

Federal Court



Cour fédérale

Date: 20220304

Docket: T-1342-21

Citation: 2022 FC 305

Ottawa, Ontario, March 4, 2022

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

BEN FLOCK

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Ben Flock seeks judicial review of a decision by an officer [Officer] with the Canada Revenue Agency to deny his eligibility for the Canada Recovery Benefit [CRB]. The Officer found that Mr. Flock was not eligible to receive the CRB because he did not earn at least \$5,000.00 in net self-employment income during the qualifying period.

[2] Mr. Flock was eligible to receive, and did receive, the Canada Emergency Relief Benefit [CERB]. He says that the transition from the CERB to the CRB was intended to be seamless, and it is inequitable and unjust for him to have received the CERB but then be denied the CRB when his financial circumstances did not change.

[3] The CERB and the CRB were introduced by two different statutes, and the qualifying criteria are not the same. The eligibility criteria for the CRB are statutory and non-discretionary, and the Officer had no choice but to apply them. The Officer reasonably found that Mr. Flock was not eligible for the CRB.

[4] Mr. Flock had three opportunities to present his case to the CRA. He was given a full and fair opportunity to make submissions, and the Officer took these into account in rendering her decision. The Officer's decision was procedurally fair.

[5] The application for judicial review must be dismissed.

II. Background

[6] Mr. Flock is a self-employed corporate and event photographer based in Toronto, Ontario. Due to public health measures resulting from the COVID-19 pandemic, almost all of his professional engagements ended after March 2020.

[7] In 2019, Mr. Flock reported gross business income of \$17,833.00 and net self-employment income of \$3,083.00. In 2020, he reported gross professional income of \$3,502.00 and a net self-employment loss of \$10,591.00.

[8] Mr. Flock applied for and received the CERB from March 15 to September 26, 2020, the full duration of the program. He then applied for and received the CRB for four two-week periods, from September 27, 2020 to November 21, 2020.

[9] Mr. Flock stopped collecting the CRB between December 2, 2020 and February 6, 2021, when he travelled to the United States to care for his ailing mother. Upon his return, Mr. Flock complied with the quarantine requirement, during which he was ineligible to reapply for the CRB.

[10] While he was in quarantine, Mr. Flock completed his 2020 tax return and submitted it early. He then reapplied for the CRB in early March 2021. He received a notice that he should contact the CRA regarding the validation process. As a result of the ensuing review, Mr. Flock was denied the CRB because his 2019 and 2020 tax returns did not demonstrate the requisite \$5,000.00 in net self-employment income.

[11] Before he received the initial decision, Mr. Flock wrote to the CRA on May 10, 2021. This prompted the CRA to re-open the file on June 5, 2021. The reviewing officer confirmed that Mr. Flock was not eligible for the CRB. He was notified of the decision on June 9, 2021.

[12] Mr. Flock again wrote to the CRA in late June 2021. The second review was assigned to the Officer, who considered the previous reviewing officer's notes, Mr. Flock's income tax returns from 2017 to 2020, and the letters and other documents he had submitted.

[13] The Officer concluded that Mr. Flock had not earned at least \$5,000.00 in net self-employment income in 2019, 2020, or in the 12 months before the date of his first application for the CRB. The decision was communicated to Mr. Flock by letter dated July 15, 2021.

III. Issues

[14] This application for judicial review raises the following issues:

- A. What is the standard of review?
- B. Was the Officer's decision reasonable?
- C. Was the Officer's decision procedurally fair?

IV. Analysis

- A. *What is the standard of review?*

[15] The Officer's decision is subject to review by this Court against the standard of reasonableness (*Aryan v Canada (Attorney General)*, 2022 FC 139 at para 16, citing *Canada*

(Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 65 [*Vavilov*] at para 23). The Court will intervene only if it is satisfied “there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency” (*Vavilov* at para 100). These criteria are met if the reasons allow the Court to understand why the decision was made, and determine whether the decision falls within the range of acceptable outcomes defensible in respect of the facts and law (*Vavilov* at paras 85-86, citing *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[16] Procedural fairness is a matter for the Court to decide. The standard for determining whether the decision-maker complied with the duty of procedural fairness is generally said to be correctness (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 34, citing *Mission Institution v Khela*, 2014 SCC 24 at para 79). The ultimate question is whether the applicant knew the case to meet, and had a full and fair chance to respond.

B. *Was the Officer’s decision reasonable?*

[17] The CERB was introduced on March 25, 2020 by the *Canada Emergency Response Benefit Act*, SC 2020, c 5, s 8 [CERBA]. Subsection 6(1) of the CERBA limited eligibility for the CERB to “a worker” as defined in s 2 who, among other criteria, had a “total income of at least \$5,000.00” from employment, self-employment, benefits, or allowances under pregnancy or parental leave plans.

[18] Subsection 12(1) of the CERBA empowers the Minister to seek reimbursement of any payment to which an individual was not entitled. However, self-employed individuals who received the CERB based on their gross self-employment income are exempted from the operation of this provision by virtue of the *Canada Emergency Response Benefit and Employment Insurance Emergency Response Benefit Remission Order*, SI/2021-19 [Remission Order]. Section 1 of the Remission Order applies to any person who: (a) collected CERB if that person would have been eligible based on their gross self-employment income; and (b) filed their 2019 and 2020 tax returns at the specified times.

[19] The Remission Order is limited to the CERB, and has never been extended to the CRB. While the Remission Order ensures that Mr. Flock will not be subjected to a “claw back” for his receipt of the CERB, it has no bearing on his eligibility for the CRB.

[20] The CRB was introduced on October 2, 2020 by the *Canada Recovery Benefits Act*, SC 2020, c 12, s 2 [CRBA]. The eligibility requirements are found in s 3(1). Income from self-employment is defined in s 3(2) as “revenue from the self-employment less expenses incurred to earn that revenue”. Accordingly, a person who is self-employed is assessed on their net self-employment income following expenses and other deductions, not their gross self-employment income.

[21] Mr. Flock says that the transition from the CERB to the CRB was intended to be seamless, and it is inequitable and unjust for him to have received the CERB but then be denied the CRB when his financial circumstances did not change. He asserts that there was nothing in

the eligibility questionnaire he completed to suggest his eligibility for the CRB would be determined with reference to his net self-employment income, rather than his gross self-employment income. He notes that he did in fact receive the CRB for four two-week periods, from September 27, 2020 to November 21, 2020.

[22] While Mr. Flock's criticism of the differing eligibility criteria for the CERB and CRB makes some logical sense, this is more a critique of the policy underlying the two legislative programs than a legal complaint. It is perhaps worth noting that the Remission Order was intended to ameliorate the effects of possible confusion surrounding eligibility for the CERB, which was introduced with short notice at the beginning of a public health emergency. Parliament was under no obligation to extend the Remission Order to the CRB when the new benefit was introduced seven months later.

[23] The eligibility criteria established by s 3(2) of the CRBA are statutory and non-discretionary. The Officer had no choice but to apply them. Even if Mr. Flock may have reasonably believed he would be eligible for the CRB based on his previous receipt of the CERB, the legal doctrine of legitimate expectations is limited to procedural relief and does not ensure a particular outcome. Furthermore, there can be no estoppel in the face of an express provision of a statute: the legislation is paramount (*Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)*, 2001 SCC 41 at paras 35, 47).

[24] I therefore conclude that the Officer's decision to deny Mr. Flock's eligibility for the CRB was reasonable.

C. *Was the Officer's decision procedurally fair?*

[25] Mr. Flock argues that the initial decision dated June 3, 2021 was made without any direct discussion with the CRA officer assigned to the file. However, he acknowledges that he had two further opportunities to present his case when his application for the CRB was reviewed by a second officer, and again by the Officer whose decision is challenged in this application for judicial review.

[26] Any procedural shortcomings that may have preceded the initial decision were remedied by subsequent reviews and discussions. Mr. Flock was given a full and fair opportunity to make submissions to the CRA, and the Officer took these into account in rendering her decision. The Officer's decision was procedurally fair.

V. Conclusion

[27] The application for judicial review is dismissed.

[28] The Respondent seeks costs. Mr. Flock represented himself in this proceeding, and his arguments were well-considered and not without substance. Having regard to all of the circumstances, I exercise my discretion not to award costs against him.

[29] The Respondent notes that the responding party in this application should be the Attorney General of Canada rather than the Canada Revenue Agency, and asks that the style of cause be amended accordingly.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed without costs.
2. The style of cause is amended to name the Attorney General of Canada as the sole Respondent, with immediate effect.

"Simon Fothergill"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1342-21

STYLE OF CAUSE: BEN FLOCK v ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: BY VIDEOCONFERENCE BETWEEN TORONTO
AND OTTAWA, ONTARIO

DATE OF HEARING: MARCH 2, 2022

JUDGMENT AND REASONS: FOTHERGILL J.

DATED: MARCH 4, 2022

APPEARANCES:

Ben Flock
(on his own behalf)

FOR THE APPLICANT

Valantina Amalraj

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada
Toronto, Ontario

FOR THE RESPONDENT