Federal Court Cour fédérale

Date: 20240223

Docket: T-1752-23

Citation: 2024 FC 306

Vancouver, British Columbia, February 23, 2024

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

GEOFFREY ROBERT EVERALL

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This application seeks judicial review of a decision of an officer of the Canada Revenue Agency [CRA], reviewing the Applicant's eligibility for the Canada Emergency Response Benefit [CERB] and the Canada Recovery Benefit [CRB].

[2] The Respondent has brought a motion for an order striking out this application for judicial review on the basis that it is premature and has no reasonable prospect of success. Associate Judge Coughlan ordered that the Respondent's motion be heard with the merits of the judicial review application.

[3] For the reasons explained in greater detail below, the Respondent's motion to strike is dismissed, and the application for judicial review is also dismissed.

II. Background

[4] The CERB and CRB are federal government measures that were introduced as a response to the COVID-19 pandemic to offer financial support to employed and self-employed Canadians.

[5] The Applicant, Mr. Geoffrey Everall, is a retired self-employed teacher. He applied for, and was initially accepted as eligible for, CRB and CERB for certain periods in 2020 and 2021. A simple process, involving attestation by the taxpayer, was used to enable Canadians to access these benefits as quickly as possible during the pandemic. However, CRA is responsible for substantiating all benefits issued and can therefore subsequently seek to validate payments where eligibility is in question.

[6] As part of its validation process, CRA sent a letter dated August 9, 2022, to the Applicant, requesting documentation to support his eligibility for the CERB and CRB. The Applicant responded with a letter dated September 20, 2022.

[7] By letter dated December 12, 2022, CRA informed the Applicant that he was not eligible for the CERB and CRB, as he had not earned the required minimum employment or self-employment income of $5000 in the relevant periods prior to the date of his first application. The Applicant was advised that he could seek a second review of those decisions by another CRA officer. The Applicant requested a second review and submitted a supplementary letter and documentation on January 10, 2023, intended to demonstrate that he earned the required level of self-employment income.

[8] On June 13, 2023, CRA wrote to the Applicant, conveying its decision on the second review. CRA determined that the Applicant was ineligible for the relevant pandemic benefits, as he had not earned at least $5,000 (before taxes) of employment or self-employment income in 2019 or in the 12 months before the date of his first application.

[9] The Applicant has commenced other applications for judicial review of CRA decisions in the course of its review of his eligibility for pandemic benefits, including seeking judicial review of the June 13, 2023 decision. The parties settled the earlier litigation on the basis that the question of the Applicant's eligibility for benefits would be returned to CRA for reconsideration.

[10] The Applicant's affidavit evidence in the present application refers to phone calls on August 10 and August 15, 2023 with a CRA officer named Ryan Works [Officer] who was conducting the reconsideration of the Applicant's eligibility. The Applicant states that, during the August 10 phone call, the Officer accepted the Applicant's evidence of additional income of $600 in 2019 and confirmed that the Applicant's 2019 income was therefore over the $5000 minimum requirement for the benefits. The Applicant states that, during the August 15 phone

call, the Officer stated a new eligibility requirement for the benefits, being that the Applicant was required to demonstrate he was looking for work in 2020 and early 2021. Also, on August 14 or 15, 2023, the Applicant received a document entitled “Statement of account for COVID-19 benefits”, indicating the Applicant had an outstanding amount owing to CRA of $32,000 [Statement of Account].

[11] In this application, the Applicant seeks judicial review of what he considers to be decisions made by the Officer and conveyed to the Applicant in the August 2023 phone calls.

[12] On December 6, 2023, the Respondent filed a motion to strike the Applicant’s Notice of Application for judicial review on the basis that there is no decision for this Court to judicially review and that the application is therefore premature and has no prospect of success.
The Respondent’s motion record includes an affidavit sworn by the Officer, which attaches as an exhibit a copy of the Statement of Account, and sought leave to adduce that evidence in support of the motion. The Applicant has filed a motion record opposing the Respondent’s motion.

[13] The Respondent has also filed a Memorandum of Fact and Law in response to the application. Consistent with its motion to strike, the Respondent’s position is that no decision has yet been made on CRA’s review of the Applicant’s eligibility and that, as there is therefore no decision to judicially review, the application is premature and should be dismissed.

III. Issues

[14] Together, the Respondent's motion and the Applicant's application for judicial review raise the following issues for the Court's determination:

A) Whether the Court should take evidence into account in adjudicating the Respondent's motion to strike;

B) Whether the Respondent's motion to strike should be granted and the application for judicial review struck on the basis that there is no decision capable of being judicially reviewed;

C) If the Respondent's motion is dismissed, whether the application for judicial review should be dismissed on the basis that there is no decision capable of being judicially reviewed; and

D) If there is a decision capable of being reviewed, whether the decision was reasonable and procedurally fair.

[15] Neither party made submissions on the applicable standard of review. Under the fourth issue articulated above, the merits of any decision would be reviewable on the reasonableness standard, and any arguments surrounding procedural fairness would be assessed to consider whether, in all the circumstances, such decision was arrived at in a procedurally fair manner.

IV. Analysis

A. *Whether the Court should take evidence into account in adjudicating the Respondent's motion to strike*

[16] As previously noted, the Respondent's motion to strike included a supporting affidavit of the Officer. The Respondent recognizes the general rule that affidavits are not admissible in support of motions to strike. However, when filing the motion, the Respondent sought leave to adduce the Officer's affidavit, on the basis of exceptions to the general rule that apply where a document is incorporated by reference in a notice of application. As explained in *Blair v Canada (Attorney General),* 2022 FC 957 [*Blair*] at paragraph 12, where a document is referred to in a notice of application, a party to a motion to strike may file an affidavit appending the document for the assistance of the Court.

[17] The Respondent intended to rely on the Officer's affidavit, which attaches a copy of the Statement of Account, because the first paragraph of the Notice of Application references the Statement of Account as follows:

> This is an Application for a Federal Judicial Review in respect of: the decision of the Canada Revenue Agency, communicated to me on August 14, 2023, (please see the CRA Statement of Account letter of 14 August 2023 in my sworn Affidavit to follow within 30 days) demanding that, I, the Applicant, Geoffrey Robert Everall, repay the entire amount of $32,000 (CERB/CRB benefits received in 2020/2021) immediately as I am not eligible for the CERB/CRB (Canada Emergency Response Benefits/Canada Recovery Benefits). …
>
> [my emphasis]

[18] Through the Officer's affidavit, the Respondent intended to establish that the Statement of Account is a record of transactions on a taxpayer's account and is not issued as a result of an eligibility decision. However, in the course of the hearing of this application, it became apparent that the Applicant was not arguing that the Statement of Account represents the decision of which he seeks judicial review. Rather, he seeks judicial review of what he considers to be decisions made by the Officer and conveyed to the Applicant in the August 2023 phone calls.

[19] The Respondent's counsel therefore advised the Court that he was no longer seeking to adduce and rely on the Officer's affidavit. Rather, the Respondent was content to argue the motion to strike based on the content of the Notice of Application, which the Respondent submits demonstrates on its face that the application for judicial review is premature, as CRA has not made a decision on the reconsideration of the Applicant's eligibility for benefits.

[20] I note that the Respondent also takes the position that the Applicant's affidavit, which the Applicant filed in support of his application and filed again in his motion record in response to the motion to strike, should not be taken into account in the Court's adjudication of the motion. The Respondent argues that the affidavit improperly consists of hearsay, argument and unsubstantiated allegations. I need not adjudicate that argument, as the that Applicant has not advanced any basis for the Court to depart from the general rule that motions to strike are to be adjudicated without the benefit of evidence (*Blair* at paras 11-13).

[21] As such, the Court will not take evidence into account in the adjudication of the motion to strike.

B. *Whether the Respondent's motion to strike should be granted and the application for judicial review struck on the basis that there is no decision capable of being judicially reviewed*

[22] I will therefore adjudicate the motion based on the facts pleaded in the Notice of Application. Those facts are to be taken as true, while reading the application broadly with a view to accommodating any inadequacies therein. In considering a motion to strike, the Court must read the notice of application holistically with a view to understanding its real essence. Moreover, the moving party faces a high threshold, as a court will strike a notice of application only where it is so clearly improper as to be bereft of any possibility of success (*Blair* at paras 6-9).

[23] Applying those principles, I am satisfied that, notwithstanding that the first paragraph of the Notice of Application (as set out above) reads as if the impugned administrative decision is that which was communicated in the Statement of Account, a holistic review of the Notice of Application supports the Applicant's assertion that his application for judicial review is intended to engage what he considers to be decisions conveyed by the Officer in the August 2023 phone calls.

[24] I therefore turn to consideration of whether the application, interpreted in that manner, is bereft of any possibility of success. In support of the position that the application cannot succeed, the Respondent invokes what it submits are two interrelated flaws: (a) that there is no decision from which to seek judicial review; and (b) that the application is therefore premature. As the Respondent notes, a motion to strike can be an appropriate vehicle in cases of prematurity, as

administrative bodies should be left to complete their work before referring the matter to a court for judicial review (*Dugré v. Canada (Attorney General)*, 2020 FC 789 [*Dugré*] at paras 24 and 67, citing *Canada (Border Services Agency) v CB Powell Limited*, 2010 FCA 61, [2011] 2 FCR 332 [*CB Powell*].

[25] The Respondent also argues that this is not a situation in which CRA has made an interim or interlocutory decision and the Court must consider whether it is appropriate for the Applicant to seek judicial review of that decision before the administrative process has run its course to a final decision. Rather, the Respondent submits that there is no decision at all represented by the August 2023 phone calls.

[26] I accept the jurisprudential principles upon which the Respondent relies. However, conscious of the high threshold the Respondent faces on this motion, I am not prepared to strike the application based on a review of the facts pleaded in the Notice of Application. In the Notice of Application, the Applicant pleads that in the August 2023 phone calls the Officer conveyed to him decisions, albeit conflicting ones, as to his eligibility for benefits. Taking the facts as pleaded, and reviewing that pleading generously as the jurisprudence requires, I am not satisfied that the Notice of Application fails to plead an administrative decision capable of judicial review and is therefore bereft of any possibility of success. As such, my Judgment will dismiss the Respondent's motion to strike.

C. *If the Respondent's motion is dismissed, whether the application for judicial review should be dismissed on the basis that there is no decision capable of being judicially reviewed*

[27] As previously noted, the Respondent raises the same argument in response to the application itself, *i.e.*, that the application is premature because CRA has not made a decision from which the Applicant can seek judicial review. In analysing this argument in the context of the application, the Court has recourse to the evidence filed in the application, being the Applicant's affidavit and the exhibits thereto.

[28] As I interpret the Applicant's submissions, he seeks relief in this application that would involve the Court giving effect to what he considers to be the positive decision made on August 10, 2023, and setting aside what he considers to be the negative decision made on August 15, 2023.

[29] In relation to the phone call on August 10, 2023, the Applicant's affidavit states that the Officer confirmed in that call that the $600 of 2019 self-employment income identified by the Applicant was acceptable and would therefore be recorded towards the $5000 minimum needed for the CERB/CRB. However, the Applicant does not state that the Officer confirmed his eligibility for benefits during that call. To the contrary, the Applicant's affidavit describes his expectation that the Officer should have next confirmed his eligibility and instead his dissatisfaction with the fact that the next call in August 15, 2023 raised a new requirement.

[30] In relation to the August 15, 2023 phone call, in which the Applicant alleges the Officer made a negative decision surrounding his eligibility for benefits, based on a requirement to demonstrate that he was looking for work in 2020 and early 2021, the Applicant's affidavit deposes that the Officer stated in that call that the Applicant had to meet this requirement and

asked the Applicant to prove he was looking for work in that period. I agree with the Respondent's position that the Applicant's own evidence does not support a conclusion that the Officer had made and was conveying a decision in the August 15, 2023 call. The Applicant describes the Officer stating a requirement and seeking information thereon, not arriving at a decision as to whether the Applicant met that requirement.

[31] I also note the Respondent's comparison of these verbal communications with the manner in which CRA previously communicated its decision on the Applicant's eligibility for benefits, prior to the Applicant's earlier applications for judicial review and their eventual settlement. Both CRA's initial decision and its second review decision were communicated formally through correspondence dated, respectively, December 12, 2022 and June 13, 2023. That correspondence forms part of the evidence attached to the Applicant's affidavit, and I agree with the Respondent's submission that such evidence detracts from a conclusion that, following the settlement of the litigation, CRA would informally convey the results of its reconsideration of the Applicant's eligibility by telephone.

[32] With the benefit of the evidence before the Court, I agree with the Respondent's position that the record does not support a conclusion that CRA has made a decision on its reconsideration of the Applicant's eligibility for benefits. Therefore, there is no decision that can form the basis of an application for judicial review, and the Applicant's application is necessarily premature.

[33] At the hearing of the application, the parties devoted considerable attention to the jurisprudence identifying that the prematurity principle is not absolute but rather applies absent exceptional circumstances (*CB Powell* at para 31). The Applicant notes that the categories of exceptional circumstances that have previously been recognized in the jurisprudence are not exhaustive (*Blair* at para 46) and argues that the Court should find that exceptional circumstances do exist in this case. He submits that, after challenging CRA's decision-making before the Court, neither the Officer nor any other officer at CRA will treat him fairly in reviewing his benefits eligibility. The Applicant emphasizes the significant financial challenges he has faced in responding to CRA's concerns about his eligibility for benefits, and he argues that the only means for him to receive a just adjudication of his eligibility is for the Court to make that determination.

[34] A similar result was rejected by this Court in *Dugré* at paragraph 34, where the applicant seeking to establish exceptional circumstances wished to have his case heard by the Court rather than by the administrative body specifically created for the purpose. While I accept that the categories of exceptional circumstances are not closed, the jurisprudence has determined that allegations of procedural unfairness or bias do not represent exceptional circumstances that allow a party to bypass an administrative process, as long as that process allows such issues to be raised and an effective remedy to be granted (*CB Powell* at para 33).

[35] In the case at hand, I find no basis to conclude that requiring the Applicant to await CRA's decision on the redetermination of his benefits, before potentially seeking recourse to the Court if the decision is unfavourable to him, would deprive him of an effective remedy. Indeed,

the Applicant explained at the hearing of this application that he hoped for a decision from the Court that would require the Officer or CRA to produce recordings or transcripts of the August 2023 phone conversations, or to provide an affidavit that spoke to those conversations. Such recordings or transcripts, if they exist, represent the sort of disclosure that could well follow the commencement of a properly constituted application for judicial review. If, following a CRA decision, the Applicant asserts that either those phone conversations or some other aspect of the decision-making process demonstrate bias or other procedural unfairness or that the decision is unreasonable, those are allegations that can be pursued through the judicial review process.

[36] As a final point, I note that in the days following the hearing, the Applicant sent letters to the Court advancing further submissions in support of his position in this application. While there was no basis for the Applicant to provide those submissions following the conclusion of the hearing, I note that I have read the Applicant's letters and conclude they provide no support for a departure from the above reasoning.

[37] In conclusion, I find that this application for judicial review is premature and, as no exceptional circumstances apply, it must be dismissed.

D. *If there is a decision capable of being reviewed, whether the decision was reasonable and procedurally fair*

[38] Having found that there is no decision capable of being reviewed, there is no basis for the Court to conduct a review for reasonableness or procedural fairness.

V. Costs

[39] Each of the parties sought costs in the event of their success in this application. The Applicant sought costs of $2000, and the Respondent sought costs of $500. In support of its claim for a costs award, the Respondent argues not just that costs should be awarded because of the Respondent's success in opposing the application, but also because this application should never have been brought due to is prematurity.

[40] I accept the principles that costs should in the normal course follow the event and that costs are an appropriate means of discouraging premature applications. However, in the circumstances of the case at hand including the Respondent's unsuccessful motion to strike, I exercise my discretion to award the Respondent a lesser amount of $100, which I consider to be sufficient to respect those principles.

JUDGMENT IN T-1752-23

THIS COURT'S JUDGMENT is that:

1. The Respondent's motion to strike this application for judicial review is dismissed.

2. This application for judicial review is dismissed.

3. The Applicant shall pay the Respondent costs in the lump sum amount of $100, inclusive of taxes and disbursements.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1752-23
STYLE OF CAUSE:	GEOFFREY ROBERT EVERALL v THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	FEBRUARY 19, 2024
JUDGMENT AND REASONS:	SOUTHCOTT J.
DATED:	FEBRUARY 23, 2024

APPEARANCES:

Geoffrey Robert Everall	THE APPLICANT ON HIS OWN BEHALF
Jean Murray	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT