

Federal Court



Cour fédérale

Date: 20240115

Docket: T-1050-23

Citation: 2024 FC 54

Ottawa, Ontario, January 15, 2024

PRESENT: Madam Justice Walker

BETWEEN:

MARIANA POLONYOVA

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Background

[1] The Applicant, Mariana Polonyova, was training to become a medical esthetician and bridal makeup artist at George Brown College in Toronto when she decided to take a break from school in July 2019, in part to obtain practical experience as a skin therapist.

[2] Ms. Polonyova obtained a job at a local spa and worked there from August 2, 2019 to September 10, 2019. At the beginning of 2020, she opened her own mobile spa and was able to

attract some initial clients. She also worked as a freelance bookkeeper during the period January-March 2020.

[3] When Ontario entered its first shut-down in March 2020 in response to the COVID-19 pandemic, Ms. Polonyova found herself without a job and unable to return to school as her college had suspended operations. She was, however, able to attract a few clients to her mobile spa in June 2020 and to obtain employment as a part-time bookkeeper (July-September 2020).

[4] Ms. Polonyova was laid off from her bookkeeping job in September 2020 and applied for the Canada Recovery Benefit (CRB) for nine two-week periods from September 27, 2020 to January 30, 2021. Her application was blocked at period 9 but it appears she was subsequently able to request the remaining permitted two-week periods.

[5] The CRB program was and is administered by the Canada Revenue Agency (CRA). It was part of a package of measures taken by the federal government in 2020 in response to COVID-19 and was a successor to the Canada Emergency Relief Benefit program. The CRB was a targeted monetary payment aimed at providing financial support to workers who suffered a loss of income as a result of the pandemic.

[6] A CRA agent undertook a first review of Ms. Polonyova's eligibility for the CRB in early 2021 and determined she was ineligible for the benefit because she had not earned at least \$5,000 (before taxes) of employment or self-employment income in 2019, 2020, or the 12 months prior to the date of her first application. Ms. Polonyova requested a second review but that too was

denied for three reasons: she had not met the minimum revenue threshold, was not working for reasons unrelated to COVID-19, and had not experienced a 50% reduction in her average weekly income compared to the previous year due to COVID-19. The initial second review decision was set out in a December 7, 2021 letter.

[7] Ms. Polonyova requested judicial review of the December 7, 2021 decision (T-1974-21) but, prior to its adjudication, her application for judicial review was discontinued and the CRA undertook a further second review of her eligibility for the CRB.

[8] On December 12, 2022, the CRA refused Ms. Polonyova's CRB application in part. A third CRA agent found her ineligible for the CRB for Periods 1 and 9 (September 27 - October 10, 2020 and January 17 - January 30, 2021) because she did not have a 50% reduction in her average weekly income compared to the previous year due to COVID-19.

[9] Ms. Polonyova requested judicial review of December 12, 2022 decision (T-33-23) but again agreed to discontinue her application pending what would be the fourth determination of her eligibility by a CRA agent (the Agent).

[10] The Agent reviewed Ms. Polonyova's income and deductions for the 2019 - 2021 taxation years, her T1 data for the period 2008 to 2021 and her eligibility overview, all as recorded in the CRA's computer systems. The Agent also considered Ms. Polonyova's submissions in support of her CRB application and spoke with her by telephone on each of March 29, 2023 and April 4, 2023.

[11] The Agent prepared a second review report (the Report) that sets out the information consulted, her notes from the two telephone calls and her analysis of Ms. Polonyova's income and reductions in income over the 2019 - 2021 period.

[12] The Report forms part of the reasons for the Decision (*Cozak v Canada (Attorney General)*, 2022 FC 1351 at para 23). The Report is important in this application because it contains the Agent's income reduction calculations that resulted in the denial of Ms. Polonyova's CRB benefits.

[13] The Agent concluded that Ms. Polonyova:

- (1) was not eligible to receive the CRB for periods 1 and 9-20 because she did not have a 50% reduction in her average weekly income compared to the previous year due to COVID-19; but
- (2) was eligible for the CRB for periods 2-7 and 21-28.

[14] The Agent's decision was communicated to Ms. Polonyova in letter form on May 10, 2023 (the Decision).

[15] Ms. Polonyova now seeks judicial review of the Decision. She submits that the Agent failed to consider all of the documentation she submitted to the CRA and wrongfully denied her COVID-19 benefits. She questions whether the Agent misunderstood the facts and did not fully understand certain expressions used in payroll documents.

[16] For the reasons that follow, Ms. Polonyova's application for judicial review is allowed in part.

II. Analysis

[17] I will first address two preliminary questions. First, Ms. Polonyova states in her memorandum that she was not able to apply for the Canada Worker Lockdown Benefit (CWLB) due to the denial of her CRB benefits. However, as I noted at the hearing, the Court's role in this application is limited to reviewing the Decision against the legal constraints and factual record before the Agent. As a result, any issue regarding the CWLB is not before me and has not been considered.

[18] Second, and in the same vein, the Respondent objects to certain portions of the affidavit and additional evidence filed by Ms. Polonyova because they were not before the Agent. The Respondent relies on the well-established principle that the Court is not to re-decide the merits of the Agent's conclusions on judicial review; it is not the forum for fact-finding. That role is reserved to the decision maker (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras 18-19 (*Access Copyright (2012)*)). In light of its role as a reviewing court, the record before the Court on judicial review is generally restricted to the evidentiary record that was before the decision-maker subject to limited exceptions (*Access Copyright (2012)* at paras 19-20). In this case, Ms. Polonyova's additional evidence consists of information that was already in the CRA's systems in some form, including tax return information, her Notice of Assessment for 2021, the various CRA decisions in her file, and the CRB eligibility criteria. The evidence adds no substantive information to the

material before the Agent and does not affect my review of the Decision. It is not necessary for me to address the admissibility of that evidence or the relevance of the limited exceptions to the admission of new evidence on judicial review. In the interests of streamlining this judgment and highlighting the points critical to the parties, I will not do so.

[19] The central question before the Court is whether the Agent's conclusion that Ms. Polonyova was not eligible for the CRB for periods 1 (September 27, 2020 – October 10, 2020) and 9-20 (January 17, 2021 – July 3, 2021) is reasonable.

[20] When the Court reviews an administrative decision for reasonableness, its role is to examine the reasons given by the decision maker and to determine whether the decision “is based on an internally coherent and rational chain of analysis” and is “justified in relation to the facts and law that constrain the decision maker” (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 10, 85 (*Vavilov*); *Flock v Canada (Attorney General)*, 2022 FC 305 at para 15). The burden is on Ms. Polonyova to show that there are sufficient central shortcomings or flaws in the Decision such that it cannot be said to be justified, intelligible and transparent (*Vavilov* at para 100).

[21] The CRB legislative framework is set out in the *Canada Recovery Benefits Act*, SC 2020 c 12, s 2 (the Act). The CRB was available to eligible taxpayers for a maximum number of two week periods and contemplated benefits of between \$300 and \$500 per week, before tax (sections 7 to 9). Subsection 3(1) of the Act sets out the eligibility criteria for the CRB. A taxpayer was required to satisfy each of the criteria in the subsection for each two-week period

for which they requested the CRB. Paragraph 3(1)(d) of the Act required Ms. Polonyova to demonstrate income from employment and self-employment of at least \$5,000 during certain 12-month periods depending on whether she requested the CRB for periods in 2020 and/or 2021. Although this requirement figured in the CRA's first and second reviews of Ms. Polonyova's requests for the CRB, it is not at issue before me.

[22] Paragraph 3(1)(f) of the Act is the relevant provision in this application because it was the basis for the Agent's Decision:

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

...

(f) during the two-week period, for reasons related to COVID-19, other than for reasons referred to in subparagraph 17(1)(f)(i) and (ii), they were not employed or self-employed or they had a reduction of at least 50% or, if a lower percentage is fixed by regulation, that percentage, in their average weekly employment income or self-employment income for the two-week period relative to

Admissibilité

3 (1) Est admissible à la prestation canadienne de relance économique, à l'égard de toute période de deux semaines comprise dans la période commençant le 27 septembre 2020 et se terminant le 23 octobre 2021, la personne qui remplit les conditions suivantes :

...

f) au cours de la période de deux semaines et pour des raisons liées à la COVID-19, à l'exclusion des raisons prévues aux sous-alinéas 17(1)(f)(i) et (ii), soit elle n'a pas exercé d'emploi — ou exécuté un travail pour son compte —, soit elle a subi une réduction d'au moins cinquante pour cent — ou, si un pourcentage moins élevé est fixé par règlement, ce pourcentage — de tous ses revenus hebdomadaires moyens

d'emploi ou de travail à son compte pour la période de deux semaines
par rapport à :

(i) in the case of an application made under section 4 in respect of a two-week period beginning in 2020, their total average weekly employment income and self-employment income for 2019 or in the 12-month period preceding the day on which they make the application, and

(ii) in the case of an application made under section 4 in respect of a two-week period beginning in 2021, their total average weekly employment income and self-employment income for 2019 or for 2020 or in the 12-month period preceding the day on which they make the application;

(i) tous ses revenus hebdomadaires moyens d'emploi ou de travail à son compte pour l'année 2019 ou au cours des douze mois précédant la date à laquelle elle présente une demande, dans le cas où la demande présentée en vertu de l'article 4 vise une période de deux semaines qui débute en 2020,

(ii) tous ses revenus hebdomadaires moyens d'emploi ou de travail à son compte pour l'année 2019 ou 2020 ou au cours des douze mois précédant la date à laquelle elle présente une demande, dans le cas où la demande présentée en vertu de l'article 4 vise une période de deux semaines qui débute en 2021;

[23] Ms. Polonyova first submits that the Agent misapplied the eligibility requirement set out in paragraph 3(1)(f) of the Act because, during the CRB periods for which she was denied benefits, she was unable to provide esthetician services through her mobile spa because of COVID-19 lockdowns in Ontario.

[24] Although I sympathize with Ms. Polonyova as paragraph 3(1)(f) can be difficult to follow, the paragraph effectively requires that, during each CRB period requested, (1) an applicant was not working or self-employed for reasons related to COVID-19, or (2) their average weekly income from employment or self-employment had declined by at least 50% compared to the previous year or 12-month period preceding the date on which they submitted the application, again for reasons related to COVID-19.

[25] The reference in the paragraph to “employed or self-employed” does not create two separate conditions. The French version of the provision better clarifies the requirement, « soit elle n’a pas exercé d’emploi — ou exécuté un travail pour son compte —, soit elle a subi une réduction d’au moins cinquante pour cent ». I am satisfied that Ms. Polonyova was employed during periods 9-20 as a part-time bookkeeper and, therefore, did not satisfy the first condition of paragraph 3(1)(f). The fact that she was not self-employed during these periods due to COVID-19 does not rescue her eligibility.

[26] Paragraph 3(1)(f) also contemplates that a taxpayer may be eligible for the CRB if they were employed or self-employed during the relevant two-week period(s) but nevertheless experienced a 50% (or more) reduction in their average weekly employment income due to COVID-19 when measured against the prior year or relevant 12-month period. I am satisfied that the Agent reasonably calculated Ms. Polonyova’s average weekly income for periods 9-20 as against her average weekly income for the relevant previous periods.

[27] The Agent's precise calculations of whether Ms. Polonyova experienced a 50% reduction in weekly income during periods 9-20 as compared to the prior relevant periods are set out in the Report and are consistent with the evidence. I find no misunderstanding on the part of the Agent of the various documents presented, nor did she overlook relevant evidence. The Agent was required to apply all of the criteria set forth in the Act and she did so without error in respect of periods 9-20. I would also note that Ms. Polonyova was in fact employed from January 1, 2021 to June 30, 2021 by Mr. Mracka and, as stated above, the fact that she was not able to pursue her spa business during that time does not bring her within the requirements of paragraph 3(1)(f).

[28] I find, as a result, that Ms. Polonyova has not established a reviewable error in the Agent's denial of her request for CRB benefits for periods 9-20.

[29] Second, Ms. Polonyova argues that she was neither employed as a bookkeeper nor self-employed during period 1 (September 27, 2020 – October 10, 2020).

[30] The Respondent disagrees and, in oral submissions, stated that the Agent took the position Ms. Polonyova was employed by Eduard Mracka, CPA, as a bookkeeper during CRB period 1 because her final pay period did not end until September 30, 2020, while period 1 began on September 27, 2020. The submission is not reflected in the Decision or in the Report. In the Decision, the Agent states only that, "[y]ou did not have a 50% reduction in your average weekly income compared to the previous year due to COVID-19". There is no reference to Ms. Polonyova's status as employed or self-employed. In the Report, the Agent refers to the Record of Employment (ROE) from Mr. Mracka that lists Ms. Polonyova's last day of

employment with him for 2020 as September 25, 2020 (I note the Agent refers to August 25th but there is no dispute that the ROE reflects September 25, 2020). The ROE also lists the final pay period as having ended September 30, 2020.

[31] I find that the Agent's denial of Ms. Polonyova's application for CRB benefits for period 1 without supporting analysis is not intelligible having regard to the evidence in the record and the words of paragraph 3(1)(f) of the Act. At the risk of repetition, the paragraph contains two criteria and a taxpayer need meet only one. The first requirement is that the taxpayer is not employed or self-employed during the period(s) for which they request CRB benefits. This requirement does not refer to a two-week period during which the taxpayer was not "paid" or that does not fall within a pay period. Ms. Polonyova's employment letter from Mr. Mracka (attached to the Agent's affidavit in the record) states that, "Mariana Polonyova was employed by my company from July 5, 2020 to September 25, 2020. I paid her salary \$1,000 per month." The letter is consistent with the ROE. The fact Ms. Polonyova was paid on a monthly basis for each month worked does not change the end-date of her employment. The Respondent's submission that Ms. Polonyova's pay period had not expired as of September 27, 2020 with the result that she was employed on that date for purposes of paragraph 3(1)(f) is not persuasive.

[32] Only if a taxpayer is not employed or self-employed, presumably receiving no income, does the second criteria come into play. In other words, even if the taxpayer was employed or self-employed during the relevant CRB period, if they nevertheless suffered a 50% (or more) reduction in their average weekly income for the period due to COVID-19 relative to the applicable prior period, they satisfy paragraph 3(1)(f) of the Act.

[33] The Agent's determination that Ms. Polonyova continued to work (as per the Respondent) or that her pay period extended until September 30, 2020 affected the analysis of whether Ms. Polonyova suffered the required 50% reduction in average weekly income during period 1. In their response to a series of questions submitted by Ms. Polonyova, the Agent stated that she calculated the 50% requirement for period 1 relying on the fact that the pay period for September 2020 extended to September 30th. The Agent concluded that Ms. Polonyova made \$142.84 during period 1 (September 27-October 10, 2020) and did not have a 50% reduction in her average weekly income as compared to the previous year. The Agent does not appear to consider that Ms. Polonyova was not employed as of September 25, 2020 and, therefore, actually received no income in respect of September 27, 2020-October 10, 2020. Hypothetically, if unlikely, Mr. Mracka could have decided to pay his employees every second month, with the result that Ms. Polonyova's final pay period would have ended on October 31, 2020. In such case, it appears clear that the Act was not designed to prevent a taxpayer from receiving the CRB for additional periods due to the vagaries of their employer's pay practices.

[34] The Agent did not explain in the Decision or Report the importance of the end date of Ms. Polonyova's final pay period with Mr. Mracka for purposes of the 50% decline in income calculation. I find that this second shortcoming or flaw in the Decision, when added to the absence of any consideration of her actual employment status, is significant as it materially undermines the justification for the Agent's conclusion regarding period 1. As a result, the Decision will be set aside with respect to the Agent's denial of CRB benefits for Ms. Polonyova for period 1.

III. Conclusion

[35] In summary, I find that the Agent's denial of CRB benefits for Ms. Polonyova for period 1 of the CRB is not intelligible or justified and will set aside the Decision as it pertains to that period. I direct that the CRA conduct an independent review of Ms. Polonyova's evidence of her employment status as of September 27, 2020 and explain its ultimate conclusion to her as expeditiously as possible.

[36] I find no reviewable error in the Agent's analysis and conclusions regarding periods 9-20 of the CRB and will maintain the Decision and the denial of Ms. Polonyova's benefits for these periods.

[37] With the parties' consent, the style of cause is amended to reflect the correct respondent, the Attorney General of Canada, as the respondent in accordance with Rules 303(1)(a) and 303(2) of the *Federal Courts Rules*, SOR/98-106.

[38] The Respondent seeks costs but, having regard to the mixed result and all of the circumstances, I exercise my discretion not to award costs against Ms. Polonyova.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed in part.
2. The decision of the Canada Revenue Agency dated May 10, 2023 is set aside only in respect of the denial of the Canada Recovery Benefit (CRB) for the applicant, Ms. Polonyova, for period 1 of the CRB (September 27, 2020 – October 10, 2020) and is maintained in all other respects.
3. No costs are awarded.
4. The style of cause is amended to name the Attorney General of Canada as the Respondent.

"Elizabeth Walker"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1050-23

STYLE OF CAUSE: MARIANA POLONYOVA v THE ATTORNEY
GENERAL OF CANADA

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: NOVEMBER 15, 2023

JUDGMENT AND REASONS: WALKER J.

DATED: JANUARY 15, 2024

APPEARANCES:

Mariana Polonyova

FOR THE APPLICANT
(ON HER OWN BEHALF)

Me Lalitha Ramachandran

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada
Toronto, Ontario

FOR THE RESPONDENT