

Federal Court



Cour fédérale

Date: 20231213

**Dockets: T-1204-23
T-1205-23**

Citation: 2023 FC 1664

[ENGLISH TRANSLATION]

Toronto, Ontario, December 13, 2023

PRESENT: Mr. Justice Pentney

BETWEEN:

PERLE BOUCHARD

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of two decisions. An officer of the Canadian Revenue Agency (CRA) concluded that the applicant, Perle Bouchard, was ineligible for the Canada Emergency Response Benefit (CERB) and the Canada Recovery Benefit (CRB) because she did not meet the criteria that apply to the two programs.

[2] The eligibility criteria for the CERB are set out and explained in the *Canada Emergency Response Benefit Act*, SC 2020, c 5, s 8 [CERB Act]. To be eligible for the CERB, a resident in Canada must, for a given period:

- a) have ceased working for reasons related to COVID-19;
- b) have earned an income of at least \$5,000 from employment or self-employment in 2019 or in the 12-month period preceding the day on which they applied; and
- c) not have quit their employment voluntarily.

[3] According to the eligibility criteria for the CRB, which are set out and explained in the *Canada Recovery Benefits Act*, SC 2020, c 12, s 3 [CRB Act], a person is eligible if:

- a) they were not employed or self-employed or they experienced a major reduction in weekly income (at least 50%) for reasons related to COVID-19 during the two-week period for which they have claimed CRB; and
- b) they had an income of at least \$5,000 from employment or self-employment for 2019, 2020 or in the 12-month period preceding the day on which they applied.

[4] The applicant is self-employed and has been working as a business broker since 2016. She works from home and tries to sell businesses across Quebec. She states that during the pandemic years, her working hours decreased considerably, and her income was reduced to nothing. Owing to the frequent closure of zones and the difficulties this created when it came to visiting sites, she lost a lot of money in accounts that were cancelled.

[5] She received CERB benefits from March 15, 2020, to September 26, 2020 (7 periods). She also received CRB benefits from September 27, 2020, to October 9, 2021, (27 periods).

[6] The CRA made three decisions regarding the applicant's eligibility for the CERB and the CRB. Following the first review (initiated after the benefits were paid), the officer determined that the applicant was not eligible because she had not shown that she met the \$5,000 criterion for the CERB and the CRB. The applicant requested a second review, which gave rise to negative decisions, once again on the grounds that she did not meet the \$5,000 criterion. A third review was then conducted, and the negative decisions are the subject of the judicial review in this proceeding.

[7] Contrary to the previous reviews, during the third review, the officer received evidence of income and concluded that the applicant met the criterion of \$5,000 net in 2019. In two separate decisions (one for the CERB and one for the CRB), the officer concluded that the applicant was ineligible because the applicant had not ceased working or her working hours had not been reduced owing to COVID-19. The reasons for refusal stated that she did not have any evidence of expenses from her work and that the evidence included did not show that she had attempted to [TRANSLATION] "find" a new job.

[8] The letters and the reasons included in the officer's notes are all part of the decisions in this proceeding.

[9] The applicant is seeking judicial review of both decisions. The standard of review is reasonableness, as required by *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 16 to 23. This is well established in the case law: *He v Canada (Attorney General)*, 2022 FC 1503 at para 20.

[10] I am of the opinion that the officer's decision regarding the applicant's eligibility for the CRB (Court file number: T-1205-23) is reasonable. The officer's notes confirm that the applicable criteria were properly applied and that the relevant facts were taken into consideration. The applicant does not agree with either the analysis or the result, but I do not find that any decisive errors occurred either in the analysis of the factual background or in the application of the statutory criteria. It should be noted that to be eligible for the CRB, according to paragraph 3(1)(i) of the CRB Act, it must be shown that "they sought work during the two-week period, whether as an employee or in self-employment".

[11] However, the officer's decision regarding the CERB is not reasonable. The officer's notes discuss facts and criteria that apply to the CERB benefits, according to the law. But the notes also discuss elements that are inappropriate for the provision of this benefit. To give just one example, in the officer's notes we find the following comment:

[TRANSLATION]

We are of the opinion that the TP has not demonstrated that she tried to "find" herself a position when she stated "not having an income makes you panic" because she left a job as a salaried employee in 2020, during the CERB payment periods, and she approached ONE employer during the CRB payment periods in 2020 and 2021. Lastly, she was aware of the fact that her colleagues made a lot of commissions during COVID and she

stated that she should have continued to be a real estate agent but in the end, the taxpayer did not take any steps to improve her situation.

Which is not consistent.

[12] The CERB Act does not include as eligibility criterion for the CERB whether an individual has tried to find another job or has changed professions to earn an income. These are criteria that are actually applicable to the CRB, for example.

[13] It seems that the officer mixed up the notes regarding the two decisions, perhaps because there was a great deal of overlap between the two. This is not fatal in itself. However, without a summary at the end of the reasons or other indication that the officer applied the suitable criteria for the CERB, there is no way of knowing whether the officer applied the right criteria at the right time when analyzing each benefit.

[14] It is important to recall “that the written reasons given by an administrative body must not be assessed against a standard of perfection” (*Vavilov* at para 91). A reviewing 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).

[15] This is the situation in this proceeding. I am of the opinion that not clarifying whether the officer applied the correct criteria for the payment of the CERB constitutes a sufficiently serious shortcoming in the CERB decision to render it unreasonable.

[16] As is pointed out in *Vavilov* at paragraph 96:

Where, even if the reasons given by an administrative decision maker for a decision are read with sensitivity to the institutional setting and in light of the record, they contain a fundamental gap or reveal that the decision is based on an unreasonable chain of analysis, it is not ordinarily appropriate for the reviewing court to fashion its own reasons in order to buttress the administrative decision. Even if the outcome of the decision could be reasonable under different circumstances, it is not open to a reviewing court to disregard the flawed basis for a decision and substitute its own justification for the outcome: *Delta Air Lines*, at paras. 26-28.

[17] The Supreme Court cited with approval the advice of Justice Donald Rennie (now a judge of the Federal Court of Appeal) in *Komolafe v Canada (Minister of Citizenship and Immigration)*, 2013 FC 431 at para 11:

Newfoundland Nurses is not an open invitation to the Court to provide reasons that were not given, nor is it licence to guess what findings might have been made or to speculate as to what the tribunal might have been thinking. This is particularly so where the reasons are silent on a critical issue. It is ironic that *Newfoundland Nurses*, a case which at its core is about deference and standard of review, is urged as authority for the supervisory court to do the task that the decision maker did not do, to supply the reasons that might have been given and make findings of fact that were not made. This is to turn the jurisprudence on its head. *Newfoundland Nurses* allows reviewing courts to connect the dots on the page where the lines, and the direction they are headed, may be readily drawn.

[18] Given the problem with the notes—and that they are the only documentation of the officer’s analysis in this proceeding because the decision letter is just a form—the officer’s decision with respect to the CERB is unreasonable.

[19] The officer's decision dated May 25, 2023, regarding the CERB (Court file number: T-1204-24) is set aside. The file regarding the applicant's eligibility for the CERB is returned for reconsideration by another officer.

[20] The application for judicial review of the officer's decision dated May 26, 2023, regarding the CRB (Court file number: T-1205-23) is dismissed.

[21] Given the divided result, each party should bear their own costs.

[22] A copy of this judgment and these reasons are to be placed on both Court files.

JUDGMENT in T-1204-23

THIS COURT ORDERS as follows:

1. The application for judicial review is allowed.
2. The officer's decision dated May 25, 2023, is set aside.
3. The file is returned for reconsideration by another officer.
4. Each party should bear their own costs.

JUDGMENT in T-1205-23

THIS COURT ORDERS as follows:

1. The application for judicial review is dismissed.
2. Each party should bear their own costs.

“William F. Pentney”

Judge

Certified true translation
Michael Palles

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1204-23
T-1205-23

STYLE OF CAUSE: PERLE BOUCHARD v THE ATTORNEY
GENERAL OF CANADA

PLACE OF HEARING: MONTRÉAL, QUEBEC

DATE OF HEARING: DECEMBER 5, 2023

**JUDGMENT AND
REASONS:** PENTNEY J

DATED: DECEMBER 13, 2023

APPEARANCES:

Perle Bouchard FOR THE APPLICANT

Emmanuelle Rochon FOR THE RESPONDENT

SOLICITORS OF RECORD:

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Montréal, Quebec