/acts/E-5.6/page-23.html#h-1242424>

administered through the CRA may not be applicable to the ERB, as it is the *Employment Insurance Act* that determines whether the Claimant is eligible for the \$2,000 advance payment.

Can the Claimant be paid regular EI benefits instead of ERB?

[19] No, the Claimant cannot be paid regular benefits instead of the ERB.

[20] The Claimant says that she did not want the ERB, as she qualified for EI.³

[21] I find, that while the Claimant may have wanted regular EI, and may have even qualified for it at the time she applied, she had no choice on whether to receive EI or ERB benefits.

[22] The Claimant applied on March 22, 2020, and the law⁴ states that for the period beginning on March 15, 2020, to September 26, 2020, no benefit period is to be established with respect to regular benefits. I find there is no option in the law for the Claimant to decline ERB and get regular EI benefits instead, or to opt-out of the ERB.

[23] While it was an arbitrary decision of the Government to force everyone on to ERB, whether they wanted it or not, I cannot rewrite the legislation or interpret it in a manner contrary to its plain meaning,⁵ it is the role of Parliament to amend the legislation.

Does the Claimant have to repay the \$2,000 advance?

[24] The Claimant does not have to repay the entire advance, only \$1,500, as that represents the three weeks of ERB she received to which she is not eligible.

[25] The Commission submits they advanced the Claimant \$2,000 worth of ERB payments and normally they would recover this advance by withholding four weeks of

³ Appellant Correspondence – Post Hearing (2)-2

⁴ Subsection 153.8(5) of the *Employment Insurance Act* says that no benefit period is to be established for any benefits referred to in paragraph 153.5(3)(a) of the *Employment Insurance Act*, and paragraph 153.5(3)(a) includes regular benefits

⁵ *Canada (Attorney General) v Knee*, 2011 FCA 301

ERB over the course of the claim, but the Claimant went back to work before they could do this.⁶

[26] The Commission submits the Claimant was paid 12 weeks of ERB from March 22, 2020, to June 20, 2020, and these were the only weeks of ERB she was eligible for,⁷ so she must repay the \$2,000 advance.

[27] The Claimant says that the \$2,000 payment was announced by the Government of Canada as help for all employees affected by COVID and at the time it was announced there was nothing said about it having to be repaid.

[28] I can understand there being some confusion around being asked to repay the \$2,000 advance, since I accept that the Claimant was never told anything about having to repay it at the time it was issued, so I will try to provide a little clarity on the situation.

[29] In a claim for ERB a claimant is able to collect up to a maximum amount of 28 weeks.⁸

[30] The law allows the Commission to pay ERB in advance of the usual time for paying it,⁹ which is what the Commission says they did, as they paid the Claimant four weeks of ERB (\$2,000), which represents the ERB the Claimant would have theoretically gotten on weeks 13 and 14 and 18 and 19 if she had been able to claim all 28 weeks of ERB.

[31] In other words the \$2,000 advance is not a special type of payment separate from ERB, it is simply the early payment of weeks 13, 14, 18 and 19, of ERB. Eligibility for the \$2,000 advance is no different from eligibility for any other weeks of ERB.

⁶ GD04-4

⁷ GD04-4

⁸ Section 153.11 of the *Employment Insurance Act*

⁹ Section 153.7(1.1) of the *Employment Insurance Act*

[32] To balance out the fact that four weeks of ERB were paid to the Claimant early, the Commission says that they would have not paid four weeks of ERB as the Claimant's claim went on.

[33] So, if, hypothetically, the Claimant had kept claiming ERB, and not been able to return to work, when weeks 13 and 14 and 18 and 19 came around on her claim, she would not have been paid ERB on those weeks, as they had technically already been paid to her in advance, when she got the \$2,000 advance payment on April 6, 2020.

[34] The Claimant says that she wants proof that the Government said the \$2,000 would have to be repaid.

[35] I would direct the Claimant to the *Employment Insurance Act* as the law says that if a claimant receives money to which they were not eligible, they must return the amount they received that they were not eligible for.¹⁰

[36] However, at the time the \$2,000 advance was paid to the Claimant the Commission could not have told her whether they would ask her to pay back some or all of it, as it was not possible for the Commission to know at the time the advance was paid, when the Claimant would return to work and no longer be eligible for ERB.

[37] It was only at a later date, when the Commission reviewed the Claimant's file, that they determined she was not eligible for all the weeks of benefits she had been paid, and asked for those weeks of benefits back; the law allows the Commission up to 36 months to review a claim for benefits.¹¹

[38] So, what I am determining, is whether the Claimant is eligible for the \$2,000 ERB advance payment, in other words, is she eligible for an extra four weeks of ERB beyond what she was already paid, as that is what the \$2,000 advance represents.

¹⁰ Section 153.1301 of the *Employment Insurance Act* <https://laws-lois.justice.gc.ca/eng/acts/E-5.6/page-24.html#h-1257875>

¹¹ Section 52 of the *Employment Insurance Act*

[39] In order to get ERB you must first be a “claimant”. One type of “claimant” is someone who ceases working for reasons related to COVID-19.¹²

[40] I find the Claimant meets the definition of “claimant” in relation to the ERB as she says it was due to provincial COVID-19 lockdowns that she was laid-off from her job. I note the Commission also agrees the Claimant is eligible for the ERB in a general sense.¹³

[41] The Claimant must also show she is eligible for the ERB by:

- residing in Canada,
- being at least 15 years of age,
- have insurable earnings of at least \$5,000 in 2019 or in the 52 weeks preceding the day on which she makes the claim for ERB,
- cease working for at least seven consecutive days within the two-week period in respect of which she claimed the benefit, and
- have no income from employment in respect of the consecutive days on which she ceased working.

[42] I find the first three points of eligibility are not in dispute, as I see no evidence the Claimant does not meet them, nor has the Commission argued she does not meet them. I find the true areas of dispute are the last two eligibility points.

[43] The Commission says they paid the Claimant ERB for the weeks of:

[44] March 22, 2020, to May 30, 2020 and June 7 to June 20, 2020; a total of 12 weeks of ERB. They did not pay her ERB for the week of May 31, 2020, to June 6,

¹² Section 153.5(2)(a) of the *Employment Insurance Act*

¹³ GD04-1

2020, due to fact she was working and had earnings, or the week of June 21 to June 27, 2020, as she returned to work full-time starting June 21, 2020.

[45] The Commission says the 12 weeks of ERB the Claimant was paid are all the weeks the Claimant is eligible for and if she were allowed to keep the \$2,000 advance, which represents four weeks of ERB, it would be like she was paid 16 weeks of ERB, four more weeks than she is eligible for.

[46] I find I disagree with the submissions of the Commission.

[47] For the week of May 31 to June 6, 2020, the Claimant does not have seven consecutive days with no work or income from work within that two-week claim period, as she reported work in the week of May 24 to May 30 and May 31 to June 6, 2020;¹⁴ however, I find the Claimant can still be paid benefits for the week of May 31 to June 6, 2020, as the alternative path to eligibility allows her to qualify for that week.

[48] While not bound by it, I find the reasoning in the case of *Canada Employment Insurance Commission v JE*, 2022 SST 201, persuasive, that there is an alternative path to eligibility for the ERB, of not having more than \$1,000 in earnings over a period of four weeks that succeed each other in chronological order but not necessarily consecutively.¹⁵

[49] If I take the week of May 31 to June 6 2020, and insert it into a four week block starting with the week of May 10 to May 16, 2020, then the Claimant has less than \$1,000 of earnings in that four week block.

[50] My choice to put the week of May 31 to June 6 2020, at the end of a four week block is an arbitrary choice. The law does not specify how the four weeks blocks are to be constructed, other than saying the weeks in the block must succeed each other chronologically. It does not say that the four week blocks must be counted from the very start of the benefit period, or say anything about where one must start counting in relation to creating a four week block. So, since my four week block of May 10 to June

¹⁴ GD06-28 to GD06-30

¹⁵ Section 153.9(4) of the *Employment Insurance Act*

6, 2020, has four weeks, which succeed each other chronologically, I find my choice of how to construct a four week block follows the law.

[51] Since the Claimant reported no earnings for the weeks of May 10 to 16, 2020 and May 17 to 23, 2020, and earnings of \$245 for the week of May 24 to 30, 2020, and earnings of \$419 for the week of May 31 to June 6, 2020,¹⁶ this represents four weeks with earnings of less than \$1,000, so that means the Claimant is eligible to be paid ERB for the week of May 31 to June 6, 2020.¹⁷

[52] For the week of June 21 to June 27, 2020, as she returned to work full-time starting June 21, 2020,¹⁸ from that time onward she would no longer have at least seven consecutive days with no work or income from work, within a two-week claim period. This means she is not eligible for the week of June 21 to June 27, 2020, so she cannot use that to help offset her \$2,000 advance overpayment.

[53] Further, the alternative path to eligibility does not help the Claimant either, as including the week of June 21 to June 27, 2020, in a four week block, of which it must be the end week of that four week block,¹⁹ results in the Claimant having over \$1,000 of earnings in that four week block.

[54] So, as the Claimant was paid 12 weeks of ERB, and I have found she was eligible for 13 weeks, she need only repay \$1,500 of the advance, as that represents the three weeks of ERB for which she is not eligible, and the law says she must repay any benefits she received that she was not eligible for.²⁰

¹⁶ GD06-22 to GD06-33. Also, even if I use the amounts reported by the Claimant in the post-hearing documents (GD07-2) that still adds up to less than \$1,000 in that four week period.

¹⁷ Section 153.9(4) of the *Employment Insurance Act* states that if a claimant has 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, the claimant is deemed to meet the eligibility requirement of having no work or income from work, for seven consecutive days within the two-week period they have claimed ERB

¹⁸ GD06-42

¹⁹ It must be the end of the four week block as after the week of June 21 to June 27, 2020, the Claimant made no further claims for ERB and I cannot consider a period of time where she did not make a claim. Section 153.8(2) says that no claim can be made for ERB after December 2, 2020, so I cannot be looking at whether she can make a claim for ERB currently, as it is well past December 2, 2020.

²⁰ Section 153.1301 of the *Employment Insurance Act*

[55] While I am sure the Claimant would like to have to repay nothing, I cannot erase or waive the overpayment,²¹ as only the Commission has the power to do that, so the Claimant would need to ask them to remove the overpayment.

Conclusion

[56] The appeal is dismissed with modification. The Claimant cannot have regular EI benefits in place of the ERB and she must repay the ERB she received that she is not eligible for; however, since she is eligible for one more week of ERB than she originally received, she need only repay \$1,500.

Gary Conrad

Member, General Division – Employment Insurance Section

²¹ *Canada (Attorney General) v Villeneuve*, 2005 FCA 440. Para 16