

Federal Court



Cour fédérale

Date: 20220922

Docket: T-509-22

Citation: 2022 FC 1314

Ottawa, Ontario, September 22, 2022

PRESENT: The Honourable Justice Fuhrer

BETWEEN:

MALGORZATA KOTOWIECKI

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

AMENDED JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Malgorzata Kotowiecki, seeks judicial review of the February 7, 2022 decision [Decision] denying her eligibility for the Canada Recovery Benefit [CRB].

[2] This judicial review raises issues of procedural fairness and the reasonableness of the Decision.

[3] I find that the process resulting in the Decision was procedurally unfair and that the Decision itself lacks transparency. For the more detailed reasons that follow, this application for judicial review is granted in part.

II. Background

[4] The CRB was introduced by the *Canadian Recovery Benefits Act*, SC 2020, c 12, s 2 [*CRB Act*] to provide income support to employed and self-employed persons who were affected by the COVID-19 pandemic and were not entitled to Employment Insurance benefits. After the Canada Emergency Response Benefit program closed, the CRB was available for the period beginning on September 27, 2020 and ending on October 23, 2021.

[5] Eligibility requirements for the CRB are found in subsection 3(1) of the *CRB Act*; this provision is reproduced in Annex “A” below.

[6] The Applicant earned \$4,052 while employed by Dollarama from June 2019 until September 2019. She claims to have stopped working to study at Ashton College in Vancouver in September 2019, and from January to February 2020, the Applicant claims that she was self-employed, working as a “support worker/cleaning,” but she stopped in March 2020 because of the COVID-19 pandemic.

[7] The Applicant applied for CRB in April 2020 and received payments between September 27, 2020 and February 27, 2021. The payments then ceased.

[8] The Applicant called the CRA on April 30, 2021 to inquire why she had stopped receiving payments. The CRA representative on the phone asked her to send proof of her income to the CRA. In response, the Applicant provided the CRA with copies of invoices or receipts for her cleaning services.

[9] On May 12, 2021, a CRA representative informed the Applicant that they did not think she met the income eligibility requirement and suggested that she send a letter explaining her income situation. The Applicant inquired again about the status of her application on May 14, 2021, and the CRA representative encouraged her to send more documents to prove her income in the relevant period.

[10] A CRA representative spoke with the Applicant by phone on July 21, 2021. During the conversation, the Applicant explained that she used her self-employment income earned in cash in January and February 2020 for personal expenses, and did not deposit money.

[11] Following its first review, the CRA issued a letter to the Applicant on July 28, 2021 [First Review Letter] informing the Applicant that she was ineligible for the CRB because she 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 her first application. The First Review Letter provided the Applicant with a period of 30 days to request a second review if she did not agree with the outcome of the first review, and also indicated that the Applicant would be required to repay any CRB payments for which she was not eligible.

[12] The Applicant called the CRA the following day on July 29, 2021 to understand the reason she was considered ineligible for the CRB. A CRA representative indicated in their notes that they “went over eligibility,” “went over her taxes and explained how she was [not] eligible,” and “sent her an external link for the eligibility to her email.”

[13] Following another phone call with a CRA officer on August 16, 2021, the Applicant sent a letter to the CRA on the same date requesting additional information about the reasons why the CRA denied the CRB following the first review. That letter was not answered. In addition, the Applicant was unable to access the website link from the CRA to obtain more information.

[14] In a further letter dated September 23, 2021, the Applicant sent submissions to the CRA. She argued that the wording used on the CRA website indicated that an applicant for CRB must have earned \$5,000 “from one or more of the following sources” and that she did earn \$5,000 from the combination of income from (third party) employment and self-employment income. In this letter, she also raised the fact that she did not receive an answer to the information she requested in her August 16, 2021 letter.

[15] The September 23, 2021 letter was not before the Officer at the time the Decision was made, however. This is confirmed in the second review report in which the Officer indicates that the Applicant did not provide additional information, further to the invoices and 2020 tax assessment the Applicant already had provided.

[16] A different CRA officer [Officer] confirmed the denial of the Applicant's eligibility for the CRB on February 7, 2022. In the second review, the Officer also determined that the Applicant did not earn at least \$5,000 (before taxes) of employment or net self-employment income during the relevant period; thus, she did not meet the eligibility requirements for CRB. Like the First Review Letter, the Decision reiterates the requirement to repay any CRB payments for which the Applicant was ineligible.

III. Analysis

A. *Preliminary Issue Regarding Style of Cause*

[17] At the outset of the hearing before the Court, the Respondent requested that the style of cause be amended to identify the Respondent as "Attorney General of Canada" in place of "Canada Revenue Agency." The Applicant had no objection or comments regarding the requested change which, I note, is supported by sub-rule 303(2) of the *Federal Courts Rules*, SOR/98-106. In the circumstances, the Court orders that the style of cause is amended immediately, as the Respondent requests.

B. *Procedural Fairness Issues*

[18] I am not satisfied that the second review was conducted in a procedurally fair manner overall. Although I am persuaded that the Applicant was afforded several opportunities to provide additional support for her second review, both orally and in writing, I find that the Applicant's written submissions in the form of her September 23, 2021 letter to the CRA inexplicably were not considered.

[19] I note that the Applicant is self-represented. In my view, the Applicant's assertions about a lack of response by the CRA to her August 16, 2021 letter and the inability to access the website link provided by the CRA are in essence procedural fairness concerns.

[20] Questions of procedural fairness attract a correctness-like standard of review, through a sharply focussed lens on whether the process followed was fair and just; that is, did the applicant know the case they had to meet and did they have a full and fair chance to respond: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 54, 56. The duty of procedural fairness, however, is variable, flexible and content-specific: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov] at para 77.

[21] I find that the Applicant here had a full and fair opportunity to provide additional information in response to the First Review Letter, and she provided copies of invoices. She also spoke with CRA representatives by phone. They indicated they were seeking additional information or documentation from her to support the grant of the CRB, and they noted the Applicant's explanations that she did not have any additional documentation and that she did not deposit the cash payments for her cleaning services but rather used them to pay her expenses.

[22] In her August 16, 2021 letter, the Applicant indicated that she was appealing the Decision but that she required further information, including the exact reasons for denying the CRB, the time periods for which the CRB was denied, and the CRA's intentions regarding repayment. Despite the lack of a response to her letter, the Applicant made fairly detailed submissions, including assumptions, by way of letter dated September 23, 2021.

[23] The Respondent admits, without written reasons, that the Applicant's September 23, 2021 letter was not before the Officer at the time the Decision was made. When asked about it at the hearing of this matter, the Respondent answered that the letter was not before the Officer because it pertained to the first review and the first reviewer already rendered the decision (i.e. the First Review Letter) at that time. I find this is nonsensical for at least two reasons.

[24] First, the September 23, 2021 letter is addressed to the same person who authored the First Review Letter and begins with the following sentence: "I am appealing your decision to deny me the Canada Recovery Benefits based on your conclusion that I did not earn \$5000 in the 12 months preceding my application." In my view, the letter is clear on its face that it was submitted in connection with the Applicant's request for an appeal or second review, which eventually culminated in the Decision.

[25] Second, the second review report indicates that the Officer received the documents for second review on October 4, 2021.

[26] I find the facts here are analogous to the following second scenario described in *Togtokh* (below) involving a deficient certified tribunal record [CTR] that justifies setting aside an administrative decision:

A document is known to have been properly submitted by an applicant but is not in the CTR, and it is not clear whether that document, for reasons beyond an applicant's control, was before the decision-maker. In this situation, the case law suggests that the decision should be overturned ... [citations omitted]

See *Togtokh v Canada (Citizenship and Immigration)*, 2018 FC 581 [*Togtokh*] at para 16, and also *Rasasoori v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 207 [*Rasasoori*] at para 13.

[27] The following is a rewording of the first sentence to fit the facts here and provides, in my view, a more compelling basis for overturning the Decision:

A document is known to have been properly submitted by an applicant but is not in the CTR, and it is clear that the document, for reasons beyond an applicant's control, was not before the decision-maker.

[28] As in the case of *Rasasoori*, the document in issue here (i.e. the September 23, 2021 letter) is in the Applicant's record. Even if it can be said that the Officer would have reached the same result had the Officer considered the letter, it is not for the Court to speculate how the Applicant's submissions could have affected the Officer's decision: *Rasasoori*, above at paras 15-16.

[29] Noting that procedural fairness includes the right to be heard, I conclude that the Decision was procedurally unfair by reason of the Officer's failure to consider the Applicant's September 23, 2021 letter: *Akram v Canada (Citizenship and Immigration)*, 2018 FC 1105 at para 22.

C. *Reasonableness of Decision*

[30] I also am persuaded that the Decision is unreasonable.

[31] A reasonable decision is one based on an internally coherent and rational chain of analysis that is justified, transparent and intelligible in relation to the applicable factual and legal constraints; the party challenging a decision has the burden of showing that it is unreasonable: *Vavilov*, above at paras 85, 99-100.

See *Togtokh v Canada (Citizenship and Immigration)*, 2018 FC 581 [*Togtokh*] at para 16, and also *Rasasoori v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 207 [*Rasasoori*] at para 13.

[32] The Applicant argues that it is not stated or clear on the CRA website, including where the CRB eligibility criteria are listed, that earnings from different sources (employment or self-employment income) cannot be combined in order to meet the \$5,000 minimum earning criterion. The Applicant thus requests that the Court order the CRA to find her eligible, to pay her all benefits to which she is entitled, and to release her from any demand of repayment of any benefits she already has received.

[33] In response, the Respondent submits that the Decision is reasonable because the Applicant did not provide sufficient proof of her self-employment income. The receipts she provided are not proof that she was paid. The receipts contain few details about the work that was done, and further, she did not declare them as part of her T4 for the 2020 tax year.

[34] I am sympathetic to the Applicant's submission that the threshold income of \$5,000 required to be eligible for the CRB can comprise multiple sources of income, on a plain reading

of paragraph 3(1)(d) of the *CRB Act*, with regard to the word “and” at the end of subparagraph (iv). I need not determine this issue at this time, however.

[35] Rather, I find that unlike the First Review Letter, the Decision is unreasonable. The first reviewer’s notes dated July 22, 2021 indicate that the Applicant was ineligible because she did not provide sufficient proof of her self-employment income. The first reviewer noted that the Applicant could not provide documents other than the receipts she already provided in support of her application. They further noted that the Applicant reported a net business income of \$712 in 2020. When that amount was combined with her \$4,052 employment income, she did not meet the \$5,000 criterion.

[36] The Officer who conducted the second review did not provide any notes, however, to explain the rationale behind the Decision, nor does the Decision itself mention if the Officer applied the same rationale as the first reviewer. The Decision essentially comes to the identical conclusion stated in the First Review Letter, namely, that the Applicant “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,” but without any explanation or reasons. This is compounded, in my view, by the Officer’s failure to consider the Applicant’s September 23, 2021 letter.

IV. Conclusion

[37] For the above reasons, I grant the Applicant’s judicial review application in part. The Decision is set aside, with the matter to be redetermined by a different officer or reviewer.

[38] I agree with the Respondent that this is not a case where there is only one possible outcome, and thus, I decline to send the matter back with a direction or directions that take into account the specific relief requested by the Applicant: *Vavilov*, above at para 141.

[39] That said, because this matter will be redetermined, I commend to the parties the decision of my colleague Justice Furlanetto in *Sjogren v Canada (Attorney General)*, 2022 FC 951 for a discussion of acceptable proof of self-employment income (at paras 20-31 in particular).

[40] The Applicant seeks costs. The Applicant has not demonstrated any lost opportunity cost in the sense of foregoing remunerative activity to prepare and present her case. I therefore decline to award costs for fees: *Yu v Canada (Attorney General)*, 2011 FCA 42 at paras 37-38. The Applicant is entitled, however, to her disbursements before this Court, payable by the Respondent.

JUDGMENT in T-509-22

THIS COURT'S JUDGMENT is that:

1. The style of cause is amended immediately to identify the Respondent as “Attorney General of Canada” in place of “Canada Revenue Agency.”
2. The February 7, 2022 decision of the Canada Revenue Agency denying the Applicant’s eligibility for the Canada Recovery Benefit is set aside.
3. The matter will be redetermined by a different officer or reviewer.
4. The Respondent will reimburse the Applicant her disbursements in this Court.

"Janet M. Fuhrer"

Judge

Annex “A”: Relevant Provisions

Canada Recovery Benefits Act, SC 2020, c 12, s 2
Loi sur les Prestations canadiennes de relance, LC 2020, c 12, art 2

| Eligibility | Admissibilité |
|--|--|
| <p>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</p> <p>...</p> <p>(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 from the following sources:</p> <ul style="list-style-type: none"> (i) employment, (ii) self-employment, (iii) benefits paid to the person under any of subsections 22(1), 23(1), 152.04(1) and 152.05(1) of the Employment Insurance Act, (iv) allowances, money or other benefits paid to the person under a provincial plan because of pregnancy or in respect of the care by the person of one or more of their new-born children or one or more children placed with them for the purpose of adoption, and (v) any other source of income that is prescribed by regulation; <p>(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</p> | <p>3 (1) Est admissible à la prestation canadienne de relance économique, à l'égard de toute période de deux semaines comprise dans la période commençant le 27 septembre 2020 et se terminant le 23 octobre 2021, la personne qui remplit les conditions suivantes :</p> <p>...</p> <p>d) dans le cas d'une demande présentée en vertu de l'article 4 à l'égard d'une période de deux semaines qui débute en 2020, ses revenus provenant des sources ciaprès, pour l'année 2019 ou au cours des douze mois précédant la date à laquelle elle présente sa demande, s'élevaient à au moins cinq mille dollars :</p> <ul style="list-style-type: none"> (i) un emploi, (ii) un travail qu'elle exécute pour son compte, (iii) des prestations qui lui sont payées au titre de l'un des paragraphes 22(1), 23(1), 152.04(1) et 152.05(1) de la Loi sur l'assurance-emploi, (iv) des allocations, prestations ou autres sommes qui lui sont payées, en vertu d'un régime provincial, en cas de grossesse ou de soins à donner par elle à son ou ses nouveau-nés ou à un ou plusieurs enfants placés chez elle en vue de leur adoption, (v) une autre source de revenu prévue par règlement; <p>e) dans le cas d'une demande présentée en vertu de l'article 4, par une personne qui n'est pas visée à l'alinéa e.1), à l'égard d'une période de deux semaines qui débute en 2021, ses revenus provenant des sources mentionnées aux sous-alinéas d)(i) à (v) pour l'année 2019 ou 2020 ou au cours des douze mois précédant la date à laquelle elle</p> |

| | |
|--|---|
| at least \$5,000 from the sources referred to in subparagraphs (d)(i) to (v); ... | présente sa demande s'élevaient à au moins cinq mille dollars; ... |
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FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-509-22

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GENERAL OF CANADA

PLACE OF HEARING: HELD VIA VIDEOCONFERENCE

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APPEARANCES:

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FOR THE APPLICANT
(ON THEIR OWN BEHALF)

Jessica Ko

FOR THE RESPONDENT

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