Federal Court  Cour fédérale

Date: 20231205

Dockets: T-670-23
T-671-23
T-672-23

Citation: 2023 FC 1632

[ENGLISH TRANSLATION]

Montréal, Quebec, December 5, 2023

PRESENT: Madam Justice St-Louis

BETWEEN:

GLORIA DUCHESNEAU

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] For the periods from March 15 to September 26, 2020; September 27, 2020, to October 9, 2021; and December 19, 2021, to January 8, 2022, Ms. Gloria Duchesneau (the Applicant) applied successively for benefits under the *Canada Emergency Response Benefit Act*, SC 2020,

c 5 s 8 [CERB Act], the *Canada Recovery Benefits Act*, SC 2020, c 12, s 2 [CRB Act] and the *Canada Worker Lockdown Benefit Act*, SC 2021, c 26, s 5 [CWLB Act].

[2] On October 3, 2022, following an initial eligibility review, the Canada Revenue Agency [Agency] informed the Applicant that she was ineligible for the CERB, CRB, and CWLB. In particular, the Agency concluded that the Applicant did not earn at least $5000.00 during the relevant reference period, an eligibility criterion common to all three types of benefits applications.

[3] On or about January 25, 2023, Ms. Duchesneau requested a second review of her file and had the opportunity to submit additional information.

[4] The officer in charge of the second review [the Officer] told Ms. Duchesneau that she needed proof that the dividends had indeed been earned as employment income. Ms. Duchesneau then forwarded a letter from her accountant dated February 22, 2023, confirming that a dividend entry had been made on February 1, 2020, in the company account identified as [TRANSLATION] “Due to shareholder Gloria Duchesneau”. The accountant referred to the tax rules and then confirmed that it is not mandatory that the amount of the dividend be deposited in Ms. Duchesneau’s personal bank account. Ms. Duchesneau confirmed at the hearing of this application for judicial review that this amount was not actually paid to her.

[5] On March 2, 2023, the Officer prepared a report in each file and noted that the Applicant had not provided any tangible evidence of her $5000.00 income. The Officer denied the applications for the CERB, CRB, and CWLB, essentially on the following grounds:

a) For the CERB: The Applicant did not earn at least $5000.00 in employment income (before taxes) or net self-employment income in 2019 or in the 12 months preceding the date of her first application.

b) For the CRB: The Applicant did not earn at least $5000.00 in employment income (before taxes) or net self-employment income in 2019, 2020 or in the 12 months preceding the date of her first application, and her average weekly income was not reduced by 50% as compared to the previous year because of COVID-19;

c) For the CWLB: The Applicant did not earn at least $5000.00 in employment income (before taxes) or net self-employment income in 2020, 2021 or in the 12 months preceding the date of her first application, and the region in which the taxpayer lives, works, or provides a service was not designated as a COVID-19 lockdown region.

[6] On March 7, 2023, the Officer informed Ms. Duchesneau of her ineligibility for benefits following the second review.

[7] Ms. Duchesneau is seeking judicial review of these three decisions. She is asking the Court to allow her applications, set aside the Officer's decisions, declare that she meets the eligibility criteria for the CERB, CRB, and CWLB, and declare that she owes no money to the Agency. The three applications initiated by Ms. Duchesneau were combined and heard at the same time, and a judgment has been issued and placed in each file.

[8] Before the Court, Ms. Duchesneau is challenging only one of the Officer's conclusions, namely, that she did not earn at least $5000.00 in 2019, 2020, 2021 or in the 12 months prior to her first application. She is not challenging either the conclusion that her average weekly income

was not reduced by 50% as compared to the previous year because of COVID-19 (CRB Act), or the conclusion that the region in which the taxpayer lives, works, or provides a service was not designated as a COVID-19 lockdown region (CWLB Act) for one of the periods. In her application record, Ms. Duchesneau solemnly affirmed an affidavit and entered into evidence a copy of a medical note dated October 17, 2022, prescribing a medical leave of absence because of exhaustion and a list of links to documents and newspaper articles.

[9] Ms. Duchesneau submits that she did earn a net income of at least $5,000.00 during the reference period because in February 2020 she declared *non-eligible dividends earned in lieu of payment for work* in the amount of $5,000.00. She acknowledges that this amount was entered in the accounting records and was not paid to her but maintains that it is nevertheless income under the CERB Act, CRB Act, and the CWLB Act. Ms. Duchesneau therefore submits that the Officer's decisions are patently unreasonable and erroneous in light of the facts and in the exceptional context of the global health crisis.

[10] Ms. Duchesneau also submits that the Agency discriminated against her as a result of her status as an employee shareholder of her own small business and that she was harassed. She alleges that Agency employees were unaware of the rules and that they were unclear and changed during the period.

[11] The Attorney General of Canada [the AGC or the respondent] first objects to the filing of evidence that was not before the Officer and objects to the Court considering facts that were not before the decision maker either. He then states that the decisions are reasonable. He adds that in order to be considered eligible for the benefits claimed, the Applicant had to demonstrate that she had earned the amount declared as dividends as income that qualifies to be eligible for the

CERB, CRB, and the CWLB. He states that this requires that the amount of the declared dividends actually be received (*Konlambigue v Canada (Attorney General*), 2022 FC 1781 at para 25 [*Konlambigue*]).

[12] The AGC also replies that Ms. Duchesneau's criticisms against the Agency are unfounded.

[13] The issue here is whether the Applicant has demonstrated that it was reasonable for the Officer not to have considered the amount of the dividends declared by the Applicant to be income within the meaning of each of the statutes at issue, on the basis of the information provided by the Applicant in support of her applications for benefits. Despite my sympathy for Ms. Duchesneau's situation, I find that Ms. Duchesneau has not demonstrated that the Officer's decisions are unreasonable in light of the provisions of each act and the evidence that was before the Officer, so I will dismiss the applications for judicial review.

II. Discussion

A. *Admissibility of the new evidence*

[14] The AGC first notes that the Applicant has introduced new evidence that was not submitted to the administrative decision maker as part of the decision-making process and is therefore inadmissible (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 [*Access Copyright*] at paras 19–20; *Ntuer v Canada (Attorney General)*, 2022 FC 1596 [*Ntuer*] at para 12).

[15] As a general rule, documents and information that were not available to the decision maker are inadmissible on judicial review before the Court. As pointed out by Gascon J. in *Lavigne v Canada (Attorney General)*, 2023 FC 1182 [*Lavigne*], it is well established that, in a judicial review, the general rule is that a reviewing court can only consider documents that were before the administrative decision maker, with a few exceptions (*Gittens v Canada (Attorney General)*, 2019 FCA 256 at para 14; *Access Copyright* at paras 19–20; *Aryan v Canada (Attorney General)*, 2022 FC 139 [*Aryan*] at para 42; *Kleiman v Canada (Attorney General)*, 2022 FC 762 at paras 25–26; *Ntuer* at para 12; *Lalonde v Canada (Revenue Agency)*, 2023 FC 41 at para 23). Accordingly, these exceptions apply to documents that (1) provide general background that might assist the reviewing court in understanding the issues; (2) bring attention to procedural defects or breaches of procedural fairness in the administrative proceeding; or (3) highlight the complete absence of evidence before the decision maker (*Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128 at para 98; *Bernard v Canada (Revenue Agency)*, 2015 FCA 263 at paras 23–25; *Access Copyright* at paras 19–20; *Nshogoza v Canada (Citizenship and Immigration)*, 2015 FC 1211 at paras 16–18).

[16] The new evidence does not qualify under any of the above exceptions, is therefore inadmissible, and will not be considered, nor will the Court consider the facts that were not before the Officer.

B. *Applicable standard of review*

[17] The applicable standard of review is reasonableness (*Aryan* at para 16; *He v Canada (Attorney General)*, 2022 FC 1503 [*He*] at para 20; *Lajoie v Canada (Attorney General)*, 2022 FC 1088 at para 12).

[18] The Supreme Court of Canada has confirmed that the reasonableness standard applies to judicial review of an administrative decision (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 85). None of the situations that justify rebutting this presumption arise in this judicial review (*Vavilov* at paras 25, 33, 53; *Canada Post Corp. v Canadian Union of Postal Workers*, 2019 SCC 67 at para 27).

[19] Where the applicable standard of review is reasonableness, the role of a reviewing court is to review the reasons given by the administrative decision maker and determine whether the decision is based on "an internally coherent and rational chain of analysis" and is "justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85). The reviewing court must consider "the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified" (*Vavilov* at para 15). The decision must possess the required attributes of transparency, justification, and intelligibility.

[20] The Agency's second review report is part of the reasons for each 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. *The reasonableness of the decisions*

[21] The CERB, CRB, and CWLB are part of a range of measures introduced by the Government of Canada in response to the impacts of the COVID-19 pandemic. First, and to answer the Applicant's question, I note that the eligibility criteria for each of the programs are set out in each of the enabling statutes, namely, section 6 of the CERB Act, section 3 of the CRB

Act, and section 4 of the CWLB Act, respectively. These criteria are cumulative so that if the person applying for a benefit does not meet any one of these criteria, that person will be ineligible.

[22] Each of the programs requires, as part of the eligibility criteria, that the individual have earned at least $5,000.00 during the reference period. Each of the statutes provides for the type of income required to be eligible for the CERB, CRB, and CWLB (CERB Act, section 2, in the definition of “worker”; CRB Act, paragraphs 3(1)(d) and (e); and CWLB Act, paragraphs 4(1)(d) and (e)). It is common ground that the non-eligible dividends could be included in the calculation of the $5,000.00 of employment or self-employment income.

[23] The CERB Act, CRB Act, and CWLB Act specify that the Minister may require an applicant to provide any additional information required in respect of the application (CERB Act at section 10, CRB Act at section 6, and CWLB Act at section 7). The burden of proving eligibility to receive benefits rested with the Applicant (*Walker v Canada (Attorney General)*, 2022 FC 381 at paras 33–37 and *Desautels v Canada (Attorney General)*, 2022 FC 1774 at para 41).

[24] The only eligibility criterion at issue in the case at hand is having a total income of at least $5,000.00 from employment or self-employment for the 2020 or 2021 taxation year or in the 12-month period preceding the day on which an application is made.

[25] As mentioned above, Ms. Duchesneau does not dispute the Officer’s conclusions on the other criteria.

[26] Ms. Duchesneau submits that she did earn a net income of at least $5,000.00 during the reference period as required by each of the three statutes because in February 2020, she declared $5,000.00 in *non-eligible dividends earned in lieu of payment for work*.

[27] She confirms that this amount was not paid to her and was instead entered in the accounting records of her business, but she maintains that it is nevertheless income under each of the statutes. Ms. Duchesneau therefore submits that the Officer's decisions are patently unreasonable and erroneous in light of the facts and in the exceptional context of the global health crisis. She adds that her T5 statement is proof of her income of more than $5000.00 in dividends dated February 2020 and that it proves that she meets the eligibility criteria for the benefits sought, and points out her accountant's letter confirming that it is not mandatory that the amount of the dividend be deposited in Ms. Duchesneau's personal bank account.

[28] I want to emphasize, as I mentioned at the hearing, that the good faith of Ms. Duchesneau or her accountant is not at issue in this matter. Rather, it is a question of whether it is reasonable for the Officer to conclude that the eligibility criterion has not been met because there is, in short, no tangible evidence that Ms. Duchesneau herself earned $5,000.00 in income during the period at issue.

[29] I agree with the AGC's position and conclude that it was reasonable for the Agency to determine that this eligibility criterion was not met.

[30] In addition, the CERB, CRB, and CWLB are part of the range of measures introduced by the federal government, starting in 2020, to address the economic impacts caused by the COVID-19 pandemic. These were targeted monetary payments that were intended to provide financial

support to workers who suffered a loss of income as a result of the pandemic and could not benefit from the protection provided by the standard Employment Insurance Program (*Baron v Canada (Attorney General)*, 2023 FC 1177 at para 7; *He* at para 5; *Hayat v Canada (Attorney General)* 2022 FC 131 at para 2; *Mathelier-Jeanty v Canada (Attorney General)*, 2022 FC 1188 at para 2; *Argüello v Canada (Attorney General)*, 2023 FC 986 at para 4; *Akouz v Canada (Attorney General)*, 2023 FC 1104 at para 2; *Laplante v Canada (Attorney General)*, 2023 FC 1450 at para 2; *Cohen v Canada (Attorney General)*, 2023 FC 1539 at para 9; *Bouchard v Canada (Attorney General)*, 2023 FC 1456 at para 7; *Boudreau v Canada (Attorney General)*, 2023 FC 567 at para 6; *Labrosse v Canada (Attorney General)*, 2022 FC 1792 at para 4).

[31] As my colleague Pamel J. points out in *Konlambigue*, if the amount of the dividends was not paid to the taxpayer—or in the case at hand, to the shareholder—but is simply entered in accounting records, it is reasonable to conclude that this amount was not earned and that it is not income within the meaning of the Act (*Konlambigue* at para 25). It is reasonable to conclude that an accounting entry is not tangible evidence of income within the meaning of the Act, especially when it is part of an income replacement program. The filing of a T-5 slip, which was issued by the Applicant, is not determinative in this regard.

D. *The Applicant has not proven discrimination*

[32] The Applicant further submits that the situation is discriminatory. In her memorandum, she raises questions about the fact that Agency employees do not appear to differentiate between a T4 statement (which relates to an employee or self-employed person) and a T5 statement, which relates to a shareholder and employee of one’s own company.

[33] The Applicant questions the ability of the agents with whom she interacted. She also states that she is aggrieved because she is being harassed and misunderstood through abusive, threatening, and intimidating letters from the Agency. She alleges that she received contradictory information, which she explains also caused her confusion, dissatisfaction, and distress.

[34] The Applicant further submits that the following sentence, found on the Agency's website in the "Judicial Review" section, is intimidating:

> If it is determined that the Minister's discretion was not properly exercised, the Federal Court cannot change the CRA's decision but it can refer the decision back to the CRA to be reconsidered by another delegated official (Applicant's Memorandum of Fact and Law at 115).

[35] The AGC replies that the Applicant has not submitted any evidence that the Agency's letters contributed to her burnout or were harassing, or any evidence as to how these Agency decisions are discriminatory against her. The AGC further notes the Applicant's contradictory statements regarding the fact that she criticizes the Agency not only for not calling or sending her paper letters, but also, at the same time, for sending her too many messages in her Agency mailbox.

[36] The AGC adds that the Officer ensured that the Applicant had the correct information to submit her documents. He submits that during the decision-making process, the Applicant was able to learn that she had to provide evidence that she had earned at least $5,000.00 in income over a given period in order to be eligible (*Hommersen v Canada (Attorney General)*, 2023 FC 800 at paras 35–38 [*Hommersen*]).

[37] Regarding the Applicant's argument that Agency officers did not understand the concept of *non-eligible dividends earned in lieu of income,* the AGC submits that the officers' work is limited to reviewing the Applicant's eligibility for the various benefits and that it was not up to them to inform her about the nature of the dividends she received.

[38] I agree with the AGC's position and find that Ms. Duchesneau has not demonstrated that she was discriminated against or harassed, nor did she establish a breach of procedural fairness. In this respect, I agree with my colleague's remarks at paras 35–38 of *Hommersen*.

III. Conclusion

[39] The Applicant has not demonstrated that the Officer's decisions do not possess the required attributes of transparency, justification, and intelligibility, and I find that they are not tainted by a reviewable error. The applications for judicial review will therefore be dismissed. No costs are awarded (*Showers v Canada (Attorney General)*, 2022 FC 1183 at para 32).

JUDGMENT in T-670-23, T-671-23, and T-672-23

THIS COURT'S ORDER is as follows:

1. The applications for judicial review are dismissed.

2. These reasons are placed in each of the three files.

3. No costs are awarded.

"Martine St-Louis"
Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

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