

Federal Court



Cour fédérale

Date: 20231121

File: T-1132-22

Citation: 2023 FC 1539

[ENGLISH TRANSLATION]

Montréal, Quebec, November 21, 2023

PRESENT: Madam Justice St-Louis

BETWEEN:

SUZY COHEN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Suzie Cohen, is self-employed in the film industry. She has worked as an independent writer, director and producer for film and television for over forty years.

[2] Ms. Cohen is seeking judicial review of the decision rendered by the Canada Revenue Agency [the Agency] on May 4, 2022, rejecting, following a second review, her applications for the Canada Recovery Benefit [CRB]. Ms. Cohen asks the Court (1) to consider and find that she

meets both eligibility criteria for the CRB; and then (2) to cancel the requested CRB refund and allow her to collect the CRB benefits she did not receive.

[3] In his May 4, 2022 decision, the second review officer [Officer] informed Ms. Cohen that she is ineligible for the CRB. The Officer concluded, as did the first reviewing officer, that Ms. Cohen did not earn at least \$5,000.00 (before taxes) in employment income or net self-employment income in 2019, 2020 or in the 12 months prior to the date of her first application for the CRB. The Officer added that Ms. Cohen has also not suffered a 50% drop in her average weekly income compared to the previous year for reasons related to COVID-19.

[4] Ms. Cohen raises several grounds in support of her application for judicial review. First, she alleges that the Agency's decision is unreasonable because (1) it does not take into account the work realities of authors; (2) the income declared was paid for royalties and not for the financing of her film, and is therefore personal and intellectual income that does not cover the expenses she incurred for the film; (3) the Agency could not review previous years' income tax returns given the uncertainties and year-to-year fluctuations in the film industry; (4) the Agency did not clearly request information on expenses; and (5) Ms. Cohen incurred expenses, but she has six years to defer them and, under the *Income Tax Act*, RSC 1985, c 1 (5th Supp.), she is not required to declare them.

[5] Ms. Cohen also raises issues of procedural fairness and submits that (1) the two contracts filed with the Court are necessary to address the second ground raised by the Agency regarding the 50% drop in revenues; (2) she was not given a chance to respond regarding this second ground; and (3) there is an apprehension of bias in the Agency's decision-making process due to a lack of knowledge of filmmaking.

[6] The Attorney General of Canada [AGC] replies in substance that the decision was reasonable and that there was no breach of the principles of procedural fairness.

[7] On judicial review, the Court's role is not to find that Ms. Cohen is or is not eligible for the CRB, or to consider new arguments and new evidence regarding that eligibility. The Court's role is simply to examine, in light of the evidence and the arguments before the Officer, whether the decision is reasonable and whether the process was in accordance with the principles of procedural fairness (*Lalonde v Canada Revenue Agency*, 2023 FC 41 at para 3).

[8] For the reasons that follow, Ms. Cohen's application for judicial review will be dismissed. In short, Ms. Cohen has not satisfied me, as her burden requires, that the Agency's decision in relation to the first of the two eligibility criteria cited, i.e. that she has not earned at least \$5,000.00 (before taxes), is unreasonable. Thus, and since the eligibility criteria for the CRB are cumulative, this conclusion is sufficient to dispose of the application; it is not necessary to determine whether the arguments Ms. Cohen raises against the Officer's conclusion on the second of the criteria cited are well founded.

II. Background

[9] The CRB is part of a package of measures introduced by the Government of Canada in response to the impacts of the COVID-19 pandemic. This benefit was available for any two-week period between September 27, 2020, and October 23, 2021, for eligible salaried employees and self-employed workers who suffered a loss of income during the COVID-19 pandemic (*Aryan v Canada (Attorney General)*, 2022 FC 139 at para 2 [*Aryan*]).

[10] The eligibility criteria for the CRB are set out in subsection 3(1) of the *Canada Recovery Benefits Act*, SC 2020, c 12, s 2 [Act]. To be eligible for the CRB, employees or self-employed workers had to have earned at least \$5,000.00 in employment income or net self-employment income in 2019, 2020, or in the 12 months preceding the date of their application. In addition, employees or self-employed workers also had to have suffered a 50% drop in their average weekly income compared with the previous year for reasons related to COVID-19.

[11] On Ms. Cohen's taxes, she has been declaring business losses or receiving tax refunds since at least 2015. In 2020, when she filed her tax return for the 2019 tax year, Ms. Cohen declared gross business income of \$5,030.00, from which she deducted expenses, and therefore declared negative net business income of \$11,467.00 once these expenses are deducted.

[12] Beginning in January 2021, Ms. Cohen applied for 16 two-week periods of CRB benefits. Around May 2021, her file was selected by the Agency for an initial review of CRB eligibility.

[13] On August 18, 2021, the Agency informed Ms. Cohen that she is ineligible for the CRB for all periods claimed on the grounds that she had not earned at least \$5,000 (before taxes) in employment income or net self-employment income in 2019, 2020, or in the 12 months prior to the date of her first application.

[14] On September 10, 2021, Ms. Cohen filed a request for adjustment of her tax return for the 2019 tax year and claimed at that time to have erroneously declared her expenses. Thus, for the year 2019, Ms. Cohen instead declared a net self-employed income of \$5,030.00.

[15] On September 13, 2021, Ms. Cohen requested a second review of her CRB eligibility record from the Agency.

[16] The entries and notes that Agency officers recorded during their interactions with Ms. Cohen do not mention any discussion of the 50% reduction in her average weekly income compared to the previous year for reasons related to COVID-19.

[17] On May 2, 2021, the Officer recorded the notes in his second examination report and stated that Mrs. Cohen confirmed that she had expenses and confirmed that she had two years to defer them.

[18] On May 4, 2022, the Agency informed Ms. Cohen that she is ineligible for CRB for periods 9 to 26. The Officer concluded, as did the first officer, that Ms. Cohen had not earned at least \$5,000 (before taxes) in employment income or net self-employment income in 2019, 2020 or in the 12 months preceding the date of her first application. The Officer added that Ms. Cohen did not suffer a 50% drop in her average weekly income compared to the previous year for reasons related to COVID-19.

[19] On June 3, 2022, Ms. Cohen made her application for judicial review. Along with her record, she also filed with the Court, as new evidence, a copy of a contract signed with K-Films Amérique on October 15, 2019, and a copy of a mandate signed with Esperanza Productions on October 28, 2020.

[20] At the hearing, Ms. Cohen presented facts and explanations that do not appear in the record and confirmed that they were not presented to the Officer.

III. Issues

[21] Taking into account the parties' submissions, the Court must determine (A) whether the new evidence (two contracts) and the facts and explanations that were not before the Officer can be considered in the context of the application for judicial review; (B) which standard of review applies; (C) whether Ms. Cohen has demonstrated that the Officer's decision to reject her CRB applications is unreasonable; (D) whether the principles of procedural fairness were respected in the second review; (E) whether the application for judicial review should be allowed; and (F) whether the remedy Ms. Cohen is seeking is appropriate to the extent that the Court allows her application for judicial review.

IV. Analysis

A. *Admissibility of new evidence*

[22] Ms. Cohen has submitted two new documents to the Court to demonstrate that she meets the eligibility criteria for the CRB and that she has suffered a 50% decrease in her average weekly income compared to the previous year for reasons related to COVID-19. At the hearing, she also added explanations and facts that were not before the decision maker.

[23] As a general rule, documents and information that were not available to the decision maker are not admissible on judicial review before the Court. As Justice Gascon points out in *Lavigne v Canada (Attorney General of Canada)* 2023 FC 1182 [*Lavigne*], it is well established that, on judicial review, the general rule is that a reviewing court can only consider documents that were available to the administrative decision maker, with a few exceptions (*Gittens v Canada (Attorney General)*, 2019 FCA 256 at para 14; *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 [AUC])

at paras 19–20; *Aryan* at para 42; *Kleiman v Canada (Attorney General)*, 2022 FC 762 at paras 25–26; *Ntuer v Canada (Attorney General)*, 2022 FC 1596 at para 12 [*Ntuer*]; *Lalonde v Canada (Revenue Agency)*, 2023 FC 41 at para 23). Thus, these exceptions apply in particular to documents that 1) provide general information likely to help the reviewing court understand the issues in dispute; 2) reveal procedural flaws or breaches of procedural fairness in the administrative process; or 3) reveal the complete absence of evidence before the decision maker (*TsleilWaututh -Nation v Canada (Attorney General)*, 2017 FCA 128 at para 98; *Bernard v Canada (Revenue Agency)*, 2015 FCA 263 at paras 23–25; *AUCC* at paras 19–20; *Nshogoza v Canada (Citizenship and Immigration)*, 2015 FC 1211 at paras 16–18).

[24] Ms. Cohen submitted these two contracts and added facts and explanations in an attempt to demonstrate that she meets the CRB eligibility criteria. These items do not qualify under any of the aforementioned exceptions, so they are not admissible and will not be considered.

B. *Standard of review*

[25] I agree with the parties that it is appropriate to use the reasonableness standard to review the May 4, 2022, decision (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]; *He v Canada (Attorney General)*, 2022 FC 1503 at para 20; *Lajoie v Canada (Attorney General)*, 2022 FC 1088 at para 12; *Aryan* at paras 15–16).

[26] A reasonable decision “is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker” (*Vavilov* at para 85). In order to overturn the decision under review, this Court “must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to

exhibit the requisite degree of justification, intelligibility and transparency” (*Vavilov* at para 100).

[27] The Officer’s second review report forms part of the reasons for decision (*Aryan* at para 22; *Larocque v Canada (Attorney General)*, 2022 FC 613 at para 17; *Mathelier-Jeanty v Canada (Attorney General)*, 2022 FC 1188 at para 20).

C. Reasonableness

(1) Parties’ positions

[28] Ms. Cohen alleges that the Agency’s decision is unreasonable because (1) it does not take into account the work realities for authors; (2) the income of \$5,030.00 was paid for royalties, not for the financing of her film, and is therefore personal and intellectual income that does not cover the expenses she incurred for the film; (3) the Agency could not examine income tax returns from previous years, given the uncertainties and fluctuations from one year to the next in the film industry; (4) the Agency did not clearly request information on expenses; and (5) she had expenses, but she has six years to defer them and, under the *Income Tax Act*, is not required to declare them.

[29] The AGC responds that the second review decision is reasonable: it is based on all the evidence available to the decision maker at the time, and applies the wording of the Act.

(2) Legal framework

[30] The Act establishes the CRB, a benefit available to provide income support, for any two-week period from September 27, 2020, until October 23, 2021, to eligible employees and

self-employed workers who have been directly affected by the COVID19 pandemic (*Aryan* at para 2).

[31] Section 3 of the Act sets out the criteria for eligibility for the CRB. Paragraphs 3(1)(d) and (e) require, among other things, that the person earn at least \$5,000 in income from, among other things, employment or self-employment in 2019, 2020, or in the 12 months preceding the date of his or her first application. Paragraph 3(1)(f) requires that the person not be employed or self-employed, or have suffered a 50% drop in average weekly income compared with their average weekly income in 2019, 2020 or in the 12 months preceding the application, for reasons related to COVID-19, with a few exceptions (paragraph 3(1)(f)).

[32] Subsection 3(2) of the Act confirms that the income of a self-employed person is “revenue from the self-employment less expenses incurred to earn that revenue”.

[33] Section 6 of the Act stipulates that the applicant must provide the Minister of Employment and Social Development with any information required to make the claim. The burden is on the applicant to establish that he or she meets the criteria of the Act.

(3) Discussion

[34] Given the evidence on the record and the applicable legislative framework, Ms. Cohen has not demonstrated that the Officer applied the Act unreasonably, or that the Officer ignored or misinterpreted the evidence Ms. Cohen submitted or the reality of Ms. Cohen’s work.

[35] The Officer applied the Act and determined that Ms. Cohen (1) has not demonstrated that she has earned at least \$5,000.00 in income in 2019, 2020 or in the 12 months prior to the date of

the application for the CRB; and (2) has not suffered a 50% decrease in her average weekly income from the previous year for reasons related to COVID-19.

[36] First of all, there is no indication that the Officer had to consider criteria not provided for in the Act, or that the work realities for an author constitute an exception to the application of the statutory criteria.

[37] Next, Ms. Cohen submits that the Officer misinterpreted the paycheque because it showed that her income came from royalties rather than financing for her film and that, consequently, she had no expenses associated with this income. According to the evidence in the file, Ms. Cohen did not, as part of the CRB application process, specify the source of her income, i.e., that it came from royalties rather than financing, or state that the expenses she incurred were not associated with this income. The notes in the file also show that Ms. Cohen was asked why she removed her expenses from her tax return, and replied that she had two years to defer them, without mentioning royalties or any distinction in the attribution of expenses to a type of income.

[38] Furthermore, and in any event, Ms. Cohen has not established that the distinction she now wishes to make before the Court has any bearing on the decision the Officer was called upon to make (*Vavilov* at para 126). Indeed, there is no indication that income from royalties would not be self-employment income under subsection 3(2) of the Act, that expenses must be associated with a type of income for the purpose of calculating net income, or that expenses are not associated with it in this case (see, for example, *Boudreau v Canada (Attorney General)*, 2023 FC 567; *Lai v Canada (Attorney General)*, 2023 FC 367). Ms. Cohen does not contest having incurred the expenses in 2019, and her tax return records the income amount of \$5,030.00 as business income.

[39] Finally, contrary to Ms. Cohen's argument, the Officer could consider that Ms. Cohen initially reported negative net business income in 2019, and that she has reported expenses since 2015, to support her conclusion; there was an initial loss of \$11,467 in 2019 and a loss of \$14,772 in 2020. In light of the evidence on file, the Officer reasonably relied on the notices of assessment from 2015 to 2020 to determine that Ms. Cohen incurred expenses in 2019 (see, for example, *Aryan* at para 35; *Ntuer* at para 27; *Showers v Canada (Attorney General)*, 2022 FC 1183 at paras 25–26 [*Showers*]).

[40] I would like to add that Ms. Cohen's argument that she is not required to declare her expenses under federal tax laws is not determinative for the purposes of an application for the CRB. The Act clearly states that a self-employed person must earn at least \$5,000.00 in net income, defined as "revenue . . . less expenses incurred in earning that revenue" (subsection 3(2) of the Act).

[41] As Justice Gascon pointed out in *Lavigne* (at para 37), even if Ms. Cohen could modify her expense deductions for tax purposes, I am not persuaded that it was unreasonable for the Officer to conclude that a tax amendment made in order to qualify for the CRB did not have the effect of modifying the fact that net income did not exceed the \$5,000.00 threshold. In other words, it was not unreasonable, in the particular circumstances of this case, to question Ms. Cohen's tax choices.

[42] As a result, Ms. Cohen did not satisfy me that she was not required to subtract her expenses from her net business income, as part of the calculation related to an application for CRB, and that it was therefore unreasonable for the Officer to take into account her expenses incurred in 2019 (*Lavigne*) in the calculation of net income.

[43] The Officer's conclusions are supported by the record. The evidence shows that Ms. Cohen confirmed on three occasions, during telephone discussions with an Officer, that she had incurred the expenses during the period in question: when she filed her initial tax return for the 2019 tax year, in which she declared a loss of \$11,467.00; during her telephone conversation with the Officer on May 2, 2022, in which she mentions that she had expenses, but that she had two years to defer them; and during her telephone conversation with the Officer on June 8, 2021, in which she mentioned that there are many expenses in producing a film. Before this Court, Ms. Cohen also confirms that she did incur her expenses, but argues that she is not obliged to deduct them in the year, and that it was unreasonable to consider them in calculating her net income.

[44] In view of the foregoing, the Officer's conclusions regarding Ms. Cohen's income are reasonable and justified in light of all the evidence on the record. I am therefore of the opinion that the Officer has taken into consideration the evidence on the record and that his decision is reasonable (*Vavilov* at para 126).

[45] The burden was on Ms. Cohen to establish that she met, on a balance of probabilities, the criteria of the Act (*Cantin v Canada (Attorney General)*, 2022 FC 939 at para 15; *Walker v Canada (Attorney General)*, 2022 FC 381 at paras 37, 55) and it is reasonable to conclude, based on the record, that she failed to meet her burden.

[46] I am therefore satisfied that the reasons provided in the Officer's report justify the decision in a transparent and intelligible manner. They enable the Court to understand the basis for the decision and confirm that no relevant and decisive facts have been omitted (*Vavilov* at paras 16–17, 85). In the context of an application for judicial review, it is not the role of the

reviewing court to reweigh the evidence on file (*Vavilov* at para 125), and Ms. Cohen has not established that the Court's intervention is justified.

D. *Breach of procedural fairness*

[47] As Ms. Cohen acknowledged at the hearing, the eligibility criteria are cumulative and must all be met to establish eligibility. Since I find that the decision on the first criterion cited is reasonable, I need not consider the allegations related to the second criterion cited and procedural fairness (*Wangchuk v Canada (Citizenship and Immigration)*, 2019 FC 1320 at para 21).

V. Conclusion

[48] The Officer's decision possesses all the requisite attributes of transparency, justification and intelligibility, and is not tainted by any reviewable error. The application for judicial review will therefore be dismissed. No costs will be awarded (*Showers* at para 32).

JUDGMENT in T-1132-22

THIS COURT'S JUDGMENT is as follows :

1. The application for judicial review is dismissed.

2. No costs are awarded.

“Martine St-Louis”

Judge

Certified true translation
Janna Balkwill

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1132-22

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APPEARANCES:

Suzy Cohen

FOR THE APPLICANT
(SELF REPRESENTED)

Samantha Jackmino

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Department of Justice Canada
Montréal, QC

FOR THE RESPONDENT