

Federal Court



Cour fédérale

Date: 20210806

Docket: T-195-21

Citation: 2021 FC 825

Ottawa, Ontario, August 6, 2021

PRESENT: The Honourable Mr. Justice Brown

PROPOSED CLASS PROCEEDING

BETWEEN:

JANET ANN RYAN

Plaintiff

and

THE ATTORNEY GENERAL OF CANADA

Defendant

JUDGMENT AND REASONS

UPON request in writing by the parties for approval of the court that this action be discontinued, without costs;

AND UPON considering Rule 334.3 of the *Federal Courts Rules*, SOR/98-106, which provides that a proceeding commenced by a member of a proposed class of persons on behalf of the members of that class may be discontinued only with the approval of a judge of this Court;

AND UPON considering that such approval is mandated both before and after certification;

AND UPON considering that, in order to approve such discontinuance, the Court must be satisfied that the interests of the proposed class members will not be prejudiced by the discontinuance;

AND UPON reading the parties' joint submissions on this issue as follows, and having accepted the same;

Overview

[1] The parties seek this Court's approval of the discontinuance of Ms. Ryan's proposed class proceeding, without costs. This approval is mandated by the *Federal Courts Rules* (**Rules**)¹ to protect the interests of the proposed class. In light of the Canada Emergency Response Benefit and Employment Insurance Emergency Response Benefit Remission Order (**Remission Order**),² there will be no prejudice to the proposed class if this action is discontinued.

I. Facts

1) Background

1 SOR/98-106.

2 SI/2021-19.

[2] The following is a brief summary of the class proceeding based solely on Ms. Ryan's Statement of Claim issued on February 1, 2021:

- a) Ms. Ryan, the proposed representative plaintiff, is an Ontario resident who receives Canada Pension Plan and Old Age Security payments.
- b) Ms. Ryan applied for and received Canada Employment Response Benefit (**CERB**) payments of \$2,000/month for seven months for a total of \$14,000.
- c) In applying for the CERB, Ms. Ryan relied on a May 25, 2020 Department of Finance posting on a federal government website. The posting described emergency relief payments to protect Canadians and specifically self-employed individuals who lost income due to the COVID-19 pandemic.
- d) According to this posting, the eligibility criteria for self-employed applicants were as follows:

You earned a minimum of \$5,000 (before taxes) in the last 12 months, or in 2019, from one or more of the following sources:

 - Employment income
 - Self-employment income
 - Provincial benefit payments related to maternity or parental leave.
- e) Later on, the government changed the eligibility criteria to individuals "Who had employment and/or self-employment income of at least \$5,000 in 2019 or in the 12 months prior to the date of their application".

- f) In November 2020, the Canada Revenue Agency (CRA) issued form letters to the proposed class members including Ms. Ryan advising that “self-employment income” for the purposes of “worker” under the *Canada Emergency Response Benefit Act (CERB Act)*³ means “net self-employment income” and demanding the return of the CERB payments by December 31, 2020 without penalty.
- g) There is no suggestion that Ms. Ryan has repaid the CERB.

[3] As a matter of context, there is no provision for penalty or interest on CERB payments which were made to an applicant who had no entitlement to them.⁴

2) Proposed class

[4] Ms. Ryan proposed to represent individuals who received Canada Pension Plan and Old Age Security payments, relied on the original CERB eligibility requirements (i.e., the posting on the government website) and received CERB payments from March 30, 2020 to November 1, 2020.

3) Relief sought by Ms. Ryan

[5] In her Statement of Claim, Ms. Ryan sought:

³ SC 2020, c. 5.

⁴ *CERB Act*, ss. 12(1) and 14.

- a) this Court's interpretation of "self-employment income" under the *CERB Act* on the Government of Canada's official website describing the CERB eligibility, and
- b) a declaration that class members who earned (presumably gross) self-employment income of \$5,000 in the last 12 months before March 2020 or in 2019 are entitled to the CERB payments received.

4) Status of the proceeding

- [6] The Statement of Claim was issued on February 1, 2021. The defendant has not filed a Statement of Defence, nor has Ms. Ryan filed motion materials for certification.
- [7] On May 12, 2021, the Remission Order was published in the Canada Gazette.
- [8] On May 27, 2021, the parties advised this Court that the Remission Order had been issued.
- [9] On June 11, 2021, the parties advised this Court that Ms. Ryan would like to discontinue her proposed class action in light of the Remission Order and sought directions about how to proceed.
- [10] By Direction dated July 20, 2021, this Court directed the parties to file written submissions and draft orders for the case management meeting set for Tuesday, August 10, 2021.

II. Point in issue

[11] Will the proposed class be prejudiced if this Court allows Ms. Ryan to discontinue her action?

III. Submissions: no prejudice to the proposed class members

[12] In the circumstances, this Court should allow Ms. Ryan to discontinue her proposed class proceeding without costs. Given the Remission Order, individuals like Ms. Ryan who applied for and received CERB benefits on the basis that the definition of worker in the *CERB Act* refers to “gross” as opposed to “net” income will not be required to repay the CERB based on the net vs gross distinction. Provided individuals meet the other requirements of the Remission Order, if they had gross self-employment income of at least \$5,000, their debts will be remitted.

[13] Pursuant to rule 334.3 of the Rules, this Court must approve the discontinuance of a proposed class proceeding. In doing so, this Court must ensure that the interests of the members of the proposed class are not prejudiced.⁵ Given the Remission Order, the discontinuance will not prejudice the proposed class members.

[14] Under s. 5(1) of the *CERB Act*, a “worker” could apply for the CERB. Under s. 6(1)(a), the worker was eligible for a CERB payment if, among other things, they ceased working for reasons related to COVID-19 for at least 14 consecutive days in the four-week period for which they apply for the CERB.

⁵ *Campbell v Canada (AG)*, 2009 FC 30 at para 9; *Dennis v Canada*, 2017 FC 1011 at para 4.

- [15] “Worker” is defined in s. 2 as a person who, among other things, had for 2019 or in the 12-month period before they applied for the CERB, “total income of at least \$5,000” from, among other things, employment or self-employment.
- [16] Ms. Ryan’s concern is whether total income from self-employment means gross or net income. She interprets total income from self-employment as meaning gross income. If total income means net self-employment income, then without the Remission Order, Ms. Ryan would have to repay the CERB benefits she received.
- [17] Under s. 1(1) of the Remission Order, a self-employed worker whose net self-income was less than \$5,000 and who applied for the CERB, will be granted remission where:
- c) They have filed their 2019 and 2020 income tax returns by December 31, 2022;
 - d) Their gross self-employment income was \$5,000 or more in 2019 or in the 12 months prior to their initial application; and
 - e) They met all other CERB eligibility criteria.
- [18] The CRA has announced that, where an individual has claimed and been paid the CERB based on their gross self-employment income of \$5,000, but has not repaid the CERB, it will verify the individual’s 2019 and 2020 income tax returns to

ensure that the conditions for remission are met. If the individual has already repaid the CERB, then they may apply for a reimbursement.⁶

[19] If the CRA determines that the individual is ineligible for remission, the individual will have recourse by way of judicial review.⁷

[20] In the circumstances, then, the issue of whether self-employment income for the purpose of the worker definition in the *CERB Act* refers to “net” or “gross” income is of no practical consequence to Ms. Ryan or members of the proposed class. As long as they meet the other requirements of the Remission Order, if they had gross self-employment income of at least \$5,000, they will not have to repay the CERB benefits they received as their debts will be remitted.

IV. *Order sought*

[21] The parties jointly request that this Court permit Ms. Ryan to discontinue the action, without costs, in accordance with the attached Draft Order, contained in attached Schedule A.

AND UPON being satisfied, in these circumstances, that the interests of the proposed class members will not be prejudiced by the discontinuance of the present action.

⁶ Canada, CRA, News Release, “Government of Canada to reimburse self-employed workers who repaid the CERB” (27 May 2021).

⁷ For an example of a judicial review where a person has applied for remission, but has been denied, see *Will-Sher Construction Ltd v Canada (Minister of National Revenue)*, 2003 FC 1207.

JUDGMENT IN T-195-21

THIS COURT'S JUDGMENT is that:

1. The discontinuance of this action is approved, and
2. Each party will bear their own costs.

"Henry S. Brown"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-195-21

STYLE OF CAUSE: JANET ANN RYAN v THE ATTORNEY GENERAL
OF CANADA

PLACE OF HEARING: BY WRITTEN SUBMISSIONS

DATE OF SUBMISSIONS: JULY 30, 2021

JUDGMENT AND REASONS: BROWN J.

DATED: AUGUST 6, 2021

SUBMISSIONS:

Jan D. Weir

FOR THE PLAINTIFF

Arnold H. Bornstein
Laurent Bartleman
Angela Shen

FOR THE DEFENDANT

SOLICITORS OF RECORD:

Jan D. Weir
Toronto, Ontario

FOR THE PLAINTIFF

Department of Justice
Toronto, Ontario

FOR THE DEFENDANT