Federal Court Cour fédérale

Date: 20241004

Docket: T-1255-21

Citation: 2024 FC 1562

Ottawa, Ontario, October 4, 2024

PRESENT: The Honourable Madam Justice Turley

BETWEEN:

MARINA KOMLEVA

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS FOR JUDGMENT

I. Overview

[1] The Applicant, a self-represented litigant, seeks judicial review of a decision dated July 16, 2021, made by a Benefits Validation Officer [Officer] of the Canada Revenue Agency [CRA] determining that she was not eligible for the Canada Recovery Benefit [CRB].

[2] The federal government introduced the CRB during the COVID-19 pandemic to offer financial support to employed and self-employed Canadians between September 27, 2020 and October 23, 2021. The Officer determined that the Applicant was ineligible for the benefit because she did not earn at least $5,000 in net self-employment income pursuant to the *Canada Recovery Benefits Act*, SC 2020, c 12, s 2.

[3] For the reasons that follow, I am allowing the application. In my view, the determinative issue is that the Officer breached procedural fairness in failing to provide the Applicant an opportunity to address concerns she had about the Applicant's evidence. In addition, I find that the Officer's decision lacks coherence and intelligibility because she relied on irrelevant considerations to find that the Applicant had not proven eligibility for the CRB. I agree, however, with the Respondent that the appropriate remedy is to refer the matter back to the CRA for reconsideration by another officer. This is not a case where the result is inevitable such that it would be pointless to remit the matter to another officer.

II. Background

[4] According to the Applicant, she had an oral contract with her husband (Jakov Bassel) in January 2020 to undertake architectural visualization technologist work that he could not perform due to illness and subsequent operations. Her husband negotiated the contracts with and issued invoices to clients in his own name. The clients paid for the work by etransfer to the Applicant and her husband's joint bank account, or by way of cheque payable to her husband that was deposited into their joint bank account.

[5] The Applicant did not have a separate bank account to which her income was transferred, but she invoiced her husband for the work she completed.

[6] Due to a lack of work, the Applicant applied for the CRB as of September 27, 2020. The CRB payments stopped in January 2021, when the CRA sought validation of the Applicant's eligibility. In response, the Applicant submitted copies of cheques, invoices, and statements from the joint bank account.

[7] By letter dated March 12, 2021, the CRA determined that the Applicant was not eligible for the CRB because she did not prove "a 50% reduction in [her] average weekly income compared to the previous year due to COVID-19". The Applicant requested a second review of the decision, and she submitted additional invoices, bank statements, and her 2020 Notice of Assessment.

[8] In its second review decision dated June 17, 2021, the CRA concluded that the Applicant was ineligible because: (i) 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 before the date of her first application; and (ii) she did not have a 50% reduction in her average weekly income compared to the previous year due to COVID-19.

[9] After receiving the second review decision, the Applicant contacted the Office of the Ombudsperson. She also requested a further review and submitted additional documents in support of her CRB eligibility, including copies of cheques, a spreadsheet of invoices, an

acknowledgement of work signed by her and her husband, receipts for business expenses, and medical reports regarding her husband's surgeries.

[10] The Officer conducted an additional second review of the Applicant's eligibility. According to the Officer's notes, the Applicant submitted invoices billing her husband for work she performed in 2020 of $12,610 gross and $6,241 net, as well as invoices totalling $1,700 for the period of January to April 2021. The Officer noted that the Applicant had submitted bank statements showing the monies deposited from the clients, but that "[n]one of the amounts match the invoices". The Officer further noted that there were no documents showing that the Applicant's husband paid her.

[11] On July 14, 2021, the Officer had a telephone conversation with the Applicant and her husband (who acted as her representative due to language barriers). The husband explained that due to health issues in 2020, he delegated work to the Applicant. In response to the Officer's questions, the Applicant's husband advised that he had the contracts, he received the payments, and he never told the clients that the Applicant was performing the work. The Officer responded that eligibility is document-driven and that the documents submitted did not show any payments to the Applicant. The Officer further stated that the medical documents simply show that the Applicant's husband underwent surgery, not that the Applicant did the work, nor that she was paid.

[12] Based on her review, the Officer determined that the Applicant was ineligible for the CRB because she failed to meet the $5,000 net income threshold. The Officer's July 16, 2021 decision is at issue in this application.

III. **Issues and Standard of Review**

[13] As a preliminary issue, the Respondent raised the matter of the proper respondent. As I said at the hearing, I agree that in accordance with Rule 303(2) of the *Federal Courts Rules*, SOR/98-106 [*Rules*], the proper respondent is the Attorney General of Canada. As a result, I ordered that the style of cause be amended to name the Attorney General of Canada as the Respondent, rather than the Canada Revenue Agency.

[14] At the hearing, I raised a procedural fairness issue — whether the Officer had given the Applicant an opportunity to address her concern that the amounts the Applicant invoiced her husband did not match the amounts deposited into the joint bank account. After the hearing, I provided the parties an opportunity to submit post-hearing submissions on this issue.

[15] There are three issues for consideration: (i) whether the Officer breached procedural fairness; (ii) whether the Officer erred in finding that the Applicant did not earn the required income for the CRB; and (iii) the appropriate remedy.

[16] With respect to breaches of procedural fairness, no standard of review is applied. Rather, the Court's reviewing exercise is "best reflected on a correctness standard": *Canadian Hardwood Plywood and Veneer Association v Canada (Attorney General)*, 2023 FCA 74 at para 57; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54 [*CPR*]. The ultimate question is "whether the applicant knew the case to meet and had a full and fair chance to respond": *CPR* at para 56.

[17] The standard of review applicable to determinations of CRB eligibility is reasonableness: *James v Canada (Attorney General)*, 2024 FC 730 at para 13; *Walker v Canada (Attorney General)*, 2022 FC 381 at para 15; *Aryan v Canada (Attorney General)*, 2022 FC 139 at para 16.

[18] A reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that 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 para 85 [*Vavilov*]; *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at para 8 [*Mason*]. A decision should only be set aside if there are "sufficiently serious shortcomings" such that it does not exhibit the requisite attributes of "justification, intelligibility and transparency": *Vavilov* at para 100; *Mason* at paras 59-61.

IV. Analysis

A. *The Officer's decision is procedurally unfair*

[19] In my view, the Officer's decision is procedurally unfair because she failed to provide the Applicant an opportunity to address her evidentiary concern, namely that the invoices for the Applicant's work did not match the payments by clients as reflected in the bank statements. The Officer relied on this discrepancy to find that the Applicant failed to establish that she met the required income threshold.

(1) The Court has the discretion to raise a new issue

[20] During the hearing, I raised this procedural fairness question with Respondent's counsel. Counsel asserted that the Court should not consider this issue because the Applicant had not raised it in her Notice of Application. Respondent's counsel nevertheless made brief oral submissions on its merits. After the hearing, I issued a Direction inviting the parties to file post-hearing submissions addressing this issue. Both parties filed written submissions in response.

[21] As the Respondent pointed out, Rule 301 of the *Rules* requires that an applicant's notice of application set out a complete and concise statement of the grounds they intend to argue. The Federal Court of Appeal has held that Rule 301 is a mandatory provision, with limited exceptions: *Canada (Attorney General) v Iris Technologies Inc*, 2021 FCA 244 at paras 38-42 [*Iris Technologies*]. It ensures that a respondent receives "adequate notice of the case being brought against them so that they can meaningfully respond": *Iris Technologies* at para 41.

[22] In her Notice of Application, the Applicant did not challenge the procedural fairness of the Officer's decision. However, the Applicant would not have known that the Officer had relied on a discrepancy between the invoices and the bank statements when she filed her judicial review application. This was only revealed when the Respondent filed the Officer's affidavit and included her notes as an exhibit.

[23] The Applicant raised the issue of the discrepancy in her written cross-examination of the Officer twice. In particular, the Applicant pointed out that the difference amounted to 13%; the HST:

> The agent's statement shows that the agent did not do calculations, otherwise she would know that the numbers shown on the bank statements and on the invoices differ for the exact amount of an HST (13%), billed to clients by [the Applicant's spouse] but not invoiced by the Applicant.
>
> […]
>
> [T]he Applicant did the work, the bank account shows the Applicant's name, the money is transferred into the bank account, and, contrary to the agent's notes, the money on the Applicant's invoices is perfectly matching the sums on the bank statements with subtraction of HST.
>
> [Emphasis added]
>
> Applicant's Record at 218, 220.

[24] The Officer did not address either of these statements in her answers to the Applicant's questions. In her oral submissions, the Applicant stated that the Officer erred because it is obvious that the difference between each invoice and the corresponding bank deposit was equal to 13% (the HST). The Applicant did not, however, frame the issue as one of procedural fairness.

[25] Judges, however, have the discretion to raise a new legal issue where failing to do so would risk an injustice: *R v GF*, 2021 SCC 20 at para 93 [*GF*]; *R v Suter*, 2018 SCC 34 at para 30; *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 at para 26; *R v Mian*, 2014 SCC 54 at para 41 [*Mian*]; *Adamson v Canada (Canadian Human Rights Commission)*, 2015 FCA 153 at para 89 [*Adamson*]. To ensure procedural fairness, a judge must raise the new issue with the parties and give them an opportunity to respond: *GF* at para 93; *Mian* at paras 52-60; *Bell Canada v Adwokat*,

2023 FCA 106 at para 31; *IMS Incorporated v Toronto Regional Real Estate Board*, 2023 FCA 70 at para 55; *Adamson* at para 89. Furthermore, there must be a sufficient factual record upon which the new issue may be resolved: *Mian* at para 51.

[26] The Supreme Court has purposefully not defined the situations that “would risk an injustice” and unduly limit a judge’s ability “to intervene to ensure that justice is in fact done”: *Mian* at para 45. An example where a judge may intervene is to ensure a fair process for a self-represented litigant: *Mian* at para 44.

[27] In the circumstances, I find that failing to raise the issue of whether the Officer breached procedural fairness would risk an injustice. The Officer’s concern with the Applicant’s evidence was a key factor in her determination that the Applicant was ineligible for the CRB. The parties had an opportunity to address this issue at the hearing, as well as in post-hearing written submissions. In addition, the record before the Court is sufficient to resolve the issue.

(2) The Applicant did not know the case to meet

[28] The determination of whether procedural fairness has been breached must be assessed based on the particular circumstances of each case: *R v Nahanee*, 2022 SCC 37 at para 53; *Vavilov* at para 77; *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817 at para 21; *Taseko Mines Limited v Canada (Environment),* 2019 FCA 320 at para 30; *Ramanathan v Canada (Attorney General)*, 2023 FC 1029 at para 42 [*Ramanathan*].

[29] The CRA's procedural fairness obligations in the context of a CRB decision is at the low end of the spectrum: *Moncada v Canada (Attorney General)*, 2024 FC 117 at para 32; *Cozak v Canada (Attorney General)*, 2023 FC 1571 at para 17; *Ramanathan* at para 46. Nonetheless, the ultimate question is whether an applicant knew the case to meet and had an opportunity to respond: *CPR* at para 56; *Godin v Canada (Attorney General)*, 2024 FC 1386 at para 10; *Richardson v Canada (Attorney General)*, 2023 FC 548 at para 15 [*Richardson*].

[30] Here, the Officer relied on discrepancies between the Applicant's invoices and the bank statements showing the amounts paid by the clients in deciding that the Applicant failed to meet the CRB income threshold. Despite noting this discrepancy in her July 13, 2021 notes-to-file, the Officer did not raise this concern with the Applicant and her husband in the following day's phone conversation.

[31] The Respondent relies on *Rukmangathan v Canada (Minister of Citizenship and Immigration)*, 2004 FC 284 [*Rukmangathan*] to argue that the Officer was not required to provide the Applicant with a "running score of the weaknesses" in her application: *Rukmangathan* at para 23. Notably, in that case, Justice Mosley also held that procedural fairness may require decision-makers "to inform applicants of their concerns with applications so that an applicant may have a chance to 'disabuse' an officer of such concerns, even where such concerns arise from evidence tendered by the applicant" [emphasis added]: *Rukmangathan* at para 22.

[32] There is no duty to provide an applicant the opportunity to address concerns arising directly from legislative requirements. However, a duty may arise where the decision-maker's concerns

relate to the credibility, accuracy, or genuineness of the information submitted by the applicant: *Opakunbi v Canada (Citizenship and Immigration),* 2021 FC 943 at para 8; *Al Aridi v Canada (Citizenship and Immigration)*, 2019 FC 381 at para 20; *Hassani v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1283 at para 24.

[33] The Respondent asserts that in this case, the Officer's concern related to the sufficiency of the Applicant's evidence and that, as such, there was no requirement to inform the Applicant of those concerns. I do not agree. The Officer was not questioning the sufficiency of the evidence at issue, but rather its integrity and accuracy. The Officer discounted the evidence because the invoices and the bank statements "did not match up". In other words, there was an inconsistency.

[34] In oral submissions, Respondent's counsel argued that the Officer made an adverse credibility finding when she noted the discrepancy. If that is the case, then it is even more reason to give the Applicant a chance to explain the differences in the amounts.

[35] Based on the differences between the invoices and the bank statements, the Officer determined that the Applicant had not established that she met the required income threshold. However, the Applicant was left in the dark about this critical aspect of the case she had to meet and she was not given a full and fair chance to rebut these concerns: *Ahmed v Canada (Citizenship and Immigration)*, 2018 FC 1207 at para 38.

[36] The Respondent relies on this Court's decision in *Broughton v Canada (Attorney General)*, 2023 FC 1693 [*Broughton*] to argue that the Officer "was not required to inform the Applicant of

the content of her own reporting or evidence for eligibility": Respondent's Written Submissions at para 5. That decision is, however, distinguishable. In that case, the CRA officer had informed the applicant that rental income did not count towards CRB eligibility. However, Justice Southcott held that the officer was not required to inform the applicant that he had claimed his income as rental income in his tax returns because a taxpayer is responsible for their own tax reporting: *Broughton* at paras 28-29.

[37] The Respondent further cites this Court's decision in *Richardson* for the proposition that procedural fairness is breached where a CRA officer fails to consider submissions provided. While Justice Bell referred to the officer's failure to respond to the additional materials filed, the breach he identified was that the CRA officer failed to explain their reasoning to the applicant. Justice Bell held that "without knowing the nature of the CRA's concern", the applicant did not know the case he had to meet: *Richardson* at para 25.

[38] In the circumstances of this case, I find that the Officer breached procedural fairness in failing to provide the Applicant an opportunity to "disabuse" the Officer of her concerns with the evidence. Had the Applicant been given an opportunity to point out that the difference amounted to 13% (the amount of the HST her husband was required to charge his clients), the Officer's ultimate decision may have been different.

[39] The Respondent argues that, in any event, the inconsistencies were part of a series of findings by the Officer. It is not for this Court sitting in review, however, to speculate about what the Officer's decision may have been absent this breach of procedural fairness: *Marentette v*

Canada (Attorney General), 2024 FC 676 at paras 58-60; *Tshisumpa v Canada (Citizenship and Immigration)*, 2022 FC 191 at para 25; *Chapman v Canada (Attorney General)*, 2019 FC 975 at paras 46-47.

[40] While I find that this procedural fairness breach alone is sufficient to vitiate the Officer's decision, I also find that the Officer's decision is unreasonable.

B. *The Officer's decision is unreasonable*

[41] The Officer relied on the following facts to find the Applicant ineligible for the CRB: (i) the contracts with clients were in her husband's name; (ii) the clients paid the husband via etransfer or cheque; and (iii) the Applicant's husband never told his clients that she would be performing the work. The Officer's reliance on these facts demonstrates that she failed to consider and appreciate the particular context of this case: a sub-contracting arrangement between the Applicant and her husband. This renders the decision unreasonable because it is based on an irrational chain of analysis, exhibits clear logical fallacies, and simply does not "add up": *Vavilov* at paras 103-104.

[42] The Applicant and her husband stated that they had an oral contract whereby she would perform work for his clients while he was unable to do so, and that she was paid for this work. Indeed, the Applicant submitted an acknowledgment signed by her and her husband attesting to this arrangement. The Applicant could not prove payment in any other manner because she only had the joint bank account. While it certainly would have been preferable to have a separate account, this, in and of itself, is not a fatal flaw due to the overall circumstances of this case.

[43] As discussed above, the Applicant submitted invoices billing her husband for the work she performed, as well as bank statements showing the corresponding payments by her husband's clients. While the Officer found these amounts did not match up, the Applicant pointed out before this Court that the difference in each case is 13% — the HST.

[44] At the hearing, Respondent's counsel attempted to justify the Officer's decision based on two reasons not relied on by the Officer in her decision. First, counsel argued that the Officer made an adverse credibility finding against the Applicant, asserting that "anyone can generate an invoice". Second, counsel stated that, in accordance with the CRA's Guidelines, an officer may determine that payments from a family member do not qualify as income for the purposes of the CRB. However, the Officer did not cite either of these justifications in her decision.

[45] The Court must assess the reasonableness of the decision based on the Officer's reasons, and not based on the Respondent's after-the-fact explanations. The Supreme Court has made clear that "it is not enough for the outcome of a decision to be *justifiable*". Rather, where reasons are required, "the decision must also be *justified*, by way of those reasons, by the decision maker to those to whom the decision applies" [emphasis in original]: *Vavilov* at para 86.

[46] In the circumstances, it was unreasonable for the Officer to determine that the Applicant was ineligible because the contracts were in her husband's name, the clients paid him, and he did not tell his clients that the Applicant would be doing the work. On this basis, I find that the decision lacks coherence and intelligibility.

C. *The appropriate remedy is to refer the matter back to the CRA for redetermination*

[47] Generally, on judicial review, the appropriate remedy is to remit the matter to the decision-maker for redetermination with the benefit of the court's reasons. This rule is grounded in respect for "the legislature's intention to entrust the matter to the administrative decision maker": *Vavilov* at para 142.

[48] Only in exceptional circumstances should a reviewing court exercise its discretion and decide issues that are left to administrative decision-makers at first instance as the "merits-decider": *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100 at para 100. For example, a court may decline to remit a matter where it is evident that a particular outcome is inevitable such that remitting the matter would serve no useful purpose: *Vavilov* at para 142; *Sharif v Canada (Attorney General)*, 2018 FCA 205 at para 54. In other words, there needs to be a "foregone conclusion" rendering a redetermination unnecessary: *Canada (Attorney General) v Duval*, 2019 FCA 290 at para 38.

[49] I agree with the Respondent that this is not a case where the result is inevitable such that the Court should declare that the Applicant is entitled to the CRB. It is the role of the CRA, not the reviewing court, to weigh and assess evidence and make a determination about the Applicant's eligibility.

V. **Conclusion**

[50] I find that the Officer's decision is both procedurally unfair and unreasonable. The application for judicial review is granted and the matter is remitted for reconsideration by another CRA officer.

JUDGMENT in T-1255-21

THIS COURT'S JUDGMENT is that:

1. The style of cause is amended to name the Attorney General of Canada as the sole Respondent.
2. The application for judicial review is allowed, and the matter is referred back to the Canada Revenue Agency for redetermination by another officer.
3. No costs are awarded.

"Anne M. Turley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1255-21
STYLE OF CAUSE:	MARINA KOMLEVA v THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	SEPTEMBER 12, 2024
JUDGMENT AND REASONS FOR JUDGMENT:	TURLEY J.
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