



Citation: *JA v Canada Employment Insurance Commission*, 2023 SST 2072

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant: J. A.
Representative: R. A.

Respondent: Canada Employment Insurance Commission

Decisions under appeal: Canada Employment Insurance Commission reconsideration decision (579435) dated March 10, 2023 (issued by Service Canada) and reconsideration decision (463689) dated March 10, 2023 (issued by Service Canada)

Tribunal member: Bret Edwards

Type of hearing: Videoconference

Hearing date: July 12, 2023

Hearing participants: Appellant
Appellant's representative

Decision date: August 21, 2023

File numbers: GE-23-1120, GE-23-1121

Decision

[1] The appeal is allowed. I agree with the Appellant.

[2] The Commission didn't exercise its discretion properly when it decided to review the Appellant's eligibility for the Employment Insurance Emergency Response Benefit (EI ERB).

[3] I won't reconsider the Appellant's EI ERB eligibility, so he doesn't have to pay back the EI ERB benefits he received.

Overview

[4] On April 15, 2020, the Appellant applied for the EI ERB. The Commission established a benefit period for the Appellant as of March 15, 2020, and sent him a \$2,000 advance EI ERB payment.

[5] On June 11, 2020, the Commission approved six more weeks of EI ERB payments for the Appellant totaling \$3,000, starting the week of March 15, 2020 and ending the week of April 25, 2020.

[6] On September 1, 2022, the Commission initiated a review of the Appellant's EI ERB eligibility.

[7] On January 23, 2023, the Commission decided the Appellant wasn't eligible for the EI ERB weekly payments he received totaling \$3,000. On March 10, 2023, the Commission decided the Appellant wasn't eligible for the EI ERB \$2,000 advance payment he received.

[8] Because of the Commission's decisions, the Appellant now has a \$5,000 overpayment.

[9] The Commission says the Appellant must pay back the EI ERB money he received because he wasn't eligible for it.

[10] The Appellant says he shouldn't have to pay back the EI ERB money he received. He applied for the EI ERB by mistake and instead wanted to apply for the Canada Emergency Student Benefit (CESB). He asked the Commission to cancel his EI ERB claim and return the advance payment, but instead the Commission sent him more money that he understood to be for the CESB, not the EI ERB. He was honest with the Commission from the beginning and had no idea what the Commission had actually done until he was told to pay back the money.

The Appellant has multiple appeals

[11] The Appellant has multiple appeals. I have decided to join the appeals because they deal with common questions of law and fact, and no injustice is likely to be caused to any party by joining them.¹

Issues

[12] Can the Commission go back and review the Appellant's EI ERB eligibility?

[13] Did the Commission exercise its discretion properly when it made its decision to go back and review the Appellant's EI ERB eligibility?

[14] If not, how should I exercise the Commission's discretion on its behalf?

Analysis

Can the Commission go back and review the Appellant's EI ERB eligibility?

[15] Yes, it can. The law allows the Commission to do this.

[16] There are two sections of the law that apply here.

¹ Section 13 of the *Social Security Tribunal Regulations* allows the appeals to be joined.

[17] First, section 52 of the *Employment Insurance Act* (Act) allows the Commission to reconsider (change) a claim for EI benefits within 36 months after the benefits have been paid.²

[18] When looking at section 52 of the Act in this case, I find the Commission acted within the 36-month limit for the Appellant's claim as set out in this section. The EI benefits at issue here were paid for the period from March 15, 2020 to April 25, 2020. The Commission changed its decision on the Appellant's entitlement to the EI ERB advance payment on October 21, 2021³, and changed its decision on the Appellant's entitlement to the additional EI ERB payments on January 23, 2023⁴. This was within 36 months of the first week of EI benefits (starting March 15, 2020) paid to the Appellant.

[19] I therefore find the Commission was acting within the law and could go back to verify and reconsider (change) its decision on the Appellant's entitlement to EI ERB benefits.

[20] Second, section 153.1303(1) of the Act requires the Commission to notify an appellant if it decides that they have received EI ERB money they aren't eligible for or haven't received EI ERB money they are eligible for.⁵

[21] When looking at section 153.1303(1) here, I find the Commission acted as the law requires. It decided the Appellant received EI ERB money he isn't eligible for and notified him of its decision.

[22] So, sections 52 and 153.1303(1) of the Act allow the Commission to go back and verify an appellant's entitlement to the EI ERB benefits they received and to assess an overpayment, if appropriate.

Did the Commission exercise its discretion properly when it made its decision to go back and review the Appellant's EI ERB eligibility?

² Or within 72 months if the Commission believes an appellant made a false or misleading statement in connection with their claim for EI benefits.

³ GD3-18 (GE-23-1121).

⁴ GD3-36 to GD3-37 (GE-23-1120).

⁵ The Commission also cited section 153.1303(1) of the Act in its additional submissions. See GDJ6-1.

[23] No, the Commission didn't exercise its discretion properly when it made its decision to go back and review the Appellant's EI ERB eligibility.

[24] While the Commission can go back and review the Appellant's EI ERB eligibility for the period from March 15, 2020 onwards, its decision to do so is discretionary.

[25] This means that it doesn't have to do a review, but it can choose to do so if it wants.

[26] What this means is that I can only interfere with (change) the Commission's decision if it didn't exercise its discretion properly when it made the decision.

[27] For the Commission to have exercised its discretion properly, it must not have done the following things when it made the decision to review the Appellant's EI ERB eligibility from March 15, 2020 onwards:

- acted in bad faith
- acted for an improper purpose or motive
- took into account an irrelevant factor
- ignored a relevant factor
- acted in a discriminatory manner⁶

[28] The Appellant says the Commission didn't exercise its discretion properly. He says the Commission acted in bad faith and ignored a relevant factor for the following reasons:

- The Commission didn't consider the steps he took to try and cancel his EI ERB claim once he realized he had made a mistake.
- The Commission didn't consider that its error, and not his, is what created his overpayment. Instead of cancelling his claim when he asked, the Commission gave him more money and made him think that this money (and the money he

⁶ See *Suresh v Canada (Minister of Citizenship and Immigration)*, [2000] 2 FC 592; *Canada (Attorney General) v Purcell*, 1995 CanLII 3558 (FCA), [1996] 1 FC 644.

had already received) was now for the benefit he wanted all along (the CESB) rather than the EI ERB.⁷

[29] The Commission says it properly applied section 153.1303 in its decisions. It also says there was no Commission error in creating the overpayment. It says the Appellant applied for EI ERB and submitted reports for the EI ERB, but he wasn't actually eligible for the EI ERB because he didn't have earnings of at least \$5,000 during the 52 weeks prior to submitting his application.⁸

[30] It appears the Commission is arguing that the only relevant factor is whether benefits were wrongly paid to the Appellant (in this case, he received EI ERB payments even though he wasn't eligible for them).

[31] But I disagree. While the question of whether benefits were wrongly paid to the Appellant is certainly relevant here, other factors related to why these benefits were wrongly paid may be relevant too because the Commission isn't required to fix all overpaid claims retroactively.

[32] In a recent decision, the Tribunal's Appeal Division wrote the following:

Parliament did not direct the Commission to reconsider every claim for benefits that may have been overpaid. Rather, the Commission was given the power to choose whether or not to reconsider a claim for benefits after it had been paid.

That choice reflects the tension between finality (claimants should be able to rely on decisions made about their benefits) and accuracy (mistakes and misrepresentations should be corrected). In my view, factors that could favour either finality or accuracy, helping to resolve that tension in a particular case, are relevant to the discretionary decision.⁹

[33] I find the Appeal Division's reasoning persuasive and give it significant weight here because it concludes that factors beyond the simple wrongful payment of benefits may be relevant to the Commission's discretionary decision if they help to clarify how to resolve the tension between finality and accuracy, which is at the heart of the

⁷ Appellant's testimony and GDJ8-1 to GDJ8-2.

⁸ GDJ6-1 to GDJ6-3.

⁹ *MS v Canada Employment Insurance Commission*, 2022 SST 933, paragraphs 45 to 46.

Commission's power to choose whether or not to reconsider a claim for benefits that has already been paid.

[34] In this case, I find the Commission ignored relevant factors when it decided to review the Appellant's EI ERB eligibility after paying him benefits. By doing so, the Commission failed to consider key information that could have helped resolve the tension between finality and accuracy here.

[35] In particular, I find the Commission ignored the Appellant's behaviour and actions in trying to cancel his EI ERB claim. It also ignored its own actions in erroneously making the Appellant think the EI ERB payments he had received (and would subsequently receive) were now CESB payments.

[36] On May 15, 2020, one month after he applied for the EI ERB, the Appellant asked the Commission to cancel his EI ERB claim because he wasn't eligible for the EI ERB and wanted to instead apply for the CESB. The Commission's response was to submit a callback as "there is no guidance in procedures yet".¹⁰

[37] The Appellant then called the Commission three more times (on May 29, 2020, June 5, 2020, and June 11, 2020) to follow up about cancelling his EI ERB claim. During the third conversation (on June 11, 2020), the Commission told the Appellant it could still pay him benefits even though he wasn't eligible for the EI ERB.¹¹

[38] The Commission's record of the June 11, 2020 conversation with the Appellant says the following:

"As per N. guidance, appellant originally called to get his claim cancelled as he had applied for the wrong type of benefits. Appellant applied for CERB when he should have applied for CESB. As per N. guidance, appellant did not need to delete claim, but simply receive a total of \$5000, or the maximum for CESB, rather than switching the benefit type. Appellant was told that any additional reports done past the \$5000 would need to be repaid as he is no longer entitled to anything more than the \$5000."¹²

¹⁰ GD3-20 (GE-23-1120).

¹¹ GD3-20 (GE-23-1120).

¹² GD3-21 (GE-23-1120).

[39] I find this evidence shows the Appellant made multiple attempts between May 15, 2020 and June 1, 2020 to contact the Commission to try and cancel his EI ERB claim. In my view, his behaviour and actions during this time show he genuinely wanted to cancel his claim and return the EI ERB advance payment he had received.

[40] I also find this evidence shows that on June 11, 2020, the Commission made the Appellant think he was no longer getting the EI ERB, but the CESB instead, and that the EI ERB advance payment he had received, along with the weekly payments he would subsequently receive, were now all CESB payments instead. The Commission's record specifically says it told the Appellant the maximum that he could receive under the CESB was \$5,000 and he was no longer entitled to claim more. In my view, it's reasonable to believe the Appellant would have taken that to mean he was now getting the CESB and not the EI ERB and that the reports he subsequently filled out¹³ would be processed as CESB claims.

[41] The Commission's notice to the Appellant, dated September 1, 2022, says it initiated an administrative review of the EI ERB money the Appellant received because it had information to indicate that his total earnings for the period from January 1, 2019 to March 14, 2020 were less than \$5,000.¹⁴

[42] The Commission's submissions also say the Appellant isn't eligible for the EI ERB for the same reason.¹⁵

[43] I don't disagree with the Commission here. I don't see any evidence on file that would lead me to reach a different conclusion. And the Appellant also doesn't disagree with the Commission on this point.

[44] But I find there's no evidence that the Commission has even considered the relevant factors I've discussed above at any point since the Appellant received EI ERB payments between April 2020 and June 2020.

¹³ GD3-22 to GD3-23 (GE-23-1120).

¹⁴ GD3-27 (GE-23-1120).

¹⁵ GD4-5 (GE-23-1120), GDJ6-2.

[45] The Commission's initial submissions don't acknowledge the Appellant's behaviour and actions in trying to cancel his EI ERB claim and return the EI ERB advance payment. They also don't acknowledge the Commission's own actions in then letting the Appellant keep the EI ERB advance payment and paying him more EI ERB benefits instead of cancelling his claim, while making him think he was now getting the CESB instead.¹⁶

[46] I then asked the Commission to respond to the Appellant's arguments at the hearing, as discussed above. The Commission's subsequent submissions say only that it acted judicially and "there was no Commission error in creating the overpayment".¹⁷ Once again, the submissions don't acknowledge the Appellant's proactive actions or the Commission's own actions in misleading the Appellant.

[47] Taken together, I find the Commission ignored the Appellant's efforts to cancel his EI ERB claim and return the advance payment. It also ignored its own erroneous decision to allow him to keep the advance payment and give him more EI ERB payments while making him think he was actually getting the CESB instead.

[48] The Commission could have looked at this information when it went back to review the Appellant's EI ERB eligibility since these events happened between April 2020 and June 2020 and their details were already on file, but its submissions for this appeal lead me to conclude that it simply chose not to do that.

[49] By failing to look at this information, the Commission neglected to consider key details about the Appellant's actions and its own actions that could have affected its decision to reconsider the wrongful payment of benefits in this case.

[50] I therefore find it more likely than not that the Commission didn't exercise its decision properly. This is because it ignored certain relevant factors.

How should I exercise the Commission's discretion on its behalf?

¹⁶ GD4-1 to GD4-20 (GE-23-1120), GD4-1 to GD4-19 (GE-23-1121).

¹⁷ GDJ6-1

[51] Since I have found that the Commission didn't exercise its discretion properly, I can now give the discretionary decision that the Commission should have given. This means looking at the relevant factors myself.

[52] The Appellant and Commission both agree that the Appellant applied for the EI ERB¹⁸, made claims for the EI ERB¹⁹, and received a \$2,000 advance payment and \$3,000 in subsequent payments.

[53] It is certainly relevant that the Appellant isn't eligible for the EI ERB. The evidence shows he didn't earn enough money between January 1, 2019 and March 14, 2020.²⁰ By itself, this evidence indicates he isn't entitled to the money he received and must pay it back and could be enough to justify a review of his EI ERB eligibility.

[54] But there are other relevant factors. One is the Appellant's genuine efforts to return the EI ERB advance payment after he realized he had mistakenly applied for the EI ERB. The evidence is clear that he asked the Commission several times to cancel his EI ERB claim because he wanted the CESB instead. The evidence also shows the Commission doesn't appear to have directly considered this request at any point prior to deciding to pay the Appellant more EI ERB benefits.²¹

[55] A second relevant factor is the Commission's own actions in misleading the Appellant during this period. The evidence is clear that instead of cancelling the Appellant's EI ERB claim as he asked, the Commission told the Appellant it would just pay him the amount of benefits he was entitled to under the CESB (\$5,000) and he couldn't claim any more than that. The Appellant reasonably concluded that this meant he was now getting the CESB, not the EI ERB. But what this really meant was the Appellant not only kept the EI ERB advance payment he wasn't entitled to and was trying to return to the Commission, but also received more EI ERB payments he wasn't entitled to.

¹⁸ GD3-3 to GD3-17 (GD3-23-1120).

¹⁹ GD3-22 to GD3-23 (GD3-23-1120).

²⁰ See the Appellant's Record of Employment (ROE) on GD3-18 (GE-23-1120).

²¹ GD3-20, GD3-21 (GD3-23-1120).

[56] When looking at the relevant factors, I give the most weight to the Commission's actions in misleading the Appellant because this is what turned a relatively straightforward case where benefits were initially paid contrary to the structure of the Act into a much more complicated (and avoidable) situation where the Appellant no longer had any idea that he was still getting benefits he wasn't entitled to.

[57] In other words, the Appellant was initially aware he wasn't entitled to the EI ERB advance payment he received. But after speaking to the Commission on June 11, 2020, he couldn't have known he still wasn't entitled to the advance payment or to the other EI ERB payments he would soon get. The Commission misled him into thinking these payments were now for the CESB instead, which he was eligible for, so he had no reason anymore to think he had been paid money he shouldn't have received. This means the Commission's actions, and not the Appellant's, ultimately caused the Appellant's overpayment.

[58] Since the Commission's actions ultimately caused the Appellant's overpayment, I have decided the Appellant's claim for benefits shouldn't be reconsidered. This means the Commission's original decision to pay the Appellant the EI ERB advance payment and six additional weeks of EI ERB payments (totalling \$5,000) remains in place. As a result, no overpayment is created.

Conclusion

[59] The appeal is allowed.

[60] The Commission didn't exercise its discretion properly when it decided to review the Appellant's EI ERB eligibility.

[61] The Appellant's EI ERB eligibility won't be reconsidered, so the earlier decision to pay EI ERB benefits remains in place. There is no overpayment.

Bret Edwards
Member, General Division – Employment Insurance Section