



Citation: *ZK v Canada Employment Insurance Commission*, 2023 SST 1812

Social Security Tribunal of Canada General Division – Employment Insurance Section

Decision

Appellant: Z. K.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (575309) dated June 26, 2023 (issued by Service Canada)

Tribunal member: Marc St-Jules

Type of hearing: Teleconference

Hearing date: September 13, 2023

Hearing participant: Appellant

Decision date: September 26, 2023

File number: GE-23-2144

Decision

[1] Z. K. is the Appellant in this appeal. I am dismissing his appeal.

[2] The Canada Employment Insurance Commission (Commission) has shown it paid the Appellant more Employment Insurance Emergency Response Benefits (EI ERB) than he was eligible for.¹ In other words, he was overpaid.

[3] The \$2,000 overpayment is valid and has to be paid back. This is the amount of the EI ERB advance payment he received and is not entitled to.

Overview

[4] In March 2020, his employer laid the Appellant off.

[5] On March 25, 2020, The Appellant applied for EI regular benefits.

[6] The Commission determined the Appellant was eligible for the EI ERB. The Commission paid him an advance payment of \$2,000 on April 6, 2020.² The Commission also paid him 11 weeks of EI ERB benefits.

[7] About two years later, the Commission decided the Appellant wasn't legally eligible for the EI ERB advance payment. It sent the Appellant a decision letter explaining why and a notice of debt for \$2,000.

[8] The Appellant disagrees stating that he applied for regular benefits and not the Emergency Response Benefit. The Appellant's arguments are discussed below in more detail.

¹ The Employment Insurance Emergency Response Benefit (EI ERB) is almost identical to the Canada Emergency Response Benefit (CERB). One important difference is that the Canada Employment Insurance Commission (Commission) ran the EI ERB program under changes to the *Employment Insurance Act* (EI Act), while the Canada Revenue Agency ran the CERB program under the *Canada Emergency Response Benefit Act*. The Commission often writes "CERB" in letters to appellants when it is referring to the EI ERB.

² See GD03 page 19. The Appellant was issued this payment on April 6, 2020. If a person is on direct deposit, the actual deposit to the bank account is normally 2 business days afterwards.

Issue

[9] Should the Appellant have been paid Employment Insurance (EI) regular benefits instead of the EI ERB?

[10] Does the Appellant have to pay back the EI ERB advance payment he received?

Analysis

The EI Emergency Response Benefit (EI ERB)

[11] In response to the COVID-19 pandemic, the federal government made temporary changes to the *Employment Insurance Act* (EI Act).³ One change the government made was to create the EI ERB. Here are the EI ERB rules that are important for this appeal:

- Between **March 15, 2020, and September 26, 2020**, the Commission had to treat applications for EI regular and sickness benefits as applications for the EI ERB.⁴
- Individuals had to first complete a full application for benefits. This was followed by the need to complete biweekly reports to prove eligibility to benefits.⁵
- The weekly rate for the EI ERB was standardized at \$500.⁶
- The Commission made EI ERB advance payments of \$2,000 to eligible people as soon as possible after they applied for EI.⁷

³ See Part VIII.4 (Employment Insurance Emergency Response Benefit) of the EI Act.

⁴ Under changes to the EI Act, **the Commission had no authority to create a benefit period for regular or sickness benefits between March 15, 2020, and September 26, 2020**. The Commission had to process these types of claims as EI-ERB claims. And any benefits paid during this period had to be paid as EI-ERB benefits, with a few exceptions for some types of benefits other than regular and sickness benefits.

⁵ See sections 153.8(1) and (3) of the EI Act. The Commission could pay the EI ERB to eligible people for two-week periods between March 15, 2020, to October 3, 2020.

⁶ See section 153.10 (1) of the EI Act.

⁷ See section 153.7(1.1) of the EI Act.

- The Commission decided it would recover the \$2,000 advance payment by not paying a person the weekly EI ERB benefit in 4 separate weeks.⁸

[12] The law also allowed the Commission to go back and review a person's eligibility for the EI ERB **up to 36 months after** they received an EI ERB payment.⁹ The Commission could set up and collect an overpayment if a person got more EI ERB than they were eligible for.¹⁰

Should the Appellant have been paid EI regular benefits instead of the EI ERB?

[13] I find that the Appellant was correctly paid the EI ERB. I find that that the weekly rate was correct at \$500 per week.

[14] The Appellant says this is wrong. He was not laid off because of COVID. His employer was allowed to remain open. He was laid off because of a change in ownership at his employer's business. For this reason, he argues he should have been paid regular benefits at a higher rate. His layoff was not related to COVID. Had the correct decision been made initially, he would not be in this situation.

[15] I accept that he applied for EI regular benefits. However, he was paid EI ERB because this is what the law obligated the Commission to pay.

[16] Because of the changes made at the start of the pandemic, between March 15, 2020, and September 26, 2020, all applications for EI regular or sickness benefits had to be processed as applications for the EI ERB. So, if someone applied for EI regular

⁸ This was an internal procedure that the Commission used based on its authority to pay the EI ERB **in advance** under section 153.7(1.1) of the EI Act. For most cases, this was after paying 12 weeks of benefits. For most claimants, the recovery was in weeks 13 and 14 of their EI ERB claim. Most claimants were then not paid in weeks 18, and 19. There are, however, some individuals who had other weeks recovered.

⁹ See sections 52, 153.6(1), (2), and (3) of the EI Act.

¹⁰ See sections 153.6(1), (2), and (3) of the EI Act. Those sections apply and adapt the Commission's authority under sections 43 (**claimant liability for overpayment**), 44 (**claimant liability to return overpayment**), and 47 (**paying a debt owed to the Crown**) to the EI ERB.

benefits and their benefit period started during that time, they would have received the EI ERB instead of EI regular benefits.

[17] The Appellant applied for regular benefits on March 25, 2020. The last day he worked was March 26, 2020. The law says that a benefit period begins on the later of

(a) the Sunday of the week in which the interruption of earnings occurs, and

(b) the Sunday of the week in which the initial claim for benefits is made.¹¹

[18] This means the Appellant's benefit period started on Sunday, March 22, 2020. This date falls in the timeframe where the Commission had to pay the Appellant EI ERB benefits. The law said so.

[19] This means the rate was correctly paid at \$500 per week. This is what the law says.¹²

Does the Appellant have to pay back the EI ERB advance payment he received?

– What the Commission says

[20] The Commission says it paid the Appellant an EI ERB advance payment of \$2,000. Then it paid the Appellant 11 weeks of EI ERB, based on the reports he filed.¹³

[21] The Appellant returned to work on May 21, 2020. This meant that the Appellant's benefits stopped. This also meant the Commission could not recover the EI ERB advance payment of \$2,000 by holding back weekly benefits in the future.

[22] The Commission now says that the advance payment is a valid overpayment. It therefore set up an overpayment, which he has to pay back.¹⁴

¹¹ See sections 10(1) of the EI Act.

¹² See section 153.10 (1) of the EI Act.

¹³ See the Commission's screenshots showing it paid the Appellant the \$2,000 EI ERB advance payment, and 11 weekly EI ERB payments, at GD3-19. It issued the advance payment to his on April 6, 2020.

¹⁴ See the decision letter (a form letter) and notice of debt the Commission sent to the Appellant, at GD3-25 to GD3-28.

– **What the Appellant says**

[23] The Appellant says it is too long ago that he does not recall the money received. He has nothing to refute that he was not paid the \$2,000 advance payment or the 11 weeks of the EI ERB he received.

[24] The Appellant also argues that the government should have told individuals about this advance. It is not right to ask for the money back over 2 years after the fact.

[25] I believe the Appellant's evidence and his testimony. I have no reason to doubt what the Appellant said. The Appellant's statements stayed the same over time.

The Commission's overpayment decision is correct as per the law

[26] Unfortunately, the evidence the Appellant gave to the Tribunal doesn't change my decision. Although I believe the Appellant, I still have to apply the law.

[27] Even if the Appellant applied for EI regular benefits, the Commission **had no legal power to pay EI regular benefits**. The changes to the law during COVID obligated the Commission **to treat his application as an application for the EI ERB**. And because he was eligible, **it had to pay EI ERB—including the \$2,000 advance payment**.

[28] I have reviewed the Commission's evidence of the EI ERB it paid to the Appellant. I have also reviewed the Commission's calculation of the overpayment it says he owes.¹⁵ I have no reason to doubt the Commission's evidence about these two things. And there is no evidence that goes against it.

[29] Based on the evidence before me, I find:

- The Appellant applied for EI regular benefits, and soon after the Commission paid him the EI ERB advance payment of \$2,000.
- The Appellant was then paid 11 weeks of the EI ERB.

¹⁵ See the Commission's representations in GD4.

- The Appellant went back to work on May 21, 2020. This meant the Commission could not recover the EI ERB advance payment in weeks 13, 14, 18, and 19.¹⁶

[30] I find that the Appellant received four weeks or \$2,000 of EI ERB payments he wasn't legally eligible for. This is an overpayment he has to pay back.

[31] I understand the Appellant's situation. However, there is no legal basis for me to say that he wasn't overpaid for these benefits. In dealing with cases where the resulting decision may seem unfair on its face, the Federal Court of Appeal has said:

...rigid rules are always apt to give rise to some harsh results that appear to be at odds with the objectives of the statutory scheme. However, tempting as it may be in such cases (and this may well be one), adjudicators are permitted neither to re-write legislation nor to interpret it in a manner that is contrary to its plain meaning.¹⁷

Conclusion

[32] The Commission has proven the Appellant received \$2,000 in EI ERB payments he isn't eligible for.

[33] The law says the Appellant has to repay the overpayment of \$2,000.

[34] I have to dismiss his appeal.

Marc St-Jules

Member, General Division – Employment Insurance Section

¹⁶ See GD4 page 4.

¹⁷ See *Canada (Attorney General) v Knee*, 2011 FCA 301 at para 9.