



Citation: *Canada Employment Insurance Commission v JA*, 2024 SST 756

## Social Security Tribunal of Canada Appeal Division

# Decision

**Appellant:** Canada Employment Insurance Commission  
**Representative:** Angèle Fricker

**Respondent:** J. A.  
**Representative:** R. A.

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**Decision under appeal:** General Division decision dated August 22, 2023  
(GE-23-1121)

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**Tribunal member:** Melanie Petrunia

**Type of hearing:** Teleconference

**Hearing date:** March 8, 2024

**Hearing participants:** Appellant's representative  
Respondent  
Respondent's representative

**Decision date:** June 30, 2024

**File number:** AD-23-884

## Decision

[1] The appeal is allowed. The General Division decision is rescinded, and the Canada Employment Insurance Commission's (Commission) reconsideration decision of October 21, 2021 is confirmed.

[2] The Commission acted judicially when it reconsidered the Claimant's entitlement to the Employment Insurance Emergency Response Benefit (EI ERB) advance payment that he received.

## Overview

[3] The Respondent, J. A. (Claimant), applied for the EI ERB. The Appellant, the Canada Employment Insurance Commission (Commission) established a benefit period for the Claimant as of March 15, 2020.

[4] The Claimant was paid a \$2,000 advance, and six additional weeks of benefits, totalling \$5,000. The Commission decided that the Claimant was not entitled to the advance payment he received, because he did not receive EI ERB for long enough to recover this amount.

[5] Later, the Commission decided the Claimant wasn't eligible for any of the EI ERB that he received. Overpayments were established for both the advance and the 6 weeks of benefits that the Claimant received.<sup>1</sup>

[6] The Claimant successfully appealed to the Tribunal's General Division. The General Division decided that the Commission did not act judicially when it decided to reconsider the Claimant's eligibility. The General Division then made the decision that the Commission should have made and decided that the Claimant's claim would not be reconsidered.

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<sup>1</sup> This decision addresses the advance payment of \$2,000. See the decision in AD-23-870 concerning the overpayment of benefits for the additional six weeks.

[7] The Commission is now appealing the General Division decision. It argues that the General Division made errors of law and based its decision on an important factual error. I am allowing the appeal.

## **Preliminary matters**

[8] The Claimant had two appeals before the General Division. The Commission has appealed both decisions. I joined the appeals and heard both matters at one hearing. This decision concerns the advance payment of \$2,000 that the Claimant received.

## **Issues**

[9] The issues in this appeal are:

- a) Did the General Division err in law by failing to meaningfully analyze the evidence when it found that the Commission didn't properly exercise its discretion?
- b) If so, how should the error be fixed?
- c) Did the Commission exercise its discretion judicially in this case?

## **Analysis**

[10] I can intervene in this case only if the General Division made a relevant error. So, I have to consider whether the General Division:<sup>2</sup>

- failed to provide a fair process;
- failed to decide an issue that it should have decided, or decided an issue that it should not have decided;
- misinterpreted or misapplied the law; or

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<sup>2</sup> The relevant errors, formally known as "grounds of appeal," are listed under section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).

- based its decision on an important mistake about the facts of the case.

– **Background**

[11] The Claimant applied for Employment Insurance (EI) regular benefits on April 15, 2020. Because of amendments to the *Employment Insurance Act* (EI Act), the Claimant received the EI ERB.<sup>3</sup> He was paid an initial \$2,000 advance payment on April 20, 2020.<sup>4</sup>

[12] The Claimant contacted the Commission on May 15, 2020, to cancel his benefit period because he was not eligible for the EI ERB or the Canada Emergency Response Benefit. He wanted to apply instead for the Canada Emergency Student Benefit (CESB).<sup>5</sup>

[13] On June 11, 2020, the Claimant was told that he did not need to cancel his claim but would instead be paid a total of \$5,000, which was the maximum amount a person could receive in CESB. The Claimant filed reports for the periods from March 15 to April 25, 2020.

[14] In October 2021, the Commission reconciled the advance payment that the Claimant received. Because he had filed reports for six week period, but had received the equivalent of ten weeks of EI ERB, an overpayment was established.<sup>6</sup>

[15] The Claimant requested reconsideration, explaining that he tried to cancel his benefit period and return the benefits he received by sending a payment to the Canada Revenue Agency. He said that he received a total of \$5,000 in EI ERB which was equivalent to what he would have been entitled to under the CESB.<sup>7</sup>

[16] The Commission maintained its decision because the Claimant did not meet the eligibility requirements for the EI ERB.<sup>8</sup> The Claimant acknowledged that he was not

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<sup>3</sup> GD3-3 to GD3-13

<sup>4</sup> GD3-15

<sup>5</sup> GD3-20 (AD-23-870)

<sup>6</sup> GD3-18

<sup>7</sup> GD3-20 to GD3-22

<sup>8</sup> GD3-23

eligible for the EI ERB but wished for the amount he received to be offset by the CESB that he would have been entitled to.<sup>9</sup>

– **The General Division decision**

[17] In its decision, the General Division found that the Commission did not exercise its discretion judicially when it decided to go back and review the Claimant's eligibility for the EI ERB. The General Division found that the Commission ignored the efforts that the Claimant made to cancel his EI ERB claim and its own actions in leading the Claimant to think that he was no longer receiving the EI ERB.<sup>10</sup>

[18] The factors that the General Division found to be relevant were the Claimant's ineligibility, his efforts to cancel his EI ERB claim and the Commission's actions in misleading the Claimant. It gave the most weight to the actions of the Commission.<sup>11</sup>

[19] The General Division determined that the Commission did not exercise its discretion properly and so it made the decision that the Commission should have made. It found that the Claimant was not eligible for the EI ERB, but his claim would not be reconsidered.

**The General Division made errors of law**

[20] Section 52 of the EI Act says that the Commission "may reconsider a claim for benefits" within certain timeframes.<sup>12</sup> This is a discretionary power: the Commission can choose whether or not it will reconsider the claim.

[21] As part of the temporary measures, section 153.1303 was added and adapted section 52(2). It reads:

If the Commission decides that a person has received money by way of the employment insurance emergency response benefit for which the person was not eligible, or has not received money for

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<sup>9</sup> GD2-35

<sup>10</sup> General Division decision at para 47.

<sup>11</sup> General Division decision at para 56.

<sup>12</sup> See section 52(1) of the EI Act.

which the person was eligible, the Commission must calculate the amount of the money and notify the claimant of its decision.

[22] The Commission must exercise its discretion judicially. This means that it cannot be made in bad faith, for an improper purpose, in a discriminatory manner, consider irrelevant factors or fail to consider relevant factors.<sup>13</sup>

[23] In the absence of guidance in the law, the Commission developed an internal policy for its agents. The Commission's policy requires consideration of whether:

- benefits have been underpaid;
- benefits were paid contrary to the structure of the Act (in other words, the basic elements of a claim weren't met, such as an interruption of earnings, insurable hours, conditions for special benefits);
- benefits were paid as a result of a false or misleading statement;
- the claimant ought to have known there was no entitlement to the benefits.<sup>14</sup>

[24] In reviewing the Commission's exercise of discretion, the General Division did not make any distinction between the reconsideration of the advance payment, and the reconsideration of the Claimant's entitlement to the additional weeks of EI-ERB.

[25] In order to get emergency response benefits to Canadians more quickly, the Government of Canada amended the EI Act to allow to the Commission to give claimants an advance payment of benefits.<sup>15</sup> The advance payment was the equivalent of 4 weeks of EI ERB. Normally, the Commission would recover this advance by not paying out benefits for two weeks, after the 12th and 17th weeks of the benefit period.

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<sup>13</sup> See *Canada (Attorney General) v Purcell*, 1995 CanLII 3558 (FCA).

<sup>14</sup> See section 17.3.3. of the Digest of Benefit Entitlement Principles.

<sup>15</sup> This was authorized by section 153.7(1.1) of the EI Act.

[26] The Commission later reconciled the advance payments and claimants who did not receive the EI-ERB for long enough to recover the advance were advised of an overpayment.

[27] The General Division found that the Commission made the Claimant think that he was no longer receiving the EI ERB and actually getting the CESB instead. It decided that the Commission ignored the Claimant's efforts to cancel his EI ERB claim and return the overpayment and ignored the erroneous decision to let the Claimant keep the advance payment and pay him 6 additional weeks of benefits.<sup>16</sup>

[28] The General Division decision does not make any reference to the fact that the Claimant only completed reports for the period from March 15 to April 25, 2020 which was 6 weeks. When the Commission reconciled the payments in October 2021, it advised the Claimant that he had received the advance of \$2,000 but should only have received \$500 per week that he was eligible. The letter noted that the information on file, including the Claimant's reporting information, indicated that he was only eligible for 6 weeks of EI-ERB.<sup>17</sup>

[29] The General Division noted the record of the call between the Claimant and Service Canada in which he was advised that he did not need to cancel his claim. The notes from that call state that the Claimant "was told that any additional reports done past the \$5,000 would need to be repaid." After this call, the Claimant completed the reports for 6 weeks, totalling \$3,000 in benefits.<sup>18</sup>

[30] I find that the General Division failed to meaningfully analyze the evidence and did not take into consideration the circumstances concerning the advance payments issued by the Commission. It did not consider that the information that the Commission had at the time of the reconciliation showed that the Claimant filed claims for 6 weeks, totalling \$3,000 of EI ERB. The Claimant had received \$5,000 total.

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<sup>16</sup> General Division decision at para 47.

<sup>17</sup> GD3-18

<sup>18</sup> GD3-21 to GD3-23 (AD-23-870)

[31] The General Division focused on the Commission's error after the advance payment was issued, when the Claimant tried to cancel his claim in order to apply for the CESB. However, it did not consider that the Claimant initially applied for benefits in April 2020 despite not being eligible. There was no Commission error when it sent the Claimant the advance payment based on the Claimant's application.

[32] The General Division also did not consider the Commission's reconsideration policy and failed to consider that, when benefits are paid contrary to the structure of the Act, the Commission's error is not relevant. Eligibility for benefits is a basic requirement for setting up a claim, which is part of the structure of the Act.

[33] I find that the General Division erred in law when it decided that the Commission did not exercise its discretion judicially.

## **Remedy**

[34] To fix the General Division's error, I can give the decision that the General Division should have given, or I can refer this matter back to the General Division for reconsideration.<sup>19</sup> The parties had an opportunity to fully present their evidence at the General Division. They agree that the record is complete and I can make the decision that the General Division should have made.

### **– The Commission exercised its discretion properly**

[35] The Commission argues that it exercised its discretion judicially because it correctly applied its reconsideration policy, which states that it will retroactively correct a claim when benefits have been paid contrary to the structure of the Act, even if an overpayment results. It says that it made no error when the Claimant applied for the EI ERB and when it issued the advance payment.

[36] The Claimant argues that he tried to cancel his claim and return the overpayment. After a number of calls to the Commission, they erroneously advised him

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<sup>19</sup> See section 59(1) of the DESD Act for the Appeal Division's authority.



that he would receive \$5,000 in benefits and his claim did not need to be cancelled because he was now receiving the CESB.

[37] The Claimant argues that the case law relied on by the Commission can be distinguished from his circumstances because neither case involved a review of the Commission's exercise of discretion. He says that the Commission is responsible for the overpayment and it did not exercise its discretion judicially when it decided to reconsider his claim.

[38] The evidence before the General Division was that the Commission determined that the Claimant had been paid the \$2,000 advance payment, as well as 6 weeks of benefits. He had filed reports for 6 weeks of benefits, which amounts to \$3,000 of EI ERB. There is no dispute that the Claimant was not eligible for the EI ERB when he applied.

[39] The Claimant contacted the Commission in May 2020 because he had applied for the wrong type of benefits and wanted to cancel his EI ERB claim. He was given erroneous information in June 2020 when he was told that he could receive \$5,000 in benefits, which was the maximum amount an individual could receive in CESB.

[40] When the Commission reconciled the payments to the Claimant, the information before it showed that the Claimant had filed claims for 6 weeks, which would have totalled \$3,000 in EI ERB. It did not make a determination at this time concerning his eligibility for the EI ERB, it was reconciling the advance payment.

[41] There is no dispute that the Claimant was not eligible for the EI ERB at the time that he applied and was issued the advance payment. The Claimant was paid benefits contrary to the structure of the Act. It is well established that Commission agents do not have the power to amend the Act. The Claimant was given incorrect advice when his claim was not cancelled; however, it is clear that he was paid EI ERB which he was not eligible for.<sup>20</sup>

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<sup>20</sup> *Granger v. Canada Employment Insurance Commission*, 1986 CanLII 7610 (FCA)

[42] This principle was recently reaffirmed by the Federal Court of Appeal in a case considering the Commission's exercise of discretion. In that case, the Court cited with approval the following comments:

This Court held in *Granger* that “the Commission and its representatives have no power to amend the law, and ... therefore the interpretations which they may give of that law do not themselves have the force of law. ... any commitment which [they] may give, whether in good or bad faith, to act in a way other than that prescribed by the law would be absolutely void and contrary to public order.”<sup>21</sup>

[43] Based on the above, I find that it is more likely that not that the Commission exercised its discretion properly. The Claimant applied for and received the advance payment of EI ERB for which he was not eligible. This means that the Commission's decision that the Claimant must repay the advance payment remains in place.

[44] At the General Division, the Commission was asked if it would consider a write-off of the Claimant's debt. It stated that it would not. As discussed in the decision on the Claimant's related matter, the Commission indicated in its written submissions that it would recommend a write-off of the debt relating to the additional \$3,000 in EI ERB paid to the Claimant.

[45] Although the Commission has not made the same representations in this matter, I understand that the Claimant might be able to contact the Canada Revenue Agency to ask if some or all of his debt could be written off (cancelled) because paying it back would be a serious hardship for him. Alternatively, the Claimant and the Canada Revenue Agency might be able to agree on a repayment plan.

## **Conclusion**

[46] The appeal is allowed and the General Division decision is rescinded. The Commission acted judicially when it reconsidered the Claimant's entitlement to the

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<sup>21</sup> See *Molchan v. Canada (Attorney General)*, 2024 FCA 46 at para 39.

Employment Insurance Emergency Response Benefit (EI ERB) advance payment that he received.

Melanie Petrunia  
Member, Appeal Division