



Citation: *EM v Canada Employment Insurance Commission*, 2024 SST 1727

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant: E. M.
Representative: N. L.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decisions (644927 and 659566) dated October 23, 2024 (issued by Service Canada)

Tribunal member: Elyse Rosen

Type of hearing: In person

Hearing date: December 5, 2024

Hearing participant: Appellant
Appellant's representative

Decision date: December 6, 2024

File numbers: GE-24-3663 and GE-24-3664

Decision

[1] The appeal is allowed in part.

[2] The Appellant was overpaid Employment Insurance Emergency Response Benefits (EI-ERB). But the Canada Employment Insurance Commission (Commission) miscalculated the amount of the overpayment.

[3] The Appellant was paid \$3,500 of EI-ERB that she wasn't eligible to receive. And the Commission off-set (in other words, applied) \$500 of the advance payment it paid her against a week of benefits that the Appellant wasn't entitled to receive.

[4] This means the Appellant was overpaid \$4,000 of EI-ERB (and not the \$5,000 the Commission says she was overpaid).

[5] The Appellant has to return the \$4,000 she was overpaid (less any amounts the Commission has already collected and applied against the debt).

Overview

[6] The Appellant stopped working on March 23, 2020, as a result of the COVID-19 pandemic. She applied for Employment Insurance (EI) benefits. Her application was treated as a claim for EI-ERB as a result of amendments to the law in place at that time.

[7] The Commission paid the Appellant 24 weeks of EI-ERB from March 22 to October 3, 2020, for a total of \$12,000. It also paid the Appellant a \$2,000 advance payment of EI-ERB on April 6, 2020. In total, the Appellant received \$14,000 from the Commission.

[8] The Commission learned that the Appellant had worked and received earnings while she was paid EI-ERB. It reconsidered her claim and found that she wasn't eligible for EI-ERB during 10 weeks of her claim. This resulted in an overpayment, which the Appellant was called upon to repay.

[9] The Appellant says she shouldn't have to repay any of the EI-ERB she received. She says she was working far less during the pandemic and needed the EI-ERB she received to support herself and her family.

[10] The Appellant says she never intended to mislead the Commission or to claim benefits she wasn't entitled to. She argues that if she wasn't eligible for EI-ERB during certain weeks of her claim, the Commission shouldn't have paid it to her.

[11] The Appellant claims she's unable to repay the overpayment. And she says the Commission already withheld approximately \$2,000 that was owed to her and applied it against the overpayment.

Matter I must consider first

The two appeal files have been joined

[12] The Appellant has appealed two decisions of the Commission—one relating to an overpayment of EI-ERB and the other relating to recovery of a portion of the advance payment she received.

[13] I have decided to join the two appeals.

[14] The appeals were heard together. They raise a common issue—namely, what weeks the Appellant was entitled to receive EI-ERB. And there are no fairness considerations which would prevent the appeals from being joined.

Issues

[15] Was the Commission entitled to reconsider the Appellant's claim?

[16] Was the Appellant overpaid EI-ERB?

Analysis

[17] I find that the Commission was entitled to reconsider the Appellant's claim. And I find that the Appellant received seven weeks of EI-ERB and one week of the advance

payment to which she wasn't entitled. This means that she was overpaid \$4,000. She will have to repay this amount.

The Commission was entitled to reconsider the Appellant's claim

[18] The law gives the Commission the power to revisit a claim on its own initiative if a claimant has received benefits which they shouldn't have received.¹ It usually has 36 months to do so. However, if the Commission is of the opinion that false or misleading statements were made in connection with the claim, the delay to reconsider is extended to 72 months.²

[19] The power to reconsider a claim is discretionary. In other words, just because the Commission has the power to reconsider a claim, that doesn't mean it should always do so, even if benefits were overpaid.

[20] When the Commission exercises its power to reconsider, it must act judicially. This means that it has to act in good faith, that it can't discriminate against the claimant, and that it must consider all of the relevant facts, but only the relevant facts, when it decides whether or not to use its power to reconsider.³

[21] When the Commission decides whether or not to reconsider a claim, it must resolve the tension between a claimant's right to consider decisions made about their benefits as final and its own desire to ensure that its decisions are correct. In other words, it must decide whether accuracy should trump finality. So, any facts that would help the Commission to resolve the tension between accuracy and finality are relevant facts.⁴

[22] The Commission has a policy that provides guidance on when it should use its power to reconsider (the reconsideration policy).⁵ The policy isn't law. Neither the Commission nor the Tribunal are bound by it. But the factors set out in the

¹ See section 52 of the *Employment Insurance Act* (Act).

² See section 52(5) of the Act.

³ *Canada (Attorney General) v Purcell*, 1995 CanLII 3558 (FCA).

⁴ *Al-Harbawi v Canada (Attorney General)*, 2024 FCA 148.

⁵ See section 17.3.2 and following of the *Digest of Benefit Entitlement Principles* (Digest).

reconsideration policy are relevant facts which the Commission should consider when it decides whether or not to reconsider a claim.⁶ If it decides not to take them into account, it should explain why.

[23] Some of the things the Commission should take into consideration when it decides whether it should reconsider a claim, which are set out in the reconsideration policy, are:⁷

- Was the claimant paid benefits contrary to the structure of the Act?⁸
- Were benefits paid as a result of a false or misleading statement?
- Should the claimant have known they weren't entitled to the benefits they received?
- Does the overpayment of benefits result from the Commission's own error?

[24] In this case, I find that the Commission had 72 months within which it could reconsider the Appellant's claim. I'm of the view that it was reasonably of the opinion that false or misleading statements were made in connection with the Appellant's claim. This is because in all of the bi-weekly claim reports which the Appellant filed, she declared that she hadn't worked and hadn't received any earnings. The Commission later learned that she had worked and had received earnings during some of those weeks.

[25] I also find that the Commission acted judicially when it decided to reconsider the Appellant's claim.

[26] The Commission says it reconsidered the claim because it paid the Appellant benefits on the basis of false and misleading information she'd provided and because it

⁶ *Molchan v Canada (Attorney General)*, 2024 FCA 46.

⁷ See the reconsideration policy, as set out in the Digest, and *Molchan v Canada (Attorney General)*, 2024 FCA 46.

⁸ The payment of benefits is considered to be contrary to the structure of the Act when the basic elements required to set up and pay a claim aren't met (see section 17.3.3.2 of the Digest).

paid her benefits that she wasn't eligible to receive (in other words, it paid benefits contrary to the structure of the Act). These were relevant facts.

[27] Although I don't have any indication that the Commission considered that the Appellant wasn't aware that she wasn't entitled to the benefits she received (also a relevant fact), I'm prepared to accept that it did.⁹ I just think it decided that this was a case where accuracy should trump finality, because it was given false information and because the payment of EI-ERB during weeks the Appellant wasn't eligible for it was contrary to the structure of the Act.

[28] I don't see any other relevant facts which the Commission failed to consider. And there don't appear to be any irrelevant facts which the Commission considered in coming to its decision to reconsider the Appellant's claim. I also have no indication that the Commission acted in bad faith or that it discriminated against the Appellant.

[29] The Appellant explained that her manager filled out her bi-weekly claim reports for her because her English is poor, and she doesn't know how to use a computer. She says she never did anything to try to mislead the Commission. In her view, if she wasn't eligible for benefits, the Commission shouldn't have paid them to her.

[30] I believe the Appellant's testimony that it was her manager, and not her, who completed her bi-weekly claim reports. And I accept that she wasn't aware that her manager had given false or misleading information to the Commission when he completed those reports for her. But these aren't relevant facts. This is because even if it wasn't the Appellant who provided false information to the Commission, it was given false information, nonetheless.

[31] Because the claim reports say that the Appellant hadn't worked and hadn't received earnings during weeks that she had, the Commission couldn't know that she wasn't eligible to receive some of the EI-ERB it paid to her. So, the Appellant is

⁹ That said, when the Commission uses its power to reconsider, it should provide its record of decision so that the Tribunal knows what facts it considered when it made its decision. If it doesn't do this, doesn't explain in its representations what facts it considered, and doesn't attend the hearing, then the Tribunal is likely to find that it didn't act judicially if it can't determine from the record what facts were considered.

incorrect when she asserts that the Commission was at fault for paying her EI-ERB that she wasn't eligible to receive. It paid those benefits to her because it was relying on the information in her bi-weekly claim reports.

The Appellant was overpaid EI ERB

[32] The EI-ERB is a benefit that was created at the beginning of the COVID-19 pandemic.¹⁰ Applications for EI benefits made between March 15 and October 3, 2020, were treated as applications for EI ERB.¹¹

[33] EI-ERB was paid to claimants in an amount of \$500 per week.¹² Claims for the EI-ERB were made for periods of two weeks at a time through the filing of bi-weekly claim reports.¹³

[34] There were two paths to eligibility for the EI-ERB:

- 1) the claimant didn't work and didn't have income for 7 consecutive days in a two-week claim period¹⁴ (**path one**)
- 2) the claimant's income was \$1000 or less in two chronological, but not necessarily consecutive, two-week claim periods¹⁵ (**path two**)

[35] The law allowed the Commission to pay claimants the EI-ERB before it would normally pay it.¹⁶ So, the Commission established a policy of paying claimants an advance payment of \$2000 when they applied for benefits. This allowed the Commission to get funds into the hands of claimants who had been impacted by the pandemic quickly. It then off-set the advance payment against payable weeks (in other words, weeks the claimant was eligible for benefits) later in the claim.

¹⁰ Part VIII.4 of the *Employment Insurance Act* (Act) sets out the rules that apply to the Employment Insurance Emergency Response Benefit.

¹¹ See section 153.8(5) and (6) of the Act.

¹² See section 153.10(1) of the Act.

¹³ See section 153.8(1) of the Act.

¹⁴ See section 153.9(1) of the Act.

¹⁵ See section 153.9(4) of the Act.

¹⁶ See section 153.7(1.1) of the Act.

[36] In this case, the Appellant filed bi-weekly claims for the EI-ERB for the period of March 22 to October 3, 2020.¹⁷ She was paid 24 weeks of EI ERB totalling \$12,000.¹⁸ In addition, the Appellant received an advance payment of \$2,000 on April 6, 2020.¹⁹

[37] To recover the advance, the Commission off-set \$500 of the advance payment against EI ERB it believed the Appellant was eligible for during the weeks of June 14, June 21, August 2, and August 9, 2020.²⁰

[38] So, in total, the Appellant received \$14,000.

[39] The Commission says that after paying this amount, it subsequently discovered that the Appellant had worked and received earnings during several weeks of her claim.

[40] Relying on information obtained from the Appellant's employer, the Commission determined that the Appellant wasn't eligible for benefits during the following two-week periods:

- July 12 to July 25, 2020
- August 9 to August 22, 2020
- August 23 to September 5, 2020
- September 2020 to September 19, 2020
- September 2020 to October 3, 2020

[41] It also says that the off set for the week of August 9, 2020 has to be reversed because the Appellant wasn't eligible to receive benefits that week. It contends that this leaves \$500 of the \$2000 advance payment that she must still repay.

¹⁷ See GD3-14 and following in file GE-24-3363.

¹⁸ See GD3-85 and following in file GE-24-3363.

¹⁹ See GD3-11 in file GE-24-3364.

²⁰ See GD3-12 in file GE-24-3364.

[42] I agree with the Commission that the Appellant was overpaid EI-ERB. But I find that it didn't correctly determine the number of weeks the Appellant wasn't eligible for the EI-ERB.

[43] In assessing the Appellant's eligibility for the EI-ERB, the Commission relies on a decision of the Appeal Division of the Tribunal (the HM decision) regarding the application of path two.²¹ But I don't agree with the Commission's interpretation of the HM decision.

[44] I'm of the view that eligibility for the EI-ERB under path two is determined looking retrospectively from **any** two week claim block for which eligibility must be determined. Two-week periods where a claimant may be eligible under path one aren't excluded when establishing eligibility for a four week period under path two. In other words, a claimant can invoke whichever path to eligibility is more favourable for them.

[45] This is what I understand the HM decision to say.²²

[46] The Commission appears to take the position that two-week periods where a claimant is eligible under path one can't be used when determining eligibility for a four-week period under path two. But the HM decision doesn't say this. And the Commission's interpretation of the section of the law setting out path two isn't supported by the text of the law, its context, or its purpose.²³

[47] First, nothing in the text of the law says we must exclude two-week periods where eligibility can be established under path one from the determination of eligibility for a four-week period under path two.²⁴ Furthermore, as the HM decision explains, the **only** weeks that aren't used when determining eligibility under path two are those where no EI-ERB was paid.

²¹ Canada Employment Insurance Commission v HM, 2023 SST 831.

²² And even if this isn't what the HM decision stands for, I'm not bound by that decision. I still think the process I set out above is the correct process for determining eligibility under path two.

²³ The Appeal Division looked at the text, context and purpose of path two in the HM decision.

²⁴ See section 153.9(4) of the Act.

[48] Second, including a two-week period where eligibility can be determined under path one when proceeding to a determination of eligibility for the following two-week period is fully in keeping with the context of the EI-ERB scheme. As the HM decision points out, that scheme determines eligibility two weeks at a time on a retrospective basis.

[49] Lastly, skipping the two-week periods where eligibility could be determined under path one would be contrary to the purpose for which the EI-ERB was created—namely, compensating those who have had a loss of income as a result of the pandemic.

[50] Using the information which the Appellant's employer provided to the Commission regarding the Appellant's earnings, I find that the Appellant was eligible for the EI-ERB for 20 weeks.

[51] During weeks 1 to 12 of her claim the Appellant was eligible for the EI ERB under path one for the two-week periods from March 22 to June 13, 2020. She didn't work at all during these two-week periods.

[52] During weeks 13 to 20 of her claim, the Appellant was eligible under path two for the four weeks from June 14 to July 11, 2020 (during which she had income of \$890) and the four weeks from July 12 to August 8, 2020 (during which she had income of \$963).

[53] The Appellant was ineligible for benefits between August 9 and October 3, 2020. This is because she hadn't ceased working for 7 consecutive days during any of the two-week periods between those dates. And she earned more than \$1,000 in all of the successive four-week periods in which EI-ERB was paid.

[54] The Appellant's 20 weeks of eligibility are summarized here:

				Eligible 153.9(1) - 2 weeks A	Eligible 153.9(4) - 4 weeks B	Eligible under either A or B
Week	Week starting	EI ERB Paid	Earnings			
1	March 22, 2020	\$500	\$0	y	y	\$500
2	March 29, 2020	\$500	\$0	y	y	\$500
3	April 5, 2020	\$2,500	\$0	y	y	\$500
4	April 12, 2020	\$500	\$0	y	y	\$500
5	April 19, 2020	\$500	\$0	y	y	\$500
6	April 26, 2020	\$500	\$0	y	y	\$500
7	May 3, 2020	\$500	\$0	y	y	\$500
8	May 10, 2020	\$500	\$0	y	y	\$500
9	May 17, 2020	\$500	\$0	y	y	\$500
10	May 24, 2020	\$500	\$0	y	y	\$500
11	May 31, 2020	\$500	\$0	y	y	\$500
12	June 7, 2020	\$500	\$0	y	y	\$500
13	June 14, 2020	\$0	\$0	y	y	\$500
14	June 21, 2020	\$0	\$194	y	y	\$500
15	June 28, 2020	\$500	\$343	n	y	\$500
16	July 5, 2020	\$500	\$353	n	y	\$500
17	July 12, 2020	\$500	\$272	n	y	\$500
18	July 19, 2020	\$500	\$323	n	y	\$500
19	July 26, 2020	\$500	\$68	y	y	\$500
20	August 2, 2020	\$0	\$300	y	y	\$500
21	August 9, 2020	\$0	\$431	n	n	\$0
22	August 16, 2020	\$500	\$445	n	n	\$0
23	August 23, 2020	\$500	\$384	n	n	\$0
24	August 30, 2020	\$500	\$367	n	n	\$0
25	September 6, 2020	\$500	\$462	n	n	\$0
26	September 13, 2020	\$500	\$373	n	n	\$0
27	September 20, 2020	\$500	\$376	n	n	\$0
28	September 27, 2020	\$500	\$74	n	n	\$0
Total paid				Total eligible		
\$14,000					\$10,000	

[55] The Appellant was paid seven weeks of EI ERB from August 16 to October 3, 2020 (7 x \$500 = \$3500), that she must return. And the offset of the advance payment

for the week of August 9, 2020 (\$500), must be reversed. This leaves a debt of \$4,000 (rather than the \$5,000 the Commission has claimed).

Does the Appellant have to repay the debt?

[56] The Appellant has to repay the debt resulting from the overpayment.

[57] The Appellant says that during the pandemic she wasn't earning enough money to pay her bills. She believes that because of this she should be able to keep all of the EI-ERB she was paid.

[58] Inasmuch as this may be the case, the law sets out specific criteria you have to meet to be eligible for EI-ERB. So, the Appellant can't be paid EI-ERB for weeks she isn't entitled to it under the law, even if her earnings were lower and she needed the benefits she received to pay her bills.

[59] The Appellant says the Commission has withheld almost \$2,000 that the Canada Revenue Agency (CRA) owed to her to repay the overpayment. If that's the case, this amount will reduce the \$4,000 that she owes. But she's entitled to an accounting of the remaining debt before being called upon to repay it.²⁵

[60] The Appellant says she isn't earning enough income to repay the debt resulting from the overpayment.

[61] I can't decide that the Appellant shouldn't have to repay the debt because she can't afford to. But the law says that the Commission can write off the debt resulting from an overpayment if it will cause the debtor undue hardship.²⁶

[62] If the Appellant is truly unable to repay the debt, she can ask the Commission to write it off. She can do so by calling the CRA at 1-866-864-5823. It will determine if repaying the debt would result in undue hardship for the Appellant. If it concludes that it

²⁵ See CUB 22758 and CUB 68350.

²⁶ See sections 153.1306(f)(ii) of the Act.

would, it will make a recommendation to the Commission as to whether the debt should be written off.

[63] If the Commission won't write off the debt, the Appellant can discuss payment arrangements with the CRA to make it easier to repay it (she can use the same phone number above).

Conclusion

[64] The appeal is allowed in part.

[65] The Commission didn't correctly determine which weeks the Appellant wasn't eligible to receive the EI-ERB.

[66] The Appellant received \$4,000 of EI-ERB that she wasn't eligible to receive. This amount, less any amounts that have been retained in reduction of the debt, must be repaid.

[67] The Appellant is entitled to a detailed accounting of the remaining debt before being called upon to repay it.

Elyse Rosen

Member, General Division – Employment Insurance Section