

Federal Court



Cour fédérale

Date: 20220203

Docket: T-38-21

Citation: 2022 FC 131

Ottawa, Ontario, February 3, 2022

PRESENT: Madam Justice Walker

BETWEEN:

NOOR HAYAT

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The Applicant seeks judicial review of a December 10, 2020 decision (the Second Decision) of a Canada Revenue Agency (CRA) officer on behalf of the Minister of Employment and Social Development, denying his application for the Canada Emergency Response Benefit (CERB).

[2] The CERB was part of a package of measures introduced by the federal government in 2020 in response to COVID-19. It was a targeted, monetary payment intended to provide

financial support to workers who suffered a loss of income due to the COVID-19 pandemic. The legislative framework for the CERB is set out in the *Canada Emergency Response Benefit Act*, (the CERB Act) being section 8 of the *COVID-19 Emergency Response Act*, SC 2020, c-5. To be eligible to receive CERB payments, an applicant was required to demonstrate at least \$5,000 of income from prescribed sources (which included income from self-employment) in 2019 or in the 12 months prior to their first application (the Income Requirement). In addition, the applicant must have ceased working or had their hours reduced due to COVID-19.

[3] By way of preliminary matter and with the consent of the parties, the style of cause in this matter is amended to reflect the correct respondent, the Attorney General of Canada.

I. **Background**

[4] The Applicant applied for and received the CERB for the four 4-week periods from March 15, 2020 to July 4, 2020. He relied on invoiced tutoring income in January and February 2020 in the aggregate amount of \$5,250.00 as the basis for his application.

[5] In July 2020, the Applicant discovered that a hold had been placed on his account that prevented him from applying for a fifth CERB payment (July 5-August 1, 2020). After a number of calls with the CRA, a Canada Emergency Benefit Validation agent (CEBV agent) informed the Applicant that the CRA required proof of his tutoring income.

[6] On August 14, 2020, and again on October 14, 2020, the Applicant submitted a series of invoices (Invoices) addressed to clients, each of which was stamped “PAID”. In response to a

CRA request for supplementary proof of income in the form of bank statements, the Applicant stated that his clients paid him in cash for his tutoring services and that he did not deposit the funds in the bank. There then ensued a further series of telephone calls between the Applicant and the CRA, a complaint to the Office of the Taxpayers' Ombudsperson, and an exchange between the Applicant and his Member of Parliament's office.

[7] In late November 2020, the Applicant received a letter from the CRA dated November 25, 2020 (the First Decision) stating that he was not eligible to receive the CERB because he did not satisfy the Income Requirement.

[8] On December 1, 2020, the Applicant requested a review of the First Decision. The Applicant argued that the CERB Act and the information listed on the Canada.ca website regarding the validation of CERB applications were ambiguous. He also argued that his Invoices were adequate supporting evidence of his income and that there was no requirement for him to deposit income into a bank account as a means of substantiating receipt of payment.

II. **The Second Decision**

[9] The Second Decision responds to the Applicant's December 1, 2020 request and is the decision being challenged in this application.

[10] The substantive paragraphs of the Second Decision are as follows:

After reviewing your request of December 1, 2020, for a second review, we have carefully considered the information you provided to support your CERB eligibility.

Based on our review, you are not eligible. You did not meet the following criteria:

- You did not earn at least \$5,000 (before taxes) of employment or self-employment income in 2019 or in the 12 months prior to the date of your first application.
- You did not stop working, or had your hours reduced, for reasons related to COVID-19.

As you did not meet the eligibility criteria to qualify for CERB your application has been denied. All following applications for the same CERB periods will be denied based on the results of this second review.

[11] On January 7, 2021, the Applicant filed his request for judicial review of the Second Decision.

III. **Issues**

[12] The Applicant raises two issues in this application. First, he submits that the Second Decision is not reasonable and cannot stand. Second, he submits that the Income Requirement violates subsection 15(1) of the *Canadian Charter of Rights and Freedoms* (the Charter).

IV. **Is the Second Decision reasonable?**

[13] The Applicant submits that the CRA based the Second Decision on an erroneous finding of fact made without regard to the Invoices that established income of \$5,250 in the 12 months prior to the date of his CERB application. He argues that the CRA's website does not require an applicant to submit evidence that income has been deposited in a financial institution, nor did the CRA clearly advise him of the type of information that would satisfy their validation inquiries. The Applicant also argues that there was no basis on which the CRA could reasonably reject the

Invoices. In his view, the CRA's inability to match his clients to the addresses in the Invoices was not a sufficient basis on which to deny his application.

[14] The Second Decision is subject to review for reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 10, 23 (*Vavilov*)). There is no dispute between the parties in this regard.

[15] Where the Court reviews an administrative decision for reasonableness, its role is to examine the reasons given by the decision maker and determine whether the decision "is based on an internally coherent and rational chain of analysis" and is "justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85). The burden is on the party challenging the decision to show that it is unreasonable and the Court "must be satisfied that any shortcomings or flaws relied on [...] are sufficiently central or significant to render the decision unreasonable" (*Vavilov* at para 100).

[16] I have considered the Applicant's submissions against the legislative framework of the CERB Act and the parties' evidence in the record, and find that the Applicant has identified no significant error or oversight in Second Decision that warrants the Court's intervention. The reasons given by the CRA for refusing the Applicant's CERB application are intelligible and justified in light of the evidence. The CRA considered the Invoices and engaged in numerous discussions with the Applicant regarding the request for supplementary documents as part of the verification of the application.

[17] The Respondent relies on the affidavit of Mr. David Liske (the Liske Affidavit), a benefits compliance officer with the CRA, and the exhibits attached to the Liske Affidavit. The Respondent argues that the Liske Affidavit establishes the CRA's thorough chain of reasoning and supports its argument that the CRA carefully considered the Invoices and provided the Applicant an opportunity to respond to its continuing concerns regarding his alleged income in January-February 2020.

[18] Mr. Liske was the CRA officer assigned to conduct the second review of the Applicant's CERB application. In the course of his review, Mr. Liske considered the documents and information in the CRA's records, including relevant entries by various CEBV agents in the CRA's Special Assessment Observations notepad (the SA Notepad) that recorded the agents' interactions with the Applicant and their findings; the Applicant's income and deductions from income and tax information slips for 2019; and the Applicant's October 14, 2020 letter and attached Invoices.

[19] Mr. Liske's material conclusions were as follows:

1. The Invoices did not indicate that the Applicant had met the Income Requirement because:
 - the Applicant had not provided any documents showing the Invoices had been paid;
 - Mr. Liske was unable to match the names and addresses on the Invoices to those on the CRA's computer system. As the Invoices did not contain full names or addresses, Mr. Liske undertook further searches to match the names and addresses but those searches were not successful; and
 - the addresses on the Invoices did not contain unit numbers.

2. With regards to his conclusion that the Applicant had not lost his job or suffered a reduction in hours worked due to COVID-19, Mr. Liske relied on a November 19, 2020 conversation between the Applicant and a CEBV agent. During that conversation, the CEBV agent explained the requirements of the CERB Act to the Applicant and attempted to understand why he had either stopped tutoring or was experiencing a reduction of hours due to the pandemic when the schools were still functioning albeit online. The CEBV agent asked the Applicant to provide bank statements to coincide with the Invoices and proof of his tutoring income in March 2020 to substantiate his claim he was tutoring less students. As the CRA's records reflected only the Applicant's receipt of social assistance in 2019 and no self-employment income, the agent stated that the CRA needed proof of his income. The Applicant questioned the need for further supporting documents and was informed that, should he not be willing to provide such documents, a denial letter could be sent to him and he could then request a second review.

[20] Mr. Liske's conclusions demonstrate a comprehensive review of the Invoices and of the Applicant's interactions with CRA agents regarding his CERB application. I am not persuaded by the Applicant's submission that the CRA disregarded the Invoices. The CRA's refusal to accept the Invoices without further evidence of payment is justified in light of the Applicant's interactions with the CRA as documented in the SA Notepad and the absence of any history of self-employment income. The Applicant had no tutoring income in 2019. His income tax returns for the year reflect only the receipt of social assistance payments. The CRA's attempts to verify the information recorded on the Invoices were unsuccessful and the Applicant did not respond to the CRA's request for further information to support his claim of income as a tutor in January and February 2020.

[21] The Applicant was advised to provide further documents in support of his application on a number of occasions. During one call, he informed the CRA that he had additional information but was not prepared to share it. He was informed that, should he not provide supplementary information, his CERB application would be denied. The Applicant chose not to comply with the

request for information. He argues that he did not know what information to submit but this argument is not consistent with the record.

[22] The Applicant submits that the CRA has not published a requirement for proof of financial institution transactions to support a CERB application. He refers to the CRA's website that provides a list of recommended supporting documents and emphasizes that the list does not refer to bank statements. The Applicant is correct in this regard. However, the list provided by the CRA is not exhaustive and is prefaced by the statement that "[y]ou have to support all income entries in your records with original documents like...". The Applicant also relies on jurisprudence in cases where invoices for services rendered were accepted as sufficient proof of income. Invoices may substantiate a claim to income in some situations but not in every situation. In the present case, the circumstances surrounding the Applicant's alleged tutoring income raised questions for the CRA and it was not unreasonable for the CEBV agents to request further documents. I note also that the cases submitted by the Applicant were decided on a number of factors and in materially different circumstances.

V. **The CERB and subsection 15(1) of the Charter**

[23] The Applicant frames his Charter arguments as follows:

Is Section 2 of the *Canada Emergency Response Benefit Act*, SC 2020, c 5, s 8, (the definition of "worker" requires a total income threshold of at least \$5,000 from certain sources to qualify for the benefit) in violation of 15(1) of the *Charter of Rights and Freedoms*?

[24] Although it is not clear whether the Applicant challenges the constitutionality of the Second Decision or the Income Requirement in the CERB Act more generally, his submissions

are premised on the argument that poverty, or low net income, is an implied or analogous ground of prohibited discrimination under subsection 15(1) of the Charter and that the Income Requirement, an arbitrary threshold, discriminates against the poor. Alternatively, the Applicant submits that, in discriminating against low net income individuals, the Income Requirement has an adverse impact among a disproportionate number of individuals within groups intended to be protected by subsection 15(1).

[25] In oral submissions, the Applicant's counsel acknowledged that he is proposing a test case as the Applicant is not in a position to marshal an evidentiary record in support of his Charter arguments. Counsel argues that individuals within the enumerated grounds of discrimination, including race and disability, are disproportionately represented among the poor and that the Court should weigh these considerations against the fact that the government has given no policy reason in support of the \$5,000 Income Requirement in the CERB Act.

[26] I have considered the Applicant's submissions in support of his Charter challenge but have concluded that it is not appropriate to address the merits of his constitutional arguments because of the inadequacy of the record before me (*Mackay v Manitoba*, [1989] 2 SCR 357 at 361-363 (*Mackay*); *Forest Ethics Advocacy Association v Canada (National Energy Board)*, 2014 FCA 245 at para 45). As Justice Cory stated in *Mackay*:

Charter decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the *Charter* and inevitably result in ill-considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of *Charter* issues. A respondent cannot, by simply consenting to dispense with the factual background, require or expect a court to deal with an issue

such as this in a factual void. *Charter* decisions cannot be based upon the unsupported hypotheses of enthusiastic counsel.

[27] In addition, the Applicant has not addressed jurisprudence that has established that poverty and low income are not recognized as analogous grounds for purposes of subsection 15(1) (*Toussaint v Canada (Citizenship and Immigration)*, 2011 FCA 146 at para 59) on the basis that they are not immutable characteristics and can be changed by the individual.

[28] Finally, the Respondent argues that poverty is not the basis of the distinction drawn by the Income Requirement. The Income Requirement draws a distinction between people who earned at least \$5,000 from certain prescribed sources of income and those who did not as a mechanism to assist Canadian workers through the immediate and devastating impacts of COVID-19. The Applicant has not engaged with this argument or provided any evidentiary basis to establish that the Income Requirement: 1) creates a distinction, on its face or in its impact, based on enumerated or analogous grounds, and 2) imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage (*Fraser v Canada (Attorney General)*, 2020 SCC 28 at paras 27, 50).

VI. **Conclusion**

[29] The application for judicial review will be dismissed.

[30] At the hearing of this application, the parties proposed that they be permitted to make submissions as to costs following the receipt of my judgment. I will permit the parties to do so in accordance with the schedule set out below.

JUDGMENT IN T-38-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.
2. The style of cause is amended to reflect the Attorney General of Canada as the Respondent.
3. The parties will make costs submissions to the Court in accordance with the following schedule:
 - (a) within 10 days of the date of this judgment, the Respondent, the Attorney General of Canada, will deliver to the Court written costs submissions, such submissions to be no longer than three (3) pages excluding any schedules, exhibits and authorities;
 - (b) within 10 days of the date of filing of the Respondent's submissions, the Applicant, Mr. Noor Hayat, will deliver to the Court written costs submissions, such submissions to be no longer than three (3) pages excluding any schedules, exhibits and authorities; and
 - (c) within five (5) days of the date of filing of the Applicant's submissions, the Respondent may deliver to the Court written reply submissions no longer than two (2) pages in total.

"Elizabeth Walker"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-38-21

STYLE OF CAUSE: NOOR HAYAT v ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: HEARD BY VIDEOCONFERENCE

DATE OF HEARING: SEPTEMBER 27, 2021

JUDGMENT AND REASONS: WALKER J.

DATED: FEBRUARY 3, 2022

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