



Citation: *HM v Canada Employment Insurance Commission*, 2022 SST 1781

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

Decision

Appellant: H. M.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (447524) dated August 31, 2022 (issued by Service Canada)

Tribunal member: Gary Conrad

Type of hearing: Teleconference

Hearing date: December 19, 2022

Hearing participant: N/A

Decision date: December 21, 2022

File number: GE-22-3384

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 he must repay all the ERB he received that he was not eligible for, but he is eligible for one more week of ERB than he was originally paid.

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 April 1, 2020. The Claimant was paid four weeks of ERB benefits. He 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 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 Commission says that they did review the Claimant's eligibility and found they could pay him two more weeks of ERB than he received, which they applied to the overpayment, so they say he only has to repay \$1,000.

[7] The Claimant argues that he never applied for the ERB; and since he did not ask for the \$2,000 advance, the Commission should not have advanced him the money.¹

Matter I have to consider first

[8] The Claimant did not attend the scheduled hearing.

¹ GD02-4

[9] Later, he sent an email stating that he was traveling and had not realized he was in a different time zone which is why he missed the hearing; he asked for the hearing to be rescheduled.

[10] I am denying his request for the following reasons:

[11] The Claimant was aware he had a hearing and was sent the date and time of the hearing in the notice of hearing and was even given a reminder call about his hearing on December 12, 2022.

[12] The notice of hearing provides the time of the hearing to the Claimant in the time zone for the address that he provides to the Tribunal.

[13] It is the responsibility of the Claimant to take the necessary steps to ensure that he calls into the hearing at the correct time, especially if he is going to be traveling outside of his home area, which could impact the time he needs to call into the hearing.

[14] As the Claimant was aware of the date and time of the hearing well in advance of the actual date of the hearing, and received a reminder call, but did not show up for the hearing, I proceeded with the hearing in his absence.

Issues

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

[16] Does the Claimant have to repay \$1,000 of the advance?

Analysis

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

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

[18] The Claimant says that he never applied for ERB and never requested the \$2,000 advance.²

[19] The Commission says that the Claimant had to get ERB, as the interim order creating the ERB overrides any other part of the legislation, so he had no choice but to have ERB.³

[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 1, 2020.⁴ The law⁵ 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,⁶ it is the role of Parliament to amend the legislation.

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

² GD02-4

³ GD04-3

⁴ GD03-11

⁵ 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

⁶ *Canada (Attorney General) v Knee*, 2011 FCA 301

Does the Claimant have to repay \$1,000 of the advance?

[25] The Claimant does not have to repay \$1,000 of the advance, only \$500, as that represents the one week of ERB he received to which he is not eligible.

[26] The Commission submits they initially paid the Claimant four weeks of ERB, and advanced him \$2,000 of ERB, which represents four weeks of ERB.⁷

[27] The Commission says that they have the authority to pay the ERB in advance as per the law.⁸

[28] The Commission says that normally, they would recover this advance by withholding four weeks of ERB over the course of the claim, but the Claimant did not collect ERB long enough for them to do this.

[29] The Commission says that during their reconsideration phase they determined the Claimant was payable an additional two weeks of ERB for the period of March 15 to 28, 2020.⁹

[30] The Commission says they applied these extra two weeks to the Claimant's overpayment which means he only has to repay \$1,000.¹⁰

[31] The Claimant says that he never asked for the \$2,000 advance and it is not fair to ask for it to be repaid after all this time.

The Commission's delay in asking for the money back

[32] I can understand the Claimant's frustration at the Commission coming back two years after giving him the \$2,000 and asking for it back, but, the law gives the Commission up to 36 months to review a claim for benefits,¹¹ and they are well within

⁷ GD04-4

⁸ Section 153.7(1) of the *Employment Insurance Act*

⁹ GD04-4

¹⁰ GD04-4

¹¹ See Section 52 of the *Employment Insurance Act* and

that timeframe in this case, as the advance payment was made on April 13, 2020,¹² and the review of the claim was done in November 2021.¹³

The advance payment

[33] I find I agree with the submission of the Commission that they have the authority under the law to make the advance payment, as the law clearly states they can do so.¹⁴

[34] However, I can understand there being some confusion around the Claimant being given this advance, since the Claimant says he never asked for it, so I will try to provide a little clarity on the situation.

[35] In a claim for ERB, a claimant is theoretically able to collect up to a maximum of 28 weeks of benefits.¹⁵

[36] The law allows the Commission to pay ERB in advance of the usual time for paying it,¹⁶ 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 20 and 21 if he had been able to claim all 28 weeks of ERB.¹⁷

[37] 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, 20 and 21 of ERB; so no special request from the Claimant is needed for the advance to be paid. The Claimant filed an application saying he wanted benefits and, once he did, the law allows the Commission to pay those requested benefits early, which is exactly what they did.

¹² GD03-13

¹³ GD03-19 see the date of the notice of debt

¹⁴ See section 153.7(1.1) of the *Employment Insurance Act*

¹⁵ Section 153.11 of the *Employment Insurance Act*

¹⁶ Section 153.7(1.1) of the *Employment Insurance Act*

¹⁷ GD04-3 and see the payment chart of GD03-18 which says which weeks 13, 14, 20, and 21, are represented by the advance payment of \$2,000

[38] 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.

[39] So, if, hypothetically, the Claimant had kept claiming ERB, and not been able to return to work, when weeks 13 and 14 and 20 and 21 came around on his claim, he would not have been paid ERB on those weeks, as they had technically already been paid to him in advance, when he got the \$2,000 advance payment.¹⁸

[40] However, just because the Commission paid the Claimant weeks of ERB in advance does not mean he was eligible for those weeks. That is what I will determine next.

Eligibility for the advance payment

[41] Eligibility for the \$2,000 advance is no different from eligibility for any other weeks of ERB.

[42] The Commission does not make any explicit submission on the Claimant's eligibility for the ERB, but do agree that he is eligible for it in a general sense.

[43] There are different paths to being a "claimant", for the purposes of ERB,¹⁹ but, regardless of which path the Claimant took to be considered a "claimant" for the purposes of ERB, he needs to have no income from employment for at least seven consecutive days within the two-week period in respect of which he ceased working, or claimed the benefit in order to be eligible.²⁰

[44] When I consider the eligibility requirements, I find that the Claimant is eligible for one more week of ERB than he was paid, as he is eligible for the week of April 26 to May 2, 2020. The Claimant is eligible for this week because in the two week claim period in which that week falls, (April 19 to May 2) he had seven consecutive days with

¹⁸ GD03-26

¹⁹ See section 153.5(2) of the *Employment Insurance Act*

²⁰ See section 153.9(1) of the *Employment Insurance Act*

no income from employment, as he did not work the week of April 19 to 25, 2020; he returned to work starting April 27, 2020.²¹

[45] So, since I have found the Claimant is eligible for one more week of ERB than he was paid, this means he only needs to repay \$500, as the \$1,000 he had as an overpayment represents two weeks of ERB, and since he is payable one extra week, which is worth \$500, subtracting that from the \$1,000 owing means he only has a \$500 overpayment left.

[46] I understand the Claimant does not want to pay back any of the advance, but the law states that if a claimant receives money for which they were not eligible, they must return the amount they received that they were not eligible for.²² As I have found the Claimant is not eligible for \$500 of the advance, he must return it.

[47] I also cannot waive or erase the overpayment, as only the Commission can do that.²³

Conclusion

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

Gary Conrad
Member, General Division – Employment Insurance Section

²¹ See the Claimant reports on GD03-28 with specific reference to the weeks of April 19 to 25, 2020, where the Claimant reported no work or income and April 26 to May 2, 2020, which is where he reports his return to work and income.

²² Section 153.1301 of the *Employment Insurance Act* <https://laws-lois.justice.gc.ca/eng/acts/E-5.6/page-24.html#h-1257875>

²³ *Canada (Attorney General) v Villeneuve*, 2005 FCA 440. Para 16