Federal Court Cour fédérale

Date: 20240306

Docket: T-1218-23

Citation: 2024 FC 380

Ottawa, Ontario, March 6, 2024

PRESENT: THE CHIEF JUSTICE

BETWEEN:

CYRIL GREGORY SEMLER

Applicant

and

CANADA (ATTORNEY GENERAL)

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] In this Application, Mr. Semler seeks this Court's intervention to set aside two Second Review decisions ("**Decisions**") made by an officer of the Canada Revenue Agency ("**CRA**").

[2] The Decisions were each dated May 15, 2023. They informed Mr. Semler of the CRA's conclusion that he was not eligible for the Canada Recovery Benefit ("**CRB**") nor the Canada

Emergency Response Benefit (“**CERB**”), respectively. They further advised that he would be required to repay any payments that he had received under those programs.

[3] Prior to being informed of the Decisions, Mr. Semler had received CRB payments totalling $18,000, and CERB payments totalling $8,000. He applied for those benefits after experiencing a reduction in his income as a handyman and as a “day trader.”

[4] It is common ground that the Decisions include the computer notes made by the officer (the “**Officer**”).

[5] For the following reasons, this Application will be dismissed.

II. Relevant Legislation

[6] Pursuant to subsection 6(1) of the *Canada Emergency Response Benefit Act*, SC 2020, c 5, s 8 (the “***CERB Act***”), a worker is eligible for an income support payment in certain conditions. Those conditions include (i) ceasing to work for reasons related to COVID-19 for at least 14 days within the four-week period in respect of which they apply for the payment, and (ii) not receiving income from employment or self-employment during that period. Pursuant to section 2 of the *CERB Act*, a worker is defined to include someone who, among other things, had a total income of at least $5,000 from employment, self-employment or certain other sources in 2019 or in the 12-month period preceding the day on which they make an application for income support.

[7] The eligibility criteria for the CRB are set out in the *Canada Recovery Benefits Act*, SC 2020, c 12 s 2 (the "***CRB Act***"). The *CRB Act* also requires applicants to have earned at least $5,000 in employment income or net self-employment income in 2019 or in the 12 months preceding the date of their last application: *CRB Act* at para 3(1)(d). In certain stipulated circumstances, that income could also be earned in 2020. In any event, an additional requirement is that applicants must have experienced a reduction of at least 50% in their average weekly income, relative to the benchmark period, for reasons related to COVID-19: *CRB Act* at para 3(1)(f).

III. Preliminary Issues

[8] Mr. Semler requests that the Court consider submissions that he made to the Officer approximately one week after the Decisions under review. However, it is trite law that the Court's review of administrative decisions are to be conducted on the basis of the record that was before the decision maker: *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, at para 19 [***Access Copyright***]. Although there are exceptions to that principle, none of those exceptions apply in the present circumstances. *Access Copyright*, at para 20.

[9] I will observe that Mr. Semler did not explain why he failed to provide those submissions, and the associated evidence, to the Officer, despite having been given multiple opportunities to establish his eligibility for CRB and CERB benefits.

[10] In any event, the submissions in question do not assist Mr. Semler. This is because they relate to his claimed reduction in income from day trading. Ultimately, the Decisions under review turned on a finding that "Covid was not the reason [Mr. Semler's] day-trading income was reduced." In reaching that finding, the Officer relied on Mr. Semler's acknowledgement that he was "hoping the markets [would] drop again …to buy in and make some money."

[11] During the hearing of this Application, counsel for the Respondent requested, pursuant to Rule 303, that the style of cause in this matter be changed to reflect that the Attorney General of Canada, rather than the CRA, should be named as the Respondent. This request will be granted in the judgment below.

IV. Issues

[12] Mr. Semler essentially raises two issues. They are as follows:

i) Were his procedural fairness rights breached by the Officer or the Respondent?

ii) Were the Decisions reasonable?

V. Standard of Review

[13] In reviewing the procedural fairness issues raised by Mr. Semler, the Court's task is to determine "whether the procedure was fair having regard to all of the circumstances": *Canadian Pacific Railway Company v Canada (Attorney General),* 2018 FCA 69 at para 54.

[14] In reviewing the reasonableness of the Decisions, the Court must approach the Decisions with "respectful attention" and consider each Decision "as a whole": *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, at paras 84–85 [***Vavilov***]. The Court's overall focus will be upon whether the Decisions are appropriately justified, transparent and intelligible. In other words, the Court will consider whether it is able to understand the basis upon which the Decisions were made and then determine whether they fall "within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law": *Vavilov*, at paras 86 and 97, quoting *Dunsmuir v New Brunswick*, 2008 SCC 9, at para 47.

[15] A decision which is appropriately justified, transparent and intelligible is one that reflects "an internally coherent and rational chain of analysis" and "is justified in relation to the facts and the law that constrain the decision maker": *Vavilov*, at para 85; *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21, at para 8 [***Mason***]. The decision should also reflect that the decision maker "meaningfully grapple[d] with key issues or central arguments raised by the parties": *Vavilov*, at para 128.

[16] It is not the role of the Court to make its own determinations of fact, to substitute its view of the evidence or the appropriate outcome, or to reweigh the evidence. The Court's function is solely to assess whether the decision maker's determinations and reasoning were unreasonable, having regard to the relevant legal and factual constraints: *Vavilov*, at paras 83, 99 and 125-126; *Mason*, at paras 62 and 66.

VI. Assessment

A. *Were Mr. Semler's procedural fairness rights breached by the officer or the Respondent?*

[17] Mr. Semler maintains that the CRA's online description of the eligibility criteria for the CRB and CERB programs did not stipulate that income from capital gains is not eligible.

[18] However, after being apprised of the CRA's position on this issue, Mr. Semler was provided with an opportunity to resubmit his 2019 income tax return. He did so, and ultimately reported $7,189 in net self-employment income. This was acknowledged by the Officer. Consequently, I reject Mr. Semler's position that he was somehow prejudiced by the lack of clarity on the CRA's website, regarding the CRA's position in relation to income from capital gains.

[19] I pause to note that the Officer proceeded to make determinations that did not turn on this issue. As noted at paragraph 10 above, the basis of the Decisions was that "Covid was not the reason [Mr. Semler's] day-trading income was reduced." I will return to this issue in part VI.B of these reasons below.

[20] Mr. Semler also maintains that he was somehow prejudiced by the fact that the Respondent did not file an affidavit in this matter. In support of his position, Mr. Semler notes that this Court's website states that a Respondent "must serve *any* affidavit(s) and supporting material upon the applicant and file proof of service with the Registry within 30 days after service of the applicant's affidavit(s)" (emphasis added). This statement is based on Rule 307 of

the *Federal Courts Rules*. However, this Rule simply applies to any affidavit that a Respondent may wish to file. A Respondent is not required to file an affidavit: *Merck Frosst Canada Inc. v Canada (Minister of National Health and Welfare)*, [1994] FCJ No 692, at pp 19-20; *Sosiak v Canada (Attorney General)*, 2003 FCA 205, at para 17. This explains the use of the word *any* in the passage on the Court's website, quoted above. Therefore, Mr. Semler's procedural fairness rights were not violated by the Respondent's failure to file an affidavit in this matter.

[21] As a result of numerous telephone calls with the Officer, Mr. Semler knew the case he had to meet and was given multiple opportunities to do so.

B. *Were the Decisions with respect to Mr. Semler's eligibility for CRB and CERB benefits reasonable?*

[22] Mr. Semler maintains that the Decisions were unreasonable because it is common sense not to sell stocks at a loss.

[23] In support of this position, Mr. Semler swore an affidavit in which he stated that, following the outbreak of the COVID-19 pandemic, "[t]he Dow Jones fell 34% below 19,000 points and the market was flat." He added: "[w]hen the stock market hits record lows you can not sell your stocks at a loss, therefore it is a waiting game and you stop working and thus your income and working hours are reduced."

[24] The computer notes that form part of the Decisions reflect that the Officer pressed Mr. Semler on this issue. Those notes record that Mr. Semler recognized that "[the market] has to be

a little bit volatile for people to make money off of it." He also noted that "you don't know where the peak and valley is, it's like a guessing game." However, he also "explained [that] the market dropped and 'really fluctuated.'" After characterizing the market as having been "mediocre," he acknowledged that "Covid didn't break my fingers," that he was "gun-shy" and "hoping the markets drop again to that level to buy in and make some money."

[25] Based on the foregoing, the Officer made the following findings:

> The stock market remained open and accessible during the pandemic and did not flatline. [Mr. Semler] was clearly aware of the market's volatile nature and voluntarily decided to lower or cease the amount of trading [he] participated in due to his personal apprehension. Covid did not impede [his] ability to participate in trading.
>
> Based on the available information it is clear Covid was not the reason [Mr. Semler's] day-trading income was reduced.

[26] In my view, the findings reflected in the quoted passage immediately above were not unreasonable. Approaching the Officer's reasons with "respectful attention," and considering them "as a whole," I find that they were appropriately justified, transparent and intelligible. I am able to understand the basis upon which the Decisions were made, and satisfy myself that the reasoning pathway reflects "an internally coherent and rational chain of analysis."

[27] The Decisions are also "justified in relation to the facts and the law that constrain the decision maker." Mr. Semler recognized the prospects for making money off the stock market when there is a degree of volatility. He also acknowledged that the market had "really fluctuated" during the period in question. However, because trading is somewhat of a "guessing

game," he preferred to wait on the sidelines, in the hope that "the markets drop again to that level to buy in and make some money."

[28] During the hearing of this Application, Mr. Semler acknowledged that "maybe he did say" the things quoted above. He explained that he "was a little bit rattled" and "nervous." Be that as it may, it was not unreasonable for the Officer to have relied on his own statements in reaching the Decisions.

[29] Although one of the formal Decisions dated May 15, 2023 used the terms "due to COVID-19," rather than the statutory language "for reasons related to COVID-19," I find that the Officer understood and applied the proper test in both of the Decisions. This is reflected in the discussion above.

[30] I acknowledge that the particular facts of Mr. Semler's situation were such that it may also have been reasonably open for the Officer to conclude that he stopped trading for reasons related to the COVID-19 pandemic. However, that is not the test to be applied by this Court on judicial review: *Canada (Citizenship and Immigration) v. Khosa*, 2009 FCA 12, at para 59; *Mason*, at para 79. The test is whether the Decisions actually made by the Officer were unreasonable.

[31] Mr. Semler also takes issue with the manner in which the Officer dealt with his income from his handyman business. However, Mr. Semler did not provide any documentation whatsoever to support the earnings he claimed to receive from that business. Consequently, it

was reasonably open to the Officer to conclude that he had not established that his income from handyman services met the requirements of the CRB Act or the CERB Act, because that income "was sporadic in nature and records did not exist."

VII. Conclusion

[32] For the reasons set forth above, this Application is dismissed.

[33] The Respondent did not request costs and none will be ordered.

JUDGMENT in T-1218-23

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. This Application is dismissed.

"Paul S. Crampton"
Chief Justice

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1218-23
STYLE OF CAUSE:	CYRIL GREGORY SEMLER v CRA
PLACE OF HEARING:	VANCOUVER, BC
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APPEARANCES:

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Kristina Mansveld	FOR THE RESPONDENT CANADA (ATTORNEY GENERAL)

SOLICITORS OF RECORD:

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