



Citation: *YM v Canada Employment Insurance Commission*, 2024 SST 374

Social Security Tribunal of Canada Appeal Division

Decision

Appellant:	Y. M.
Respondent:	Canada Employment Insurance Commission
Representative:	Marcus Dirnberger
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Decision under appeal:	General Division decision dated November 23, 2023 (GE-23-2364)
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Tribunal member:	Glenn Betteridge
Type of hearing:	Videoconference
Hearing date:	February 27, 2024
Hearing participants:	Appellant Respondent's representative
Decision date:	April 16, 2024
File number:	AD-24-10

Decision

[1] I am dismissing Y. M.'s appeal.

[2] The General Division made an error in its decision when it ignored one of his legal arguments. I have fixed (remedied) the error by making the decision the General Division should have made.

[3] My decision doesn't change the outcome.

[4] The Canada Employment Insurance Commission (Commission) paid Y. M. the Employment Insurance (EI) regular and sickness benefits he was entitled to get. He was not eligible for the Employment Insurance Emergency Response Benefit (EI ERB). And the Commission had no power to cancel his benefit period (established effective February 2, 2020) or to start a new one for him in October 2020.

Overview

[5] I will call Y. M. the Claimant because he made a claim for Employment Insurance (EI) regular benefits on February 26, 2022. He wasn't able to get his record of employment from his employer. So the Canada Employment Insurance Commission (Commission) didn't decide his claim for many months.

[6] In the meantime, the Claimant applied for and received the Canada Emergency Response Benefit (CERB). The Canada Revenue Agency (CRA) administered the CERB. He received \$500 per week starting March 15, 2020.

[7] Then he applied for the EI sickness benefit. But he didn't send in a medical certificate with his application.

[8] In August 2020 the Commission approved his claim and paid him sickness benefits (\$158 per week) starting the week of February 9, 2020, and ending the week of May 17, 2020. He received both EI sickness benefits and the CERB for many weeks.

[9] On October 15, 2020, the Claimant applied for EI regular benefits. The Commission treated this as a renewal of his existing claim. It paid him regular benefits at a rate of \$158 per week. In some weeks he received both EI regular benefits and the Canada Response Benefit (\$500 per week, administered by the CRA).

[10] On November 17, 2020, the Claimant asked the Commission to **terminate his benefit period effective February 6, 2020**. The Commission refused.

[11] On July 24, 2023, the Claimant made a request for reconsideration. He argued the Commission should have

- told him he was eligible for EI regular benefits when his EI sickness benefits ended
- cancelled his benefit period, instead of reactivating his existing claim, so he could have received the CRB starting September 27, 2020
- not imposed a waiting period when it reactivated his EI claim effective October 4, 2020
- followed section 15 of the *Canada Emergency Response Benefits Act* (CERB Act) and paid him \$500 per week in EI ERB rather than \$158 per week in EI sickness and regular benefits

[12] The Commission maintained its decision. So the Claimant appealed to this Tribunal's General Division. The General Division dismissed his appeal.

[13] The Claimant now appeals to the Appeal Division. He argues the General Division made jurisdictional errors, legal errors, and important factual errors. The Commission argues the General Division didn't make any errors.

Preliminary matter: I didn't accept new evidence

[14] The Claimant wanted to introduce into evidence two affidavits. Affidavits are sworn documents used to introduce evidence in a legal case. A CRA employee prepared the affidavits. One is about the Claimant's eligibility for the CERB.¹ The other is about the Claimant's eligibility for the CRB.² The Attorney General of Canada introduced these affidavits in a Federal Court case brought by the Claimant.³

[15] Generally, the Appeal Division can't accept new evidence that wasn't before the General Division.⁴ To introduce new evidence a party has to show the evidence meets one of the three recognized exceptions **or** convince the Appeal Division to accept it for another reason.

[16] The Claimant didn't make any argument based on the legal test to admit new evidence. The Commission argued the affidavits don't meet any of the three recognized exceptions. It also argued the information in the two affidavits doesn't change the Claimant's eligibility for benefits under the *Employment Insurance Act* (EI Act).

[17] At the hearing I decided I would not accept the affidavits, for the following reasons. They are **new evidence** because they weren't before the General Division. The Claimant hasn't shown the information in the affidavits meets any of the three exceptions or shown another reason why I should accept the affidavits into evidence.

[18] Paragraph 3 of the Commission's submissions also contained new evidence.⁵ At the hearing the Commission said this paragraph was included by mistake. It isn't about this appeal. So I have not considered it.

¹ See the CERB affidavit at pages AD01-26 to AD01-34.

² See the CRB affidavit at pages AD01-35 to AD01-42.

³ See *Y. M. v Attorney General of Canada*, Federal Court File No. T-1515-23.

⁴ The legal test was reviewed by the Federal Court of Appeal in *Sibbald v Canada (Attorney General)*, 2022 FCA 157 at paragraphs 36 to 42.

⁵ See paragraph 3 of the Commission's written argument, at pages AD06-4 and AD06-5.

Issues

[19] There are five issues in this appeal

- Did the General Division **fail to decide an issue** it should have decided when it refused to apply section 15 of the CERB Act?
- Did the General Division make a **legal error** when it ignored the Claimant's argument he met the definition of "claimant" for the EI ERB under section 153.5(2)(c) of the EI Act?
- Did the General Division make an **important factual error** or a **legal error** when it accepted the Commission's decision to establish his benefit period effective February 2, 2020?
- Did the General Division make an **important factual error** or a **legal error** because it didn't give a full or thorough analysis in its decision and didn't refer to details of documents the Claimant sent in?
- If the General Division made an error, how should I **fix (remedy) the error**?

Analysis

[20] The General Division made a **legal error**. It ignored the Claimant's argument that he met the EI ERB definition of "claimant" under section 153.5(2)(c) of the EI Act.

[21] I have fixed (remedied) that error by making the decision the General Division should have made. But my decision doesn't change the outcome in his case.

The Appeal Division's role

[22] The Appeal Division's role is different than the General Division's role. The law allows me to step in and fix (remedy) a General Division error where a person can show the General Division

- **didn't decide an issue** it should have decided

- made a **legal error**
- made an **important factual error**⁶

[23] If I find the General Division didn't make an error, I have to dismiss the appeal.

[24] In his written argument, the Claimant said the General Division was **biased and didn't follow a fair process**.⁷ At the hearing he withdrew these arguments. So I don't have to decide whether the General Division made a **natural justice** error.

The General Division didn't make an error when it refused to apply section 15 of the CERB Act

[25] The General Division makes an error if it acts beyond or refuses to exercise its decision-making power.⁸ In other words, the General Division makes an error if it decides an issue it has no power to decide **or** doesn't decide an issue it has to decide. In law these are called **jurisdictional errors**.

[26] The General Division decided it had no power to consider a CRA decision made under the CERB Act (paragraph 14). It reasoned the Tribunal only has the power to decide appeals of Commission decisions made under the EI Act and regulations made under it (paragraphs 12 and 13).

[27] The Claimant argued the General Division made an error when it **refused to apply section 15 of the CERB Act**. He says the CERB Act was new so the General Division should not have taken a "conservative narrow-minded old-school approach."⁹

⁶ Section 58(1) of the *Department of Employment and Social Development Act* (DESD Act) calls these the "grounds of appeal." This is what I mean by an error. I wrote the errors in plain language. I explain more about each type of error when I analyze the Claimant's arguments.

⁷ Section 58(1)(a) says it's a ground of appeal where the General Division failed to observe a principle of natural justice.

⁸ Section 58(1)(a) of the DESD Act says it's a ground of appeal where the General Division acts beyond or refuses to exercise its jurisdiction.

⁹ The Claimant makes arguments about section 15 of the CERB Act in his written argument at pages AD05-3, AD05-8, AD05-9, and AD05-11. See also his application to the Appeal Division at pages AD01-9 and AD01-13.

The Commission argued this wasn't an error because the General Division had no decision-making power (in other words, jurisdiction) to use that law in his appeal.

[28] I agree with the General Division's interpretation of its decision-making power. I have reviewed the CERB Act. The CERB Act doesn't give this Tribunal the power to deal with appeals of decisions made under that Act. And the EI Act doesn't give the Tribunal the power to deal with appeals of decisions made under the CERB Act.

[29] So the General Division **didn't make a jurisdictional error** when it refused to apply section 15 of the CERB Act.

The General Division made a legal error when it ignored the Claimant's argument he met the EI ERB definition of "claimant"

[30] The General Division makes a legal error when it ignores an argument made by a party that it should have considered.¹⁰ While the General Division doesn't have to refer to every argument, its reasons have to show it considered the questions it needed to examine in the appeal.¹¹

[31] The government created the EI ERB under Part VIII.4 of the EI Act to respond to the COVID pandemic.¹²

[32] The General Division decided the Claimant wasn't eligible for the EI ERB because he applied for EI benefits before the EI ERB came into force on March 15, 2020 (paragraph 21). So the law about the EI ERB didn't apply to him (paragraph 27).

[33] The Claimant argues the General Division made an error of law when it ignored his argument that he was eligible for the EI ERB based on the **December 29, 2019, date used in section 153.5(2)(c)** of the EI Act.¹³ He says the General Division didn't

¹⁰ Section 58(1)(b) of the DESD Act says it's a ground of appeal where the General Division erred in law in making its decision. See *Uvaliyev v Canada (Attorney General)*, 2021 FCA 222 at paragraph 6.

¹¹ See for example, *Szabo v. Canada (Attorney General)*, 2020 FCA 33 at paragraph 12; *Kuk v Canada (Attorney General)*, 2023 FC 1134 at paragraph 44; and *Sennikova v Canada (Attorney General)*, 2021 FC 982 at paragraph 62.

¹² See EI Act at Part VIII.4 "Employment Insurance Emergency Response Benefit (SS. 153.5—153.14)."

¹³ See the Claimant's written arguments at pages AD01-8 (paragraph 2), AD01-11 (paragraph 11), and AD01-13 (paragraph 24b). The Claimant repeats the argument in AD05 and reiterates the argument at page AD05-5 (paragraph 15). He also includes the highlighted text of the EIA section 153.5(2)(c).

explain why it used March 15, 2020, and not December 29, 2019, when it found he wasn't eligible for the EI ERB. He also says the General Division didn't consider other relevant provisions under Part VIII.4 of the EI Act he relied on—sections **153.8(5)**, **153.8(6)**, and **153.121**.

[34] At the hearing the Commission argued that the Claimant's argument about the December 29 date was vague to the point of not disclosing an error the Tribunal could take into account.¹⁴ His focus on this date was misplaced because the sections that refer to December 29 don't apply to his situation and his claims.

[35] I agree with the Claimant. The General Division made a legal error when it **ignored his argument under section 153.5(2)(c)** of the EI Act. Under Part VIII.4 of the EI Act, in some circumstances people who established EI benefit periods **before the EI ERB came into effect** on March 15, 2020 were able to claim and get the EI ERB. The General Division didn't consider this.

[36] Section 153.5(2) defines who can be a "claimant" for the EI ERB. Section 153.5(2)(c) read with 153.5(3)(b) say a claimant includes a person who

- is **unable to start working** for reasons related to COVID-19, and
- a **regular benefit** was paid or payable to that person at any time between December 29, 2019 and October 3, 2020, **if during that time**
 - their benefit period ended, or
 - the Commission paid them all the benefits they were entitled to, or
 - the Commission could not pay some of the benefits because of the maximum of 50 weeks of combined benefits a person can get

[37] The last day to apply for the EI ERB was December 2, 2020.¹⁵

¹⁴ Listen to the recording of the Appeal Division hearing starting at 1:08:05.

¹⁵ See section 153.8(2) of the EI Act.

[38] I listened to the General Division hearing. I reviewed the written arguments the Claimant made to the General Division. And I considered the General Division's decision. These show me

- the General Division interpreted its jurisdiction broadly and found it had to decide whether the Claimant could be paid the EI ERB (paragraphs 18 and 21 to 27)
- the Claimant argued he was eligible for the EI ERB based on the December 29, 2019 date in **section 153.5(2)(c)**¹⁶
- in its decision, when the General Division considered whether he was eligible for the EI ERB it didn't refer December 29, 2019, section 153.5(2)(c), or the other sections of Part VIII.4 of the EI Act the Claimant relied on (**153.8(5), 153.8(6), and 153.121**)

[39] The General Division said it had to decide whether the Claimant was eligible for the EI ERB. It decided the issue based **only on the coming into force date of the EI ERB** (March 15, 2020). It didn't consider the Claimant's argument that he was eligible for the EI ERB based on section 153.5(2)(c) along with other sections of Part VIII.4 of the EI Act he relied on.

[40] By ignoring the Claimant's argument, the General Division made an error of law.

The General Division didn't make an error when it found his benefit period was established in February 2020

[41] The General Division accepted that the Commission established his claim on February 2, 2020 (paragraph 36).

¹⁶ See pages GD02-59 and GD2-62 of his appeal document, where he underlined in red text from a Government of Canada webpage that uses that date to say when describing who is eligible for COVID-19 benefits. See also his written arguments at page GD07-3 where he has pasted the text of section 153.5(2) and once again highlighted in red 153.5(2)(b) and (c).

[42] The Claimant argues the Commission established his benefit period on August 7, 2020. So the General Division made an error when it decided the Commission correctly established his benefit period effective February 2, 2020 (paragraphs 24 to 26, 36).

[43] The Claimant also argued the **Commission used the wrong record of employment** (ROE) to establish his benefit period. It used the X ROE.¹⁷ It showed pay for four hours the employer underpaid him, with a last day of February 7, 2020. He says this was for work he did in 2019, but X underpaid him then and only realized its mistake later. I have no reason to doubt the Claimant's evidence about this. I believe his testimony he didn't work for X in 2020.

[44] The Claimant could be arguing the General Division made **an important error of fact** or **an error of law**, so I will consider both types of errors.

[45] The General Division makes an **important factual error** if it bases its decision on a factual finding it made by ignoring, misunderstanding, or mistaking the evidence.¹⁸ In other words, the evidence goes squarely against or doesn't support a factual finding the General Division made.¹⁹

[46] The Commission used confusing language in its written argument to the General Division. It stated the Claimant's EI application was "established on August 7, 2020."²⁰ Then it wrote the effective date of his claim was February 2, 2020.²¹

[47] I have reviewed the evidence that was before the General Division. It shows

¹⁷ See that ROE at page GD03-49.

¹⁸ Section 58(1)(c) of the DESD Act says it's a ground of appeal where the General Division based its decision on an erroneous finding of fact it made in a perverse or capricious manner or without regard for the material before it. I have described this ground of appeal using plain language, based on the words in the Act and the cases that have interpreted the Act.

¹⁹ See *Garvey v Canada (Attorney General)*, 2018 FCA 118; and *Walls v Canada (Attorney General)*, 2022 FCA 47.

²⁰ See page GD04-1.

²¹ See page GD04-1.

- January 31, 2020, was the last day of work the Claimant was paid by his employer (X)²²
- he made an initial claim for benefits on February 26, 2020,²³
- the Commission decided the first day of his benefit period was February 2, 2020, and it paid him the sickness benefit for 15 weeks after a one week waiting period²⁴

[48] The EI Act says that a benefit period begins on the later of the Sunday of the week in which the interruption of earnings occurred and the Sunday of the week in which the initial claim for benefits is made.²⁵ The Commission applies an administrative policy to any application made within four weeks of an interruption of earnings.²⁶ Under that policy it treats the application as if it was filed on the Sunday of the week of the interruption of earnings or the last week worked. It then determines the effective date of the claim (or renewal) based on what is most advantageous to a claimant.

[49] There is no dispute the Claimant made an initial claim for EI benefits on February 26, 2020.²⁷ That's the day he submitted his on-line application to the Commission. That date was within four weeks of his last day of paid work, January 31, 2020 (his interruption of earnings). So the Commission established his claim for benefits effective February 2, 2020 (which was the Sunday of the week of his interruption of

²² This is what the Claimant wrote in his request for record of employment at page GD03-7, and in two of his EI applications at pages GD03-12, GD03-33, and GD03-. He also included it in his appeal document to the General Division, at pages GD02-65 and GD02-70. It is also what his employer wrote on the record of employment it filed with the Commission, at page GD03-50.

²³ See his first EI application at page GD03-26.

²⁴ The Claimant's chart at page GD03-150, and the screen shots from his My Service Canada Account at GD03-123 to GD03-126. And see the Commission's Full Text Screen—Payments printout at page GD03-53.

²⁵ See section 10(1) of the EI Act.

²⁶ The Commission explains this policy at page GD04-6.

²⁷ See the Claimant's initial application for EI regular benefits, dated February 26, 2020, at page GD03-26.

earnings).²⁸ Then he served a one-week waiting period, and the Commission paid him sickness benefits starting February 9, 2020, until the week of May 17, 2020.

[50] Based on the evidence I have accepted and the law, I find the Commission **correctly established his benefit period effective February 2, 2020**. This means the **General Division didn't make a legal error** or an **important factual error** when it agreed with the Commission and accepted this date.

The General Division didn't make any other important factual error

[51] The General Division didn't have to refer to every piece of evidence in its decision. The courts have said I can presume it reviewed and considered all the evidence.²⁹

[52] The Claimant argues the General Division made three factual errors.

[53] First, the General Division said the Claimant asked her to issue an administrative fine against the Commission. The Claimant argues he asked the General Division to issue a fine against his employer.

[54] I agree that the General Division got this fact wrong. At the hearing and in his written arguments he asked the General Division to impose a fine on his employer. **But the General Division didn't make an important factual error**. It didn't make a finding of fact based on its mistake. And it didn't base its decision on its mistake. In other words, the mistake had no effect on the General Division's decision. So it's not an important factual error.

[55] Second, the **Claimant argued the General Division ignored a chart** he sent to the General Division and referred to at the hearing.³⁰ That chart sets out the EI benefits he received, the CRA benefits he received, and the debt he owes to the CRA.

²⁸ Section 9 of the EI Act says that where an insured person under section 7 makes an initial claim for benefits, a benefit period shall be established. The Commission's Full Text Screens—Payments, at page GD03-53, shows the first week of his claim was February 2, 2020.

²⁹ See *Sibbald v Canada (Attorney General)*, 2022 FCA 157 at paragraph 46.

³⁰ See the chart at page GD07-21.

[56] The Commission argued the Claimant's chart was a collection of dates and benefits. It was drawn from other evidence. So the chart wasn't probative evidence the General Division had to consider.

[57] I agree with the Commission's argument. The Claimant created the chart using evidence from other documents that were before the General Division. In other words, there is no original evidence in the chart. And the General Division didn't have to consider the CERB the Claimant received or his debt to the CRA, because it had no legal decision-making power under the CERB Act and it didn't affect his entitlement to EI.

[58] So the Claimant hasn't shown the General Division ignored evidence it had to consider by not specifically referring to the chart in its decision.

[59] Third, the Claimant argued the General Division made an important factual error in the way it handled the evidence. He argues it didn't give **a full or thorough analysis in its decision**. It didn't explain its conclusions about EI ERB eligibility, and **benefit renewal and cancellation**. He also argued the General Division **didn't discuss any of the reasoning or analysis in his GD7 written arguments**.

[60] The Commission argued the General Division gave reasons for its conclusions on EI ERB eligibility, and claim cancellation and renewal. It argued the General Division doesn't have to refer to every piece of evidence.

[61] The Claimant **hasn't shown the General Division made an important factual error**. The Claimant disagrees with the emphasis and weight the General Division gave to the evidence. He doesn't think the General Division paid enough attention to his chart. He disagrees with the focus of its analysis and conclusions. And he disagrees with the outcome in his appeal.

[62] I don't have the power to review the General Division's application of the correct law to the evidence it has properly considered then weighed. In other words, I have no power to find the General Division made **mixed errors** of fact and law. And I can't second-guess the General Division's weighing of the evidence.

[63] To summarize this section, the Claimant hasn't shown the General Division made a finding of fact by **ignoring, misunderstanding, or mistaking the evidence**, then based its decision on such a finding. So the General Division **didn't make an important factual error**.

[64] The third factual error the Claimant says the General Division made—not giving a thorough analysis—**could also be a legal error**. The General Division makes a legal error when it fails to give adequate reasons on an issue it had to decide.³¹

[65] Above, I found the General Division ignored the Claimant's argument about EI ERB eligibility—in other words, it gave no reasons. But the General Division gave adequate reasons when it decided the **benefit cancellation issue and benefit renewal issue** (paragraphs 28 to 42). It set out the relevant facts and law. It explained how these issues legally related to one another. And it showed the logical chain of resonating it followed, applying the law to its factual findings, to arrive at its conclusion on these issues. In other words, it gave adequate reasons.

[66] The General Division also gave adequate reasons why it didn't go into a detailed analysis of the **statutory interpretation and fairness arguments (and calculations) the Claimant included in GD7**. In a subsection titled "Legislative intent" (paragraphs 43 to 46), the General Division found there was no ambiguity in the law it had to apply. So it didn't have to analyze in detail his arguments about why the Commission should have paid him \$500 per week rather than the \$158 per week. As the General Division pointed out, he acknowledged \$158 per week was the correct amount of sickness and regular benefits (paragraph 44). And the General Division didn't have to deal with the set-off calculations he set out to settle the case based on fairness. So the General Division's reasons were adequate.

[67] This means the General Division **didn't make an error of law by giving inadequate reasons**.

³¹ See *Doucette v Canada (Minister of Human Resources Development)*, 2002 FCA 292 at paragraph 6.

Fixing (remedying) the error by making the decision the General Division should have made

[68] The law gives me the power to fix (remedy) the General Division's errors. The parties agreed that if I found an error, I should make the decision the General Division should have made. I agree with the parties because they had a full and fair opportunity to present their evidence and arguments at General Division.

[69] The Claimant owes a large debt to the CRA. With his appeal to the Tribunal he is trying to find a legal pathway to reduce or eliminate his indebtedness.³² I understand his legal arguments in this appeal to be about this, at least in part. He relies heavily on fairness and the fact he had to live through the COVID pandemic just like people who received higher benefits under the EI ERB, CERB, and CRB—up to \$500 per week. So he says the Commission should have paid him \$500 per week instead of \$158. Or it should have cancelled his EI claim retroactively so he would be legally entitled to keep the CERB and CRB he received. Then he would only have to pay back the lower EI benefits he received.

[70] He has made arguments that contradict one another. I have treated those as alternative arguments to make sure I have analyzed all of the arguments he made.

[71] Because the Claimant based his case heavily on fairness and his financial circumstances, it is important to point out I can't decide his appeal based on fairness, compassion, or financial hardship. And I can't interpret the law based on those things. I have to follow the law—as it appears in the EI Act and the courts have interpreted that Act.³³

– The three issues I have to decide

[72] I have to decide three issues

³² His arguments make this clear. His calculation sets off amounts he believes he should have received from the Commission against what he received. This would get him money to pay off his debt to the CRA. Also, in his written documents at the Appeal Division, he makes a settlement proposal to the Commission along these lines. See pages ADS01-13 and AD05-16.

³³ See generally *Canada (Attorney General) v Knee*, 2011 FCA 301.

- whether the Commission should have **cancelled the benefit period** it established starting February 2, 2020,
- whether the Commission should have **established a new benefit period** for the Claimant in October 2020
- whether the Commission should have established a claim for and paid the Claimant the **EI ERB** under **section 153.5(2), 153.8(5), 153.8(6), or 153.121** of the EI Act

[73] The sections the Claimant relies on under the third issue are all from Part VIII.4 of the EI Act and relate to the EI ERB.

[74] At the Appeal Division hearing the Claimant agreed with the General Division finding that he didn't serve two waiting periods. So I don't have to decide this issue.

[75] Next I will analyze the first two issues, about cancelling his February 2020 benefit period and his October 2020 benefit renewal. Then I will analyze the EI ERB issues under several subheadings.

– **The Commission could not cancel the Claimant's benefit period or establish a new benefit period (section 10 of the EIA)**

[76] The Claimant argues the Commission should have cancelled the February 2, 2020 benefit period it established for him. He believes this would have cleared the way for him to keep all the CERB and CRB he received, and to have received more CRB. The Claimant argues the Commission should have started a new benefit period for him in October 2020—rather than renewing his existing benefit period. He says if the Commission established a new benefit period, it could have paid him the CRB amount (\$500) rather than the \$158 it paid him. It should do that because that is fair to him.

[77] The General Division analyzed whether the Commission could cancel the February 2020 benefit period, or start a new benefit period in October 2020 (paragraphs 28 to 42). It decided the Claimant

- **didn't meet the conditions to cancel his claim** set out in section 10(6) of the EI Act because he was paid benefits under the claim (paragraph 36)
- **hadn't worked enough hours in his qualifying period to start a new claim** in October 2020 because he didn't work any hours since he established his February 2020 claim (paragraph 41)

[78] I am adopting these General Division legal and factual findings. I can do this because the Claimant hasn't proven the General Division made an important factual error, a legal error, or an error of jurisdiction in these parts of its decision.

[79] Next I will analyze whether the Commission should have used sections under Part VIII.4 of the EI Act to cancel his February 2, 2020, benefit period and pay him the EI ERB.

- **The Claimant didn't meet the definition EI ERB definition of "claimant" so he could not get the EI ERB**

[80] **Section 153.5(2)** defines "**claimant**" for the purposes of the EI ERB. This is important because

- only a **claimant** could apply for the EI ERB
- the Commission can only decide whether a **claimant** is eligible for the EI ERB
- the Commission can only pay the EI ERB to an **eligible claimant**

[81] Section 153.5(2) sets out four ways a person can meet the EI ERB definition of claimant—under paragraphs (a), (b), (c), and (d). To be thorough, I will consider the Claimant's circumstances under each paragraph, even if he didn't make an argument about each paragraph.

Section 153.5(2)(a)

[82] The Claimant doesn't meet the definition under **section 153.5(a)** because **he didn't cease working because of COVID**.

[83] The evidence shows his last day of work was January 31, 2020—before the COVID epidemic caused shutdowns and job losses in Ontario.³⁴ He and his employer both say he was dismissed.³⁵ And there is no evidence that shows his job ended for reasons related to COVID. So I find it's more likely than not the Claimant didn't cease working because of COVID.

Section 153.5(2)(b)

[84] The Claimant doesn't meet the definition under **section 153.5(b)** because he could not have had a benefit period for regular or sickness benefits **established on or after March 15, 2020**.³⁶

[85] Section 153.5(2)(b) refers to 153.5(3)(a). The definition of a claimant under these sections includes an employed person who **could have had a sickness or regular benefit period established on or after March 15, 2020**.

[86] The Claimant argued the Commission established his claim on August 7, 2020.

[87] The evidence that I accept shows that

- the Claimant applied for EI regular benefits on February 26, 2020,
- the Commission correctly established a benefit period for him starting February 2, 2020,
- then he switched his application to EI sickness benefits
- the Commission paid him the **sickness benefit** for the maximum number of weeks (15 weeks, from February 2, 2020, to May 17, 2020)

³⁴ I am taking "judicial notice" of this fact. It is widely known and accepted that the Ontario government declaration of the state of emergency and restrictions came into force in March 2020.

³⁵ See the record of employment at page GD03-50. And see the request for record of employment the claimant filed, at page GD03-7, where he writes he was "fired, wrongful dismissal."

³⁶ See EI Act section 153.5(2)(b) and 153.8(6).

- he didn't make an application for regular benefits from the time his sickness benefit ended through October 3, 2020,
- when he applied for EI regular benefits on October 15, 2020, the Commission reactivated his existing claim (called a renewal) and paid him regular benefits from the week of October 4, 2020, through the week of January 3, 2021,
- at that point his benefit period ended, after 50 weeks

[88] I adopted the General Division's findings that

- the Commission **could not cancel** the benefit period it established effective February 2, 2020
- he **could not end his benefit period** because he didn't have enough hours to qualify for a new initial claim

[89] Because the Claimant had an existing benefit period, the Commission could not have **established** a benefit period for the Claimant for EI regular or sickness benefits **on or after March 15, 2020**, up to the last week the EI ERB was available (October 3, 2020). This means he doesn't meet the definition under **section 153.5(b)**

Section 153.5(2)(c)

[90] The Claimant argued he met the definition of a claimant under section 153.5(2)(c). He based his argument on the **December 29, 2019** date in that section. That section refers to 153.5(3)(b). Together these sections say an EI ERB claimant means a person who

- is **unable to start working** for reasons related to COVID-19, and
- at least one EI benefit under Part I of the Act (**except the benefits in sections 21 to 24**) at any time between December 29, 2019, and October 3, 2020, **had been paid or was payable, if during that time**

- their benefit period ended, or
- the Commission paid them all the benefits they were entitled to, or
- the Commission could not pay some of the benefits because of the maximum of 50 weeks of benefits a person can get³⁷

[91] Section 21 of the EI Act allows the Commission to pay special benefits, including the **sickness benefit**. Section 153.5(2)(c) says that **people who received a sickness benefit** between December 29, 2019, and October 3, 2020, **can't meet the definition of claimant**.³⁸ The Claimant received a sickness benefit during this time, so he can't meet the definition of Claimant based on the sickness benefit he received.

[92] Can the Claimant meet the definition of EI ERB claimant because an EI regular benefit was payable to him?

[93] I will assume the Commission **could have paid** the Claimant an EI **regular benefit** after his EI sickness benefit ran out. I will also assume he was unable to start working because of COVID, and not because he was incapable of working due to sickness.

[94] Even with these assumptions, the Claimant doesn't meet the section 153.5(2)(c) definition. He doesn't meet any of the three conditions that had to take place with his claim, between December 29, 2019, and October 3, 2020. The maximum 50 weeks of benefits **didn't apply to his claim**. His **benefit period hadn't ended**. And the **Commission hadn't paid him all the benefits he was entitled to**. The Commission paid him benefits through the week of January 3, 2021. At the end of that week, he had received all the benefits he was entitled to under the claim the Commission established effective February 2, 2020.

³⁷ See section 12(6) of the EI Act.

³⁸ Sections 153.5(2)(c) and 153.5(3)(b) say that people who were paid benefits (or to whom benefits were payable) under section 21 to 24 of the EI Act don't meet the EI ERB definition of claimant. The Commission pays sickness benefits under section 21 of the EI Act.

Section 153.5(2)(d)

[95] The Claimant doesn't meet the definition of EI ERB claimant in section 153.5(2)(d) of the EI Act because he didn't receive benefits under Part VIII. He wasn't a self-employed person engaged in fishing.

- **Sections 153.8(5) and 153.8(6) don't apply because the Commission correctly established the Claimant's claim starting on February 2, 2020**

[96] The Claimant argued the Commission should have established his claim as an EI ERB claim based on **sections 153.8(5) and 153.8(6)** of the EI Act.³⁹ He says the Commission had no power to establish a benefit period for him starting August 7, 2020.

[97] Taken together, **sections 153.8(5) and 153.8(6)** say no benefit period is to be **established** for the regular or sickness benefit **between March 15 and October 3, 2020**. In other words, during this time the Commission had to establish an EI ERB benefit period for eligible people instead of a regular or sickness benefit period.

[98] Above I decided the Commission correctly established the Claimant's benefit period for the sickness benefit **effective February 2, 2020**. Because his benefit period was established **before March 15, 2020**, I find section 153.8(5) and 153.8(6) of the EI Act don't apply to his situation.

- **The Commission had no power to end the Claimant's benefit period under section 153.121 of the EI Act**

[99] **Section 153.121** of EI Act automatically ended a benefit period established before March 15, 2020 on the day before the **first week an EI ERB claimant is paid the EI ERB**.

[100] The Claimant argued the Commission should have used this section to end the February 2, 2020 benefit period it established for him.

³⁹ The Claimant refers to these sections in his written argument at pages AD05-4 through AD05-10.

[101] Section 153.121 of EI Act didn't (and could not) end the Claimant's benefit period. As I decided above, he didn't meet the definition of EI ERB claimant. So he could not apply for or get paid the EI ERB.

[102] So factually and legally there **was no first week the Commission paid him the EI ERB** or had a legal duty to do that. In other words, section 153.121 doesn't apply to the Claimant and could not end his EI benefit period the Commission correctly established for him effective February 2, 2020.

Conclusion

[103] The General Division made a legal error. It ignored the Claimant's argument that he should have been considered for the EI ERB under section 153.5(2)(c) and other sections in Part VIII.4 of the EI Act.

[104] I have fixed that error by making the decision the General Division should have made.

[105] My decision doesn't change the outcome in the Claimant's case. Under the EI Act, the Commission could not cancel his February 2, 2020 EI claim. It could not establish a new claim for him in October 2020. And it could not pay him the EI ERB. The Commission paid him the EI sickness and regular benefits he was entitled to receive.

[106] I appreciate how unfair this seems to the Claimant. In the space of a year he lost his job. He experienced mental health challenges that left him unable to work for many months. And he had to cope with the many negative effects of the COVID pandemic. Then in 2022 he learned he had to pay back thousands of dollars of CERB and CRB he had received.

[107] But the law I have applied is clear. And unfortunately for the Claimant, I have to follow it.

Glenn Betteridge
Member, Appeal Division