



Citation: *HG v Canada Employment Insurance Commission*, 2023 SST 355

## Social Security Tribunal of Canada Appeal Division

# Decision

**Appellant:** Canada Employment Insurance Commission  
**Representative:** Suzette Bernard

**Respondent:** H. G.

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**Decision under appeal:** General Division decision dated July 7, 2022  
(GE-22-1322)

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**Tribunal member:** Melanie Petrunia

**Type of hearing:** Teleconference

**Hearing date:** November 10, 2022

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

**Decision date:** March 28, 2023

**File number:** AD-22-477

## Decision

[1] The appeal is allowed in part. The General Division based its decision on an important factual error. I have made the decision that the General Division should have made. The Claimant was overpaid benefits in the amount of \$1,500.

## Overview

[2] The Respondent, H. G. (Claimant) applied for employment insurance (EI) regular benefits on April 28, 2020, and filed a renewal claim on July 25, 2020. Because of amendments to the *Employment Insurance Act* (EI Act), the Claimant received the Emergency Relief Benefit (ERB).

[3] The Claimant received an advance of \$2,000 of ERB, equivalent to four weeks of benefits. The Commission intended to withhold four weeks of benefits later in his benefit period in order to recover the advance.

[4] The Claimant did not collect the ERB for long enough for the amount to be recovered, which the Commission said resulted in an overpayment of \$2,000. The Commission also paid the Claimant benefits for a week for which it later decided he was not eligible. This resulted in an additional \$500 overpayment.

[5] The Claimant disagreed that he had an overpayment and appealed this decision to the Tribunal's General Division. The General Division dismissed the appeal with modification. It decided that the Claimant had to repay \$1,000 because he was entitled to benefits for two weeks that the Commission had determined he was ineligible.

[6] The Commission is now appealing the General Division decision to the Appeal Division. It argues that the General Division made errors of law and based its decision on an important factual error. The Commission says that the General Division ignored that the total overpayment at issue was \$2,500. When it found that the Claimant was entitled to two additional weeks of benefits, the overpayment should have been reduced to \$1,500.

[7] The Commission also argues that the General Division made an error of law when it decided that the Claimant was entitled to the two additional weeks of ERB. It says that the General Division erred in its interpretation of the legislation.

[8] The General Division based its decision on an error of fact when it decided that the Claimant only had to repay \$1,000. The General Division ignored that the Commission had paid the Claimant benefits for one of the weeks that it later decided he was not entitled to. This resulted in a \$500 overpayment that was in addition to the \$2000 advance overpayment.

[9] The General Division did not err in law in its interpretation of the EI Act when it found that the Claimant was entitled to the additional two weeks of benefits. I have made the decision that the General Division should have made and find that the Claimant is liable for an overpayment in the amount of \$1500.

## Issues

[10] The issues in this appeal are:

- a) Did the General Division base its decision on an important mistake about the facts concerning the total amount of the overpayment?
- b) Did the General Division make an error of law by misinterpreting the ERB eligibility provisions in the law?
- c) If so, what is the best way to fix the General Division's error?

## Analysis

[11] I can intervene in this case only if the General Division made a relevant error. So, I have to consider whether the General Division:<sup>1</sup>

- failed to provide a fair process;

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<sup>1</sup> The relevant errors, formally known as "grounds of appeal," are listed under section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).

- failed to decide an issue that it should have decided, or decided an issue that it should not have decided;
- misinterpreted or misapplied the law; or
- based its decision on an important mistake about the facts of the case.

### **The General Division based its decision on a factual error**

[12] The Commission argues that the General Division made an important error of fact. It says that the General Division ignored that the Claimant was paid a \$2,000 advance, which was not recovered, and was also paid \$500 for the week of August 9 to 15, 2020. The Commission says that the Claimant was not eligible for that week which resulted in an additional overpayment of \$500.

[13] The Commission argues that the General Division failed to consider that the Claimant received a total of \$2,500 in overpayments. I agree with the Commission.

[14] In its decision, the General Division agreed that the Claimant received an advance payment of \$2,000 for four weeks of ERB and that the Commission did not collect any weeks of benefits to offset this amount.<sup>2</sup> It then considered whether the Claimant has to repay the entire \$2,000 advance received.

[15] The General Division accepted that the Commission did not pay the Claimant ERB for the week of May 24 to May 30, 2020, because he reported returning to work.<sup>3</sup> The General Division also acknowledged that the Commission paid the Claimant ERB for the week of August 9 to 15, 2020. The Claimant later reported working that week and an overpayment of \$500 was established.<sup>4</sup>

[16] The General Division found that the Claimant was entitled to ERB for the weeks of May 24 to May 30, 2020 and August 9 to 15, 2020. It based this finding on its

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<sup>2</sup> General Division decision at paras 20 and 32.

<sup>3</sup> General Division decision at para 24.

<sup>4</sup> General Division decision at para 26.

interpretation of the legislation and followed the reasoning in a decision of the Appeal Division.<sup>5</sup>

[17] The General Division decided that the Claimant was entitled to receive ERB payments for a total of 10 weeks. Because it found that the Claimant was entitled to ERB for two weeks more than the Commission had determined, it decided that the Claimant only has to repay \$1,000 of the \$2,000 advance payment.<sup>6</sup>

[18] The General Division based this decision on an important error of fact. The Claimant was not paid benefits for the week of May 24 to May 30, 2020. However, he was paid benefits for the week of August 9 to 15, 2020. When the Commission learned the Claimant had worked that week, an additional \$500 overpayment resulted. This overpayment was on top off the \$2,000 advance that the Claimant received.<sup>7</sup>

[19] In total, the Claimant received \$6,500 in ERB payments.<sup>8</sup> The Commission argued that he was only entitled to \$4,000 for 8 weeks of benefits. The General Division found that he was entitled to 10 weeks of ERB payments, which would be a total of \$5,000.

[20] In finding that the Claimant only had to repay \$1,000 of the advance payment, the General Division ignored that the Claimant was paid benefits for the week of August 9 to 15, 2020. The Commission's submissions to the General Division treat the \$500 overpayment for that week as separate from the \$2,000 overpayment resulting from the advance.<sup>9</sup>

[21] The Commission argued that the Claimant owes a total of \$2,500 in overpayments. The General Division found that the Claimant was entitled to two

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<sup>5</sup> General Division decision at paras 33 to 35.

<sup>6</sup> General Division decision at para 36.

<sup>7</sup> The chart in the General Division decision at para 30 shows that the Claimant received 9 weeks of payments, in addition to the 4-week advance, for a total of 13 weeks, or \$6,500.

<sup>8</sup> See GD3-16.

<sup>9</sup> See GD4-4.

additional weeks of benefits, totalling \$1,000 but effectively reduced the overpayment by \$1,500.

[22] The General Division based its decision on an important error of fact by failing to consider the overpayment from the \$2,000 advance as a separate amount from the \$500 overpayment for the week of August 9 to 15, 2020.

### **The General Division did not err in its interpretation of the legislation**

[23] The Commission argues that the General Division erred in its interpretation of the ERB provisions in the EI Act. It says that the General Division erred in law when it found that the Claimant qualified for ERB for the weeks of May 24 to May 30, 2020, and August 9 to August 15, 2020.

[24] The legislation says that the ERB is payable to a claimant who makes a claim under section 153.8 and who is eligible.<sup>10</sup> Section 153.8 provides that a claimant makes a claim for any two-week period starting on a Sunday and falling within the period of March 15, 2020 to October 3, 2020.

[25] According to section 153.8(7), on receiving a claim, the Commission shall decide whether the claimant is eligible for the benefit and whether it is payable to the claimant for the two-week period in respect of which they claimed. Eligibility is addressed in section 153.9.

[26] The Commission argues that the proper interpretation of section 153.9 requires that 153.9(1) and 153.9(4) be read together. It states that section 153.9(4) is an exception to the eligibility criteria in section 153.9(1).

[27] The words used in these sections are important so I will include the full text. Section 153.9(1) states:

Eligibility – A claimant is eligible for the employment insurance emergency response benefit

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<sup>10</sup> See section 153.7(1) of the *Employment Insurance Act* (EI Act).

- (a) if they
  - (i) reside in Canada,
  - (ii) are at least 15 years of age,
  - (iii) have insurable earnings of at least \$5,000 in 2019 or in the 52 weeks preceding the day on which they make the claim under section 153.8,
  - (iv) whether employed or self-employed, cease working for at least seven consecutive days within the two-week period in respect of which they claimed the benefit, and
  - (v) have no income from employment or self-employment in respect of the consecutive days on which they cease working.

[28] Sections 153.9(2) and (2.1) address certain circumstances that result in ineligibility and are not relevant to this appeal. Section 153.9(3) excludes claimants who leave their employment voluntarily.

[29] Section 153.9(4) provides:

**Exception – employment, self-employment and income** – 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.

[30] The Commission argues that this section was intended to have a dual purpose. It is meant to offer flexibility to claimants so that they can earn up to \$1,000 during a four-week period in which they received the ERB and also limit the amount of income that can be earned while remaining entitled to benefits.

[31] These provisions were considered and interpreted in a previous Appeal Division decision, *Canada Employment Insurance Commission v. JE (JE)*.<sup>11</sup> The General

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<sup>11</sup> See *Canada Employment Insurance Commission v JE*, 2022 SST 201.

Division did not engage in an exercise of statutory interpretation when it considered whether the Claimant was entitled to benefits for the additional weeks. It stated that it was following the reasoning in *JE*.

[32] Based on the interpretation of the legislation in *JE*, the General Division found that a claimant is eligible for the ERB if they have no income from employment for at least seven consecutive days during the two-week period for which they claimed the benefit.<sup>12</sup>

[33] The two-week periods for which the Claimant claimed ERB were May 17 to May 30, 2020 and August 2 to August 15, 2020. In both of those two-week periods, the Claimant had no income from employment for at least seven consecutive days. The General Division found that this meant he was eligible for ERB for both of the weeks within the period.<sup>13</sup>

[34] The Commission argues that I should not follow the reasoning *JE* because the Appeal Division did not have certain evidence of legislative intent before it and did not consider section 153.9 in its entire context and in its grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intent of Parliament.

[35] The Commission argues that the Appeal Division in *JE* did not give sufficient weight to statements showing that Parliament intended section 153.9(4) to limit a claimant's eligibility for the ERB.

[36] The Commission says that these statements support a conclusion that the intention was to allow claimants receiving the ERB to earn up to \$1,000 and still remain eligible. It stands to reason, the Commission argues, that this would mean claimants who earned more than \$1,000 would cease being eligible for the ERB for the corresponding four-week period.

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<sup>12</sup> General Division decision at para 34.

<sup>13</sup> General Division decision at para 35.



[37] The Commission also argues that the *JE* decision does not address the full text of section 153.9(4). Specifically, it says that the Appeal Division did not deal with the interpretation of the following phrase found in that section:

(...) 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 (...)

[38] The Appeal Division has addressed these criticisms of the *JE* decision in *Canada Employment Insurance Commission v. RG (RG)*. In that decision, it declined the Commission's urging to depart from the reasoning in *JE*. Similarly, I find the reasoning in *JE* persuasive, as well as the reasoning in *RG*, and I adopt the interpretation of section 153.9 set out in those decisions.

[39] I agree with the finding in *JE* and *RG* that the words of sections 153.9(1) and 153.9(4) are clear and precise. Given that clarity, considerable weight is given to the ordinary meaning of the words.<sup>14</sup>

[40] In *RG*, the Commission relied on the same evidence of legislative intent as they have in this appeal.<sup>15</sup> I agree with the finding in *RG*, that this evidence does not clearly establish an intent to render claimants who meet the eligibility criteria in 153.9(1), in eligible if they earn income over \$1,000 over a four-week period.<sup>16</sup>

[41] The Commission says that the *JE* decision misunderstands the four-week timeframe referenced in section 153.9(4) and didn't grapple with the words used in that subsection. It argues that the provision applied in four-week groups, starting from the first week claimed and paid and the counting three subsequent, chronological weeks. It says that when one four-week block ends, another begins.

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<sup>14</sup> See *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paragraph 120.

<sup>15</sup> In both this appeal and *RG*, the Commission provided hyperlinks in its submissions to House of Commons Debates (Hansard), the Auditor General of Canada's report on the Canada Emergency Response Benefit and announcements by the Prime Minister and Minister Qualtrough.

<sup>16</sup> See *RG* at paras 39 to 44.

[42] In this appeal, the Commission doesn't appear to have followed its own reasoning. The two-week periods that the Claimant applied for ERB are as follows:

Period	ERB paid	Claimant's earnings
April 19 to 25 April 26 to May 2	\$500 \$500	0 0
May 3 to 9 May 10 to 16	\$500 \$500	0 0
May 17 to 23 May 24 to 30	\$500 0	0 \$1,200
July 19 to 25 July 26 to Aug 1	\$500 \$500	0 0
Aug 2 to 8 Aug 9 to 15	\$500 \$500 (overpayment)	0 \$1,200
Aug 16 to 22 Aug 23 to 29	0 0	\$1,200 \$1,200

[43] The Commission has not suggested that the Claimant is ineligible for ERB for the weeks of May 17 to 23 and August 2 to 9, 2020, despite returning to work the following weeks and earning more than \$1,000 during those two-week periods.

[44] As the Commission notes, the language in section 153.9(4) states that the four weeks referenced are weeks "in respect of which the employment insurance emergency response benefit is paid."

[45] Yet, in its written submissions, the Commission argued that the period to which section 153.9(4) applies for the Claimant is the weeks from August 9 to 29, 2020.<sup>17</sup> It says that the Claimant earned \$2,400 during this period and so cannot be deemed to

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<sup>17</sup> AD1-26 at para 29.

meet the requirements of 153.9(1). As can be seen from the table above, no benefits were paid to the Claimant for the weeks of August 16 to 29, 2020.

[46] The Commission argues that the reasoning *JE* is flawed because it did not offer clear guidance as to how to calculate the four-week periods in section 153.9(4). However, I find that the Commission's position is also unclear as to how these provisions apply to render ineligible those claimants who otherwise meet the requirements in section 153.9(1).

[47] As the Appeal Division stated in *RG*, if there is a gap in the legislation, it is up to Parliament to address it. I cannot ignore the clear wording of the legislation in order to read in an exception to eligibility that is not supported by the language used by Parliament.

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

[48] At the hearing before me, both parties argued that, if the General Division made an error, then I should give the decision the General Division should have given.<sup>18</sup>

[49] I agree. I find that this is an appropriate case in which to substitute my own decision. The facts are not in dispute and the evidentiary record is sufficient to enable me to make a decision.

#### **– The Claimant was overpaid benefits in the amount of \$1,500**

[50] The Claimant is eligible for benefits for the weeks of May 24 to 30 and August 9 to 15, 2020 as determined by the General Division. This means that he was entitled to 10 weeks of benefits, or \$5,000. The Claimant was paid \$6,500, including the \$2,000 advance payment. The Claimant was overpaid benefits in the amount of \$1,500.

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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 paras 16 to 18.

## **Conclusion**

[51] The appeal is allowed in part. The General Division based its decision on an important factual error. I have given the decision that the General Division should have given. The Claimant is eligible for ERB for the weeks of May 24 to 30 and August 9 to 15, 2020. This means that he was overpaid benefits in the amount of \$1500.

Melanie Petrunia  
Member, Appeal Division