

Federal Court



Cour fédérale

Date: 20231214

Docket: T-569-23

Citation: 2023 FC 1693

Toronto, Ontario, December 14, 2023

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

PETER BROUGHTON

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of two decisions, conveyed by letters dated February 21, 2023 [Decisions], of an officer [Officer] of the Canada Revenue Agency [CRA], determining that the Applicant was not eligible for the Canada Emergency Response Benefit [CERB] and the Canada Recovery Benefit [CRB]. The Officer concluded that the Applicant was ineligible for these benefits because he had not demonstrated the necessary level of employment

income or self-employment income in specific periods prior to his application for the benefits, as required by the relevant legislation.

[2] As explained in greater detail below, this application is dismissed, because the Applicant's arguments do not undermine the reasonableness or the procedural fairness of the Decisions.

II. Background

[3] The CERB and CRB are federal government measures that were introduced as a response to the COVID-19 pandemic to offer financial support to employed and self-employed Canadians.

[4] The Applicant applied for and was initially accepted as eligible for CRB and CERB for certain periods in 2020 and 2021. A simple process, involving attestation by the taxpayer, was used to enable Canadians to access these benefits as quickly as possible. However, CRA is responsible for substantiating all benefits issued and can therefore subsequently seek to validate payments where eligibility is in question.

[5] As part of its validation process, the CRA sent a letter dated August 25, 2022, to the Applicant, requesting documentation to support his eligibility for the CERB and CRB benefits. The Applicant subsequently submitted documentation to CRA as proof of his income.

[6] By letters dated December 2, 2022, CRA informed the Applicant that he was not eligible for the CERB and CRB, as he had not earned the required minimum employment or self-

employment income in the relevant periods prior to the date of his first application. The Applicant was advised that he could seek a second review of those decisions by another CRA officer. The Applicant requested a second review and submitted supplementary documentation on December 17, 2022, intended to demonstrate that he earned the required level of self-employment income.

[7] On February 15, 2023, the Applicant spoke by telephone with the Officer who had been assigned to the second review of his applications. The Officer's notes of that call reflect that the Applicant stated that he spent most of 2019 and some of 2020 on his boat docked in the US before having to come back to Canada once the COVID-19 pandemic started. The Applicant explained that he rented the boat to guests through the AirBnb platform and sometimes for movies and that this was the only source of his income because he is retired. The Applicant also stated that he took care of all of the repairs and cleaning on the boat before and after rentals. The Applicant advised the Officer that he lost this revenue source once he returned to Canada, because he could no longer rent the boat. The Officer explained to the Applicant that rental income is not employment income but, because the rental was through Airbnb, CRA would look at the documents more closely.

[8] Additional notes bearing the title "Second Review Report – Case Analysis for CERB", which are undated but reference and therefore must postdate the February 15, 2023 telephone call, include the following entry by the Officer in reviewing the Applicant's CERB eligibility:

Explain your decision regarding each criteria the taxpayer did not meet: TP claimed their income as gross rental income on 2019 and 2020 tax return. Rental income is not eligible income. As the TP did not provide any extra services for their rental, other than

providing the property to rent and cleaning. Therefor I will be denying all CERB periods.

[9] The record includes a materially identical set of notes related to the Officer's review of the Applicant's CRB eligibility [together with the notes related to the Officer's review of the Applicant's CERB eligibility, the Second Review Reports].

[10] On February 21, 2023, CRA issued the Applicant the letters conveying the Decisions that the Applicant was ineligible for the CERB and CRB. The Officer determined that the Applicant was ineligible for the CERB as he had not earned at least \$5,000 (before taxes) of employment or self-employment income in 2019 or in the 12 months before the date of his first application. Similarly, he was ineligible for the CRB because he did not earn at least \$5,000 (before taxes) of employment or net self-employment income in 2019, 2020, or in the 12 months prior to his first application.

[11] These Decisions are the subject of this application for judicial review.

III. Issues and Standard of Review

[12] The Applicant, who is self-represented, has not expressly identified a list of issues for the Court's determination. However, based on the Application Record, the Respondent has identified the substantive issues for determination as:

A. Were the Decisions procedurally fair?

B. Were the Decisions reasonable?

[13] I agree with this articulation of the issues. The Applicant has not made submissions about the applicable standard of review. The Respondent submits, and I agree, that the merits of the Decisions are reviewable on the reasonableness standard (see *Aryan v Canada (Attorney General)*, 2022 FC 139 [*Aryan*] at para 16; *Canada (Minister of Citizenship and Immigration v Vavilov*, 2019 SCC 65 [*Vavilov*]) and that the issue of procedural fairness is reviewable on the correctness standard.

[14] The Respondent also raises, as a preliminary issue, its position that portions of the documents appended to the Applicant's affidavit in this application or otherwise included in the Application Record are inadmissible, as this evidence was not before the Officer when making the Decisions. This evidence [Disputed Evidence] consists of the following (employing the descriptions of these items provided in the Table of Contents in the Application Record):

- Exhibit 1, Tab 3.14 – a letter from the Applicant, entitled “Testimonial of Change of Income from Rental to Business”
- Exhibit 1, Tab 3.15 – a letter from the Applicant, entitled “Letter of Explanation of Business Income Rather Than Rental Income”
- Exhibit 1, Tab 3.16 – the Applicant's T1 Adjustment Request
- Exhibit 1, Tab 3.17 – the Applicant's Statement of Real Estate Rentals
- Exhibit 1, Tab 3.18 – the Applicant's Statement of Business or Professional Activities
- Exhibit 1, Tab 3.19 – the Applicant's CRA Acceptance of Re-file Submission

- Tab 5 - Tax Receipts re Rental Business (in the mooring field) as opposed to docking as per the misinformed statement made on Page 11 in the Tribunal Document, by CRA agent
- Tab 6 – Email received on June 11th, 2023, from Geoffrey Warren re 2019 Income Adjustment
- Tab 7 – AirBnB Advertisement – online link and copy of ad (begins next page after 104)

[15] The Respondent also argues that the evidence, identified in the above list as found at Tabs 5, 6 and 7 of the Application Record, is inadmissible for the additional reason that this evidence is not introduced by way of a sworn or affirmed affidavit.

[16] I will address this preliminary issue before moving to the analysis of the substantive issues.

IV. Analysis

A. *Is the Disputed Evidence Admissible?*

[17] As the Respondent correctly submits, the evidentiary record before the Court on judicial review is typically restricted to the evidentiary record that was before the administrative decision-maker (see, e.g., *Yan v Canada*, 2023 FC 595 [*Yan*] at para 54; citing *Andrews v Public Service Alliance of Canada*, 2022 FCA 159 at para 18). However, as the Respondent also notes, although the list of exceptions is not closed, there are commonly considered exceptions to this rule, which include evidence necessary to bring to the attention of the Court procedural defects,

that cannot be found in the evidentiary record of the administrative decision-maker, to enable the Court to fulfil its role of reviewing the decision for procedural fairness (see *Yan* at para 55).

[18] As I will canvas shortly, the Applicant's arguments challenging the Decisions relate principally to procedural fairness, in that he asserts that CRA did not inform him of the case he had to meet. The Officer's notes demonstrate that the Applicant's ineligibility for the CERB and CRB turned significantly on the fact that, when he filed his tax return for the 2019 and 2020 taxation years, he claimed the revenue generated from his boat as rental income rather than self-employment income. The Applicant wishes to rely upon the Disputed Evidence to demonstrate that, after he received the Officer's notes in the Certified Tribunal Record [CTR] provided in this application for judicial review, he filed adjustments to his 2019 and 2020 tax returns to claim the relevant revenues as self-employment income rather than rental income.

[19] I understand the Applicant to be arguing that, had he understood the reason CRA did not consider him eligible, he could have taken these steps before the Decisions were made, and that the Disputed Evidence represents the sort of information that he could then have provided to CRA to demonstrate his eligibility.

[20] The Respondent submits that the Disputed Evidence is not admissible under the procedural fairness exception described in *Yan*, because it does not demonstrate a procedural defect in the administrative decision-making process. In my view, this submission relies on too narrow an interpretation of that exception. In advancing a procedural fairness argument, an applicant will sometimes wish to demonstrate that additional evidence would have been adduced

had it not been for the alleged procedural defect (see, e.g., *Nchelem v Canada (Citizenship and Immigration)*, 2016 FC 1162 at paras 13-14; *Babafunmi v. Canada (Citizenship and Immigration)*, 2022 FC 948 at para 18; *Chahal v Canada (Citizenship and Immigration)*, 2022 FC 725 [*Chahal*] at para 20).

[21] In *Showers v Canada (Attorney General)*, 2022 FC 1183 [*Showers*], this Court admitted evidence about the applicant's request for a reassessment of his eligibility for CRB benefits, which request was made after the impugned second review decision (comparable to the Decisions challenged in the case at hand). While noting that evidence that post-dates a decision is typically inadmissible, Justice Pallotta admitted this evidence, because it related to a procedural fairness argument raised by the Applicant and therefore fell within the applicable exception (at para 13).

[22] I find this exception applicable in the present circumstances and, on that basis, I find admissible the portions of the Disputed Evidence included in Exhibit 1 to the Applicant's affidavit. With respect to Tabs 5, 6 and 7 of the Application Record, I agree with the Respondent's position that this evidence is inadmissible, because it was not introduced through an affidavit (see Sidney N Lederman, Alan W Bryant and Michelle K Fuerst, *The Law of Evidence in Canada*, 6th ed (Markham: LexisNexis, 2022) at paragraph 2.16).

B. *Were the Decisions procedurally fair?*

[23] With the benefit of the portions of the Disputed Evidence that I have found admissible, the Applicant submits that, after realizing that CRA found him ineligible for the CERB and CRB

because his 2020 tax return claimed rental income rather than self employment income, he approached his accountant to file adjustments to his 2020 tax return (as well as similar adjustments to his 2019 return). The Applicant argues that his accountant had erred in claiming this revenue as rental income and that he was not aware of this error until he received the CTR.

[24] The Applicant also submits that the revenue is properly characterized as self-employment income, because the generation of revenue from guests on his boat was not passive rental income but rather required him to ferry his guests to and from the moored vessel, cook breakfast for his guests, clean the guests' cabin, do laundry and vessel repairs, and use a combination of his dinghy and bicycle to pick up groceries and other supplies from a nearby town. He argues that, had he been aware that his eligibility turned on his income having been claimed as rental income, he could have explained these details and initiated the adjustment to his tax returns to support his eligibility.

[25] However, for the reasons explained below, I agree with the Respondent's position that the Applicant's argument, that he was denied procedural fairness because he did not know the case he had to meet, must fail.

[26] The CTR demonstrates that, in the course of the overall decision-making process, CRA informed the Applicant, both as a matter of general principle and in relation to his particular circumstances, that rental income did not support eligibility for CERB or CRB. The August 25, 2022 letter that initiated CRA's review of the Applicant's eligibility for these benefits explained that eligible income included employment income and self-employment income but identified

various categories of income (including rental income) that did not qualify. In relation to the Applicant's particular circumstances, the Officer's notes of the February 15, 2023 telephone call, in which the Applicant explained how he generated revenue from his boat in the US, conclude with the following sentence:

Gave tP my contact number and explained that rental income is not employment income however as they were renting through Air bnb we will look at the documents closer.

[27] As such, it is not possible to conclude that CRA failed to inform the Applicant that he was required to demonstrate the necessary level of employment or self-employment income and that rental income did not qualify. I appreciate that the Officer's notes in the CTR (including the Second Review Reports) suggest that the Officer conducted the analysis of the Applicant's eligibility underlying the Decisions as early as February 16, 2023, i.e. the day after the above referenced telephone call with the Applicant. However, as the Respondent submits, the Decisions were not communicated to the Applicant until CRA sent the February 21, 2023 letters, and the record does not reflect the Applicant having made any effort in the intervening period, following the February 15, 2023 phone conversation, to provide the Officer with additional information, to support a conclusion that his revenue represented self-employment income rather than rental income, or to request additional time to do so.

[28] To the extent that the Applicant is arguing that CRA had an obligation to inform him more explicitly that his tax returns had claimed his income as rental income, I agree with the Respondent's submission that it cannot be a procedural defect for CRA to have failed to inform a taxpayer of his own tax reporting.

[29] The Respondent refers the Court to *Yew v Canada (Revenue Agency)*, 2022 FC 904 [*Yew*] at paras 49-50 (citing *R v McKinlay Transport Ltd*, [1990] 1 SCR 627 at pp 636-37 and 648, and other authorities) as summarizing the well understood principles that Canada's self reporting taxation system relies on taxpayers to be informed of the law and to take reasonable steps to comply therewith, including in disclosing their tax circumstances to CRA and in seeking advice where required. *Yew* applied these principles in the context of contributions to a tax-free savings account [TFSA], explaining that a taxpayer is responsible to be aware of their contribution limits and to ensure that their contributions comply with applicable rules (at para 51). Similarly, I accept the Respondent's submission that a taxpayer is responsible to be aware of their own tax reporting.

[30] As such, I find no breach of procedural fairness in the process leading to the Decisions under review.

C. *Were the Decisions reasonable?*

[31] In order to successfully challenge the reasonableness of the Decisions, the Applicant must demonstrate that they do not exhibit the requisite degree of justification, intelligibility and transparency (see *Vavilov* at para 100). In keeping with the principles surrounding the admissibility of evidence on judicial review, as canvassed earlier in these Reasons, the portions of the Disputed Evidence that I have admitted for purposes of the procedural fairness issue cannot be relied upon to challenge the reasonableness of the Decisions on their merits (see *Chahal* at para 20).

[32] Taking into account the Officer's notes as canvassed earlier in these Reasons (including the Second Review Reports), which inform the Court's understanding of the reasons for the Decisions (see *Aryan* at para 22), it is clear that the Decisions turned significantly on the fact that the Applicant's tax returns had reported the relevant income as rental income. Moreover, the Second Review Reports reflect that the Officer considered not only the manner in which the Applicant had claimed that income but also the Applicant having provided limited services in connection with the rental of the boat. The Applicant has not drawn the Court's attention to evidence, that was before the Officer when the Decisions were made, that would undermine the reasonableness of that analysis. The Officer provided justification for the Decisions, the analysis is intelligible, and the Decisions therefore withstand reasonableness review.

V. Conclusion

[33] As the Applicant's arguments do not undermine the reasonableness or procedural fairness of the Decisions, this application for judicial review must be dismissed.

[34] The Respondent's Memorandum of Fact and Law requests that this application be dismissed, with costs payable by the Applicant to the Respondent in the event of the Respondent's success. However, the Respondent made no oral submissions surrounding the adjudication of costs or their quantification. In *Showers*, Justice Pallotta exercised her discretion not to order costs, notwithstanding that the respondent had prevailed, as the applicant had represented himself, his written materials and oral submissions were concise, and he demonstrated civility at the hearing. I similarly analyse the case at hand and will award no costs.

JUDGMENT IN T-569-23

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.
2. No costs are awarded.

"Richard F. Southcott"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-569-23

STYLE OF CAUSE: PETER BROUGHTON v THE ATTORNEY GENERAL
OF CANADA

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: DECEMBER 13, 2023

JUDGMENT AND REASONS: SOUTHCOTT J.

DATED: DECEMBER 14, 2023

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