Federal Court  Cour fédérale

Date: 20250123

Docket: T-1352-24

Citation: 2025 FC 135

Toronto, Ontario, January 23, 2025

PRESENT: Madam Justice Whyte Nowak

BETWEEN:

CAROLYN J. PRESTON

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Carolyn J. Preston [Applicant], is a self-represented litigant who initially sought judicial review of two second level review decisions of the Canadian Revenue Agency [CRA] dated May 7, 2024, in which she was found ineligible for the Canada Recovery Benefit [CRB] [the CRB Decision] and the Canada Emergency Response Benefit [CERB]. The Applicant has been granted relief from the overpayments of CERB by virtue of the *Canada*

Emergency Response Benefit and Employment Insurance Emergency Response Benefit Remission Order, SI/2021-19 [*CERB Remission Order*]; accordingly, with the agreement of the Applicant, this Court's review is restricted to whether the Applicant has met her onus of showing that the CRB Decision was unreasonable and procedurally unfair as she has alleged.

[2] For the reasons that follow, I am granting the application as I find that the Applicant has shown the CRB Decision is unreasonable as it is not justified in its reasoning and lacks transparency.

II. Facts

A. *The Applicant's background*

[3] The Applicant is a graphic artist/designer and art director who runs two businesses: (i) a graphic design business operating under the name Shapeshifting Graphic Design; and (ii) a start-up business in which the Applicant designs and produces graphic artisan homewares under the name Summerhouse. The Applicant received funding for her start-up business from Skills PEI Self Employment Business Start-up Program [the PEI Program]. Both businesses were significantly affected by COVID-19, which in turn severely affected the Applicant's income stream.

[4] The Applicant applied for and received CRB for periods between September 27, 2020 and October 9, 2021.

B. *CRA request for supporting documents*

[5] By letter dated March 24, 2023, the CRA asked the Applicant to provide documents demonstrating that she met the income criteria for eligibility for the CRB under the *Canada Recovery Benefits Act*, SC 2020, c 12, s 2 [*CRB Act*]. In response, the Applicant mailed the CRA documents showing proof of her income for the tax years 2019 and 2020. The documents included: income documents, a letter outlining the Applicant's income, as well as invoices and proof of e-transfer payments from clients. There was a delay in the CRA obtaining these documents, but they were eventually entered in the CRA's system on April 13, 2023.

C. *The first decision*

[6] A CRA benefits validation officer [First Reviewer] tried to contact the Applicant on May 25, 2023, and when she did not hear from the Applicant, the CRA sent the Applicant a letter on June 6, 2023 [the CRA Letter], noting the fact that they had not been able to reach her and she had failed to respond to the request for proof of her income. The CRA Letter stated that as a result, the Applicant was found ineligible for the CRB.

[7] The Applicant sent a position letter dated June 27, 2023, resubmitting her documentation originally sent in April 2023. The CRA received the letter on June 29, 2023.

[8] After the First Reviewer again had trouble reaching the Applicant, the First Reviewer sent the Applicant a denial letter dated September 22, 2023 [the First Decision] notifying the Applicant that she was not eligible for the CRB. The First Decision states that the Applicant is

not eligible as she did not meet the criteria of having earned at least $5,000 (before taxes) of employment and/or net self-employment income in 2019, 2020, or in the 12 months before the date of her first application [the CRB Income Criteria].

[9] The rationale for the First Decision can be seen in the agency-wide case notes [Case Notes] dated September 20, 2023, which were attached to the Respondent's supporting affidavit on this application:

> Documents submitted in response to the [initial contact letter] along with information on file are not sufficient (no bank statements to support the amount in invoices, no expenses amount) to prove that TP has earned at least $5000 in 2019, 2020, 2021 or 12 months before application. Redetermination will be completed for CRB, CERB. Denial letter to be sent for CRB, CERB.

[10] The Applicant requested a second level review. She submitted a position letter dated October 21, 2023 together with copies of invoices and e-transfer printouts from one of her businesses, a T4E form and printouts related to the PEI Program.

D. *The second review and the CRB Decision*

[11] A second benefits validation officer at the CRA [Second Reviewer] held calls with the Applicant on April 16, 2024, April 25, 2024 and May 3, 2024.

[12] Following the First Decision, the Applicant received the advice and assistance of her accountant, who is a Certified Public Accountant and the Director of Finance for PEI Tourism [the Accountant]. The Accountant corrected an error with respect to HST and, pursuant to the instructions of the Applicant, the Accountant prepared a T1 Adjustment Request Form, which

reduced the Applicant's business expenses to Nil for the 2019 tax year [the T1 Adjustment]. On April 29, 2024, the Applicant submitted the T1 Adjustment, together with a cover note as well as an explanatory note from her Accountant. The Accountant's letter:

> • states "taxpayer wishes to reduce the business expenses claimed on the 2019 tax return to Nil";
>
> • explains that this was done to meet the income eligibility requirement; and
>
> • provides her opinion that the Applicant clearly meets the $5,000 threshold for "gross earning" and the T1 adjustment to reduce expenses will result in "net self-employment" earnings of over $5,000."

E. *The second decision*

[13] In her affidavit, the Second Reviewer states that she considered the following documents:

> (i) The relevant Case Notes;
>
> (ii) The Applicant's submissions and documentation dated April 12, 2023, June 29, 2023, October 9 and 22, 2023;
>
> (iii) The Applicant's income and deductions from income for the 2019, 2020 and 2021 tax years; and
>
> (iv) A summary of the Applicant's T1 Adjustment.

[14] The Second Reviewer concluded that the Applicant was not eligible for the CRB and advised the Applicant by way of the CRB Decision dated May 7, 2024. The stated basis for the CRB Decision is that the Applicant is not eligible as she did not meet the CRB Income Criteria.

III. Legislative Framework

[15] The CRB Income Criteria provided for at paragraph 3(1)(d) of the *CRB Act* states that a person is eligible for the CRB if,

> (d) in the case of an application made under section 4 in respect of a two-week period beginning in 2020, they had, for 2019 or in the 12-month period preceding the day on which they make the application, a total income of at least $5,000 from the following sources:
>
> (i) employment,
>
> (ii) self-employment,
>
> (iii) benefits paid to the person under any of subsections 22(1), 23(1), 152.04(1) and 152.05(1) of the *Employment Insurance Act*,
>
> (iv) allowances, money or other benefits paid to the person under a provincial plan because of pregnancy or in respect of the care by the person of one or more of their new-born children or one or more children placed with them for the purpose of adoption, and
>
> (v) any other source of income that is prescribed by regulation…

[16] Subsection 3(2) of the *CRB Act* confirms that the income of a self-employed person is "revenue from the self-employment less expenses incurred to earn that revenue."

IV. Preliminary Issue

[17] The Applicant's Affidavit attaches 23 documents that do not appear in the Certified Record [collectively, the New Evidence] which she relies on in her written and oral submissions.

[18] The Respondent objects to the Applicant's inclusion of the New Evidence (with the exception of Exhibits C, F, G, H, R, S, T, U, BB and CC) relying on well-established law that holds that judicial review of an administrative tribunal should be based on 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 paras 19-20 [*Access Copyright*]).

[19] However, *Access Copyright* recognizes exceptions to this rule, which include evidence that: (i) is general evidence of a background nature that is of assistance to the Court; (ii) is relevant to an alleged denial of procedural fairness by the decision maker that is not evident in the record before the decision maker; or (iii) demonstrates the complete lack of evidence before a decision maker for an impugned finding [*Access Copyright* at para 20].

[20] I have considered the exceptions recognized in *Access Copyright* and find as follows with respect to the disputed New Evidence:

i. Exhibit A is allowed as general background information that may assist the Court, given that this document was available to the First and Second Reviewer;

ii. Exhibits B, J, Z are disallowed as they relate to the CERB Decision and are not relevant given that the CERB Decision is no longer at issue;

iii. Exhibits D, E, Q, X, Y (while taking note of the discrepancy raised by the Respondent that the information contained in Exhibit Y purportedly differs from that available to the Second Reviewer at the time of her review), are allowed as they are relevant to the issues of procedural fairness raised by the Applicant;

iv. Exhibit I is disallowed as it does not fall under any of the recognized exceptions given that it does not relate to an issue of procedural fairness raised by the Applicant;

v. Exhibits K, L, N, O, P, V, W, DD, EE, FF, GG are disallowed as they were not before the First or Second Reviewers and are not relevant to the issues the Court must decide and cannot be used for the purpose for which the Applicant has tendered them which is for the truth of their contents;

vi. Exhibit AA and M are disallowed as they post-date the CRB Decision and are therefore not relevant; and

vii. The cases included in Exhibit P are not evidence but shall be considered as part of the Applicant's authorities.

V. Issues and Standard of Review

[21] The Applicant has raised the following issues going to both the reasonableness of the Second Decision and matters relating to procedural fairness:

A. Is the CRB Decision unreasonable for failing to allow valid income?

B. Is the CRB Decision unreasonable by reason that the CRA failed to consider relevant evidence?

C. Was the Applicant denied procedural fairness by reason that the CRB eligibility criteria were confusing and not well communicated to her by the CRA?

D. Was the Applicant denied procedural fairness by reason that the CRA Case Notes "create streaming bias?"

[22] The Second Reviewer's determination that the Applicant did not meet the income eligibility criteria for CRB is reviewable on a standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 10, 23-27 [*Vavilov*]; *Larocque v Canada (Attorney General)*, 2022 FC 613 at para 16). Based on *Vavilov*, the Applicant bears the

burden of showing that the decision under review was unreasonable in that there is some fundamental flaw in its rationale or outcome, or that it lacks the hallmarks of justification, intelligibility and transparency to those who are subject to it (*Vavilov* at paras 95, 99-100). In conducting this analysis, the Court is not entitled to either reweigh or reassess the evidence (*Vavilov* at para 125).

[23] Issues raised by the Applicant going to whether she was afforded procedural fairness in the manner in which the Second Reviewer arrived at the CRB Decision are reviewed on a standard akin to correctness (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 34-35, 54-55 [*Canadian Pacific*], citing *Mission Institution v Khela*, 2014 SCC 24 at para 79). The Court looks to ensure that administrative decisions are made using a fair, open and appropriate procedure that provides an opportunity for those affected by the decision to understand the case they have to meet and put forward their views and evidence fully for consideration by an impartial decision maker (*Canadian Pacific* at para 41).

VI. Analysis

A. *Did the CRA unreasonably fail to allow valid income?*

[24] The Applicant alleges that the CRA unreasonably disallowed the income she received as part of the PEI Program.

[25] The Case Notes reflect the fact that no mention of the PEI Program amounts was made in the First Reviewer's Case Notes nor in the First or Second Decision. The only substantive

reference made to the PEI Program monies is by the Second Reviewer in a single Case Note dated May 3, 2024, which states:

> "Benefit recipient's (BR) main arguments:
>
> > 2019 T4E [redaction] BR stated that this income was received for SKILLS PEI Self employment Business Start Up Program.
> >
> > They believed that this was eligible income because it was called wages and grants by the Skills PEI Program.
> >
> > Advised them that the above T4E is not considered eligible income for benefits."

[26] I find that this notation is conclusory in nature and offers no insight into why the Second Reviewer drew the conclusion, nor does it engage the information provided by the Applicant regarding the nature of the PEI Program and is therefore not reasonable (*Vavilov* at paras 102, 106).

[27] The Respondent submits that in the Applicant's T4E form entitled, "Statement of Employment Insurance and Other Benefits," the Applicant herself characterized the monies she received from the PEI Program as "Employment benefits and support measures paid" and not as wages from either employment or self-employment income.

[28] Whether or not this represents a valid basis for rejecting the PEI Program monies as a valid source of income, the Respondent's justification for the CRB Decision aims to provide a justification that the CRA simply did not give. As *Vavilov* holds, a decision must be

understandable to the person to whom it applies and must be not only justifiable, but justified (*Vavilov* at paras 95, 97-98).

[29] I find that the CRB Decision lacks transparency and justification in disallowing the PEI Program amounts as an eligible source of income rendering the CRB Decision unreasonable.

B. *Did the CRA fail to consider relevant evidence?*

[30] As the Applicant points out, the Case Notes show that her amended tax return was not in front of the Second Reviewer at the time the Second Reviewer made the CRB Decision, (the Case Notes refer to it as "NOT SHOWING ON SYSTEM"). The Applicant therefore alleges that the Second Reviewer refused to "accept or consider" her T1 Adjustment.

[31] I disagree: it is clear from the Second Reviewer's affidavit that T1 Adjustment Summary was considered along with the Accountant's explanatory letter. The Second Reviewer's Case Notes dated May 3, 2024, state:

> They stated in a letter that they were removing their expenses entirely for their 2019 return, however in the letter and on the call dated May 3, 2024, they were unable to provide a sufficient explanation as to why they were reducing their expenses to 0.00.
>
> BR stated on the call:
>
> > "They do not need to claim these expenses/people take them the next year whatever suits. They stated they do not want to have a loss on their 2019 tax return if it affects their income. They want their income to stand alone without the expenses & HST to reinforce the fact that they meet the 5K for 2019 for the benefits. They want to show that they met the threshold for 2019 for the benefits. BR states they do not need to claim the 2019 expenses.

> Which leads me to the conclusion that the BR is only removing expenses to be eligible for the benefit."

[32] It was open to the Second Reviewer to find that the Applicant had not met her onus of establishing on a balance of probabilities that she met the criteria of the *CRB Act*, which describes self-employment income as revenue from self-employment less expenses incurred to earn that revenue. In *Cohen v Canada (Attorney General)*, 2023 FC 1539 [*Cohen*], Madam Justice St-Louis (as she then was) considered the CRA's rejection of a taxpayer's T1 adjustment in similar circumstances in which the taxpayer confirmed that while she did incur the expenses previously claimed, she had reduced them to meet the CRB criteria. While the taxpayer argued that she is not obliged to deduct them in the year they were incurred, the Court confirmed that it was not unreasonable for the CRA to nonetheless consider these expenses in calculating her net income (*Cohen* at paras 41-44). I find therefore that the Applicant has not shown that the CRB Decision is unreasonable for having failed to consider the Applicant's T1 Adjustment.

C. *Was the Applicant denied procedural fairness by reason that the CRB eligibility criteria were confusing and not well communicated to her by the CRA?*

[33] Many of the Applicant's allegations of unfairness include complaints regarding how the CRA dealt with her. These include the fact that: she was "labelled non-compliant"; the CRA lost her initial proof of income; she was locked out of her online account; she received a "harassing" phone call from the Second Reviewer about her T1 Adjustment; the Second Reviewer would not speak to her or her Accountant about the CRB Decision after it was sent to the Applicant; and the Second Reviewer did not return her calls. These matters go to the quality of service that the

Applicant received from the CRA; they did not prevent her from knowing the case she had to meet, nor do they detract from the overall fairness of the procedure that led to the CRB Decision.

[34] The Applicant's main submission is that both before and during the reviews of her eligibility, the CRA failed to provide her with the correct income eligibility criteria in a way that she could understand as required by the Taxpayer's Bill of Rights, which advises taxpayers that they can expect the CRA to provide them with "complete, accurate, and timely information in plain language explaining the laws and policies that apply to [their] situation." She alleges in her written submissions that "[n]o mention of 'net' self-employment income came from the reviewer during the review process."

[35] The Applicant argues that the *CERB Remission Order* acknowledges that there was significant confusion over the eligibility criteria for the various COVID-19 benefits. She argues that the "correct information was not available nor published clearly" and she was prevented from responding appropriately to the qualifying criteria, such as by structuring her taxes differently.

[36] The Applicant relies largely on statements made by the Auditor General and news articles that highlight the problems associated with the public's understanding of the eligibility criteria for the various COVID-19 benefits. However, these articles have not been allowed as new evidence as the task of this Court is not to determine if the COVID-19 benefit programs were properly articulated to the public, but whether the Applicant personally was aware or should

have been aware of the eligibility criteria such that she could be said to have understood the case she had to meet. I find that she did.

[37] The Applicant's suggestion that the reviewers failed to use the phrase "net income" is undermined by the contents of the First Decision, which expressly uses the phrase "net self-employment income." The Applicant's Accountant was also fully aware of the "net income" requirement as reflected in her letter to the CRA explaining the T1 Adjustment:

> "[the Applicant] clearly meets the $5,000 threshold for "gross earning" and the T1 adjustment to reduce expenses will result in "net self-employment" earnings of over $5,000."

[38] The fact remains that the CRB Income Criteria requires "net self-employment income" as subsection 3(2) of the *CRB Act* states that the income of a self-employed person is "revenue from the self-employment less expenses incurred to earn that revenue." The onus is on the Applicant as a claimant to inquire about the eligibility criteria and to prove that they have been met (*Walker v Canada (Attorney General)*, 2022 FC 381 at para 55). As is often cited in the tax context (as harsh as it may sound), ignorance of the law is not a valid defence (*Roussel v Canada (Attorney General)*, 2024 FC 809 at para 37).

[39] It cannot be said that the CRA's process was procedurally unfair to the Applicant where the criteria were published and available, but the Applicant did not understand it.

D. *Was the Applicant denied procedural fairness by reason that the CRA Case Notes "create streaming bias"*

[40] The Applicant alleges that the Case Notes of a first reviewer improperly influence a second reviewer, creating bias. She believes the early Case Notes made by the First Reviewer unjustifiably characterized her as non-responsive and non-compliant, and improperly tainted her and branded her a "high risk case." The Applicant alleges that this characterization unfairly influenced the Second Reviewer.

[41] Procedural fairness requires that decisions be made free from a reasonable apprehension of bias on the part of decision makers (*Baker v Canada (Minister of Citizenship and Immigration*), [1999] 2 SCR 817 at para 45). However, the threshold for establishing a reasonable apprehension of bias is a high one (*R v RDS*, [1997] 3 SCR 484 at para 113) and requires that the Applicant show 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 et al v National Energy Board et al* (1976), [1978] 1 SCR 369 at 394).

[42] The Applicant has not shown how the Second Reviewer was improperly influenced by the Case Notes. The onus was on the Applicant to make this link and an allegation of bias like this which is entirely speculative and based on mere impressions does not meet the requisite threshold of proof (*Arthur v Canada (Attorney General)*, 2001 FCA 223 at para 8).

VII. Conclusion

[43] I find that the Applicant has met her burden of showing that the CRB Decision was unreasonable. Accordingly, this judicial review application is granted.

VIII. Costs

[44] Despite the Applicant's success, no costs of this application are awarded as the Applicant stated in her written submissions that she was not seeking costs and she confirmed this at the hearing.

JUDGMENT in T-1352-24

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted;
2. The Applicant's CRB case shall be remitted back to a different decision maker for re-determination;
3. No costs are awarded.

"Allyson Whyte Nowak"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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