

Federal Court



Cour fédérale

Date: 20220526

Docket: T-223-22

Citation: 2022 FC 762

Ottawa, Ontario, May 26, 2022

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

JOSHUA KLEIMAN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Mr. Joshua Kleiman, brings this application for judicial review of a decision made by a benefits validation officer [Officer] of the Canada Revenue Agency [CRA]. The Officer found the Applicant was not eligible to receive the Canada Recovery Benefit [CRB].

Background

[2] The *Canada Recovery Benefits Act*, SC 2020, c 12, s 2, [*CRB Act*], came into effect on October 2, 2020 and established the CRB. The CRB was available to provide income support, for any two-week period beginning on September 27, 2020, and ending on October 23, 2021, to eligible employed and self-employed individuals who were directly affected by the COVID-19 pandemic. The Minister responsible for the CRB is the Minister of Employment and Social Development (*CRB Act*, ss 2, 3 and 4), however, the CRB is administered by CRA.

[3] The Applicant applied for and received the CRB for seven two-week periods between September 27, 2020 and January 2, 2021. The Applicant applied for but did not receive the CRB for the seven two-week periods from January 2, 2021 to April 10, 2021, and the two-week period from October 10, 2021 to October 23, 2021.

[4] After the above payments were made, the Applicant was requested by CRA to provide documentation to support his application. On January 30, 2021, the Applicant advised that he is a handyman and does not use invoices for his work. He provided his bank statements for 2020 and circled on those statements the entries (electronic transfers) that he identified as his work-related income. On April 27, 2021 a benefits compliance officer advised the Applicant that he was not eligible to receive the CRB benefit because, compared to the previous year, he did not have a 50% reduction in his average weekly income due to COVID-19 [First Decision].

[5] On May 2, 2021, the Applicant requested a second review of the First Decision. He submitted that, in total, he earned \$6709 during the 12-month period from September 2019 to September 2020, when he made his first CRB application. He also stated that he had a subsequent reduction in his income of more than 50%. The Applicant subsequently provided further submissions, his bank statements from December 31, 2020 to April 30, 2021 and a screenshot of an email showing that his 2020 income tax had been assessed and he was owed a refund of \$484.30. Among other things, he stated that he had an income of \$828 from October to December 2021, and no income from January to mid-April 2022. Based on this, he calculated his income reduction and submitted that he had demonstrated that he had suffered an income reduction which met the CRB eligibility requirements.

[6] By letter dated January 31, 2022, CRA advised the Applicant of the negative decision regarding his request for a second review of his CRB application [Second Review Decision]. The Second Review Decision is the decision under review in this application.

Second Review Decision

[7] The decision states that:

We are writing to advise you of our decision regarding your request dated May 19, 2021, for a second review of your Canada Recovery Benefit (CRB): application.

We have completed your request and have carefully considered all the information to support your CRB 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 net self-employment income in 2019, 2020, or in the 12 months before the date of your first application.

As you did not meet the eligibility criteria to qualify for CRB, any future CRB applications will be denied, unless you can provide proof that you are able to satisfy the eligibility criteria.

If you received a CRB payment that you were not eligible for, you will be required to repay the amount.

[8] The Second Review Decision also indicated that if the Applicant disagreed with the decision he could apply to this Court for judicial review within 30 days of the date of the letter.

[9] I pause here to note that, similar to the Global Case Management System notes utilized by immigration officers, the CRA's Special Assessment Observations notepad [SA Notepad] entries and second review report [Second Review Report], which will be discussed below, form part of the reasons for the officers' decisions (*Sedoh v Canada (Citizenship and Immigration)*, 2021 FC 1431 at para 36; *Ezou v Canada (Citizenship and Immigration)*, 2021 FC 251 at para 17; *McClintock's Ski School & Pro Shop Inc. v. Canada (Attorney General)*, 2021 FC 471 at para 26; *Vavilov* at paras 94-98).

Relevant Legislation

Canada Recovery Benefits Act, SC 2020, c 12, s 2 [CRB Act]

Eligibility

3(1) A person is eligible for a Canada recovery benefit for any two-week period falling within the period beginning on September 27, 2020 and ending on October 23, 2021 if

...

(d) in the case of an application made under section 4 in respect of a two-week period beginning in 2020, they had, for 2019 or in the 12-month period preceding the day on which they make the application, a total income of at least \$5,000...

(e) in the case of an application made under section 4 by a person other than a person referred to in paragraph (e.1) in respect of a two-week period beginning in 2021, they had, for 2019 or for 2020 or in the 12-month period preceding the day on which they make the application, a total income of at least \$5,000 from the sources referred to in subparagraphs (d)(i) to (v);

...

(i) they sought work during the two-week period, whether as an employee or in self-employment;

...

Obligation to provide information

6 An applicant must provide the Minister with any information that the Minister may require in respect of the application.

Payment of benefit

7 The Minister must pay a Canada recovery benefit to a person who makes an application under section 4 and who is eligible for the benefit.

Preliminary Matter

[10] As a preliminary matter, the Respondent submits that the Applicant has named the incorrect respondent in this matter. The proper responding party, in accordance with Rule 303 of the *Federal Courts Rules*, SOR/98-106, is the Attorney General of Canada as the Applicant is challenging a decision made by CRA, which entity is not directly affected by the decision, on behalf of the Minister of Employment and Social Development.

[11] I agree and will order that the style of cause be amended (*Aryan v Canada (Attorney General)*, 2022 FC 139 [Aryan] at para 16; *Hasselsjo v Canada (Attorney General)*, 2021 CanLII 89551 (FC) at para 2).

Issues and Standard of Review

[12] The sole issue in this matter is whether the Second Review Decision was reasonable.

[13] The standard of review applicable to the merits of the Second Decision is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 23 [Vavilov]). When applying that standard “the reviewing court asks whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision” (*Vavilov* at para 99).

Reasonableness of the Second Decision

Applicant’s position

[14] The Applicant is self-represented. He filed no formal written representations. However, the Table of Contents of the Applicant’s Record contains submissions about the documents he submitted to CRA and upon which he relies in support of his application for judicial review; background information with respect to his CRB applications; and, his employment income during the relevant periods. The Applicant also filed an affidavit sworn on February 22, 2022, which largely states the same thing.

[15] In summary, the Applicant states that he made his first CRB application on October 11, 2020. He was 22 years old, had graduated in April 2020 during the pandemic and was unable to find work. Therefore, he did his own work and was also on-call for a landscaper. All of his jobs were paid by e-transfers every 1-2 weeks (and sometimes cash) and he earned \$5432 from January to September 2020. Additionally, he earned \$1277.56 from a 2019 summer job for a total of \$6709.56 earned in the 12 months prior to his first CRB application. Thus, he met the \$5000 minimum income eligibility requirement. Divided by 26 two-week periods, this is \$385 a month on average. From October to December 2020, he earned \$828. When divided by 6.5 two-week periods, this amounts to \$127 per month, on average, demonstrating a 50% reduction in his earnings. He submits that CRA treats cash tips as self-employment income and that the documented e-transfers into his bank account should similarly be treated as cash income.

Respondent's position

[16] The Respondent submits that the Officer considered all of the documents submitted by the Applicant but did not accept that the Applicant met the income requirement because: he had not provided invoices supporting the claimed income, the e-transfers identified on the Applicant's bank statements did not identify the source of deposits into his account, and his bank statements did not establish that \$5000 of income was earned by the Applicant prior to the first period of benefits.

Analysis

[17] The Respondent has filed the affidavit of Mr. Ben Terrell, a CRA benefits compliance officer, sworn on March 23, 2022. Mr. Terrell indicates that he conducted the second review and made the Second Review Decision. Mr. Terrell is the “Officer” in these reasons.

[18] As I indicated to counsel for the Attorney General at the hearing of this matter, I have some concerns with this affidavit. These include that while the Officer deposes that a true copy of the Document entitled *Confirming CERB, CRB, CRSB or CRCB Eligibility* [CRB Guideline] (used by CRA agents to guide them in determining if the Applicant was eligible to received CRB) was attached as an exhibit to his affidavit, the attached document appears to differ from the document with the same name referenced in *Aryan* at para 33 and in *Santaguida v Attorney General of Canada*, 2022 FC 523 at paras 27-28, which document included examples and instructions to officers to work with applicants in situations where the applicant was unable to provide any of the suggested documents to establish their income to see what other acceptable documents they may have. The Officer does not indicate that the version attached to his reasons was the version in effect at the time he made his decision.

[19] The Officer also deposes that a benefits validation agent and other CRA officers involved in attempting to validate the Applicant’s CRB applications set out their findings, notes, and interactions with the Applicant in the SA Notepad, a true copy of which is attached to his affidavit. However, a review of that exhibit reveals that it appears to be comprised only of segmented screenshots of entries; it is unclear if this is a complete document. The Officer also

states that in the course of his review he considered the listed documents and information, he reached a stated conclusion and that he recorded his findings in the SA Notepad and in the Second Review Report and that his entries on the SA Notepad can be identified by his user number “VJM953”. However, the SA Notepad screenshot document attached to his affidavit does not include any entries by VJM952 nor does it record what documents were received from the Applicant. There are eight entries, seven of which record calls from the Applicant’s parents looking for status reports on behalf of their son.

[20] I would also note that a certified tribunal record has not been filed in this matter. The Applicant is self-represented and likely was not aware that it was open to him to request one. Thus, the only CRA-generated documents that are before the Court are those that are attached to the Officer’s affidavit. This is another reason why care should have been taken when preparing that affidavit to ensure that a complete and accurate record was before the Court.

[21] Further, to an extent, in his affidavit the Officer inappropriately supplemented his reasons found in the Second Review Decisions.

[22] That said, these concerns are not fatal in this case.

[23] In addition to the Second Review Decision, the Officer’s reasons are also set out in the Second Review Report dated January 27, 2022, which appears as a discrete document and exhibit to the Officer’s affidavit, not as an entry in the SA Notepad. This includes:

Date documents were received for second review: May 19, 2021

What documents were provided: Letter requesting 2nd review

Date of phone call(s): January 24/2022 – first attempt; 12:43 EST, spoke with t/p, passed confid., confirmed he does not have invoices for his s/e work, just completed and get his client to send over the funds, asked him to submit all he can to support his 2020 income and also request bank statements to 2021 to show reduction of income; he confirmed that he has been on EI since Dec 24 as he is currently injured and can't work.

Applicant provided additional information: Bank statements from Dec 2020 to April 2021 showing transfers from his parents to pay for rent

Eligibility criteria not met: Could not confirm taxpayer met 5000\$ threshold prior to applying

Explain your decision regarding each criteria the taxpayer did not meet: Taxpayer is self-employed and does not have invoices for his work, he sent in bank statements with deposits however cannot confirm the source, has been injured since December 2021 and on EI

...

[24] The Second Review Report indicates that during the telephone call from the Officer to the Applicant, the Applicant confirmed that he does not have invoices for his self-employed work but just completes the work and gets his client to sent payment. Further, the Officer records that he asked the Applicant to “submit all he can to support his 2020 income”. The Officer concluded that the Applicant is self-employed, did not have invoices for his work and his bank statements showed deposits but the Officer could not confirm the source of those deposits.

[25] When appearing before me the Applicant stated that the income that he earned came for work that he did for a person who did lawn maintenance and similar work. He would often get a call the night before when jobs were available, be picked up by this person to go to the job site and worked about 12 -15 hours a week. He indicated that he was paid by this person by e-

transfer on Mondays and Thursdays as indicated by the circled transfers on his bank statements. Further, that he had recently been able to obtain from his bank documentation that established that the source of the payments was from that person.

[26] The difficulty that the Applicant faces is that those records which he states demonstrate the source of his income were not before the Officer and, therefore, could not have been considered by the Officer. And, as a general rule, the evidentiary record before a court on judicial review is restricted to the evidentiary record that was before the decision maker (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 19; *Henri v Canada (Attorney General)*, 2016 FCA 38 at para 41). Evidence that was not before the decision maker and that goes to the merits of the matter is, with certain limited exceptions, not admissible (*Namgis First Nation v Canada (Fisheries and Oceans)*, 2019 FCA 149 at paras 7-12; *Ohwofasa v Canada (Citizenship and Immigration)*, 2020 FC 266 at paras 13-15). The Applicant's new documents speak to the merits of the matter and do not fall into any of the limited exceptions. They were not admitted into evidence.

[27] Further, the Applicant indicated before me that he had made many requests of the person who provided him with work for confirmation of his work and payment, that these requests had been refused and, ultimately, cost him his job. However, there is no evidence in the record before me that the Applicant explained this to the Officer. His various letters to CRA indicate: that he is a handyman and did not use invoices for his work; that he picked up odd jobs painting and in warm weather was outside doing lawn cutting and whatever else he could find, and referring to

“my customers”; and, that he worked odd jobs and was e-transferred his weekly payments for handyman jobs. Nowhere does he mention that these weekly payments were from a person who provided him with work, that the work he did was for the clients of that employer, or that that person would directly invoice his own clients.

[28] The Applicant was responsible for establishing that he met the CRB eligibility requirements. Specifically, that he had a net self-employment income of at least \$5000 in 2019, 2020 or in the 12 months before the date that he applied for the CRB. However, the Applicant did not provide any documentation to confirm who he provided his services to, the dates on which those services were provided and a description of the services, the hourly rate or other fee he charged or was paid for his services, or confirming the source of the e-transfers. Because of this, the Officer reasonably found that the Applicant was not eligible for the CRB.

[29] The Applicant also has the burden of establishing that the Officer’s decision is unreasonable (*Vavilov* at para 100; *Aryan* at para 45). The Applicant does not identify any errors in the Officer’s decision-making; he simply disagrees with the Second Review Decision. Given the absence of any documentation in the Applicant’s record confirming the source of the e-transfers or otherwise confirming that the Applicant provided and was paid for the services he claims to have rendered, I cannot conclude that the Officer overlooked or misapprehended any relevant evidence.

[30] To find the Second Review Decision to be unreasonable the Court must be satisfied “that there are sufficiently serious short comings in the decision such that it cannot be said to exhibit

the requisite degree of justification, transparency and intelligibility” (*Vavilov* at para 100). Based on the reasons and the evidence before me, I am not satisfied that the Applicant has met his burden.

[31] The application for judicial review is therefore dismissed.

[32] The Attorney General advises that it is not seeking costs and, accordingly, there will be no order as to costs.

JUDGMENT IN T-223-22

THIS COURT'S JUDGMENT is that

1. The style of cause is hereby amended, replacing the Canada Revenue Agency with the Attorney General of Canada as the named respondent;
2. The application for judicial review is dismissed; and
3. There shall be no order for costs.

"Cecily Y. Strickland"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-223-22

STYLE OF CAUSE: JOSHUA KLEIMAN v ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: MAY 17, 2022

JUDGMENT AND REASONS: STRICKLAND J.

DATED: MAY 26, 2022

APPEARANCES:

Joshua Kleiman

FOR THE APPLICANT
(ON HIS OWN BEHALF)

Christopher Ware

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Department of Justice Canada
Toronto, Ontario

FOR THE RESPONDENT