

Federal Court



Cour fédérale

Date: 20220809

Docket: T-81-22

Citation: 2022 FC 1183

Ottawa, Ontario, August 9, 2022

PRESENT: Madam Justice Pallotta

BETWEEN:

JASON SHOWERS

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Jason Showers, challenges an April 30, 2021 decision of a benefits compliance officer (Officer) with the Canada Revenue Agency (CRA). Following a second review, the Officer determined that Mr. Showers was ineligible for the Canada Recovery Benefit (CRB) because he did not demonstrate net self-employment income of at least \$5000 in 2019, 2020, or in the 12 months before his first CRB application, as required by paragraph 3(1)(e) of the *Canada Recovery Benefits Act*, SC 2020, c 12, s 2 [CRBA].

[2] Mr. Showers alleges his eligibility review was procedurally unfair because: (i) he did not have a meaningful opportunity to respond to concerns about his application; and (ii) the CRA refused to reassess his eligibility in June 2021, after he filed a revised 2019 tax return reporting self-employment income of more than \$5000.

[3] Mr. Showers explained that he is in a difficult situation as a result of the ineligibility finding. While I have sympathy for Mr. Showers' situation, I am unable to conclude that the second review decision should be set aside. Prior to the second review, CRA agents had multiple conversations with Mr. Showers and told him what information he needed to provide in order to substantiate his net self-employment income during the qualifying period. Mr. Showers had full and fair opportunity to provide the information.

[4] Mr. Showers believes he provided all of the required information except his 2019 tax return, but this is incorrect. While his original 2019 tax return, filed in February 2020, reported \$0 in income from employment or self-employment in 2019, the Officer did not rely on it. Instead, the Officer calculated net self-employment income based on the source documents Mr. Showers provided, and Mr. Showers has not established any error in the calculation. The fact that the CRA refused to reassess eligibility when Mr. Showers subsequently provided a revised 2019 tax return reporting over \$5000 in net self-employment income does not provide a basis to set aside the second review decision.

[5] For these reasons, which are more fully explained below, I must dismiss this application.

II. Issue and Standard of Review

[6] The sole issue on this application is whether Mr. Showers has established he was denied procedural fairness.

[7] Questions of procedural fairness are reviewed on a standard that is akin to correctness: *Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54 [*Canadian Pacific Railway*]. The duty of procedural fairness is “eminently variable”, inherently flexible, and context-specific: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 77. A court assessing a procedural fairness question is required to ask whether the procedure was fair, having regard to all of the circumstances: *Canadian Pacific Railway* at para 54.

[8] The key consideration is whether Mr. Showers knew the case to meet and had a full and fair chance to respond: *Canadian Pacific Railway* at para 56; *Flock v Canada (Attorney General)*, 2022 FC 305 at paras 16, 26.

III. Analysis

A. *Preliminary Issue – Admissibility of Evidence*

[9] The respondent submits that parts of Mr. Showers’ affidavit filed in support of this application are inadmissible. The respondent relies on the Officer’s affidavit, stating that the following information was not before her when she made her decision: (i) Brownstone Tax Services letter dated May 18, 2021; (ii) amended tax return for 2019, dated May 18, 2021; (iii)

handwritten notes on Mr. Showers' copy of the second review decision; and (iv) the evidence in paragraphs 1-2, the second sentence of paragraph 3 and paragraphs 5-11 of Mr. Showers' affidavit.

[10] As a general rule, the evidentiary record on judicial review is restricted to the record that was before the decision maker: *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency*, 2012 FCA 22 at para 19 [*Access Copyright*]. There are exceptions to the general rule for evidence that: (i) provides general background information to assist the Court in understanding the issues relevant to the judicial review, without providing evidence relevant to the merits of the administrative decision; (ii) explains procedural defects that cannot be found in the record, so that the Court can fulfill its role of reviewing for procedural unfairness; or (iii) highlights a complete absence of evidence before the administrative decision-maker when it made a particular finding: *Access Copyright* at para 20.

[11] Paragraphs 1-2 of Mr. Showers' affidavit describe his personal situation. This evidence does not fall under any of the exceptions noted in *Access Copyright*, and it is not relevant to the issues that are before me.

[12] With respect to the handwritten notes on the second review decision, I expect that Mr. Showers simply intended to introduce a copy of the decision and he used the copy he had. Mr. Showers does not rely on the handwritten notes or refer to them in his materials. In the absence of any explanation of their relevance, I have disregarded the handwritten notes.

[13] The balance of Mr. Showers' affidavit provides information and supporting documents about his request for a reassessment of eligibility, after the second review decision. While evidence that post-dates a decision is typically inadmissible, I am not satisfied that I should exclude this evidence. In my view, it relates to the procedural fairness issues Mr. Showers has raised and falls within the second exception noted in *Access Copyright*, above.

[14] The Officer's affidavit provides information and supporting documents about: (i) the CRB regime and the eligibility review process; (ii) CRA tax assessment records of Mr. Showers' income tax filings for the 2019 and 2020 taxation years; (iii) information about Mr. Showers' CRB eligibility review—including the CRB payments he received, a chronology of the review process, "SA Notepad" computerized records of conversations with Mr. Showers and the reviewers' notes, and copies of the first review and second review decisions. In my view, this evidence is admissible. The parts of the affidavit related to the CRB regime and the eligibility review process, the record of CRB payments to Mr. Showers, and the chronology of his eligibility review provide general background information to assist the Court to understand the issues relevant to the judicial review. While some of this evidence was not necessary, it falls under the first exception to the general rule in *Access Copyright* (see also *Delios v Canada (Attorney General)*, 2015 FCA 117 at paragraphs 42-47). The computerized records, including the "Second Review Report" which forms part of the Officer's decision (*Aryan v Canada (Attorney General)*, 2022 FC 139 at paragraph 22 [Aryan]), are documents from the record that are relevant to the application for judicial review: *Canada (Attorney General) v Canadian North Inc.*, 2007 FCA 42 at para 4; Rule 307 of the *Federal Courts Rules*, SOR/98-106.

B. *Was there a breach of procedural fairness?*

[15] The CRB is a benefits program providing income support to eligible employed and self-employed individuals directly affected by the COVID-19 pandemic. Section 5 of the *CRBA* states that first-time CRB applicants must attest that they meet the eligibility requirements of section 3, including the minimum income requirement.

[16] Mr. Showers applied for the CRB on October 13, 2020 and received \$4000 for the period from September 27, 2020 to November 21, 2020.

[17] Mr. Showers' file was selected for review. A first reviewer found he was not eligible to receive the CRB. The first review decision, dated February 10, 2021, states that Mr. Showers did not meet the following criteria:

- (a) he did not earn at least \$5000 (before taxes) of employment or net self-employment income in 2019, 2020, or in the 12 months prior to the date of his first application; and
- (b) he did not stop working, or have his hours reduced, for reasons related to COVID-19.

[18] Mr. Showers requested a second review on February 21, 2021. According to the second review decision issued on April 30, 2021, the Officer determined that Mr. Showers was ineligible for the CRB because he did not earn at least \$5000 (before taxes) of employment or net self-employment income in 2019, 2020, or in the 12 months prior to the date of his first application.

[19] The key period for the purposes of this proceeding is 2019. The 2019 tax return Mr. Showers filed in February 2020 did not report any employment or self-employment income. He

states he was incorrectly advised that he did not have to report self-employment income because his sales were under \$10,000. On May 18, 2021, Mr. Showers filed a revised 2019 tax return through Brownstone Tax Services, reporting \$5390 in net income from self-employment. He provided the revised 2019 return to the CRA on June 30, 2021 and requested a redetermination of his CRB eligibility. The CRA refused to do so.

[20] Mr. Showers does not allege the Officer incorrectly calculated his 2019 net self-employment income, based on the source documents he had provided prior to the second review. Instead, Mr. Showers alleges the eligibility review was procedurally unfair. He argues that the duty of procedural fairness requires: (i) a meaningful opportunity to respond to the Officer's concerns about his eligibility; and (ii) that the CRA should reassess eligibility when new or revised information is submitted—in this case, when he submitted his revised 2019 tax return. Mr. Showers relies on *Canada (Minister of Citizenship and Immigration) v Kurukkal*, 2010 FCA 230 at paragraphs 2-4 [*Kurukkal*] for the proposition that the doctrine of *functus officio* does not limit a decision maker's ability to reopen or reconsider an application when an applicant has provided further evidence.

[21] Apart from the refusal to redetermine his eligibility, Mr. Showers does not specify how he was denied a meaningful opportunity to respond to the Officer's concerns. Based on my review of the record, I agree with the respondent that the Officer decided the second eligibility review in a procedurally fair manner.

[22] The record demonstrates that Mr. Showers was informed of the case he had to meet and given full and fair opportunity to provide the necessary information and documents. Ultimately, the Officer assessed eligibility based on the documents that were provided, calculating net self-employment income for 2019 of \$4,900 based on sales receipts for revenue (without proof of payment because Mr. Showers was paid in cash) and rent expense receipts. As noted above, there is no evidence that the Officer made a calculation error.

[23] The respondent submits the Officer was under no duty to inform Mr. Showers of concerns about his eligibility, or the shortcomings in the documents he provided to substantiate his self-employment income. In my view, it is unnecessary to decide this point because the record shows Mr. Showers was informed of the concerns about his eligibility, and CRA agents worked with him to identify acceptable documents he could provide to substantiate the minimum income requirements for eligibility. There were multiple calls about the kind of documents needed to substantiate net self-employment income of at least \$5000 in a relevant qualifying period, before the first review decision and also before the second review decision. Furthermore, the first review decision letter explained why Mr. Showers was found ineligible and stated he could submit further documents for a second review. Mr. Showers provided some additional documents, and stated that he was not able to provide others. The Officer called Mr. Showers and provided a further opportunity to submit documents prior to issuing the second review decision. Since Mr. Showers was apprised of the case to be met and given an opportunity to present specific documents to respond to the Officer's concerns, the requirement for procedural fairness was met: *Walker v Canada (Attorney General)*, 2022 FC 381 at para 25.

[24] I agree with the respondent that the post-decision events—the revised 2019 tax return reporting over \$5000 in net self-employment income, or the CRA’s refusal to reassess eligibility based on the revised 2019 tax return—do not provide a basis to set aside the second review decision. If there was any error in the CRA’s refusal to reassess eligibility, it had no bearing on the reasonableness or fairness of the second review decision: *Kosolapova v Canada (Minister of Citizenship and Immigration)*, 2014 FC 458 at para 9 [*Kosolapova*].

[25] Mr. Showers states the doctrine of *functus officio* does not prevent the CRA from reassessing eligibility (*Kurukkal* at paragraphs 2-4), and principles of procedural fairness dictate that the CRA should reassess eligibility when new or revised information is submitted. The respondent makes three arguments in response. First, the notice of application only seeks to set aside the second review decision and accordingly, the respondent submits this Court can only entertain grounds related to the procedural fairness of the second review decision itself, based on the record that was before the Officer. Second, the respondent contends Mr. Showers has not established that the refusal to reassess was a decision that is subject to review, or alternatively, that any error arose in making the decision. Third, the question of *functus officio* only needs to be decided if the additional information was significant enough to have potentially affected the outcome: *Kurukkal* at para 20. Mr. Showers’ revised 2019 tax return is immaterial because the Officer did not rely on tax returns to determine eligibility. An officer is not required to accept self-reported income from a tax return: *Aryan* at paras 35-40.

[26] I agree with the respondent’s submissions.

[27] According to Mr. Showers' affidavit, he provided a revised 2019 tax return summary to the CRA around June 30, 2021, requesting a redetermination of his eligibility. He states that he called the CRA "on numerous occasions" (no dates are provided) and "was advised verbally that the CRA refused to reassess my eligibility because a second review was already completed". He states that on October 1, 2021, he called the CRA with the assistance of a lawyer and "[t]he CRA representative stated that they were unable to provide a reassessment". He was referred to the CRA's Validations Department to determine if this office would review his revised 2019 tax return. Mr. Showers called the CRA's Validations Department the same day and was advised that they would not reassess his eligibility.

[28] There is insufficient information in the record to determine whether one or more of the responses given on one of these calls constitutes a reviewable decision, but if it does, it would be a separate decision that is not properly before me on this judicial review application: *Harms-Barbour v Canada (Minister of Public Safety and Emergency Preparedness)*, 2021 FC 59 at para 64; *Kosolapova* at para 8. The decision before me is the second review decision, of April 30, 2021.

[29] Mr. Showers wishes to rely on his revised 2019 tax return to support his assertion that he earned more than \$5000 in net self-employment income in 2019. Mr. Showers believes that he provided all of the required information to the CRA except for this tax return—he asserts this was the only thing missing, and he had sent the CRA everything else that was needed to support his eligibility based on his 2019 self-employment income. However, the record does not support Mr. Showers' position. He was not found to be ineligible for the CRB based on a failure to

provide a copy of his tax return. The Officer did not rely on Mr. Showers' original 2019 tax return, reporting \$0 in income from employment or self-employment in 2019, to determine his eligibility for CRB. Similarly, the self-reported income on Mr. Showers' revised 2019 tax return does not establish that he meets the requirements under the *CRBA*.

IV. **Conclusion**

[30] Based on the record that is before me, Mr. Showers has not established that his eligibility review was procedurally unfair. Accordingly, this application for judicial review must be dismissed.

[31] The respondent asked for costs if successful, and prepared a draft bill of costs for \$1680, calculated in accordance with Column III of Tariff B. The respondent suggested it would be appropriate for the parties to attempt to reach an agreement on costs, prior to any ruling by the Court.

[32] In my view, this is not an appropriate case to order costs. Mr. Showers represented himself in this matter. His written materials and oral submissions were concise, and he demonstrated civility at the hearing. In view of his personal circumstances, an order of costs would be unduly punitive. In the exercise of my discretion, no costs are awarded.

JUDGMENT in T-81-22

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.
2. No costs are awarded.

"Christine M. Pallotta"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-81-22

STYLE OF CAUSE: JASON SHOWERS v THE ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: HELD BY WAY OF VIDEOCONFERENCE

DATE OF HEARING: JUNE 15, 2022

JUDGMENT AND REASONS: PALLOTTA J.

DATED: AUGUST 9, 2022

APPEARANCES:

Jason Showers

FOR THE APPLICANT
(ON HIS OWN BEHALF)

Jason Stober

FOR THE RESPONDENT

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FOR THE RESPONDENT