



Citation: *Canada Employment Insurance Commission v JA*, 2024 SST 757

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: Canada Employment Insurance Commission
Representative: Angèle Fricker

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

Decision under appeal: General Division decision dated August 22, 2023
(GE-23-1120)

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-23-870

Decision

[1] The appeal is allowed. The General Division decision is rescinded, and the Canada Employment Insurance Commission's (Commission) reconsideration decision of January 23, 2023 is confirmed.

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

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 six weeks of benefits that the Claimant received.¹

[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.

¹ This decision addresses the \$3,000 for the additional six weeks of benefits. See the decision in AD-23-884 concerning the advance payment.

[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 six weeks of benefits (\$3,000) 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:²

- 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

² 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.³ He was paid an initial \$2,000 advance payment on April 20, 2020.

[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).⁴

[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, 2020.⁵

[14] In October 2021, the Commission reconciled the advance payment that the Claimant received. Because he did not receive EI-ERB for long enough to recover the advance payment, an overpayment was established.

[15] The Commission reconsidered the Claimant's eligibility for the six additional weeks of EI ERB on January 23, 2023.⁶ The Claimant requested reconsideration, explaining that he was not qualified for the EI ERB but did qualify for the CESB. He asked that his debt be offset by the amount that he would have qualified to under the CESB.⁷

³ GD3-3 to GD3-13

⁴ GD3-20

⁵ GD3-21 to GD3-23

⁶ GD3-36

⁷ GD3-40

[16] The Commission maintained its decision because the Claimant did not meet the eligibility requirements for the EI-ERB.

– **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.⁸

[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.⁹

[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.¹⁰ 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

⁸ General Division decision at para 47.

⁹ General Division decision at para 56.

¹⁰ 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.¹¹

[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.¹²

[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] The General Division found that the Commission made the Claimant think that he was no longer receiving the EI-ERB and 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 six additional weeks of benefits.¹³

[26] I find that the General Division ignored important evidence concerning the steps taken by the Commission prior to reconsidering the claim. When the Commission

¹¹ See *Canada (Attorney General) v Purcell*, 1995 CanLII 3558 (FCA).

¹² See section 17.3.3. of the Digest of Benefit Entitlement Principles.

¹³ General Division decision at para 47.

decided to review the Claimant's eligibility for the EI ERB, it first wrote to him to request additional information. The Commission sent the Claimant a letter dated September 1, 2022 with an attached questionnaire. It asked for the questionnaire to be returned by September 29, 2022. The letter stated:

It is in your interest to reply by the date so that we can consider any additional information you provide. If you do not reply, a decision will be made based on the information we have obtained on file.¹⁴

[27] The Claimant did not reply to the letter from the Commission and a decision was made based on the information on file. The Commission decided that the Claimant did not meet the eligibility criteria for the EI ERB.

[28] The General Division placed significant emphasis on the notes from a conversation between the Claimant and a Service Canada agent on June 11, 2020. These notes state:

as per N. guidance, claimant originally called to get his claim cancelled as he had applied for the wrong type of benefits. Claimant applied for CERB when he should have applied for CESB. As per N. guidance, claimant did not need to delete claim, but simply receive a total of \$5000, or the maximum for CESB, rather than switching the benefit type. Claimant 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 \$5000.¹⁵

[29] The General Division found that these notes show that the Commission made the Claimant think that he was no longer receiving the EI ERB, but was now receiving the CESB instead. It found that it was reasonable for the Claimant to believe that subsequent reports he filed would be processed as CESB claims.¹⁶ I find that the evidence does not support this conclusion.

[30] The Claimant had acknowledged when he contacted the Commission to cancel his claim, that he had to apply for the CESB through the CRA. The CESB was payable

¹⁴ GD3-27

¹⁵ GD3-21

¹⁶ General Division decision at para 40.

for a maximum of 16 weeks at a rate of \$312.50 per week and had its own eligibility requirements.¹⁷

[31] The Claimant spoke with an agent of Service Canada on June 11, 2020. This was the same day that the additional \$3,000 was paid to the Claimant. While the Claimant may have been entitled to the maximum of \$5,000 in CESB, the Service Canada agent would not have been in a position to determine this at that time, nor would it have been Service Canada making the decision on the Claimant's eligibility.

[32] The notes from the call that the Claimant had with the Commission say that the Claimant was told he would receive \$5,000 in EI-ERB rather than switching benefit type to CESB. I find that this is different from the General Division's conclusion that the Claimant was told he was now receiving CESB.

[33] The General Division also makes no mention of the records on file of two attempts made to contact the Claimant on June 28, 2022 and July 21, 2022. The notes state a voicemail was left on the first call requesting a call back within 24 hours. On the second attempt, the following voicemail was left for the Claimant:

This remission order was just approved and the steps were posted on the following page: Student CERB debt reduction

**Please note that the page talks about CERB, but this applies to both CERB and EI ERB.

Clients must first complete an application and submit any requested documentation to the CRA. Only the CRA can determine the client's entitlement to CESB.

Then, if the client had instead received the benefits on the EI side (EI ERB), the CRA will inform us of the decision regarding the client's entitlement to the CESB.

Student CERB debt reduction with CRA at Canada.ca¹⁸

¹⁷ *Canada Emergency Student Benefit Act* S.C. 2020, c. 7. See s. 6 for eligibility criteria.

¹⁸ GD3-26

[34] The Claimant does not appear to have returned either of these calls. The Commission sent the letter to the Claimant approximately two months later requesting information regarding his eligibility.

[35] I find that the above information concerning the Commission's attempts to contact the Claimant in June and July, regarding remission, and in September regarding eligibility contradict the General Division's finding that the Claimant was made to believe he was now receiving the CESB.

[36] The General Division does not refer to this evidence in its decision. It also does not refer to the fact that the Claimant did not reply to the Commission's letter of September 2022. The General Division failed to meaningfully analyze the evidence.

[37] 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.

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

Remedy

[39] 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.¹⁹ 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

[40] The Commission argues that it exercised its discretion judicially because it correctly applied its reconsideration policy, which states that it will retroactively correct a

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

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.

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

[42] 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.

[43] The evidence before the General Division was that the Commission advised the Claimant in July 2022 of the process to apply for a remission order. It also contacted the Claimant advising that it appeared he was not eligible for the EI ERB and requesting additional information.

[44] The Claimant did not reply to the Commission's calls in June or July 2022 and did not reply to the letter in September 2022. While it is relevant that the Claimant tried to cancel his claim in May 2020 and was given incorrect advice, the Commission attempted to contact the Claimant on three occasions after this call. Given these attempts and the Claimant's lack of reply, it is not evident that the Commission should have known the Claimant was still relying on the erroneous information or had not applied already for remission.

[45] There is no dispute that the Claimant was not eligible for the EI ERB. The Claimant was paid benefits contrary to the structure of the Act.

[46] 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.²⁰

[47] 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.”²¹

[48] Based on the above, I find that it is more likely that not that the Commission exercised its discretion properly. The Claimant received 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.

The Commission agrees to write-off the overpayment

[49] In its written submission, the Commission notes that the Claimant did not make a false or misleading statement when the additional \$3,000 in EI ERB was paid. The Commission made an error when it thought that the CESB would offset the additional benefits.

[50] While it is not an issue before me, the Commission indicated that it agreed to writing off the \$3,000 overpayment once the appeal has been decided.²²

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

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

²² AD4-6

Conclusion

[51] The appeal is allowed and the General Division decision is rescinded. The Commission acted judicially when it reconsidered the Claimant's entitlement to the Employment Insurance Emergency Response Benefit (EI ERB) that he received.

Melanie Petrunia
Member, Appeal Division