



Citation: *FL v Canada Employment Insurance Commission*, 2023 SST 494

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

## Decision

**Appellant:** F. L.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (524857) dated August 31, 2022 (issued by Service Canada)

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**Tribunal member:** Gary Conrad

**Type of hearing:** Videoconference

**Hearing date:** February 6, 2023

**Hearing participant:** Appellant

**Decision date:** February 7, 2023

**File number:** GE-22-3530

## Decision

[1] The appeal is dismissed. The Claimant cannot have regular Employment Insurance (EI) benefits instead of the EI Emergency Response Benefit (ERB) and he must repay all the ERB he received that he was not eligible for (\$2,000).

## Overview

[2] Due to the COVID-19 pandemic the Government amended the *Employment Insurance Act* to create a new benefit, the ERB. The ERB was made 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 April 13, 2020.<sup>1</sup> He collected 3 weeks of ERB<sup>2</sup> before returning to work. He was also advanced \$2,000 worth of ERB payments.<sup>3</sup>

[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 he did not collect ERB long enough for them to do that, so they say he has a \$2,000 overpayment, as he needs to repay the advance, because it represents weeks of ERB for which he is not eligible.

[6] The Claimant says he never applied for the ERB, he applied for EI benefits.

[7] The Claimant says that, in fact, all the money he has ever collected from EI he is being asked to pay back and this is not fair, since he has paid into EI, but is now being denied benefits.

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<sup>1</sup> See the electronic filing date of his application on GD03-14

<sup>2</sup> See the payment information on GD03-37

<sup>3</sup> See the payment information on GD03-19

## Issues

[8] The Claimant wanting regular EI benefits instead of ERB.

[9] The Claimant's eligibility for the \$2,000 advance.

## Analysis

[10] 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.

[11] In the information provided by the Commission, two different acronyms are used throughout, ERB and CERB.

[12] 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.

[13] There were two ways to apply for the CERB. A person could apply through the Canada Revenue Agency (CRA) or could apply through Employment Insurance.

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

[15] The benefit that was provided if a person applied through Employment Insurance is called ERB, the Emergency Response Benefit.<sup>4</sup>

[16] As the Claimant applied through Employment Insurance, the benefit he received is called the ERB.

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<sup>4</sup> 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>

## The Claimant wanting regular EI benefits instead of ERB

[17] The Claimant says that he never applied for ERB, he filed for regular EI benefits. Every deposit into his bank account says it is EI benefits, and he would never have applied for the ERB, as he assumed those benefits might have to be paid back.

[18] The Claimant says he is entitled to EI benefits because money is taken off every paycheque to pay for EI.

[19] The Commission says that there is no possibility for the Claimant to collect regular EI, as the law says he is deemed to have made a claim for the ERB.<sup>5</sup>

[20] I find I agree with the submission of the Commission.

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

[22] The Claimant completed an application for benefits on April 13, 2020.<sup>6</sup> The law<sup>7</sup> 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 EI 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] So, while it was an arbitrary decision (as in based on personal choice) of the Government to force everyone on ERB whether they wanted it or not, I cannot rewrite the legislation or interpret it in a manner contrary to its plain meaning,<sup>8</sup> it is the role of Parliament to amend the legislation.

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<sup>5</sup> GD04-3

<sup>6</sup> See the electronic filing date of his application on GD03-14

<sup>7</sup> 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

<sup>8</sup> *Canada (Attorney General) v Knee*, 2011 FCA 301

[24] This means that despite the fact the Claimant may not have wanted ERB, he had no choice but to receive the ERB.

### **The Claimant's eligibility for the \$2,000 advance**

[25] The Commission submits they paid the Claimant 3 weeks of ERB, and that is all the weeks of ERB he is eligible for.<sup>9</sup>

[26] The Commission submits that they advanced the Claimant \$2,000 worth of ERB payments (which is equal to 4 weeks of ERB) but the Claimant is not eligible for those 4 weeks of ERB, as he is only eligible for 3 weeks in total.<sup>10</sup>

[27] I find I agree with the submissions of the Commission. The Claimant is not eligible for the \$2,000 advance.

[28] The Claimant was paid 3 weeks of ERB<sup>11</sup> and given a \$2,000 advance that represents 4 weeks worth of ERB.<sup>12</sup> This means, if the Claimant gets to keep the advance, it would be like he was paid 7 weeks of ERB.

[29] So, to be eligible for the advance, in other words to keep the advance, he needs to be eligible for 7 weeks of ERB.

[30] Unfortunately, I find the Claimant is only eligible for 3 weeks of ERB.

[31] The Claimant filed ERB claims for the periods of April 12 to 25, 2020, and April 26 to May 9, 2020. He was paid for the period of April 12 to May 2, 2020. He was not paid for the week of May 3 to 9, 2020, as he reported he returned to work on May 1, 2020.

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<sup>9</sup> GD04-4

<sup>10</sup> GD04-4

<sup>11</sup> See the payment information on GD03-37

<sup>12</sup> See the payment information on GD03-19

[32] The fact the Claimant was not paid for the week of May 3 to 9, 2020, is relevant as, if he could be paid for it, that week could be used to offset a small part of his overpayment.

[33] Unfortunately, I find the Claimant is not eligible for the week of May 3 to 9, 2020, so, despite the fact he filed a claim for it, he cannot be paid that week.

[34] As the Claimant says he stopped working due to COVID, in order to be eligible for weeks of ERB, he needs to have, among other things, no work for at least seven consecutive days within the two-week period in which he claimed the benefit, and no income from employment for those seven or more days he was not working.<sup>13</sup>

[35] This means that since he went back to work on May 1, 2020,<sup>14</sup> even though he says he was only working 3 to 4 days a week, he would not have seven consecutive days without work or income from work, so he would not be eligible for the week of May 3 to 9, 2020.

[36] There is an alternative path to eligibility (making \$1,000 or less over a period of four weeks that succeed each other in chronological order but not necessarily consecutively and in respect of which the ERB is paid)<sup>15</sup> but this does not help the Claimant either, as he does not have four weeks in which he earned money and was paid the ERB.<sup>16</sup>

[37] This means the Claimant is only eligible for 3 weeks of ERB (from April 12 to May 2, 2020) and he was paid for those 3 weeks, so the \$2,000 ERB advance represents 4 weeks of ERB above and beyond the 3 weeks the Claimant is eligible for.

[38] I find the Claimant must repay the \$2,000 advance as the law says he must repay any ERB he got that he was not eligible for,<sup>17</sup> and The Federal Court of

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<sup>13</sup> Section 153.9(1)(a) of the *Employment Insurance Act*

<sup>14</sup> The Claimant testified that May 1, 2020 was an actual day of work.

<sup>15</sup> Section 153.9(4) of the *Employment Insurance Act*

<sup>16</sup> Also the Claimant was not paid for the week of May 3 to 9, 2020, so the alternative path to eligibility would not even apply to that week.

<sup>17</sup> Section 153.1301 of the *Employment Insurance Act* <https://laws-lois.justice.gc.ca/eng/acts/E-5.6/page-24.html#h-1257875>

Appeal has said that I cannot erase and overpayment.<sup>18</sup> If the Claimant wants his overpayment removed, he will have to specifically ask the Commission to do so.

## Summary

[39] So, in summary, I have found the Claimant is only eligible for 3 weeks of ERB.

[40] He was paid for all 3 weeks of ERB he was eligible for.

[41] This means the \$2,000 advance, which represents 4 additional weeks of ERB beyond the 3 weeks he was paid, are weeks of ERB he is not eligible for.

[42] The law says he must repay any weeks of ERB he got that he is not eligible for and despite my sympathy for the Claimant, as I have no doubts it will be difficult for him to repay \$2,000, I cannot erase the overpayment, as only the Commission can do that.<sup>19</sup>

## Conclusion

[43] The appeal is dismissed. The Claimant cannot have regular EI benefits in place of the ERB and he must repay the entire \$2,000 advance, as it represents weeks of ERB he is not eligible for.

Gary Conrad

Member, General Division – Employment Insurance Section

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<sup>18</sup> *Canada (Attorney General) v Villeneuve*, 2005 FCA 440. Para 16

<sup>19</sup> *Canada (Attorney General) v Villeneuve*, 2005 FCA 440. Para 16