



Citation: *Canada Employment Insurance Commission v HM*, 2023 SST 831

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: Canada Employment Insurance Commission
Representative: Jordan Fine

Respondent: H. M.

Decision under appeal: General Division decision dated December 21, 2023
(GE-22-3384)

Tribunal member: Shirley Netten

Type of hearing: Videoconference

Hearing date: March 28, 2023

Hearing participants: Appellant's representative
Respondent

Decision date: June 21, 2023

File number: AD-23-50

Decision

[1] I am allowing the appeal by the Canada Employment Insurance Commission (Commission). H. M. (the Claimant) was overpaid \$1,000 in Employment Insurance Emergency Response Benefits (EI-ERB).

[2] I issued an interim decision on April 21, 2023. To be complete, this final decision repeats the analysis in the interim decision and goes on to decide the remaining issue.

Overview

[3] There are two paths to eligibility for the EI-ERB:

- First path: having no income for at least seven days in a row within a two-week claim period¹
- Alternative path: having no more than \$1,000 in income over a period of four weeks²

[4] This appeal is about the details: Which two weeks should be considered in the first path? Which four weeks should be considered in the second path?

[5] In the interim decision, I explained that the two-week period for the first path is the two-week claim period for which entitlement is being considered.

[6] Service Canada³ decided that the Claimant was overpaid the EI-ERB by \$1,000. The General Division reduced this by \$500. The General Division said that the Claimant was eligible for an extra week of EI-ERB because he met the income requirement in the two-week claim period from April 19 to May 2, 2020. This was an error of fact, because April 19 to May 2, 2020 was not one of the Claimant's two-week claim periods. The Claimant could not get any more EI-ERB by following the first path.

¹ See section 153.9(1) of the *Employment Insurance Act*.

² See section 153.9(4) of the *Employment Insurance Act*.

³ Service Canada acts on behalf of the Canada Employment Insurance Commission.

[7] In this decision, I have concluded that the four-week period for the second path is the four weeks leading up to and including the two-week claim period for which eligibility is being determined.

[8] I considered whether the Claimant could benefit from the second path to eligibility for the weeks of April 26 and May 3, 2020. Since the Claimant earned more than \$1,000 between April 12 and May 9, 2020 (the four-week period leading up to and including the two-week claim period of April 26 to May 9, 2020), he could not get the EI-ERB under that path either.

[9] The Claimant was only entitled to \$3,000 in EI-ERB benefits, but he received \$4,000 in benefits. So, he was overpaid by \$1,000.

Issues

[10] The issues in this appeal are:

- a) Did the General Division err in fact or in law by describing April 19 to May 2, 2020 as a two-week claim period?
- b) If so, how should the error be fixed? Was the Claimant entitled to any additional weeks of EI-ERB?

The General Division made an error of fact about the two-week claim period

[11] One of the grounds of appeal to the Appeal Division is that the General Division based its decision on a fact that was contrary to the evidence.⁴ This is what happened here.

⁴ See section 58(1)(c) of the *Department of Employment and Social Development Act*.

[12] For the EI-ERB, a claimant makes a claim for two weeks at a time.⁵ The following chart shows the Claimant's earnings, EI-ERB initially paid, and EI-ERB accepted by Service Canada. The Claimant filed a claim for each of the two-week periods shown:⁶

WEEK (2020)	EARNINGS	EI-ERB PAID	EI-ERB ACCEPTED
Mar 15-21	\$0	\$0	\$500
Mar 22-28	\$0	\$0	\$500
Mar 29-Apr 4	\$0	\$500	\$500
Apr 5-11	\$0	\$500	\$500
Apr 12-18	\$0	\$500 + \$2,000 advance	\$500
Apr 19-25	\$0	\$500	\$500
Apr 26-May 2	\$634.62	\$0	\$0
May 3-9	\$606.85	\$0	\$0
TOTAL		\$4,000	\$3,000

[13] The General Division said that the Claimant should also get the EI-ERB for the week of April 26 to May 2, 2020, because he met the income requirement in the two-week claim period from April 19 to May 2, 2020. But, as can be seen above, April 19 to May 2, 2020 wasn't one of the Claimant's two-week claim periods. This was an error of fact.

Remedy : how to fix the General Division's error

[14] The evidence about the Claimant's EI-ERB claims is complete. The parties said, and I agree, that I can make the decision that the General Division should have made.⁷

[15] The Commission says that I should reinstate the Commission's reconsideration decision, concluding that the Claimant was overpaid \$1,000 in EI-ERB. The Claimant wants his overpayment reduced, but he does not take a position on how eligibility should be determined.

⁵ It says this at section 153.8(1) of the *Employment Insurance Act*.

⁶ Most of these reports were made contemporaneously. Service Canada allowed the Claimant to re-file reports at the reconsideration stage

⁷ I have the power to do this under section 59(1) of the *Department of Employment and Social Development Act*.

No more benefits under the first path to eligibility

[16] A claimant meets the income loss requirement for the EI-ERB if they have no income for at least seven days in a row during the “two-week period in respect of which they claimed the benefit.”⁸ The language is precise: it refers to a specific and fixed two-week claim period.

[17] The Claimant met the income loss requirement for the first three two-week claim periods (March 15 to March 28, March 29 to April 11, and April 12 to April 25, 2020). The Commission accepts the Claimant’s entitlement for these six weeks.

[18] The Claimant did not meet the income loss requirement for the final two-week claim period, from April 26 to May 9, 2020. This is because he had income during both weeks. I agree with the Commission’s representative that the Claimant can’t get the EI-ERB for either of these weeks under the first path to eligibility.

No more benefits under the alternative path to eligibility

[19] As an exception, a claimant will be deemed to have met the above income loss requirement if they earn no more than \$1,000 over four weeks. In other words, even if they had income in both weeks of a two-week claim period, they might still be eligible for the EI-ERB.

[20] I considered whether the Claimant in this appeal could benefit from the alternative path to eligibility, for the weeks of April 26 and/or May 3, 2020.

[21] The law says:

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

⁸ It says this at section 153.9(1) of the *Employment Insurance Act*. See also Appeal Division decisions *Canada Employment Insurance Commission v JE*, 2022 SST 201, *RG v Canada Employment Insurance Commission*, 2022 SST 1207, *SS v Canada Employment Insurance Commission*, 2022 SST 1459; *Canada Employment Insurance Commission v HG*, 2023 SST 355.

requirements of subparagraphs (1)(a)(iv) and (v), of paragraph (1)(b) or of subparagraph (1)(c)(iv), as the case may be.⁹

[emphasis added]

[22] As outlined in the interim decision, I agree with the Commission’s representative that I can only look at weeks for which the Claimant was paid the EI-ERB.¹⁰ Since the Claimant was issued 4 weeks of EI-ERB on April 13, 2020¹¹ (in addition to the weeks he had specifically claimed), and since there is no contemporaneous evidence of that payment being allocated for other weeks, I find it more likely than not that the Claimant did receive the EI-ERB for the weeks of April 26 and May 3, 2020.¹²

[23] So, the Claimant could get the EI-ERB for the week of April 26 and/or May 3 if he earned **no more than \$1,000 over a period of four weeks in chronological order, excluding any weeks that he didn’t get the EI-ERB**. Which four-week period(s) should I look at?

– **I considered three counting methods**¹³

[24] As proposed in my interim decision, I considered three possible methods of counting the four weeks:

1. Successive and distinct four-week blocks starting from the first week a claimant claimed the EI-ERB, skipping any weeks for which the EI-ERB isn’t paid. In this appeal, the blocks would be March 15 to April 11 and April 12 to May 9.
2. A four-week block looking backward from the week for which eligibility is being determined, skipping any weeks for which the EI-ERB isn’t paid. In this

⁹ Section 153.9(4) of the *Employment Insurance Act*.

¹⁰ This is what section 153.9(4) says. See also *Canada Employment Insurance Commission v PP*, 2023 SST 113.

¹¹ See the payment chart at GD3-14.

¹² I couldn’t find **any** evidence of this in Service Canada’s file. Service Canada’s submissions to the General Division (GD4-3) mentions a system of procedural disentitlements after the 12th week of benefits to offset the advance payment.

¹³ I have adopted the terminology “counting methods” used by the Commission, for clarity.

appeal, the four-week block for the week of April 26 would be April 5 to May 2, and the four-week block for the week of May 3 would be April 12 to May 9.

3. A four-week block looking backward from the two-week period for which eligibility is being determined, skipping any weeks for which the EI-ERB isn't paid. In this appeal, the four-week block for the two-week period April 26 to May 9 would be April 12 to May 9.

– **All three methods are consistent with the text of section 153.9(4)**

[25] In submissions supporting the first method, the Commission's representative argues that the second and third methods are inconsistent with section 153.9(4) because they count in reverse chronological order. I disagree.

[26] Section 153.9(4) requires the four weeks to "succeed each other in chronological order." As the Commission's representative says, the word "chronological" means "starting with the earliest and following the order in which they occurred".¹⁴ While this certainly requires a starting point, it does not prescribe a particular method of determining the starting point. Even though their starting points are different, the four-week blocks for each of the three methods contain a series of weeks that follow (succeed) each other in the order that those weeks occurred.

[27] The Commission's representative suggests that the language in section 153.9(4) supports the use of distinct four-week **periods succeeding the other**.¹⁵ But it is clearly the **weeks within** the four-week period that must succeed each other, and not the four-week periods themselves. Section 153.9(4) references **weeks**, not **periods**, that succeed each other.

[28] So, all three counting methods can offer "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." They are each

¹⁴ See AD5-3.

¹⁵ See AD5-3.

consistent with the text of the provision, even though each proposes a different starting point.

[29] As the Commission’s representative has pointed out, the EI-ERB provisions were drafted with urgency. This perhaps explains why the description of the four-week period in section 153.9(4) provides insufficient guidance. I’ll turn now to the context and purpose of the provision.

– **Context favours the third counting method**

[30] There are three contextual elements that favour using the **four weeks leading up to and including the two-week claim period for which eligibility is being determined**, skipping weeks for which the EI-ERB wasn’t paid.

[31] First, as the representative notes, the Commission “administered the EI ERB using two-week claim periods.”¹⁶ Under the law, the EI-ERB had to be claimed in 2-week periods, and the Commission had to decide whether the benefit was payable for the same 2-week periods.¹⁷ It follows that determination of eligibility under the section 153.9(4) exception would also be administered by looking at two-week claim periods.

[32] Second, section 153.9(4) does not say that a claimant earning no more than \$1,000 over four weeks is eligible for the EI-ERB for those weeks. Rather, section 153.9(4) **deems** that claimant to have met the requirement in section 153.9(1) of having no income for at least seven days in a row within **a two-week claim period**. In this way, a claimant’s EI-ERB eligibility is determined for a two-week (not a four-week) period. The deeming provision is tied to the specific two-week period for which eligibility is in question.¹⁸

[33] Third, section 153.9(4) establishes eligibility for the EI-ERB on a retrospective (backward-looking) basis. The provision covers weeks for which the EI-ERB was

¹⁶ See AD5-2.

¹⁷ See section 153.8(1) and (7) of the *Employment Insurance Act*.

¹⁸ We refer to eligibility under section 153.9(4) for simplicity, but the deeming provision effectively makes a claimant eligible under section 153.9(1): by operation of section 153.9(4) the claimant has been deemed to meet the income requirement in section 153.9(1), and that is why they are eligible.

already paid, and so it can only be used post-payment. Since section 153.9(4) is an exception, it need only be considered for those two-week periods when a claimant wasn't already eligible under section 153.9(1) (the first path). Establishing a set of four-week periods beginning from the first week of the claim is neither required nor logical.

– **Purpose of the EI-ERB and section 153.9(4)**

[34] I agree with the Commission's representative's summary of the purpose of the EI-ERB being to compensate people, temporarily, for a loss of income resulting from unemployment due to Covid-19.¹⁹ Within this broader purpose, section 153.9(4) provides an alternative path to eligibility for the EI-ERB.

[35] The Commission's representative says that the "backward-looking alternatives" are inconsistent with the purpose of the EI-ERB because they would allow for benefit payments after a return to full-time work, thereby acting as an income supplement. He says that the EI-ERB is "an income replacement, not an income supplement."²⁰

[36] I don't agree that the purpose of compensating people for a loss of income means that the EI-ERB is solely an income replacement and cannot also provide an income supplement. It is abundantly clear from section 153.9(4) that one purpose of the EI-ERB was precisely that: to supplement the income of people who earned no more than \$1,000 over a period of four weeks. Certainly for some claimants, this could include a period of full-time work. With all three counting methods, a lower-income earner who returned to full-time work in the last week or two of the four-week period could receive the EI-ERB. In other words, even the counting method favoured by the Commission permits both income replacement and income supplement through the EI-ERB.

– **Purpose favours the third counting method**

[37] I agree with the Commission's representative that compensating people for a loss of income is best done through a scheme that is not arbitrary. But I don't agree that

¹⁹ See AD5-3.

²⁰ See AD5-3.

counting distinct four-week periods from the start of the claim applies “fairly and not arbitrarily.”²¹ To the contrary, those distinct four-week periods bear no relationship to the weeks for which the section 153.9(4) exception is claimed. There is no reason to start from the first week of the claim. It is considerably **less arbitrary**, when looking at retrospective eligibility, to relate the four-week period to the weeks for which the exception is being claimed (as happens in the third counting method).

[38] Moreover, the use of distinct four-week blocks from the start of the claim would leave many claimants without the opportunity to benefit from the exception near the end of their claim. As the Commission’s representative acknowledged, these claimants would be left with only the first path to eligibility under section 153.9(1).

[39] For example, if the last of the distinct four-week blocks ended on September 19, 2020, a claimant earning only \$200 a week during the two-week claim period from September 20 to October 3, 2020 would not be entitled to the EI-ERB. Those two weeks would not fall within one of the distinct four-week periods. So, this claimant would receive no compensation at all for that two-week claim period — simply because the four weeks landed in the wrong place. And this would not be a rare occurrence: in all four of the cases submitted by the Commission, the four-week blocks did not match up with the end of the EI-ERB claim.²²

[40] The Commission also argues that their favoured approach is predictable. I disagree: the four-week periods can’t be predicted using **any** of the counting methods, because only weeks for which the EI-ERB was paid can be included (and that can only be known after the fact). A counting method that starts from the first week of benefits and a counting method based on the two-week period for which eligibility must be determined are both relatively simple to use for retrospective entitlement. As indicated

²¹ See AD5-4.

²² *TS v Canada Employment Insurance Commission*, GD-22-1109, dated December 8, 2022 (unpublished); *FB v Canada Employment Insurance Commission*, 2022 SST 238; *RC v Canada Employment Insurance Commission*, 2022 SST 607; *CC v Canada Employment Insurance Commission*, 2021 SST 675. In one case, the proposed solution was to include weeks after the end of the claim – but this wouldn’t work since section 153.9(4) excludes weeks for which the EI-ERB was not paid.

above, it is more important for the counting method to be rationally connected to the period for which the section 153.9(4) exception is claimed.

– **Summary of interpretation**

[41] The third counting method is most consistent with the text, context, and purpose of section 153.9(4). A claimant is retrospectively eligible for the EI-ERB under section 153.9(4) (as an alternative to section 153.9(1)) **if they earn no more than \$1,000 over the period of four weeks leading up to and including the two-week claim period for which eligibility is being determined, skipping any weeks for which the EI-ERB wasn't paid.**

– **This counting method doesn't help the Claimant in this case**

[42] In this appeal, the remaining question is whether the Claimant could benefit from the section 153.9(4) exception for the weeks of April 26 and May 3, 2020.

[43] The four-week period leading up to and including the two-week claim period of April 26 to May 9, 2020, and for which EI-ERB was paid, is from April 12 to May 9, 2020. The Claimant earned \$1,241.47 during this four-week period. Since this is more than \$1,000, he is not eligible for the EI-ERB under section 153.9(4).

Conclusion

[44] The Commission's appeal is allowed.

[45] The General Division made an error of fact about the Claimant's EI-ERB claim periods.

[46] The Claimant is not entitled to any additional EI-ERB under the first path to eligibility (section 153.9(1)) or under the alternative path to eligibility (section 153.9(4)).

[47] The Claimant received \$4,000 in EI-ERB but was entitled to only \$3,000 in EI-ERB (for the 6 weeks from March 15 to April 25, 2020). He was overpaid by \$1,000.

Shirley Netten
Member, Appeal Division