



Citation: *MR v Canada Employment Insurance Commission*, 2023 SST 1862

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

Decision

Appellant: M. R.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (518031) dated June 23, 2023 (issued by Service Canada)

Tribunal member: Glenn Betteridge

Type of hearing: Teleconference

Hearing date: October 3, 2023

Hearing participant: Appellant

Decision date: October 6, 2023

File number: GE-23-2415

Decision

[1] M. R. is the Appellant in this appeal. I am dismissing his appeal.

[2] He hasn't shown he was eligible to keep 3 weeks (\$1,500) of the Employment Insurance Emergency Response Benefit (EI ERB) advance payment he received.¹

[3] This is an overpayment he owes to the Commission.

Overview

[4] The Appellant's employer (Canadian Armed Forces) laid him off during the COVID pandemic.

[5] He applied for Employment Insurance (EI).

[6] The Commission decided he was eligible for the EI ERB. The Commission paid him an advance payment (\$2,000) soon after he applied. And it paid him 12 weeks of EI ERB.

[7] The Commission recovered one week of the EI ERB advance payment, in the final week of his last EI ERB claim.

[8] About two years later, the Commission reviewed his EI ERB claims. It decided he wasn't eligible to keep the other 3 weeks (\$1,500) of the EI ERB advance payment. So the Commission decided this is an overpayment he has to pay back.

[9] The Appellant says it's not fair to ask him to repay all of the overpayment over three years later. During 2020 he called the Commission many times and was told there was nothing owing, and he had no debt.

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's actually referring to the EI ERB. This can be confusing.

Issues

[10] I have to decide two issues in this appeal:

- whether the Appellant was eligible to keep the EI ERB advance payment
- whether the Commission correctly calculated his overpayment, taking into account his eligibility for weekly EI ERB payments

Analysis

[11] It's up to someone who applies for an EI benefit to show they are eligible for that benefit.²

[12] In this appeal, the Appellant has to prove he was eligible for the EI ERB advance payment and weekly benefits the Commission paid him. He has to prove this on a balance of probabilities. In other words, he has to show it's more likely than not he was eligible.

The EI Emergency Response Benefit (EI ERB)

[13] The federal government made temporary changes to the *Employment Insurance Act* (EI Act) in response to the COVID-19 pandemic.³ 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.⁴

² See sections 48(1) and 48(2) of the EI Act.

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

⁴ The Commission had to process regular and sickness benefits 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 benefits other than regular and sickness benefits.

- Any person could file a claim 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.⁵
- To be eligible for the EI ERB, a person had to show they
 - didn't work for 7 consecutive days in a two-week period and had no income for those days in a two-week period; or
 - earned \$1,000 or less over a four-week period.⁶
- The usual EI ERB weekly benefit the Commission paid was \$500.⁷
- The Commission made EI ERB advance payments of \$2,000 to eligible people as soon as possible after they applied for EI.⁸
- The Commission decided it would recover the \$2,000 advance payment by not paying a person a weekly EI ERB benefit in 4 weeks (weeks 13, 14, 18, and 19).⁹

[14] 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

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 sections 153.9 (1) and 153.9 (4) of the EI Act. 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** they have to show they had \$1,000 or less in income over a period of four weeks that succeed each other in chronological order but not necessarily consecutively. The four-week rule only applies to weeks where the Commission has already paid the person the EI ERB. See the SST Appeal Division decision in, *Canada Employment Insurance Commission v HM*, 2023 SST 831 (AD).

⁷ See section 153.10 of the EI Act.

⁸ See section 153.7(1.1) of the EI Act.

⁹ Recovering the advance payment in these four weeks is an internal procedure that the Commission used. It calls this a procedural disentitlement.

payment.¹⁰ And the Commission could set up and collect an overpayment if a person got more EI ERB than they were eligible for.¹¹

What the Commission and the Appellant say

[15] The Commission says it paid the Appellant an EI ERB advance payment of \$2,000.¹² Then it paid him 12 weekly payments (\$6,000). So it paid him total of \$8,000.

[16] The Commission says it paid the Appellant for 9 weeks (March 15 through May 10, 2020) Then he went back to work the week of May 17, 2020, and stopped filing reports.

[17] The Commission says the Appellant made a new EI ERB claim in early September 2020. He was eligible for 4 weeks in September. The Commission paid him 3 weeks and used 1 week to recover \$500 of the advance payment (week 29; September 27, 2020).

[18] Because the EI ERB was no longer offered after that week, the Commission says it didn't recover any more weeks of the EI ERB. In other words, it didn't recover 3 weeks of EI ERB (\$1,500). This is an overpayment the Appellant has to pay back.¹³

[19] The Appellant says it would be unfair to make him pay back all of the EI ERB advance payment overpayment.¹⁴ He called EI many times in 2020 and was told he didn't owe anything. These were "false statements." He lost his job and income during COVID, so he should be entitled to keep all the EI ERB he received.

¹⁰ See section 52 of the EI Act (**Commission's power to reconsider a claim**), which applies to the EI ERB because of amendments made under sections 153.6 (1) and (2) and (3); and 153.1303 of the EI Act.

¹¹ See sections 153.6 (1), (2), and (3); 153.1301; and 153.1303 of the EI Act. Those sections apply and adapt the Commission's authority under section 43 (**claimant liability for overpayment**), section 44 (**claimant liability to return overpayment**), and section 47 (**paying a debt owed to the Crown**).

¹² See the Commission's screenshot of its EI ERB benefits screen for the Appellant, at GD3-19. See also the Full Text Screen pay history details for the Appellant's EI ERB claims, at GD3-21 and GD3-22.

¹³ See the Notice of Debt the Commission sent the Appellant, at GD3-30 to GD3-33.

¹⁴ This paragraph is based on what the Appellant's testimony at the hearing, and what he wrote in his reconsideration request (at GD3-35), and his appeal documents (GD2).

The advance payment overpayment (\$1,500) is correct

[20] I have reviewed the Commission's evidence of the EI ERB advance payment it paid to the Appellant. I also reviewed Commission's evidence about the week of EI ERB advance payment it recovered.¹⁵

[21] There is no evidence that goes against the Commission's evidence about these things. And I have no other reason to doubt the Commission's evidence.

[22] So based on the evidence I have accepted and the law I set out above, I find:

- The Commission paid the Appellant the EI ERB advance payment (\$2,000).
- The Commission recovered 1 week (\$500) of the EI ERB advance payment.
- This means the Appellant received 3 weeks (\$1,500) of EI ERB advance payment he wasn't legally eligible to keep.

[23] This means the Appellant has a \$1,500 overpayment.

[24] I can't accept the Appellant's argument that he should not have to pay back the overpayment because the Commission made "false statements" to him. The courts have decided the Commission can't change the qualifying conditions for EI benefits, even for special benefits.¹⁶ And the Commission has to apply the EI Act as it is written—even where the Commission has provided misinformation.¹⁷

¹⁵

¹⁶ See the Commission's representations at GD4-4. The Commission cites *Canada (Attorney General) v Levesque*, 2001 FCA 304; and *Pannu v Canada (Attorney General)*, 2004 FCA 90.

¹⁷ See *Brazan v Canada (Employment and Immigration)*, A-373-92 (FCA); *Granger v Canada (Employment and Immigration)*, A-684-85 (FCA); and *Canada (Attorney General) v Tjong*, A-672-95 (FCA).

The Appellant isn't eligible for any more weeks of the EI ERB

[25] If the Appellant is eligible for more weeks of EI ERB than the Commission paid him, I can use any extra week(s) to reduce his overpayment balance.

[26] There are two pathways a person can use to show they are eligible for weekly EI ERB payments:

- General test¹⁸
- Alternative pathway¹⁹

– The general test for eligibility

[27] The general test for eligibility for the EI ERB is based on a **two-week period**.

[28] The Commission has to assess the Appellant's eligibility for a two-week period. And then pay benefits for that two-week period if the Appellant is eligible. The Commission can't pay only one week (\$500) out of the two weeks. Either it pays both weeks (\$1,000) or no weeks.²⁰

[29] A person is eligible for the EI ERB if they:

- stopped work for at least seven consecutive days **within a two-week period**, and
- had no income from employment for the days they weren't working in **that two-week period**.

[30] The Tribunal's Appeal Division supports the EI ERB two-week period—a person makes their claim for a two-week period, the Commission assesses their eligibility for a two-week period, and the Commission pays eligible people \$1,000 for a two-week

¹⁸ See EI Act section 153.9(1).

¹⁹ See EI Act section 153.9(4).

²⁰ The EI ERB was only available for a limited time (29 weeks, from the week of March 15 to September 27, 2020). This means in some rare cases a person will be eligible for just one week (\$500). This will only happen for the last week the EI ERB was available (week 29, starting September 27, 2020), where a person has applied for that week only. But this appeal isn't one of those rare cases.

period.²¹ I find the Appeal Division's decisions are well-reasoned and I am persuaded by them. So I am going to follow them.

– **The alternative pathway to eligibility**

[31] If a person isn't eligible under the general test, they might be eligible under the alternative pathway.²² To decide whether a person is eligible for EI ERB for a two-week claim period, the alternative pathway focuses on how much income the Appellant earned over 4 weeks.

[32] So to review the Appellant's eligibility for a two-week claim period, I have to consider the four-week period leading up to and including the two-week claim period.²³

To do this:

- identify the **two-week claim period** being reviewed (it doesn't matter whether the Commission originally paid the person the EI ERB for this period)
- go back in time and find the **most recent two weeks that the person received the EI ERB** (in other words, skip any week they didn't get the EI ERB)
- add together their **earnings for those four weeks**
- if their total earnings is **\$1,000 or less**, the person is eligible for the EI ERB for the two-week claim period being reviewed

²¹ See *Canada Employment Insurance Commission v LC* (File AD-23-2230; Melanie Petrunia; August 27, 2023) [unpublished], at paragraphs 13 to 15 and 18 (*CEIC v LC*); *Canada Employment Insurance Commission v HM*, 2023 SST 831 (AD) (*CEIC v HM*); and *HG v Canada Employment Insurance Commission*, 2023 SST 355, at paragraphs 24, 25, 33, 34, and 39 (*HG v CEIC*).

²² In the words of section 153.9(4), the person is "deemed" to meet the general test for eligibility in section 153.9(1).

²³ See *CEIC v HM* at paragraphs 24, and 41 to 43. I am following the third counting method the Appeal Division adopted in that decision.

– **The Appellant’s eligibility for weekly EI ERB**

[33] The Appellant and the Commission agree he received 12 weeks of weekly EI ERB (\$6,000).

[34] I accept what the Appellant’s biweekly reports said about when he worked and his earnings.

[35] Although the employer submitted a record of employment, it shows the Appellant’s income for twice-monthly pay periods.²⁴ I am not relying on the record of employment for two reasons. First, the Commission didn’t rely on it to decide the Appellant’s eligibility. Second, and more important, I can’t take the earning information from the record and plug it into the EI ERB weeks or the two-week claim periods. The dates don’t line up, at all. And I can’t guess about what income goes in what week.

[36] The table on the next page shows the evidence I have accepted. I used the table to decide the Appellant’s eligibility for each two-week claim period—under the general eligibility test and, if necessary, under the alternative pathway.

²⁴ See that record of employment at GD3-27. The employer submitted another record of employment (at GD3-17), but it isn’t for the period when the EI ERB was available. So I don’t need to consider it.

EI ERB Week	Benefit Week	EI ERB Paid	²⁵ Work Reported	Earnings Reported	General Test	Alternative Pathway
1	March 15, 2020	500	n		500	
2	March 22, 2020	500	n		500	
3	March 29, 2020	500	y	530		500
4	April 5, 2020	500	y	76		500
5	April 12, 2020	500	y	228		500
6	April 19, 2020	500	y	152		500
7	April 26, 2020	500	y	76		500
8	May 3, 2020	500	y	228		500
9	May 10, 2020	500	y	152		
10	May 17, 2020	0	n/a			
11	May 24, 2020	0	n/a			
12	May 31, 2020	0	n/a			
13	June 7, 2020	0	n/a			
14	June 14, 2020	0	n/a			
15	June 21, 2020	0	n/a			
16	June 28, 2020	0	n/a			
17	July 5, 2020	0	n/a			
18	July 12, 2020	0	n/a			
19	July 19, 2020	0	n/a			
20	July 26, 2020	0	n/a			
21	August 2, 2020	0	n/a			
22	August 9, 2020	0	n/a			
23	August 16, 2020	0	n/a			
24	August 23, 2020	0	n/a			
25	August 30, 2020	0	n/a			
26	September 6, 2020	500	y	304		500
27	September 13, 2020	500	y	228		500
28	September 20, 2020	500	n		500	
29	September 27, 2020	0	n		500	
Weekly Benefits Paid		6,000			2,000	4,000
				Weekly Benefits Eligible		6,000

²⁵ See GD7. The Appellant filed reports for the weeks of March 15 through May 17, 2020, and for September 6 through September 27, 2020. In this column "n/a" means not available. In other words, the Appellant didn't file a report, or there was no information in the report for the week.

[37] I find the Appellant is eligible for 12 weeks (\$6,000) in EI ERB. (See the boxes in the chart that have thick borders.) (This is what the Commission paid him.) Here is my explanation:

[38] I find the Appellant is eligible for **weeks 1 and 2**, and **28 and 29** under the **general test**.²⁶ In each two-week period he didn't work for at least 7-days and had no earnings in that 7-day period. So he was eligible for \$2,000 under the general test.

[39] I find the Appellant is eligible for **weeks 3 through 8**, and **26 and 27** under the **alternative pathway**. His total earnings for each four-week period I considered are less than \$1,000. So he was eligible for \$4,000 under the alternative pathway.

[40] I find it's more likely than not he **wasn't eligible** for **weeks 9 and 10**. The Commission made an error when it paid him for just one week (week 9) in a two-week period. And because the Appellant didn't file a report for week 10 (May 17 to 23, 2020), I don't know if he worked and had income in that week.²⁷ So he hasn't proven it's more likely than not he is eligible for weeks 9 and 10 under the general test or under the alternative pathway.

Write-off, payment plans, and debt relief

[41] Unfortunately for the Appellant, I have to follow the law.²⁸ I have no power to make my decision based on fairness, compassion, or financial hardship. The overpayment is a debt the Appellant owes to Employment and Skills Development Canada (ESDC). ESDC is the federal government department that runs the Commission.

²⁶ I have included \$500 for **week 29** because the Appellant was eligible in that week (and week 28) under the general test. The Commission agrees the Appellant was eligible. But it didn't pay him week 29. It recovered the \$500 to pay off one week of his EI ERB advance payment. That's why his advance payment overpayment is for 3 weeks (\$1,500) rather than 4 weeks (\$2,000).

²⁷ The report for May 17 to May 23, 2020 says, "Telephone report not completed — screened out". See that report at GD7-38.

²⁸ See *Canada (Attorney General) v Knee*, 2011 FCA 301.

[42] The Commission can write off all or part of an overpayment.²⁹ (The Tribunal doesn't have the legal power to do that.³⁰) So if the Appellant hasn't already asked the Commission to write off his overpayment, he can do that.

[43] The Canada Revenue Agency (CRA) collects debts for federal government departments, including ESDC. The Appellant can get more information about **payment plans** and **debt relief** from the [CRA webpage on the collection of EI ERB overpayments](#), or by calling toll-free 1-800-864-5823.³¹

Conclusion

[44] The Appellant hasn't shown he was eligible to keep 3 weeks (\$1,500) of the EI ERB advance payment. This is an overpayment he has to pay back.

[45] The Commission paid him the correct amount of weekly EI ERB he was eligible to receive. In other words, this doesn't change his overpayment balance.

[46] So I am dismissing his appeal.

Glenn Betteridge
Member, General Division — Employment Insurance Section

²⁹ 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.

³⁰ Section 112.1 of the EI Act says this. And section 153.1307 says section 112.1 applies to EI-ERB overpayments.

³¹ 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.