

Federal Court



Cour fédérale

Date: 20230704

Docket: T-222-22

Citation: 2023 FC 924

Ottawa, Ontario, July 4, 2023

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

ANDREW CLARKE

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Mr. Clarke, applied for the Canada Recovery Benefit (CRB). In a decision dated January 12, 2022, the Canada Revenue Agency (CRA), which administers the CRB, determined the Applicant was not eligible on the ground that he quit his job voluntarily [the Decision].

[2] The Respondent concedes that the Applicant was not give an opportunity to make submissions on the issue of whether it was reasonable for him to leave his employment and that the Decision was arrived at in a procedurally unfair manner. The Respondent requests this matter be remitted for redetermination by a different decision maker at the CRA.

[3] Mr. Clarke has requested this Court remit the matter back to the CRA and instruct them that he is eligible for the CRB. He also has asked for costs to be awarded against the CRA. Mr. Clarke has also submitted a notice of constitutional question, challenging the constitutional validity of the *Canada Recovery Benefits Act* S.C. 2020, c. 12 (“CRB”).

[4] For the reasons that follow, I would grant part of this application for judicial review.

II. **Preliminary issue: Materials not before the Second Reviewer**

[5] The Respondent submits that the Applicant’s record contains materials that are not properly before this Court.

[6] First, the Respondent submits that the Applicant’s record contains materials subject to settlement privilege, namely, settlement offers made by the Applicant on August 5th, 2022 and September 30, 2022.

[7] Second, the Respondent asserts that several exhibits in the Applicant’s affidavit, dated June 17, 2022, should not be considered because they were not before the Second Reviewer. The Respondent relies on the principle in *Association of Universities and Colleges of Canada v The*

Canadian Copyright Licensing Agency (Access Copyright), 2012 FCA 22 [*Access Copyright*] at paragraph 19, that the evidentiary record before a court on judicial review is restricted to that which was before the tribunal whose decision is under review. As noted in *Access Copyright* at paragraph 20, there are a few recognized exceptions to this general rule, including general background information that might assist the court in understanding the issues relevant to the judicial review. However, no such exceptions are present in this matter.

III. **Background**

[8] Mr. Clarke applied for the CRB for twenty-seven two-week periods from October 11, 2020 to October 23, 2021.

[9] On July 20, 2021, Mr. Clarke contacted the CRA by telephone to check on the status of his CRB application.

[10] On August 17, 2021, August 19 2021, and on August 21, 2021, the CRA attempted to contact Mr. Clarke by telephone but was not able to reach him.

[11] The CRA subsequently proceeded to review Mr. Clarke's eligibility on the basis of the available information and found he was not eligible for the CRB as he did not earn at least \$5000 of employment income or net self-employment income in 2019, 2020, or in the 12 months before the date of the Applicant's application (the First Decision).

[12] The CRA informed the Applicant of the First Decision by letter dated October 4, 2021.

[13] In the letter notifying the Applicant of the First Decision, the CRA advised Mr. Clarke that he could request a review of the decision. This administrative review, referred to as a “second review”, would be conducted by a CRA officer who was not involved in the First Decision.

[14] On October 15, 2021, the Applicant requested a second review of the First Decision by way of a request, with attachments uploaded onto his CRA MyAccount online portal.

[15] During the second review, the reviewer considered various documents including:

- a) the Relevant Notepad Entries;
- b) notes recorded by CRA officers with respect to interactions with the Applicant;
- c) copies of documents uploaded by the Applicant on January 10, 2021, including: a cheque totalling \$200 from Golf Tournaments Inc., Benefit Claim History, a ROE from Acid League and a T4 from Acid League;
- d) a copy of the screenshot uploaded by the Applicant on October 15, 2021, of bank deposits showing funds transferred from Abletribe Inc.;
- e) a copy of the Applicant’s CIBC bank statements for the period from October 1, 2019 to October 31, 2020, uploaded by the Applicant on January 6, 2022; and
- f) the Applicant’s income and the deductions from income for the 2018 to 2020 taxation years as recorded on the CRA’s computer system.

[16] On January 12, 2022, the Second Reviewer determined that the Applicant was not eligible to receive the CRB.

[17] According to the Second Review Report and the decision letter dated January 12, 2022, the reason for the Decision was that the Applicant voluntarily quit his job in November, 2020.

[18] As the issue with the first application was the income eligibility threshold of \$5000, Mr. Clarke was unaware that the Second Reviewer was assessing how his employment ended and he was not given an opportunity during the Second Review to make submissions on the issue of whether it was reasonable for him to have left his job.

IV. Issues

[19] Since the Respondent has conceded the Decision is procedurally unfair, the main issues in dispute are the nature of the remedy that this Court can order and the Applicant's request for costs.

[20] The Applicant also asks this Court to remit the matter to the CRB with instructions that he is eligible for CRB. The Respondent requests that the matter be remitted back to a different reviewer, without directions from the Court on eligibility.

V. Analysis

A. *Materials before the Court*

[21] As previously noted, the Applicant's Record contains materials that were not before the Officer and therefore are not properly before this Court as established in *Access Copyright*, 2012 at paragraph 19. Those materials have not been considered by the Court.

B. *Remedy*

[22] I agree with the Respondent that this is not an appropriate case for the Court to direct the CRA to find the Applicant did not leave his job voluntarily and is thus eligible for the CRB.

[23] The Court's power of indirect substitution is exceptional and only used where sending the case back for redetermination would be pointless, or where there is only one possible outcome: *Canada (Minister of Citizenship and Immigration) v Tennant*, 2019 FCA 206 at paras 79-82; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 142.

[24] Neither of the above circumstances are present here.

[25] I will therefore set aside the Decision and refer the matter back for redetermination by a different Officer.

[26] In so doing, I encourage the Minister to provide an opportunity for the Applicant to make further submissions and to provide additional documentation concerning the circumstances surrounding the end of his employment.

C. *Constitutional Question*

[27] As noted by the Federal Court of Appeal in *Kimoto v Canada (Attorney General)*, 2011 FCA 291 at paragraph 20, a Notice of Constitutional Question must clearly set out the grounds for finding that a particular statutory provision is unconstitutional. In addition, Form 69 requires

that the contents of the Notice set out the legal basis for each constitutional question and the nature of the constitutional principles to be argued.

[28] While Mr. Clarke may have technically adhered to the notice requirement, the question he proposes fails to articulate how the *CRB* infringes his Charter rights or any other constitutional provision. The ambiguity of the allegations made by the Applicant in the Notice and the failure to identify a legal basis for the constitutional question also raise questions about the sufficiency and efficacy of the Notice.

[29] Based on the foregoing, I find Mr. Clarke has failed to establish there is a valid constitutional question in this matter. As a result, I decline to consider the question.

D. *Costs*

[30] With respect to costs, Mr. Clarke seeks an award in the amount of \$3652.89.

[31] The Respondent's position is that no costs should be awarded.

[32] Rule 400 of the *Federal Court Rules*, SOR/98-106, affords this Court full discretionary power over costs.

[33] Having considered all of the factors in awarding costs as enumerated in subrule 400(3), I find this to be an appropriate case to award some costs. The Applicant should immediately be reimbursed by the Respondent for his proven out of pocket disbursements in this matter.

VI. **Conclusion**

[34] This application for judicial review is allowed and the matter is referred back for redetermination by a different decision maker.

[35] The Applicant is to be given an opportunity to make further submissions and provide additional documentation on redetermination.

[36] Any claim by the Applicant for costs other than out of pocket disbursements shall be determined by the assessment Officer.

JUDGMENT IN T-222-22

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is allowed and the matter is referred back for redetermination by a different decision maker.
2. The Applicant is to be given an opportunity to make further submissions and provide additional documentation on redetermination.
3. Any claim by the Applicant for costs other than out of pocket disbursements shall be determined by the assessment Officer.

"E. Susan Elliott"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-222-22

STYLE OF CAUSE: ANDREW CLARKE v ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: JUNE 6, 2023

JUDGMENT AND REASONS: ELLIOTT J.

DATED: JULY 4, 2023

APPEARANCES:

Andrew Clarke

FOR THE APPLICANT
(ON HIS OWN BEHALF)

Grigor Grigorian

FOR THE RESPONDENT

SOLICITORS OF RECORD:

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Toronto, Ontario

FOR THE RESPONDENT