



Citation: *EH v Canada Employment Insurance Commission*, 2023 SST 959

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

# **Decision**

**Appellant:** E. H.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (448124) dated April 17, 2023 (issued by Service Canada)

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**Tribunal member:** Glenn Betteridge

**Type of hearing:** Teleconference

**Hearing date:** July 18, 2023

**Hearing participants:** Appellant  
Appellant's witness

**Decision date:** July 24, 2023

**File number:** GE-23-1228

## Decision

[1] E. H. is the Appellant in this appeal. I am dismissing his appeal.

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

[3] He has to pay back the overpayment (\$2,000). This is the amount of the EI ERB advance payment he received.

## Overview

[4] The Appellant worked as a manager at a franchise of X (employer). In March 2020, his employer laid him off because of the COVID-19 pandemic.

[5] Then he applied for the Canada Emergency Response Benefit (CERB)—in other words, the EI ERB.

[6] The Commission paid him an EI ERB advance payment (\$2,000) soon after he applied.

[7] But his employer called him back very shortly after it laid him off. So he cancelled his EI ERB claim before the Commission paid him any weekly EI ERB benefits.

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

[9] The Appellant says his circumstances are unique. His employer got the Canada Emergency Wage Subsidy (CEWS). He went back to work soon after that, without any

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<sup>1</sup> 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 actually referring to the EI ERB, which is confusing.

interruption in his wages. But his employer deducted the amount of the EI ERB advance payment from his pay—\$500 for 4 weeks (\$2,000 total). This means he had no net gain in his income from the EI ERB. Paying the debt would cause him financial hardship. So he should not have to pay back the advance payment.

## Issue

[10] Does the Appellant have to pay back the EI ERB advance payment (\$2,000)?

## 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).<sup>2</sup> One of those changes 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.
- Any person could apply for the EI ERB for a two-week period, and they had to follow the Commission's rules and give it the information it needed to decide their application.<sup>3</sup>
- The usual EI ERB weekly benefit the Commission paid was \$500.<sup>4</sup>
- The Commission made EI ERB advance payments of \$2,000 to eligible people as soon as possible after they applied for EI.<sup>5</sup>

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<sup>2</sup> See Part VIII.4 (Employment Insurance Emergency Response Benefit) of the EI Act.

<sup>3</sup> 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.

<sup>4</sup> See section 153.10 of the EI Act.

<sup>5</sup> 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 a weekly EI ERB benefit in 4 separate weeks (for weeks 13, 14, 18, and 19).<sup>6</sup>

[12] The changes to 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 got an EI ERB payment.<sup>7</sup> And the Commission could set up and collect an overpayment if a person got more EI ERB than they were eligible for.<sup>8</sup>

### **What the Commission and the Appellant say**

[13] The Commission says it paid the Appellant an EI ERB advance payment of \$2,000.

[14] The Commission says it didn't pay the Appellant any weekly EI ERB. His employer paid him regular wages to March 22, 2020. Then his employer paid him wages (using the CEWS) starting March 23, 2020. So he cancelled his EI ERB claim. This meant the Commission could not recover the EI ERB advance payment (\$2,000) by holding back weekly benefits in weeks 13, 14, 18, and 19. So the advance payment is an overpayment, which he has to pay back.<sup>9</sup>

[15] The Appellant testified that his employer called him back to work a week after it laid him off. His employer continued to pay him.<sup>10</sup> So he agrees he wasn't eligible for any weekly EI ERB.

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<sup>6</sup> 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..

<sup>7</sup> See sections 52, 153.6(1), (2), and (3) of the EI Act.

<sup>8</sup> 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.

<sup>9</sup> See the decision letter (a form letter) and notice of debt the Commission sent to the Appellant, at GD3-21 to GD3-24.

<sup>10</sup> The Appellant's Record of Employment shows his last day of work and pay before lay off was March 15, 2020. See GD3-15. He earned \$4,084.82 in the two-week pay period ending on that day. On his EI application, he listed March 22, 2020, as his last day of work. His employer told the Commission the Appellant was paid his full salary up to March 22, 2020. See the Commission's notes of the call with the employer at GD3-33. The Appellant sent pay stubs that show he received full pay (\$2,576.92) for March 2 to March 15, 2020, and for March 16 to March 29, 2020. Then his employer started to pay him based on the Canada Emergency Wage Subsidy (CEWS) and reduced his weekly pay by \$500 for the

[16] But the Appellant says his circumstances are unique. His employer told him to apply for the CERB. Then, when his employer got the CEWS, it told him to cancel his CERB. But it was too late. He had already received the advance payment. His employer said it wanted to make sure the Appellant and other managers didn't get the EI ERB plus wages under the CEWS (what it called "double-dipping"). His employer assumed the Appellant and other managers would have to pay the money back to the federal government later on. To prevent this, his employer deducted \$500 from his pay for 4 weeks (\$2,000 total).

[17] The Appellant argued that, because his employer deducted \$2,000 from his pay, he had no net gain in income from the EI ERB. And he testified that, if he has to pay the Commission back \$2,000, he will face undue hardship while he is still recovering financially from the pandemic. So he should not have to pay back the Commission.

[18] The Appellant's witness testified that he works for the same employer. He was in charge of the employer's CERB and CEWS programs. He came to the hearing to explain what went on with the CERB, CEWS, and managers' pay. The witness described the circumstances and referred to a letter the employer wrote to explain the situation to the Commission.<sup>11</sup> (The Appellant sent the Commission a copy as part of his reconsideration request.<sup>12</sup>)

[19] I asked the witness whether the employer had contacted the Commission to try to solve the problem the Appellant and other managers now face. He said the employer had. But the Commission told the employer it had to "uphold the black and white letter of the law." The witness asked the Tribunal to take the "unfortunate set of circumstances" into account and reduce the debt the Appellant owes.

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next four weeks so he wasn't "double-dipping." So his employer reduced his pay (\$1,448.08) for March 30 to April 12, 2020, and April 13, to April 26, 2020. See his pay stubs at GD2-10 to GD2-14.

<sup>11</sup> See GD3-29.

<sup>12</sup> See GD3-29.

## The Commission's overpayment decision is correct

[20] I accept the Appellant's evidence and his witness's testimony. I have no reason to doubt what the Appellant and his witness said. Both testified in an upfront and detailed way. The Appellant's story stayed the same over time. And his witness's testimony supported what the Appellant told the Commission and said at the hearing.

[21] But the evidence the Appellant and his witness gave to the Tribunal doesn't change my decision.

[22] I have reviewed the Commission's evidence of the EI ERB it paid to the Appellant.<sup>13</sup> I have also reviewed the Commission's calculation of the overpayment it says he owes.<sup>14</sup> I have no reason to doubt the Commission's evidence about these two things. And there is no evidence that goes against it.

[23] The Commission and the Appellant agree on the key facts, and I have confirmed them by reviewing the documents in the Commission's reconsideration file.<sup>15</sup> So I find:

- The Appellant applied for EI, and the Commission paid him the EI ERB advance payment (\$2,000).
- The Appellant wasn't eligible for any weeks of EI ERB benefits because he continued to have employment income.<sup>16</sup>
- The Appellant went back to work, and his EI ERB ended. This meant the Commission could not recover the EI ERB advance payment in weeks 13, 14, 18, and 19.

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<sup>13</sup> See the Commission's screenshots showing it paid the Appellant the \$2,000 EI ERB advance payment, at GD3-17 and GD3-18. It issued the payment to him on April 6, 2020.

<sup>14</sup> See the Commission's representations in GD4.

<sup>15</sup> See GD3.

<sup>16</sup> To be eligible for the EI ERB, a person had to show that, among other things, they ceased working for at least seven days within a two-week period **and** had no income in those seven days **or** had income that wasn't more than \$1,000 over a period of four weeks that succeed each other in chronological order but not necessarily consecutively. See sections 153.9(1) and 153.9(4) of the EI Act.

[24] So I find that the Appellant received four weeks (\$2,000) of EI ERB he wasn't legally eligible for. (This is the EI ERB advance payment.) This is an overpayment he has to pay back.

[25] When I asked the witness, he told me the employer didn't get legal advice before deducting the \$2,000 from the managers' pay. I also asked him whether the employer usually manages its employees' money by making decisions for them. He said the managers had a lot of confusion and anxiety about their pay. So the employer got involved to try to calm their nerves. Rather than having 16 or 17 managers try to figure things out, the employer decided to deduct \$2,000 from each manager's pay.

[26] The employer had no authority under the EI Act to recover the advance payment from the Appellant for the Commission. When it deducted the \$2,000 from the Appellant's wages, it could have paid that money to the Commission for him, to pay off the overpayment. But it didn't.

[27] So under the EI Act, which I have to follow, the Appellant has to pay back the \$2,000 overpayment.

## The Tribunal can't write off the overpayment

[28] The overpayment is a debt the Appellant owes to Employment and Skills Development Canada (ESDC). ESDC is the federal department that runs the Commission.

[29] I acknowledge how unfair the overpayment is to the Appellant. He is going to be out of pocket \$4,000—the \$2,000 his employer deducted from his wages and \$2,000 he owes to ESDC. But the Tribunal has no power to write off an overpayment—not partially or fully.<sup>17</sup>

[30] The Commission can write off all or part of an overpayment.<sup>18</sup> If the Appellant hasn't already asked the Commission to write off his overpayment, he can do that.

[31] The Canada Revenue Agency (CRA) collects debts for some federal government departments, including ESDC. The Appellant can get more information about **payment plans** and **debt relief** from the [CRA webpage about the collection of EI ERB overpayments](#), or by calling toll-free 1-800-864-5823.<sup>19</sup>

## Conclusion

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

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

[34] So I have to dismiss his appeal.

Glenn Betteridge

Member, General Division – Employment Insurance Section

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<sup>17</sup> Section 112.1 of the EI Act says this. And section 153.1307 says section 112.1 applies to EI ERB overpayments.

<sup>18</sup> The section 153.1306 of the EI Act. That section refers to section 56 of the *Employment Insurance Regulations*, which gives the Commission broad authority to write off an overpayment when it would cause undue hardship for a person to repay it.

<sup>19</sup> The CRA hyperlink is [www.canada.ca/en/revenue-agency/services/about-canada-revenue-agency-cra/when-you-money-collections-cra/collection-canada-emergency-response-benefit-issued-by-service-canada.html](http://www.canada.ca/en/revenue-agency/services/about-canada-revenue-agency-cra/when-you-money-collections-cra/collection-canada-emergency-response-benefit-issued-by-service-canada.html).