Federal Court Cour fédérale

Date: 20240229

Docket: T-2150-22

Citation: 2024 FC 331

Ottawa, Ontario, February 29, 2024

PRESENT: The Honourable Madam Justice Tsimberis

BETWEEN:

DIANNE HABARAGAMUWAGE PEIRIS

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Ms. Dianne Habaragamuwage Peiris [Applicant] seeks judicial review of a Second Reviewer decision made by an agent of the Canada Revenue Agency [CRA] dated September 19, 2022, who found she was ineligible for the Canada Recovery Benefit [CRB] on the basis that she had not earned at least $5,000 (before taxes) of total eligible income in any one of 2019, 2020, or in the 12 months before her first application for the CRB [Decision].

[2] The Applicant seeks an order from this Court that she is entitled to the CRB payments for the periods from September 27, 2020 to July 17, 2021 and from July 18, 2021 to October 19, 2021 and not be required to repay the amounts received for the aforementioned periods.

[3] For the reasons that follow, and in conformity with the role of this Court in a judicial review, I find that the Decision is not unreasonable and was arrived at in a procedurally fair manner.

II. Factual Background

[4] Over the course of the COVID-19 pandemic, the Applicant applied for three benefits:

a. Canada Emergency Response Benefit [CERB], beginning on March 15, 2020 [CERB Application Date];

b. CRB, beginning on September 27, 2020 [CRB Application Date]; and,

c. Canada Worker Lockdown Benefit [CWLB], beginning on January 23, 2022.

[5] The CRA decided to review the Applicant's eligibility for all three benefits. The Applicant submitted letters and documentation supporting her eligibility on January 23, 2022, February 7, 2022, and March 6, 2022. Her income was as follows:

a. July 7th, 2019: $2000 in cash from Milanos Grill;

b. October 5th, 2019: $1000 by cheque from Milanos Grill;

c. February 20th, 2020: $2000 by cheque from Century 21; and,

d. April 14th, 2020: $481.37 by e-transfer from Clinicare Medical Centre.

[6] Given these items of income, the Applicant's income for 2019 was $3000 and their income for 2020 was $2481.37.

[7] On April 19, 2022, an agent of the CRA [First Reviewer] commenced their review. On April 21, 2022, they spoke with the Applicant, and confirmed the Applicant has no further income to submit other than that for 2019 and 2020. On the same date, they found that the Applicant was not eligible for the CRB because she had not earned at least $5,000 of employment or self-employment income [Qualifying Income] in either 2019, 2020, or in the 12 months prior to the date of her first application [Relevant Periods].

[8] By a letter dated May 5, 2022, the Applicant was informed of the First Reviewer's decision. In their notes, the First Reviewer appeared to believe the Applicant was arguing they met the Qualifying Income requirement because their income from 2019 and 2020 *combined* met the requirement, and found them ineligible because the qualifying income must be in *either* 2019, 2020, or the 12-month period prior to the date of their first application.

[9] The First Reviewer also found the Applicant did not qualify for either the CERB or the CWLB because she separately did not meet their separate qualifying income thresholds during their separate relevant periods.

[10] After receiving the First Reviewer's three decisions, the Applicant wrote to the CRA requesting a second review and outlining by benefit their arguments for why they are eligible. Pertinent to this matter is their combined explanations for their eligibility for the CERB and CRB. The Applicant writes that its "income of $5000.00 was received on July 7, 2019, Oct 5, 2019, Feb 20, 2020, all of which fell within the 12 months period before the date of my first application (I applied on May 1, 2020, and the effective date of my first CERB was March 15, 2020, so the 12 months period will be March 2019 to March 2020)." In the following section explaining why they separately qualified for the CRB, the Applicant writes, "as stated above (for CERB) my income of $5000 was received in 2019 and 2020."

[11] The Applicant's explanation bears scrutiny because it illustrates precisely where some of the confusion in this matter began. Based on the evidence and their submissions, it appears the Applicant has been under the impression this entire time that the CRB's Relevant Period was the same relevant period as that of the CERB. Ordinarily this would be an obvious error on their part, but nowhere in the CRA's letters to the Applicant or in the notes of their calls with the Applicant do they explain with exact dates what the different relevant periods were for each of the three benefits that were being reviewed. The only mention of the relevant periods is the reiteration of what generally constitutes the Relevant Period in the CRB eligibility criteria, but there is no mention that the actual range of relevant dates was explained to the Applicant. It is clear that the Applicant's confusion about why they qualified for the CERB but not the CRB was not entirely unfounded.

III. Decision Under Review

[12] The CRA assigned Lucas Goudie to conduct the second review [Second Reviewer], who provided an affidavit containing their notes and records from the second review [Second Reviewer's Affidavit]. The CRA has also provided a certificate pursuant to a Rule 317 request including screenshots from the CRA's notes, the second review reports, a phone script used by call centre agents, and the procedure for determining benefit eligibility [Rule 317 Certificate]. The Second Reviewer carefully considered the Applicant's submissions and her information in CRA's systems, then spoke with the Applicant and her spouse on August 10, 2022, to explain that the CRB eligibility criteria required the Qualifying Income be earned in one of the Relevant Periods.

[13] The Second Reviewer identified the First Reviewer's error, being that the First Reviewer believed the Applicant was arguing they qualify based on the combined income of 2019 and 2020, when in fact they qualified for the CERB based on the combined income from the 12-month period before the date of their first application and qualified for the CWLB from the income they properly received from the CERB. The Applicant did qualify for the CERB and the CWLB because their four items of income all fell within those benefits' relevant periods and amounted to $5,481.37, which is over the $5000 qualifying income threshold. However, the Applicant did not qualify for the CRB because the Applicant applied for the CRB to start on September 27, 2020, which was the start date of the CRB (see section 3(1) of the *Canada Recovery Benefits Act*, SC 2020, c 12, s 2 [CRB Act]; see also page 24 of the Rule 317 Certificate). As such, the CRB Relevant Period would be 2019, or 2020, or from approximately September 27, 2019 to September 27, 2020.

[14] On August 10, 2022, the Second Reviewer called the Applicant (see Exhibit C of the Second Reviewer's Affidavit). They recognized the Applicant was "under the impression that for CRB income you can combine 2019 and 2020 as they felt the criteria was unclear". The Second Reviewer explained that they "treat each benefit separately and they have to make the income in 2019 OR 2020 OR the 12 months leading up" to the date of their first application. In their notes from the call dated August 10, 2022, the Second Reviewer noted that the July 7, 2019 payment of $2000 is outside the 12-month period.

[15] As the Applicant's first item of income was dated July 7, 2019, and therefore outside the relevant 12-month period, their income in the 12-month period prior to their first CRB application was in fact only $3481.37, well below the Qualifying Income. Since the Applicant's annual incomes for each of 2019 and 2020 were also below the Qualifying Income, they did not qualify for the CRB.

IV. Relevant Legislation

[16] Section 3(1) of the Act outlines the following criteria for CRB eligibility:

> 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
>
> (…)
>
> (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 (…);
>
> (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 at least $5,000 from the sources referred to in subparagraphs (d)(i) to (v);

[17] Other relevant provisions of the Act are:

> Definitions
>
> 2 The following definitions apply in this Act.
>
> (…)
>
> Minister means the Minister of Employment and Social Development. (ministre)
>
> Application
>
> 4(1) A person may, in the form and manner established by the Minister, apply 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.
>
> (2) No application is permitted to be made on any day that is more than 60 days after the end of the two-week period to which the benefit relates.
>
> Obligation to provide information
>
> 6 An applicant must provide the Minister with any information that the Minister may require in respect of the application.
>
> Payment of benefit
>
> 7 The Minister must pay a Canada recovery benefit to a person who makes an application under section 4 and who is eligible for the benefit.

V. Issues

[18] The Respondent has raised two preliminary issues that will be dealt with at the outset of my analysis below:

A. *Whether the Applicant improperly named the Respondent Canada Revenue Agency in this application?*

B. *Whether the Applicant's newly submitted evidence (not before the decision maker, some of which consists of unsworn and privileged materials) could be considered by the Court?*

[19] The Applicant alleges a panoply of issues in this matter. In addition to the Decision being unreasonable, the Applicant has raised many issues with the way her CRB request was handled. As such, a fair framing of the main issues is as follows:

C. *Was the Applicant's CRB request handled and the Decision arrived at in a procedurally unfair manner?*

D. *Was the Decision unreasonable?*

VI. Standard of Review

[20] The Supreme Court of Canada has established that when conducting a judicial review of the merits of an administrative decision, other than a review related to a breach of natural justice and/or the duty of procedural fairness, the presumptive standard of review is reasonableness (see *Canada (Minister of Citizenship and Immigration)* v *Vavilov*, 2019 SCC 65 [*Vavilov*] at para 23).

[21] The reasonableness standard "requires that a reviewing court defer" to a decision that is based on "an internally coherent and rational chain of analysis" and be "justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at paras 85 and 99). In assessing whether a decision is reasonable, the Court will examine the reasons given by the administrative

decision maker and will assess whether the decision is appropriately justified, transparent and intelligible. Both the outcome of the decision and its reasoning process must be considered in assessing whether these hallmarks are met (*Vavilov* at paras 15, 95, 136).

[22] If there is no breach to the procedural fairness duty, the Court will apply *Vavilov*'s presumption to use the reasonableness standard of review. In that case, a court applying the reasonableness standard does not ask what decision it would have made in place of the administrative decision maker. It is "an approach meant to ensure that courts intervene in administrative matters only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process. It finds its starting point in the principle of judicial restraint and demonstrates a respect for the distinct role of administrative decision makers" (*Vavilov* at para 13).

[23] Such a review must include a rigorous and robust evaluation of administrative decisions. However, as part of its analysis of the reasonableness of a decision, the reviewing court must take a "reasons first" approach and begin its inquiry by examining the reasons provided with "respectful attention", seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion (*Vavilov* at para 84). The decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. "The reviewing court must refrain from reweighing and reassessing the evidence considered by the decision maker" (*Vavilov* at para 125).

[24] The onus is on the party challenging the decision to prove that it is unreasonable. Flaws must be more than superficial for the reviewing court to overturn an administrative decision. The court must be satisfied that there are "sufficiently serious shortcomings" (*Vavilov* at para 100).

[25] When conducting a judicial review, a breach of natural justice and/or the duty of procedural fairness is determined on the basis that approximates correctness review.

VII. Analysis

A. *Preliminary Issues*

(1) The Proper Respondent

[26] The Applicant has incorrectly named an individual and the CRA as Respondents in this matter. The CRA is not the proper Respondent as it is not directly affected by the Second Decision (Rule 303 of the *Federal Courts Rules*, SOR/98-106; *Aryan v Canada (Attorney General)* 2022 FC 139 at 13). The Respondent rightly points out the proper Respondent is the Attorney General of Canada, because the Applicant is challenging a decision made by an officer of the CRA on behalf of the Minister of Employment and Social Development (definition of "Minister" at section 2 of the Act reproduced above). Accordingly, I order that the style of cause will be amended, replacing the Canada Revenue Agency with the Attorney General of Canada as the named Respondent.

(2) Can the Applicant's newly submitted evidence be considered by the Court?

(a) *Applicant's Representative's Affidavit & Record Materials*

[27] The Respondent rightly raises the issue that the Applicant included evidence in her Record that should not be admissible. In the Applicant's Record, pages 79 to 103, 150 to 166, 232 to 418, 501 to 529, and 547 to 559 are unsworn material, some of which was not before the Second Reviewer. All documents from pages 82 to 103, 150 to 166, 232 to 481, 501 to 529, and 547 to 559 of the Applicant's Record post-date the Second Reviewer's Decision. As for the unsworn materials in the Applicant's Record, the Respondent points to Rules 80(1) and 309 of the *Federal Courts Rules* that contemplate an Applicant's Record not containing unsworn documents and submit that there are no special circumstances that would justify the Court using its discretion to dispense with the *Federal Courts Rules'* compliance.

[28] In the normal course, evidence that was not before the decision maker and that goes to the merits of the matter is not admissible in an application for judicial review in this Court (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 [*Access Copyright*] at para 19). In *Access Copyright*, the Federal Court of Appeal held, at paragraph 20, that there are a few recognized exceptions to the general rule, which "exist only in situations where the receipt of the evidence by the Court is not inconsistent with the differing roles of the judicial review court and the administrative decision-maker". The Federal Court of Appeal listed the following three non-exhaustive exceptions:

a. Where the new evidence provides general background information in circumstances where that information might assist in understanding the issues relevant to the judicial review but does not add new evidence on the merits;

b. Where the new evidence brings to the attention of the reviewing court procedural defects not found in the evidentiary record of the decision maker; and

c. Where the new evidence highlights the complete absence of evidence before the decision maker on a particular finding.

[29] After review of the above-mentioned pages of the Applicant's Record, and the Affidavit of Charles Amerkesere dated March 27, 2023 [Applicant's Representative's Affidavit], I am not satisfied that any of the above exceptions are applicable that would allow for this new evidence's admissibility.

[30] The Respondent also rightly raises the issue that the Applicant's evidence includes privileged settlement materials that should not be before the Court. The Respondent points to the Applicant's Representative's Affidavit at Tab 42A of the Applicant's Record containing privileged settlement negotiations and attached Schedule "A" to his Memorandum of Fact and Law listing the paragraphs of the Applicant's Representative's Affidavit that relate to privileged settlement exchanges. In addition to the information in Tab 42A not being before the decision maker, the Court must disregard these documents as they are subject to settlement privilege (*Sable Offshore Energy Inc v Ameron International Corp* 2013 SCC 37 at paras 12-13).

[31] Finally, by virtue of section 18.1(4)(d) of the *Federal Courts Act,* Parliament granted the Federal Court the authority to review the decision of the Minister based upon the facts before the decision maker. As such, the Court's role is to review the Second Reviewer's Decision based upon the facts that were before the Second Reviewer, and not to consider other facts or evidence not before him.

[32] For the purposes of this matter being a judicial review, except for paragraphs 1 to 3, the remainder of the Applicant's Representative's Affidavit and the aforementioned pages of the Applicant’s Record will be stricken from the record and will not be considered by the Court. They do not meet the *Access Copyright* exceptions and/or contain privileged settlement communication. The relevant material before the Second Reviewer is included in both the Affidavit of Lucas Goudie and the Applicant’s Affidavit, and this will be the only material considered.

(b) *Applicant’s Post-Hearing Submissions & Evidence*

[33] After the hearing and without a request to do so, the Applicant sent 17 pages of additional evidence and submissions. The Respondent’s position on these new materials is simply that none of it should be considered because the Applicant had a full and fair opportunity to make their case before the Court.

[34] The Applicant gave two hours of oral submissions at the hearing, they provided written submissions beforehand. The Court expects that parties will always put their best foot forward at this stage of litigation since there is seldom an opportunity post-hearing for any additional evidence or submissions to be made without a request from the Court. For the same reasons supporting inadmissibility for the materials submitted in their record, I find the Applicant’s additional, post-hearing evidence similarly inadmissible. I will also not consider their additional submissions.

B. *Was the Applicant's CRB request handled and the Decision arrived at in a procedurally unfair manner?*

[35] Ultimately, the question of procedural fairness comes down to whether the Applicant knew the case to be met and had a full and fair chance to respond (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 56 [*Canadian Pacific*]).

[36] From the whole of their submissions, it appears that the Applicant alleges the Decision was procedurally unfair for several reasons:

a. All the CRA's decisions on the Applicant's file related to COVID benefits, including not only their CRB application but also applications for the Canada Emergency Response Benefit [CERB] and the Canada Worker Lockdown Benefit [CWLB], "have been contradictory of each other" by making different findings and coming to different conclusions upon review;

b. The First Reviewer did not "understand self-employment and did not seek clarification from a peer or supervisor";

c. The Second Reviewer only denied the CRB application "based on his own interpretation" of their evidence and submissions;

d. The Second Reviewer's decision to "overturn" the First Reviewer's findings is procedurally unfair because it should not be possible for two different people to reach different conclusions on the same evidence;

e. The Second Reviewer "erroneously" overturned the "validation of the CRB that was done by the CRA Call Centre agent"; and,

f. The "CRA is not following proper procedures and some of their employees lack the knowledge and training needed to interpret legislation relating to the Qualifying periods and Benefit period relating to social benefits."

[37] The Respondent submits several issues with that the Applicant's procedural fairness argument:

a. The Applicant is improperly arguing about CRA decisions that are not at issue on this judicial review;

b. The Applicant has not provided any evidence of inconsistent interpretations of the CRBA;

c. The Second Reviewer properly reviewed all the documents submitted;

d. The Second Reviewer explained the CRB eligibility criteria and gave the Applicant 15 days after the call before issuing his Decision in order to ensure that the Applicant had a chance to submit additional supporting documentation (if required); and,

e. The Second Reviewer came to a different decision from the First Reviewer, which shows that he conducted himself appropriately.

[38] Firstly, there is nothing in the evidence to suggest there was any decision made by any CRA call centre agent. It appears the Applicant called the call centre seeking information on whether or not they could qualify for the CRB and took the agent's response as an immediate

declaration that they do qualify. The Second Reviewer’s Affidavit includes at Tab 7 the script for how call centres are supposed to handle inquiries for eligibility and nowhere in the script is there a prompt or authorization to make any such decision, only to provide information. Only the Second Reviewer’s CRB Decision is under review, not any call centre agent's scripted response, not any of the First Reviewer's decisions, and not the Second Reviewer's decisions in respect of the CERB and the CWLB, which are not relevant to this judicial review.

[39] The bulk of the Applicant's submissions on procedural fairness focus on the fact that, on review, the Second Reviewer's findings were inconsistent with the First Reviewer's and those allegedly from the call centre agent. Understanding no decision was made by any call centre agent, those submissions are irrelevant. I also find the Applicant's submissions of inconsistencies between the reviewers' findings irrelevant. If it were unfair for a decision-maker reviewing the appeal of a decision before them to reach a different conclusion than the decision itself, there would be no point or purpose of any appeal of any decision.

[40] Briefly, the remainder of the reasons provided by the Applicant on this point amount to unfounded allegations that the CRA's reviewers do not understand the law they are authorized to adjudicate. On this point, the Applicant has offered no evidence in the record, and so it is baseless.

[41] The Applicant has failed to establish any procedural fairness argument. From the record, it is clear that the Applicant had a number of calls with CRA agents, including calls with the Second Reviewer who explained the threshold the Applicant had to meet. It is also clear that the

Applicant had a full and fair chance to make their case before the CRA at the time of its Second Review as the Second Reviewer left the case open for 15 business days after their call in case the Applicant thinks of other income that may make the Applicant eligible for the CRB.

C. *Was the Decision unreasonable?*

[42] The burden is on the Applicant, as the challenging party, to demonstrate that the Second Decision is unreasonable. In that regard, the 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, transparency and intelligibility" (*Vavilov* at para 100).

[43] The Applicant has three key arguments for why the Decision is unreasonable. Firstly, they argue the word "total" in sections 3(1)(d) and 3(1)(e.1) of the Act suggests the Applicant only needs to demonstrate that they have income totalling $5000 across the years of 2019 and 2020. Secondly, the four payments they have evidenced all fall within the 12-month period prior to the date of their first application just as it did for their CERB application. Thirdly, they claim that they have switched from a cash basis accounting to accrual accounting, which they allege would make their February 20, 2020 payment payable when the work was done in late 2019.

[44] With respect to the effect of the word "total" in sections 3(1)(d) and 3(1)(e.1) of the Act, the Applicant has simply misread the eligibility criteria. As was explained by the Second Reviewer in their August 10, 2022 call, in order to be eligible for the CRB, the Applicant must have a total of $5000 in net self-employment income in either "2019 OR 2020 OR the 12 months leading up" to the date of their first application, not in some combination of those periods. The

Applicant's income in 2019 was $3000, their income in 2020 was $2481.37, and their income in the 12 months leading up to their CRB application was $3481.37, and for that reason they do not qualify.

[45] For the same reason as their first argument, being a misreading of the criteria, the Applicant's second argument must fail. The Applicant applied for the CERB beginning on March 15, 2020, the 12-month period leading up to which included all four of their listed payments, and so they met the $5000 threshold for the CERB. However, per section 4 of the Act, the CRB did not begin until September 27, 2020, which was the date the Applicant applied for their CRB benefit to begin. That 12-month period (September 27, 2019 to September 27, 2020) leaves out the July 7, 2019 payment, leaving them with an income for this period of $3481.37, and for that reason, they do not qualify.

[46] The Applicant's third submission was largely evidenced by materials, including notices of reassessment post-dating the Second Review, which were deemed inadmissible as explained above. Regardless of whether the CRA has since accepted the Applicant's new use of the accrual accounting method, this method and all related documents were *not* before the Second Reviewer. As such, this submission and its related documents are not to be considered by this Court on this judicial review.

VIII. Conclusion

[47] After a review of the CRB Act and the admissible documents in the record, and after considering the arguments of both parties, I find, for all the forgoing reasons, that the Decision is not unreasonable.

[48] Despite the fact that her arguments, through her representative, were unable to carry the day, I commend the Applicant and her representative husband for their poise and professionalism as a self-represented litigant during the hearing.

[49] The application for judicial review is dismissed.

IX. Costs

[50] During the hearing, the Respondent submitted a Bill of Costs of fees calculated in the middle of Column III of the Tariff and disbursements (excluding assessment of costs) for $4,852.77. In its oral submissions, the Applicant’s husband who acted as her representative had indicated that he spent approximately 150 hours of his time over the course of the past few years researching, preparing documentation, and attending case management calls, as the Applicant was unable to afford representation of an attorney.

[51] In the exercise of my discretion, and given the procedural history of two reviews with varying underlying reasons for refusing the Applicant's CRB request and the confusion regarding the different relevant period for the CRB (see paragraph 11 above), I do not find this is an appropriate case to award costs under the Tariff. Rather, I exercise my discretion to render a smaller amount of $500 CAD in line with another decision rendered under the Act (*Lussier v Canada (AG)*, 2022 FC 935 at para 25).

JUDGMENT in T-2150-22

THIS COURT'S JUDGMENT is that:

1. The style of cause is hereby amended, replacing the Canada Revenue Agency with the Attorney General of Canada as the named Respondent.

2. The application for judicial review is dismissed.

3. The Respondent is entitled to costs in the amount of $500.

"Ekaterina Tsimberis"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2150-22
STYLE OF CAUSE:	DIANNE HABARAGAMUWAGE PEIRIS v E. THISTLE, CANADA REVENUE AGENCY
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	FEBRUARY 15, 2024
JUDGMENT AND REASONS:	TSIMBERIS J.
DATED:	FEBRUARY 29, 2024

APPEARANCES:

MR. CHARLES AMERESKERE	FOR THE APPLICANT
MR. JIA WEN LI	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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ATTORNEY GENERAL OF CANADA TORONTO, ON	FOR THE RESPONDENT