Federal Court Cour fédérale

Date: 20240606

Docket: T-2084-23

Citation: 2024 FC 859

Ottawa, Ontario, June 6, 2024

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

MARIE-ISABELLE FOURNIER

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Ms. Marie-Isabelle Fournier, applied for and received the Canada Emergency Response Benefit [CERB] and the Canada Recovery Benefit [CRB] during the COVID-19 pandemic [together the Benefits]. Subsequently, a Canada Revenue Agency [CRA] officer concluded that she was not eligible for the Benefits. The Applicant requested a second

review, and in decisions dated September 1, 2023, a CRA officer [Officer] again concluded that she was not eligible [Decisions]. The Applicant seeks judicial review of these Decisions.

[2] The Respondent concedes that the Decisions are unreasonable and were made in a procedurally unfair manner. The Respondent therefore concedes that the Decisions should be quashed and the matters re-determined. However, the Applicant also argues that the Officer was biased, a position that the Respondent disputes, and the Applicant takes the position that the Court should quash the Decisions and exercise its discretion to instruct the decision-maker that she is eligible for the Benefits.

[3] As explained in greater detail below, this application is allowed, because the Decisions are unreasonable and the Applicant was deprived of procedural fairness. However, I have not found bias or a reasonable apprehension of bias on the part of the Officer. By way of remedy, the Court will quash the Decisions and return them to a different CRA officer for redetermination, after the Applicant has been afforded an opportunity to provide further evidence and submissions.

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 submits she was prevented from working in March 2020 and beyond for reasons related to COVID-19. She 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 initially sent a letter dated July 12, 2022, to the Applicant, requesting documentation to support her eligibility for the CRB. On August 26, 2022, CRA sent a second letter to the Applicant, indicating that the July 12, 2022 letter had been sent in error, and requested documentation to support her eligibility for both the CERB and CRB. In response, the Applicant submitted documentation including her 2019, 2020 and 2021 tax information slips.

[7] By correspondence dated January 6, 2023, CRA informed the Applicant that she was not eligible for the CERB and CRB, as she had not earned the required minimum employment or self-employment income of $5000 in the relevant periods prior to the date of her application. The Applicant was advised that she could seek a second review of those decisions by another CRA officer.

[8] The Applicant requested a second review in a letter dated January 27, 2023. In this letter, the Applicant explained that her income for 2019 was over $5,000, that she had received a T4A form in relation to some of that income even though her income was earned through employment, and that the COVID-19 pandemic had prevented her from finding employment. The Applicant also explained other health issues that she had been experiencing.

[9] On May 25, 2023, the Applicant had a telephone conversation with a CRA officer, in which the Applicant stated she had not returned to work since March 2020 due to health reasons. The Applicant also stated she had earned $6,480 of total income in 2019. The officer identified that total income is different from employment income. However, the Applicant explained to the officer that the income noted in Box 28 of her T4A for 2019 was earned through employment income as part of a government program.

[10] On June 21, 2023, following receipt of additional submissions by the Applicant, CRA advised the Applicant that she was ineligible for the CERB and CRB as she did not meet the $5,000 of employment income needed for the Benefits. In July 2023, the Applicant filed an application for judicial review of the June 21, 2023 decision. The parties subsequently settled that application, agreeing that the matter be sent back to the CRA for redetermination.

[11] On August 23, 2023, the Applicant had a phone call with the Officer who would be reviewing her CERB and CRB eligibility. During this call, the Applicant discussed with the Officer, among other things, the Applicant's T4 and T4A for 2019. The T4 showed $0 earnings and $0 deductions, and the T4A showed $2248 in Box 28 as "other income." The Officer stated that Box 28 income is not valid for purposes of CERB and CRB eligibility. The Applicant advised the CRA officer that the T4A was incorrect, and the Officer explained that, if the Applicant believed the T4A to be incorrect, it would be necessary for her to have her employer correct it. The Applicant also stated that she could provide to CRA additional information related to that employment, and the Officer advised that, if this information was required, they would call the Applicant back to advise her to upload that information.

[12] On September 1, 2023, CRA issued the Applicant the letters conveying the Decisions that she was ineligible for the CERB and CRB. The Officer determined that the Applicant was ineligible for the CERB as she had not earned at least $5,000 (before taxes) of employment or self-employment income in 2019, 2020, or in the 12 months before the date of her first application, and because she was not working for reasons unrelated to COVID-19. She was determined to be ineligible for the CRB because she did not earn at least $5,000 (before taxes) of employment or net self-employment income in 2019, 2020, or in the 12 months prior to her first application, because she was not working for reasons unrelated to COVID-19, and because she did not have a 50% reduction in her average weekly income compared to the previous year due to COVID-19.

[13] These Decisions are the subject of this application for judicial review.

III. Issues and Standard of Review

[14] The Applicant's written submissions identify the following list of issues for the Court's determination:

> A. Whether the Officer erred in finding that the Applicant did not earn more than $5000 before taxes in 2019; and
>
> B. Whether the CRA erred in finding that the Applicant did not stop working for reasons related to COVID-19.

[15] These issues, which relate to the merits of the Decisions, are reviewable on the reasonableness standard (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 23 [*Vavilov*]). The Applicant takes the position that the Court should apply the standard of correctness. However, she has advanced no argument as to why the reasonableness

standard should not apply pursuant to the principles explained in *Vavilov*. I interpret her position on the standard of correctness to reflect her argument that, by way of remedy, the Court should determine her eligibility for benefits rather than returning the matter to another CRA officer for such determination. I will turn to the question of the appropriate remedy later in these Reasons.

[16] The Applicant's written and oral submissions also advance procedural fairness arguments, to the effect that the Officer did not afford her an opportunity to provide information that would have demonstrated that she earned more than the required $5000 from employment and that the cessation of her employment was attributable to the pandemic. Issues of procedural fairness are subject to judicial scrutiny to ensure that a fair and just process was followed, an exercise best reflected in the correctness standard even though, strictly speaking, no standard of review is being applied (*Canadian Pacific Railway Company v Canada (Transportation Agency)*, 2021 FCA 69 at paras 46-47).

[17] The Applicant also argues that the record demonstrates bias on the part of the Officer who made the Decisions. In addition to demonstrating actual bias, an applicant may succeed in judicial review by demonstrating a reasonable apprehension of bias. The test for a reasonable apprehension of bias requires an applicant to establish that a reasonable and informed person, viewing the matter realistically and practically—and having thought the matter through—would conclude that it is more likely than not that the decision-maker, whether consciously or not, would not decide the matter fairly (*Committee for Justice and Liberty v National Energy Board*, [1978] 1 SCR 369 at 394, as cited in *Baker v Canada (Minister of Citizenship and Immigration)*, [1997] 2 SCR 817 at para 46).

[18] Finally, the Respondent has identified, as a preliminary issue, the question whether the Applicant should be permitted to introduce in this application evidence that was not before the Officer when the Decisions were made.

IV. Analysis

A. *Preliminary Issue: New Evidence*

[19] The Respondent argues that the Applicant has included materials in her Application Record that were not before the decision-maker, that this evidence is therefore improperly before the Court on judicial review, and that it should not be considered.

[20] The general rule is that the evidentiary record before a court on judicial review is restricted to that which was before the tribunal (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 19). This principle applies where judicial review is sought of a CRA decision relating to CERB and CRB benefits (see, e.g., *Vetrici v Canada (Attorney General)*, 2024 FC 602 [*Vetrici*] at para 5).

[21] However, as explained in *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128 [*Tsleil-Waututh Nation*] at paragraphs 97-98, there are exceptions to this general rule, principally in the following circumstances:

> A. Sometimes the Court will receive an affidavit that provides general background in circumstances where that information might assist it in understanding the issues relevant to the judicial review;
>
> B. Sometimes an affidavit is necessary to bring to the attention of the Court procedural defects that cannot be found in the

evidentiary record of the administrative decision-maker, so that the judicial review court can engage in meaningful review for procedural unfairness; and

C. Sometimes an affidavit is received on judicial review in order to highlight the complete absence of evidence before the administrative decision-maker when it made a particular finding.

[22] In the case at hand, the Applicant filed her Affidavit dated October 24, 2023 [Affidavit] principally for purposes of introducing several exhibits into evidence. The Respondent argues that certain exhibits and related paragraphs of the Affidavit represent new evidence that does not fall within any of the recognized exceptions described above. At the hearing of this application, the Respondent conceded that one of those exhibits (Exhibit 10 and related paragraph 9 of the Affidavit) are indeed found in the Certified Tribunal Record. The remaining exhibits and paragraphs challenged by the Respondent are as follows:

A. Screenshots of the *Employment Insurance Act*, SC 1996, c 23 [*EIA*] from the Government of Canada website (Affidavit, paragraph 3, and Exhibit 2);

B. The Applicant's notes from her phone calls with the CRA on May 25, 2023 and August 23, 2023 (Affidavit, paragraph 6, and Exhibit 7);

C. Email correspondence between the Applicant and third parties between February 22, 2019, and January 8, 2022; and a letter from WorkBC Centre indicating that the income received and reported in Box 28 of the Applicant's T4A represented financial support for participating in a Job Creation Partnership and not a fee for service that could be entered into Box 48 (Affidavit, paragraph 7, and Exhibit 8);

D. Email correspondence between the Applicant and her landlord, indicating a notice to end tenancy dated August 2020 (Affidavit, paragraph 8, and Exhibit 9);

E. Correspondence from CRA, providing a goods and services tax/harmonized sales tax and BC climate action tax credit

notice for the payment period of July 2023 to June 2024 (Affidavit, paragraph 10, and Exhibit 11);

F. Correspondence from CRA, providing a goods and services tax/harmonized sales tax notice for the payment period of July 2022 to June 2023 (Affidavit, paragraph 11, and Exhibit 12); and

G. A news article dated November 17, 2020 (Affidavit, paragraph 13, and Exhibit 14);

[23] The Applicant has advanced no submissions to establish that the evidence identified in subparagraphs D, E, F and G above was before the Officer or that any of the exceptions described in *Tsleil-Waututh Nation* apply. As such, the Court will disregard that evidence. However, I would note that, as Justice Gleeson found in *Vetrici* at paragraph 7, even evidence excluded from consideration by the Court in this judicial review application may be placed before any decision-maker responsible for re-determining these matters.

[24] I am also prepared to disregard the evidence identified in subparagraph A above (Affidavit, paragraph 3, and Exhibit 2), which represents excerpts from legislation that the Applicant argues is applicable. I agree with the Respondent that legislative authorities properly belong in a list of authorities rather than in an affidavit. That said, to the extent legislation is relevant to the Court's determination of this matter, it can be taken into account without having been included in the Applicant's materials.

[25] I am not prepared to disregard the evidence identified in subparagraph B above (Affidavit, paragraph 6, and Exhibit 7), which represents the Applicant's notes of her calls with the CRA officers. While the notes themselves were not before the Officer, the contents of those calls were. As such, without arriving at any conclusions as to the accuracy of the Applicant's

notes, I am satisfied that it is not appropriate to exclude them from the evidentiary record in this application.

[26] I am also not prepared to disregard the evidence identified in subparagraph C above (Affidavit, paragraph 7, and Exhibit 8), which represents the Applicant's communications with various third parties. At the hearing, the Applicant emphasized in particular an April 1, 2020 email to her from her then employer, referring to the virus problem having slowed down the employer's production, and an undated communication from Naksup Work BC Centre, describing her participation in a Job Creation Partnership program in April and May 2019, pursuant to which she received financial support that was reported on Box 28 of her T4A.

[27] The Applicant acknowledges that this evidence was not before the Officer. However, she submits that this was evidence that she wished to place before the Officer, relevant to the bases on which she was found ineligible for Benefits, and that the Officer deprived her of an opportunity to do so. I am satisfied that this evidence falls within the *Tsleil-Waututh Nation* exception applicable to evidence relevant to a procedural fairness argument.

B. *Reasonableness of the Decisions*

[28] The Applicant's primary position on the reasonableness of the Decisions is that the income that had been reported in Box 28 of her 2019 T4A should be considered as contributing to the required $5,000 for CERB and CRB eligibility. She submits that she was employed with an organization called Kootenay Adaptive Sport Association, as a result of her participation in a Job Creation Partnership program, and that the income she received represented financial support

funded through that partnership. The Applicant submits that the *EIA* provides that employment support measures, such as partnerships related to helping workers to prepare for, obtain or keep employment and to be productive participants in the labour market, represent earnings from employment (sections 26 and 59(d)).

[29] The Respondent's submissions do not engage with this particular argument. Rather, the Respondent acknowledges that the Decisions do not provide reasons why the income claimed in Box 28 of the Applicant's 2019 T4A does not meet the requirements to support eligibility for the Benefits. I accept the Respondent's concession, as the Decisions do not explain why the Officer concluded that the relevant income did not support eligibility, either through consideration of the *EIA* or otherwise. As such, the Decisions are not reasonable, as they do not demonstrate the intelligibility required by *Vavilov*.

C. *Procedural Fairness*

[30] The Respondent also concedes that, as the Applicant argues, the Officer did not afford her an opportunity to provide additional evidence or submissions following their August 23, 2023, notwithstanding express references in the Officer's notes to providing such an opportunity. I agree with the Respondent's concession that the record supports the Applicant's argument that she was deprived of the requisite procedural fairness.

D. *Bias*

[31] In support of her position that the Officer was biased and intent on finding that she was not eligible for Benefits, the Applicant relies on the Officer's failure to provide her an opportunity to provide the evidence supporting her eligibility that she referred to in their August 2023 telephone conversation. As explained above, this failure represents a lack of procedural fairness. However, it does not support a conclusion that the Officer was biased or (applying the test articulated earlier in these Reasons) give rise to a reasonable apprehension of bias.

[32] The Applicant notes that the Decisions added an additional basis for finding her ineligible (*i.e.*, that she was not working for reasons unrelated to COVID-19) that had not been included in earlier CRA decisions on her eligibility. However, I agree with the Respondent that, upon a redetermination of an administrative decision, it is potentially available to the decision-maker to identify different or additional reasons for a decision. This aspect of the Decisions does not support a conclusion of bias or give rise to a reasonable apprehension of bias.

[33] The Applicant also identifies elements of the record that demonstrate the Officer considering aspects of her employment or self-employment history and claims for employment insurance benefits preceding 2019. She submits that this history is irrelevant to her eligibility for the Benefits and demonstrates a zeal on the part of the Officer to find a basis to conclude that she is ineligible. The Respondent argues that such history is relevant to assessing whether a reduction in an applicant's income is consistent with historical fluctuations, rather than attributable to the pandemic. I accept the logic of that argument. Although it is difficult to

determine from the Decisions themselves that the Officer was conducting an assessment of this sort, I agree with the Respondent that the Officer's consideration of aspects of the Applicant's pre-2019 history does not support the inference that the Applicant wishes the Court to draw.

[34] The Applicant refers to the Officer's notes (that appear to be dated August 30, 2023) that reference other CRA agents having attempted to explain to the Applicant that only certain sorts of income support eligibility for Benefits, as well as the Applicant having hung up on these agents. The Applicant disputes that these events occurred. The record before the Court does not allow for a determination as to which version of events should be preferred and, in my view, does not in any event support an inference of bias or reasonable apprehension of bias on the part of the Officer.

[35] In the same notes, the Officer describes the Applicant as having stated that she was let go from her 2020 employment because her help was no longer needed, as sales had dropped. The Applicant submits that this is inaccurate and that she did not make such a statement. The Applicant instead refers the Court to the April 1, 2020 email to her from her employer (referenced earlier in these Reasons), which describes the virus problem having slowed down the employer's production. Again, the record before the Court does not allow for a determination as to exactly what the Applicant told the Officer as to the circumstances that led to the end of her 2020 employment. However, I note that the April 1, 2020 email is consistent with a conclusion both that the Applicant's 2020 employment ended because the employer's sales had dropped and that such drop in sales was attributable to the pandemic. Regardless, I again find that the record

does not support an inference of bias or reasonable apprehension of bias on the part of the Officer.

[36] The Applicant also argues that the Respondent's counsel's role in negotiating a settlement of her last judicial review application, followed by another negative determination of her eligibility, demonstrates an intention on the part of the Respondent and the Respondent's counsel to prevent the Applicant from presenting her case to the Court. I find no merit to this submission. It is entirely appropriate for legal counsel to make efforts to resolve litigation, particularly in a circumstance where counsel for an administrative decision-maker concludes that the decision-maker has committed a reviewable error.

[37] Finally, in her reply submissions at the hearing, the Applicant emphasized in particular that the Officer's August 30, 2023 notes end with an entry reading "Denial letter sent date: to be determined." The Applicant argues that this reference to a denial letter is inconsistent with the immediately preceding lines in the notes, which state that the review is continuing and that the decision is yet to be determined, and therefore suggests a predetermination that the Decisions would be negative.

[38] As the Applicant raised this last argument only in reply, the Court does not have the benefit of a response from the Respondent. While I understand the point the Applicant is raising, I am also conscious of the guidance by the Supreme Court of Canada that the threshold for establishing bias is a high one (*R v RDS*, [1997] 3 SCR 484 at para 113). Particularly given the advanced stage of the decision-making process when it appears that the Officer's notes were

authored, the Court is not prepared to infer a bias or a reasonable apprehension of bias based on this language in the notes.

[39] In conclusion on this issue, I find no bias or reasonable apprehension of bias on the part of the Officer.

E. *Remedy*

[40] While the Applicant has not succeeded in advancing her bias arguments, I have found that the Decisions are unreasonable and deprived her of procedural fairness. As such, consistent with the Respondent's concession, this application for judicial review will be allowed.

[41] By way of remedy, the Respondent submits that the Court should quash the Decisions and refer the matter to a different CRA officer for redetermination. However, the Applicant instead asks the Court to consider her arguments surrounding her eligibility for Benefits and come to a different conclusion than the Officer. I note that I understand her to be requesting this relief regardless of her success on the bias issue. Indeed, even if I had found bias on the part of the Officer, this would not necessarily have precluded returning the matter to a different CRA officer.

[42] The relief the Applicant requests is not the typical role of the Court on judicial review (*Vavilov*, para 125). Rather, the typical remedy is for the Court to remit the matter back to the Minister (in practical terms, a different CRA officer) for reconsideration (*Vavilov*, at para 141; *Linklater v Thunderchild First Nation*, 2020 FC 1065 at para 48; *Sexsmith v Canada (Attorney*

General), 2021 FCA 111 at para 39). However, there are limited circumstances where remitting a matter to the administrative decision maker would not be an appropriate remedy. In *Vavilov* at paragraph 142, the Supreme Court of Canada explained:

> a. that the legislature's intention to entrust a matter to an administrative decision-maker "cannot give rise to an endless merry-go-round of judicial reviews and subsequent reconsiderations";
>
> b. that in exercising discretion as to whether to refer a matter back to the decision-maker, a reviewing court should consider whether the decision-maker had a genuine opportunity to weigh in on the issue in question; and
>
> c. that, where a particular outcome is inevitable, remitting a matter to the decision-maker serves no useful purpose.

[43] Against that jurisprudential backdrop, the discretionary power to direct a specific outcome following judicial review is a discretion that should be exercised in rare cases and with restraint *(Labrosse v Canada (Attorney General)*, 2022 FC 1792 at paras 39-40).

[44] In the case at hand, I find no basis to depart from the usual remedy. I appreciate that this matter has already been sent back to CRA for a redetermination, following the 2023 settlement of the Applicant's first application for judicial review. However, these circumstances cannot at this stage be characterized as an endless merry-go-round of judicial reviews and subsequent reconsiderations.

[45] Moreover, I am not satisfied that a specific outcome in this matter is inevitable, particularly as the administrative decision-maker has not yet had a genuine opportunity to weigh in on the issues in question. The decision-maker has not had the benefit of the additional evidence that the Applicant considers to support her eligibility for Benefits, including in

particular her 2020 employer's explanation of the pandemic's effect upon their business and the documentation explaining the nature of the program through which she was receiving income in 2019. This evidence may inform the decision-maker's consideration of the Applicant's arguments based on the provisions of the *EIA*.

[46] I recognize that it was because the decision-maker did not afford the Applicant the opportunity to provide this evidence that it did not have the benefit of the evidence. However, these facts support the Court's finding on procedural fairness and the decision to grant this application for judicial review, rather than a conclusion that the Applicant's eligibility should not be determined by CRA at first instance as is the usual course.

[47] My Judgment will therefore set aside the decision and refer to the matter back to another CRA officer for redetermination, after the Applicant is afforded an opportunity to provide further evidence and submissions.

V. Costs

[48] The Applicant claims costs of this application and has identified four categories of costs that she submits should be awarded to her: (a) $3000.00 in additional Benefits of which she says she was deprived as a result of the Decisions; (b) $75.00 that has been garnished by CRA as a result of amounts owing due to the Decisions; (c) $1000.00 that the Applicant was required to repay to the British Columbia Minister of Finance, related to provincial benefits for which the Applicant lost eligibility as a result of the Decisions; and (d) $334.40 in costs related to filing

fees, notarization of documents, and travel, incurred in connection with this application for judicial review.

[49] The Respondent has explained that it is not seeking costs of this application, regardless of its outcome. Rather, notwithstanding that the Applicant has not prevailed on the issues related to bias or remedy (which, other than costs, were the only issues that necessitated the hearing before the Court), the Respondent accepts that the Applicant should receive costs, because the application is being granted on grounds of review that the Respondent has conceded.

[50] However, the Respondent takes the position that only the last category of costs claimed by the Applicant is probably claimable as costs of this application. I agree with the Respondent's position. The other categories appear to flow from the Decisions, and it may be that the Applicant will receive those amounts if she obtains favourable redeterminations of her eligibility for Benefits. In contrast, the $334.40 figure represents costs incurred by the Applicant in pursuit of this application. While she has not provided evidence in support of that figure, the Respondent has accepted it, and I am therefore prepared to include a costs award of that amount in my Judgment.

JUDGMENT IN T-2084-23

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is allowed, the Decisions are quashed, and these matters are returned to a different CRA officer for redetermination, after the Applicant is afforded an opportunity to provide further evidence and submissions.
2. The Applicant is awarded costs of this application in the all-inclusive amount of $334.40.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2084-2
STYLE OF CAUSE:	MARIE-ISABELLE FOURNIER v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	VIA VIDEOCONFERENCE
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DATED:	JUNE 6, 2024

APPEARANCES:

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