



Citation: *SR v Canada Employment Insurance Commission*, 2024 SST 259

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant: S. R.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (443625) dated November 2, 2023 (issued by Service Canada)

Tribunal member: Bret Edwards

Type of hearing: In person

Hearing date: February 1, 2024

Hearing participant: Appellant

Decision date: February 8, 2024

File number: GE-23-3562

Decision

[1] The appeal is allowed.

[2] The Appellant doesn't have to pay back \$1,000 of the Employment Insurance Emergency Response Benefit (EI ERB) advance payment she received.

Overview

[3] The EI ERB is a new benefit that was created at the beginning of the COVID-19 pandemic.¹ The amount of the EI ERB was \$500 per week.² But the Canada Employment Insurance Commission (Commission) gave appellants an advance payment of four weeks of the EI ERB (\$2,000) when they first applied.

[4] The Appellant applied for the EI ERB on May 25, 2020. After this, the Commission paid the Appellant the \$2,000 advance payment. The Commission also paid the Appellant 17 weeks of the EI ERB. In total, the Appellant received \$10,500 in the EI ERB.

[5] I have to decide whether the Appellant has to pay back \$1,000 of the EI ERB advance payment she received.

[6] The Commission says that the Appellant was overpaid \$1,000 because she didn't collect EI ERB benefits long enough for it to recover the rest of the \$2,000 advance payment.

[7] The Appellant disagrees and says the overpayment isn't her fault. She also says she can't afford to pay back \$1,000 right now.

¹ Part VIII.4 of the *Employment Insurance Act* (EI Act) sets out the rules that apply to the Employment Insurance Emergency Response Benefit (EI ERB).

² See section 153.10(1) of the EI Act.

Matter I have to consider first

I accepted the post-hearing documents

[8] The Appellant submitted documents after the hearing.³ I accepted them as they relate to an issue that the Commission brought up in its submissions, specifically her potential eligibility for other weeks of the EI ERB. As discussed more below, I find I have jurisdiction to consider this issue as part of the appeal.

My jurisdiction

[9] The Commission says the Appellant must repay \$1,000 of the EI ERB advance payment she received. But it says it will also review her claim to see if she is eligible for more weeks of the EI ERB that can then be applied against the overpayment. It argues that I should dismiss her appeal and she should then provide the Commission with reports for the period from April 19, 2020 to May 23, 2020 so that it can review her claim.⁴

[10] My jurisdiction flows from the Commission's reconsideration decision. If the Commission hasn't reconsidered an issue, then I can't review it.⁵

[11] The Federal Court of Appeal (Court of Appeal) has suggested the Tribunal should take a broad approach to its jurisdiction, within the limits of the law, to manage appeals fairly and efficiently and determine the scope of the reconsideration.⁶

[12] And in a recent decision, the Tribunal's Appeal Division also says the same thing and cites the same case law that I've just mentioned.⁷

³ GD5-1 to GD5-5.

⁴ GD4-2 to GD4-3.

⁵ Sections 112 and 113 of the EI Act say that only decisions that have been reconsidered by the Commission can be appealed to the Tribunal.

⁶ See *Fu v Canada (Attorney General)*, 2019 FC 527.

⁷ See *FM v Canada Employment Insurance Commission*, 2023 SST 966, paragraphs 9 to 11.

[13] I'm not bound by other Tribunal decisions. But I'm persuaded by the Appeal Division's reasoning, particularly since it draws from what the Court of Appeal has already said. This means I will follow its decision here too.

[14] If I am to follow the Court of Appeal and Appeal Division's reasoning and take a broad approach here, I find that means I can look at any issue that the Commission appears to have turned its mind to during the reconsideration phase.

[15] In this case, I find the Commission appears to have turned its mind during the reconsideration phase to other potential weeks that the Appellant might be eligible for the EI ERB.

[16] I acknowledge the Commission couldn't do any fact finding with the Appellant during the reconsideration phase. It contacted the Appellant several times, but the Appellant was either busy and couldn't talk or wasn't willing to talk because she thought it was a fraud call.⁸

[17] But I note the Commission says the following in its submissions: "there is potential for additional weeks to be applied to the overpayment...The reconsideration agent would have requested reports from the appellant to see if any additional weeks met the criteria to allow further adjustment of the overpayment."⁹

[18] I find the fact that the Commission specifically says the reconsideration agent would have asked the Appellant about her eligibility for more weeks of the EI ERB if they had been able to do fact finding leads me to think the agent was prepared to look at this issue, which means they had turned their mind to it.

[19] I also note the Commission included in its submissions a table of the entire EI ERB claim period (from the week of March 15, 2020 to the week of September 27, 2020). The table shows the specific weeks that the Appellant received EI ERB benefits. The table also indicates the other potential weeks that the Appellant could be eligible for

⁸ GD3-26 to GD3-31.

⁹ GD4-3.

EI ERB benefits during the claim period, specifically from the week starting April 19, 2020 to the week starting May 17, 2020.¹⁰

[20] I find the fact that the Commission's table clearly highlights other potential weeks that the Appellant could be eligible for the EI ERB shows that the Commission had turned its mind to this issue during the reconsideration phase. Otherwise, I don't see why it would have included those other weeks on the table.

[21] Taken together, I find the Commission appears to have turned its mind during the reconsideration phase to the issue of whether the Appellant is eligible for more weeks of the EI ERB.

[22] So, since the Commission appears to have turned its mind to whether the Appellant is eligible for more weeks of the EI ERB, it is something I can look at too.

Issues

[23] Is the Appellant eligible for more weeks of the EI ERB?

[24] Does the Appellant have to pay back \$1,000 of the EI ERB advance payment?

Analysis

Is the Appellant eligible for more weeks of the EI ERB?

[25] Yes, the Appellant is eligible for more weeks of the EI ERB.

[26] Due to the COVID-19 pandemic, the Government of Canada changed the law to create a new benefit, the EI ERB. It was effective as of March 15, 2020.

[27] Generally, appellants who applied and qualified for one of the different types of EI benefits between March 15, 2020 and October 3, 2020 got the EI ERB instead.

¹⁰ GD3-33 to GD3-34.

[28] The Appellant applied for EI sickness benefits on May 25, 2020.¹¹ She automatically received the EI ERB instead based on the law at the time.

[29] The Appellant was eligible for and received the EI ERB from the week starting May 24, 2020 to the week starting September 27, 2020.¹² The EI ERB ended after the latter week.

[30] As discussed above, the Commission says the Appellant might be eligible for more weeks of the EI ERB before she applied, specifically from the week starting April 19, 2020 to the week starting May 17, 2020. I can look at this myself because I find the Commission appears to have considered this issue during the reconsideration phase.

[31] When I look at the Appellant's evidence, I find she is eligible for more weeks of the EI ERB, specifically from the week starting April 26, 2020 to the week starting May 17, 2020.

[32] First, I find the Appellant meets the definition of a "appellant" for the EI ERB for the above weeks.

[33] I note that neither party disputes that the Appellant is generally eligible for the EI ERB. The Commission has already paid the Appellant 17 weeks of EI ERB payments and the EI ERB \$2,000 advance payment. So, I accept that the Appellant is generally eligible for the EI ERB.

[34] The law also says a person is a "appellant" for the EI ERB if they "could have had a benefit period established on or after March 15, 2020 with respect to any of the benefits referred to in paragraph (3)(a)", which are "benefits provided under section 152.03 or provided under Part I."¹³

[35] I find the Appellant meets the above definition of a "appellant" for the EI ERB.

¹¹ GD3-3 to GD3-13.

¹² GD3-16.

¹³ See section 153.5(2)(b) of the EI Act.

[36] I find the evidence shows that the Appellant could have had a benefit period established during any of the above weeks.

[37] The Appellant testified that she stopped working on April 17, 2020 due to illness. She had existing mental health challenges that worsened once the COVID-19 pandemic began and after her former employer refused to adopt any safety protocols in the weeks that followed.

[38] I find the Appellant to be credible. Her testimony was clear, direct, and detailed. Because I find her to be credible, I have no reason to doubt what she says about why she stopped working.

[39] The Appellant's Record of Employment (ROE) also indicates that her last day of work was on April 17, 2020 and the reason for issuing the ROE was "illness or injury."¹⁴

[40] So, based on this evidence, I find the Appellant stopped working on April 17, 2020 due to illness. I see no evidence that would lead me to conclude otherwise.

[41] I find the evidence therefore shows the Appellant could have had a benefit period established if she had applied during the period between the week starting April 26, 2020 and the week starting May 17, 2020. There is also no evidence that would lead me to conclude otherwise.

[42] Second, as a "appellant" for the EI ERB, I find the Appellant is eligible for more weeks of the EI ERB.

[43] The law says the definition of a "appellant" that the Appellant falls under is eligible for the EI ERB if they "have no income from employment or self-employment for at least seven consecutive days within the two-week period in respect of which they claimed the benefit."¹⁵

¹⁴ GD3-14.

¹⁵ See section 153.9(1)(b) of the EI Act.

[44] I find the Appellant meets this condition for the week starting April 26, 2020 to the week starting May 17, 2020.

[45] The Appellant testified that she couldn't work and didn't earn any money from the time when she stopped working on April 17, 2020 to when she applied for benefits on May 25, 2020. She testified in detail about why she couldn't work due to her mental health challenges. Since I find her credible, I have no reason to doubt what she says.

[46] I find the Appellant also provided other evidence to support her testimony.

[47] More specifically, the Appellant provided a doctor's note, dated May 21, 2020. It says that "due to medical reasons", she is "unfit to do regular work at this time". It also says that she needs to be excused from work for "May 9, 2020-June 30, 2020 inclusive due to medical reasons."¹⁶

[48] I acknowledge the Appellant's medical note doesn't specifically indicate that she couldn't work due to illness for the entire period between April 18, 2020 and May 24, 2020. But I find it does clearly show that she couldn't work due to illness from May 9, 2020 onwards, which strengthens her already credible testimony.

[49] And, as discussed above, I find there is other evidence that leads me to conclude that the Appellant couldn't work due to illness from April 18, 2020 to May 24, 2020 and wasn't earning any money during that time. Her ROE specifically indicates that she stopped working on April 17, 2020 due to illness¹⁷, and her May 25, 2020 application was for sickness benefits.¹⁸

[50] As a result, I find the Appellant stopped working on April 17, 2020 and wasn't working or earning any income as of April 18, 2020.

[51] Since the Appellant wasn't working or earning any income as of April 18, 2020, I find this means she had no income for at least seven consecutive days as of April 25,

¹⁶ GD5-5.

¹⁷ GD3-14.

¹⁸ GD3-3 to GD3-13.

2020. This makes her eligible for the EI ERB during the week starting April 26, 2020. It also makes her eligible for the EI ERB for the following three weeks, up until she applied for benefits and started getting the EI ERB.

[52] So, I find the Appellant is eligible for more weeks of the EI ERB, specifically from the week starting April 26, 2020 to the week starting May 17, 2020.

Does the Appellant have to pay back \$1,000 of the EI ERB advance payment?

[53] No, the Appellant doesn't have to pay back \$1,000 of the EI ERB advance payment.

[54] Between March 15, 2020, and October 3, 2020, appellants could apply for the EI ERB for two weeks at a time.¹⁹ The law allowed the Commission to pay appellants the EI ERB before it would normally pay it.²⁰

[55] The Commission paid the Appellant the \$2,000 advance payment on June 1, 2020.²¹ This was equal to four weeks of the EI ERB. The Commission planned to recover this advance payment by holding back four weeks of benefits later on—usually the 13th, 14th, 18th, and 19th weeks of benefits claimed.²²

[56] I find the Commission already recovered half of the advance payment (\$1,000) from the Appellant, specifically during the week starting August 16, 2020 and the week starting August 23, 2020 (the 13th and 14th weeks the Appellant claimed the EI ERB).²³ The parties don't dispute this.

[57] The Commission says it couldn't recover the other half of the advance payment from the Appellant because she reached the end of her EI ERB claim on October 3,

¹⁹ See sections 153.7(1) and 153.8 of the Act.

²⁰ See section 153.7(1.1) of the Act.

²¹ GD3-16.

²² GD4-2.

²³ GD3-17, GD4-3.

2020 before she got to the 18th and 19th weeks of that claim.²⁴ That is the reason for the \$1,000 overpayment.

[58] But, as discussed above, the Commission also says it will review whether the Appellant is eligible for more weeks of the EI ERB so that it can recover the other half of the advance payment that way. And I find I can review this issue here myself since the Commission appears to have turned its mind to this issue during the reconsideration phase.

[59] Also, as discussed above, I find the Appellant is in fact eligible for more weeks of the EI ERB, specifically from the week starting April 26, 2020 to the week starting May 17, 2020.

[60] Because the Appellant is eligible for more weeks of the EI ERB, I find the Commission can therefore recover the other half of the advance payment from those weeks.

[61] This means the Appellant doesn't have to repay \$1,000 of the EI ERB advance payment she received.

[62] The Appellant may also wonder if this means she is entitled to receive more EI ERB payments. Unfortunately, it doesn't. This is because the law says any EI ERB claim must not be made after December 2, 2020²⁵, so it is now too late for the Appellant to receive more EI ERB payments. I only looked at her eligibility for more EI ERB weeks here to see whether she must repay the other half of the advance payment or whether the Commission can recover it from her in some other way, which it now can.

²⁴ GD4-3.

²⁵ See section 153.8(2) of the EI Act.

Conclusion

[63] The Appellant is eligible for more weeks of the EI ERB and doesn't have to repay \$1,000 of the EI ERB advance payment. The Commission can recover that money from the other weeks that she is eligible.

[64] This means the appeal is allowed.

Bret Edwards

Member, General Division – Employment Insurance Section